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Agency No. 17532

CHARLIE DONNELLY
144 12th Street, N.E.
Washington, D.C. 20002

Appeal No. _____

DAVID SMALLEN
129 12th Street, N.E.
Washington, D.C. 20002

GOVERNMENT OF THE
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Respondent.

Petitioners Joseph Jorgens, III, Ilene Blinick, Charlie Donnelly and David Smallen

(“Petitioners”), hereby seek review by the District of Columbia Court of Appeals of the decision

and order of Respondent Government of the District of Columbia Board of Zoning Adjustment (“Respondent”) entered on July 25, 2007. A copy of the decision and order is attached.

The names and addresses of all other parties and their counsel who appeared in the agency are:

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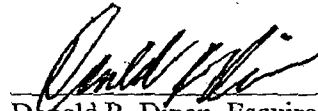
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DATE: August 24, 2007

Respectfully Submitted,

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17532 of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require BZA special exception approval for a proposed addition to an existing building to accommodate a public charter school use¹. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 District at premises 138 12th Street, N.E. (Square 998, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007

ORDER

PRELIMINARY MATTERS

This appeal was filed on June 27, 2006, by the AppleTree Institute for Education Innovation, Inc., ("Appellant"), which owns the property that is the subject of the appeal, 138 12th Street, N.E., Square 988, Lot 820, ("subject property"). The Appellant alleges that the Zoning Administrator ("ZA") erred in his decision to deny its February 9, 2006 application for a building permit. According to the April 28, 2006 letter communicating the Zoning Administrator's decision to the Appellant, he based his denial on the determination that the Appellant's proposed use of the property as a public school failed to meet the minimum requirements in an R-4 zone district for lot area, lot width, and number of parking spaces.

The Board held a public hearing on the appeal on November 21, 2006, at which the Appellant presented its case through counsel and the Zoning Administrator's decision was defended by the Zoning Administrator himself. Travis Parker, who was involved in reviewing this project with the Zoning Administrator, testified in support of the Zoning Administrator's decision, as did a representative of Advisory Neighborhood Commission ("ANC") 6A, the ANC within which the subject property is situated. The ANC also submitted a report in support of the Zoning Administrator's decision. A group of neighboring property owners, the "Northeast Neighbors for Responsible Growth" ("NNRG"), was granted opposition party status by the Board. At the end of the hearing, the Board set a decision date for January 9, 2007.

¹ The caption has been changed to delete the reference to "an addition to an existing public charter school". Based upon the record, the subject property was not being used as a public charter school at the time Appellant filed its application for a building permit.

After its deliberations at the January 9, 2007 public decision meeting, the Board voted 4-1-0 to grant the appeal and reverse the Zoning Administrator's decision to deny the building permit. An explanation of the facts and law that justify the Board's conclusion follows.

FINDINGS OF FACT

1. The Property. The subject property is located at 138 12th Street, N.E in the R-4 zone district and is improved with a building constructed prior to May 12, 1958, the date on which the modern version of the Zoning Regulations became effective ("1958 Regulations").
2. The subject property has been certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic District.
3. The subject property is situated between rowhouses on a primarily residential street, but has been used for non-residential purposes at least since the enactment of the Zoning Regulations.
4. On the effective date of the Zoning Regulations, the building was used as an office facility for a heating-oil company.
5. The subject property was used as an office facility for a hospice in the mid- to late-1960s and as a private club by the Knights of St. John and Women's Auxiliary from 1969 until 2005, when the Appellant acquired the property.
6. The building includes 4,296 square feet of gross floor area, as well as a cellar area.
7. The lot underlying the building is a rectangle with a lot width of 36 feet and a lot area of 4,230 square feet.
8. The area of the lot behind the building is paved with asphalt. The paved area is somewhat less than 36 feet wide (due to encroachments by the immediate neighbors on both sides), and somewhat less than 77 feet deep (due to the space behind the building taken up by a fire escape descending from the second floor, an exterior staircase into the cellar, and two large air-conditioning units).
9. The paved area is separated from a 30-foot-wide public alley at the rear property line by a chain-link fence, which includes a pair of gates that open to allow access from the alley through a 12-foot gap.
10. The chain-link fence was erected in 1970 by the Knights of St. John, along the rear property line, pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia." Exhibit No. 32, Attachment 4.
11. No legal, striped parking spaces are marked on the paved area, and there is no evidence that any such spaces have ever been marked on the paved area.
12. Between 1958 and 1969, a large portion of the current paved area was occupied by a storage shed that was 15 feet wide and 49 feet long and provided no parking. In 1969,

the Knights of St. John razed that structure, pursuant to a permit that indicated that the previous use of the building was "Storage Garages No Parking."

13. The prior owner, Knights of St. John, would periodically use the paved area at the rear of the lot for stacked parking of up to approximately ten vehicles. Transcript of Nov. 21, 2006 Public Hearing at 399, lines 14-19 ("Transcript").
14. On February 9, 2006, the Appellant applied for a building permit to expand the existing building on the subject property by adding an addition on the back, which would increase the total gross floor and cellar floor area to 8,975 square feet and would occupy a portion of the paved area at the rear of the lot.
15. Under the Appellant's plans, the remainder of what is now the paved area would be occupied by a grassy area, a sidewalk, and three marked parking spaces roughly perpendicular to the rear property line and directly accessible from the public alley.
16. The Appellant also proposed changing the use of the property from a private club to a public charter school for approximately 50 pre-school and pre-kindergarten students and up to 15 teachers and staff members.
17. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. See 53 DCMR 2017 (Mar. 17, 2006). It re-adopted the emergency rule on June 12, 2006, see 53 DCMR 5898 (July 21, 2006), and adopted a permanent version on September 25, 2006. See 53 DCMR 9580 (Dec. 1, 2006).²
18. The new rule: (a) expanded the definition of "public school" contained in 11 DCMR § 199.1 to include schools "chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board," (b) increased the minimum lot area for a public school in an R-4 zone district from 4,000 to 9,000 square feet, and the minimum lot width from 40 feet to 120 feet; and (c) established a parking formula for pre-elementary and pre-kindergarten schools or facilities of two spaces for every three teachers or staff members.
19. Pursuant to the new rule, a school employing 15 teachers would have to provide ten parking spaces ($15 \div 3 = 5$; $5 \times 2 = 10$).

²The Appellant contends that aspects of that rulemaking "exceeded [the Zoning Commission's legal] authorities in multiple ways," but the Appellant also contends that the Board may hear this appeal without addressing those contentions. The Zoning Administrator contends that "the validity of the Zoning Commission's action on adopting the emergency text amendment is not within the [Board's] jurisdiction." Transcript at 324, lines 12-14. The written report of the ANC does not directly address the question of jurisdiction, but the NNRG also contends that the Board lacks jurisdiction to address the validity of the emergency rule. See, Exhibit No. 23, ANC Report, and Exhibit No. 28, Reply Brief of Intervenor NNRG at 1-2. In this order, the Board assumes *arguendo* that the emergency rule is legally valid, without intending any prejudice to the Appellant's ability to press its arguments to the contrary elsewhere.

20. On April 28, 2006, the Zoning Administrator denied the Appellant's building permit application on grounds that the Appellant's proposed use failed to meet the minimum-lot-area requirement of "9,000 square feet," the minimum-lot-width requirement of "120 feet," and the minimum-parking-spaces requirement of "10 spaces." Exhibit No. 13.
21. Appellant asserted to the Zoning Administrator and asserts in this appeal that the property is exempt from the minimum lot area and lot width requirements pursuant to 11 DCMR § 401.1. That provision states:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.
22. Appellant asserted to the Zoning Administrator and asserts in this appeal that no more than three parking spaces are required.
23. Appellant relies on 11 DCMR 2100.5 as the legal authority for its parking space calculations.
24. Section 2100.5 exempts buildings certified as contributing to a historic district from providing additional parking.
25. At the hearing, the Zoning Administrator changed his position to assert that 7 parking spaces were required based on the theory that the previous club use required 7 spaces.
26. Neither the regulations in effect when the property changed from an office use to a private club use in 1969 nor the current regulations specify a parking space requirement for a private club.
27. In 1969, the Zoning Regulations contained a provision specifying that if the parking schedule contained no requirement for a particular structure, that structure was to provide the number of "parking spaces . . . required for a warehouse located in a C-M-1 District," Zoning Regulations of the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). In 1969, the parking requirement for a warehouse located in a C-M-1 District was one space "for each 2,400 square feet of gross floor area."
28. The private club use would therefore have required two parking spaces ($4,296 \div 2400 = 1.79$).³
29. DCRA computed the parking requirement for the private club use with the current catch-all requirement of one space for every 600 square feet of GFA, set forth in 11 DCMR

³The rules of interpretation for Chapter 21 provide that "whenever calculations based on the schedule set forth in § 2101 result in a fractional space, any fraction under one-half shall be disregarded and any fraction of one-half or over shall require one (1) parking space", 11 DCMR § 2118.6.

§2101, rather than with the catch-all requirement that was in effect when the private club use began.

30. The parties in Opposition claimed that ten spaces were required, based on observations that the private club periodically stacked ten cars in the lot. (See Finding of Fact ("FOF") 13.)
31. DCRA changed its position again in its Proposed Findings of Fact, No. 24, asserting that only five spaces were required on the theory that when the use changed, the parking requirement changed.
32. DCRA then based the five spaces requirement upon 11 DCMR § 2101.10, which reads as follows:

In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required:

- (a) If the existing number of parking spaces *now provided* is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced; and
 - (b) If the existing number of parking spaces *now provided* is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.
33. Although there are currently no parking spaces marked in the paved area in the rear of the building (as would be required by 11 DCMR § 2117.3), up to three angled spaces could be placed there while still allowing sufficient space for a 17-foot aisle and screens from contiguous residential properties (as required by 11 DCMR §§ 2117.5 and 2117.12).
 34. The Zoning Administrator claimed that six legal parking spaces could fit in the paved area. He conceded, however, that one of those supposed spaces was impermissibly placed in the midst of a fixed fire-escape staircase from the second floor. Transcript at 347, lines 12-14; 350, lines 7-9; and 368-69, lines 21-22 and 1. He also conceded that two of the remaining five spaces — located perpendicular to and immediately adjacent to the alley — would not actually be accessible without changing the existing chain-link fence. Transcript at 361, lines 4-9.
 35. The Appellant is planning to provide three parking spaces in the rear paved area and has secured a long-term lease in a nearby parking lot for a minimum of another ten parking spaces.

CONCLUSIONS OF LAW AND OPINION

The Board has jurisdiction to hear an appeal from any administrative decision of a District official "based in whole or in part on any zoning regulation." D.C. Official Code § 6-641.07(f) (2001). It may "reverse or affirm, wholly or partly, or may modify the order . . . , decision, determination, or refusal appealed from, . . . and to that end shall have all the powers of the officer or body from whom the appeal is taken." *Id.* § 6-641.07(g)(4); *see also* 11 DCMR § 3100.4.

This appeal was timely under 11 DCMR § 3112.2(a), because it was filed within 60 days of the date the Appellant had notice or knowledge of the decision being appealed.

There are two principal issues on appeal:

(1) Whether the building on Appellant's lot may be enlarged for the purpose of accommodating a public school use without regard to the lot area limitations applicable to that use; and

(2) Whether a change in the building's use to a public school requires the provision of any parking spaces on site.

For the reasons stated below, the Board concludes that the proposed change in use does not require adherence to either the lot size or parking requirements for the new use.

As set forth in the findings of facts above, on February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. This rule was readopted as an emergency rule on June 12, 2006, and then adopted as a permanent rule on December 1, 2006. The new rule, in relevant part, amended the definition of public schools in § 199.1 to include charter schools, amended Chapter 4 of the Zoning Regulations to increase minimum lot area and width requirements in Residence Districts, and amended Chapter 21 of the Zoning Regulations to require parking for pre-elementary schools and pre-kindergarten schools or facilities. This appeal arises from the Zoning Administrator's denial of Appellant's application for a building permit on April 28, 2006 on grounds that the proposed use as a public charter school did not meet the requirements set forth in the new regulation. Specifically, the Zoning Administrator determined that the proposed use did not meet the minimum lot area and width requirements, nor the parking requirements.

1. Compliance with the Lot Requirements for a Public School.

Appellant argues that the subject property is exempt from the requirements of the new area restrictions by reason of 11 DCMR § 401.1. That section states as follows:

Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the

building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

The Board interprets this section to mean simply, that a building that was located on a lot on May 12, 1958, that does not meet the lot area or width of lot requirements prescribed in § 401.3 may be enlarged or replaced, provided it complies with all other provisions of the Zoning Regulations.

The new public school regulations added public school to the chart set forth in § 401.3. There is no factual dispute that the subject building was located on the lot on May 12, 1958 and that the lot does not meet the lot area or width of lot requirements prescribed in § 401.3 for use as a public school.

Accordingly, the only issues before the Board with respect to the lot requirements are whether the subject property is exempt from the public school lot requirements set forth in § 401.3 and whether the property complies with all other provisions of the Zoning Regulations. The new public school regulations, while amending several regulations in Chapter 4, including § 401.3, in particular, leave § 401.1 intact. The Zoning Administrator and the parties in opposition ask this Board to treat the omission to amend this regulation as an "oversight" on the part of the Zoning Commission and to read the inapplicability of § 401.1 to buildings used for public schools as consistent with the Zoning Commission's intent with respect to the new public school regulations. The Board notes that the Zoning Commission specifically reviewed the regulations in Chapter 4 when adopting the new regulations, and that § 401.1 was a part of the regulatory scheme it was reviewing. Further, there is evidence in the record that this specific issue was brought to the attention of the Office of Planning prior to final action, (Exhibit 33, Attachment N). Accordingly, the Board finds that it is beyond its purview to assume that the omission to amend § 401.1 was an oversight on the part of the Zoning Commission.

As stated by the Chair of the Zoning Commission, who participated in this decision:

To the extent that 401.1 is ultimately inconsistent with the Commission's intent but remains meaningful on its own terms, then it is the flaw of the Commission interacting (sic) [in enacting] the rulemaking, not an area of interpretation for the ZA.

The Board further recognizes that any such flaws of rulemaking are not for the Board to fix, in an appeal case, but rather within the authority of the Zoning Commission to correct in a rulemaking proceeding.

The Board therefore reverses the determination of the Zoning Administrator that the building on the Appellant's lot may not be expanded because its lot has less area and width than is required for a public school.

2. Compliance with all other Provisions of the Zoning Regulations

To be successfully invoked, § 401.1 requires not only that the building have been on the lot as of May 12, 1958, but that the property comply with all other provisions of the Zoning Regulations (other than the lot area and width of lot requirements.) The Zoning Administrator and the parties in opposition allege that Appellant is not in compliance with the parking regulations. The Zoning Administrator argues ultimately that five parking spaces are required. Appellant will only be providing three, which Appellant argues is in compliance with the parking regulations. Appellant relies on 11 D CMR § 2100.5 for this conclusion, which the Board finds is controlling. § 2100.5 provides as follows:

No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district.

There is no dispute that the building has been certified by the State Historic Preservation Officer as contributing to the character of the historic district. Accordingly, the issue in the first instance is whether "additional parking" refers to additional to the number of spaces required for the previous use or additional to what currently exists on the lot. As set forth below, the Board finds that the Applicant is compliant under either scenario and will be providing the maximum number of legal spaces that can fit on the lot, which is the greater number of the two scenarios.

The previous use of the building was that of a private club. The property changed to a private club use in 1969. Under the parking regulations in effect at that time, the parking requirement for the private club on this lot would have been two spaces. (See FOFs 27 and 28.) Accordingly, pursuant to § 2100.5, appellant's parking requirement would be two spaces.⁴

The Board finds unpersuasive the opposition parties' argument that the required parking for the previous use was ten spaces based on the neighbors periodically seeing ten cars stacked on the lot. The Board's task is to determine the number of legally required parking spaces on the lot, not how many could be packed onto the lot.

Finally, the Board finds that only three lawful spaces can be accommodated on this lot. Of the potential five spaces identified by the Zoning Administrator, two would not actually be accessible without changing the existing chain-link fence. (That chain link fence was erected in 1970 pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia.")

⁴ Because the Appellant has agreed to provide three spaces, one more space than is required, the Board need not determine whether any parking spaces were credited or grandfathered from the original 1958 use.

The Board finds that based on the size of the surface area, the existence of the egress stairs, the air conditioning units and the gate which creates the drive aisle, no more than three regulation size parking spaces will fit on the lot.

As “§ 2100.5 provides that no additional parking shall be required, Appellant is meeting this requirement by providing three spaces on the lot.

The Zoning Administrator relied on 11 DCMR § 2101.10 for his final determination that five spaces are required. That regulation provides that whenever the use of a property changes to a use that requires more parking than was previously required, additional parking spaces must be required to make up the difference.

The Board finds that this provision is not applicable to the property because § 2100.5 is controlling for properties that have been certified by the State Historic Preservation Officer. No additional spaces are required regardless of whether the additional spaces would be triggered by a structural addition or by a change in use. Any other interpretation would negate the protection to historic properties afforded by this provision. See *BZA Order No. 17459 of DC Hampton LLC*, (2006) (self-certified application for a parking variance dismissed because “§ 2100.5 operates to waive the requirement for additional parking spaces for new construction” in such instances); See also, *BZA Order No. 16307 of National Child Research Center* (1998) (parking variance not needed because § 2100.5 exempts such historic structures from providing additional parking when the use is changed.); and *BZA Order No. 16071 of the Washington International School* (1995) (pursuant to § 2100.5 no parking spaces required for the change of use of a school building to an apartment building.)

Great Weight to the ANC

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations of the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The ANC submitted a report in support of the Zoning Administrator’s decision in which it also argued that the Appellant did not meet the parking regulations. The ANC offered two bases for that assessment: First, it alleged that the property previously accommodated ten cars. The Board has already addressed that issue, finding that stacking ten cars does not equate with the provision of lawfully required parking spaces. Second, the ANC argues that the Appellant’s proposal to place a charter school in the existing structure is prohibited by 11 DCMR § 2002.3 and § 2002.5. These provisions regulate the expansion of nonconforming uses. In essence, the ANC argues that the charter school is a nonconforming use for that building because the building does not meet the lot area or lot of width requirements of §401.3. However, those nonconformities are structural. They are not nonconformities as to use. The use as a public charter school is a matter of right use in the R-4 zone. Accordingly, the ANC’s arguments with respect to nonconforming use are misplaced.

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The Board therefore concludes that the Zoning Administrator erred in determining that the Appellant needed to provide any more than three parking spaces for its contributing building.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proving that the Zoning Administrator erred in denying the Appellant's building permit application. The Board has carefully considered the issues and concerns stated in the written report of the ANC and, for the reasons stated above, finds them unpersuasive.

It is hereby **ORDERED** that the Zoning Administrator's decision is **REVERSED**, and it is further **ORDERED** that this appeal is **GRANTED**.

VOTE: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to grant; Carol J. Mitten to deny.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:


JERRILY R. KRESS, FAIA

Director, Office of Zoning 

FINAL DATE OF ORDER: JUL 25 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17532

As Director of the Office of Zoning, I hereby certify and attest that on JULY 25, 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR

CERTIFICATE OF SERVICE

I hereby certify that on this August 24, 2007, a copy of the foregoing *Petition for Review* was mailed, first-class, postage prepaid to:

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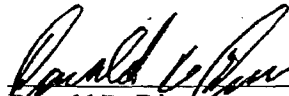
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