

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Appeal No. 18239 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision on February 24, 2011 of the Department of Consumer and Regulatory Affairs to withdraw its “Notice of Revocation” of Building Permit No. B1010205, allowing the construction of a public charter school (AppleTree Institute), in the R-4 District at premises 138 12th Street, N.W. (Square 988, Lot 820).

Appeal No. 18241 of Northeast Neighbors for Responsible Growth, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision on February 24, 2011 of the Department of Consumer and Regulatory Affairs to withdraw its “Notice of Revocation” of Building Permit No. B1010205, allowing the construction of a public charter school (AppleTree Institute), in the R-4 District at premises 138 12th Street, N.W. (Square 988, Lot 820).

HEARING DATE: September 20, 2011
DECISION DATE: September 20, 2011

DECISION AND ORDER

The two appeals above challenge the decision made by the Department of Consumer and Regulatory Affairs (“DCRA”) to withdraw its notice of revocation for a building permit issued September 17, 2010. DCRA’s decision confirmed the validity of the building permit and allowed the construction of a public charter school known as the AppleTree Institute (“AppleTree”). Because the appeals present identical issues of fact and law, the Board of Zoning Adjustment (“Board”) consolidated the two appeals.¹ The Board received voluminous filings from each party: AppleTree², DCRA, and the two Appellants. Based upon a careful review of

¹ The only difference in the two appeals is their respective filing dates. Advisory Neighborhood Commission (“ANC”) 6A filed its appeal on April 22, 2011 and the Northeast Neighbors for Responsible Growth filed its appeal on April 25, 2011. Unless indicated, the term “Appellant” will refer to both Appellants, but references to exhibits shall correspond to the record in Appeal No. 18239 of ANC 6A.

² As the property owner, AppleTree is automatically a party pursuant to 11 DCMR § 3199.

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the written submissions, the Board dismissed the consolidated appeal, finding that the Board lacked subject-matter jurisdiction to review the alleged errors raised by the Appellants. A full discussion of the facts and law are set forth below.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning (“OZ”) scheduled a hearing on September 20, 2011. In accordance with 11 DCMR §§ 3112.13 and 3112.14, OZ mailed notice of the hearing to the Appellants, Advisory Neighborhood Commission (“ANC”) 3C (the ANC in which the subject property is located), as well as AppleTree (the property owner), and DCRA.

Parties

The Appellants are ANC 6A and the Northeast Neighbors for Responsible Growth. Commissioner David Holmes was the authorized agent for ANC 6A. The Northeast Neighbors for Responsible Growth was represented by the law firm of Roetzel & Andress, LPA.

AppleTree filed a Request for Party Status. (Exhibit 16.) However, this was unnecessary, since the property owner, AppleTree, is automatically a party pursuant to 11 DCMR § 3199.1. AppleTree was represented by the law firm of Gibson, Dunn & Crutcher LLP.

The Appellee, DCRA, was represented by Assistant Attorney General Jay Surabian.

Submissions to the Board

Prior to the public hearing, the Board received comprehensive filings from the parties detailing their respective positions. Each Appellant filed a Statement and supporting documents. (See, Exhibit 3 - Statement of ANC 6A, Exhibits 2 and Exhibit 24 - Statement and Exhibit List of Northeast Neighbors for Responsible Growth.) The Board also received submissions from AppleTree and DCRA. (See, Exhibit 17 - Pre-Hearing Statement of District of Columbia, and Exhibit 18 - AppleTree’s Brief and Supporting Exhibits.)

Board’s Determination

After reviewing the submissions, the Board determined that it lacked subject matter jurisdiction to hear the consolidated appeal.

FINDINGS OF FACT

1. The subject property is located at 138 12th Street, N.E. (Square 988, Lot 820) in the Capitol Hill neighborhood.

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2. The property is owned by AppleTree Institute for Education Innovation, Inc.
3. AppleTree purchased the property in 2005 to serve as the location of a three-classroom public charter school.
4. DCRA issued Building Permit No. 89587 in 2007 to AppleTree authorizing the construction of a public school³ on the subject property.
5. Thereafter, AppleTree applied for and received three extensions of its building permit. On October 21, 2008, DCRA issued Building Permit No. B0900498, with an expiration date of October 21, 2009. DCRA then issued Building Permit No. B0909377 on September 21, 2009, with an expiration date of September 21, 2010. On September 17, 2010, AppleTree received its final permit extension when DCRA issued Building Permit No. B1010205, with an expiration date of September 17, 2011.
6. On December 3, 2010, DCRA issued a notice proposing to revoke Permit No. B1010205, citing a violation of the District's Construction Code. The Notice stated in pertinent part:

This is official notice that Building Permit No. B1010205 is revoked effective ten (10) business days from the mailing of this Notice. This action is taken pursuant to District of Columbia Municipal Regulations ("DCMR") Title 12A § 105.6, which authorizes the code official to revoke a building permit when the permit was issued in error. Here, the Construction Code does not allow an extension of the existing building permit beyond a total of eighteen months from the original building permit, B89587, which was issued on October 26, 2007. Therefore, the last building permit extension ended on 4/26/10. Building Permit B1010205 erroneously extended the building permit beyond the maximum eighteen months of extensions and must be revoked.

7. On February 24, 2011, DCRA withdrew the notice of revocation and confirmed that Permit No. B1010205 was valid *nunc pro tunc*.
8. On April 22, 2011, ANC 6A filed an appeal to the Board, and on April 25, 2011, Northeast Neighbors for Responsible Growth filed an appeal to the Board. Both appeals challenge DCRA's withdrawal of its notice of revocation; i.e., Appellants contend that the permit should have been revoked, as was initially proposed by DCRA.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act of 1938 authorizes the Board to hear appeals of any decision of any administrative officer or body "in the carrying out or enforcement" of any Zoning Regulation.

³ The definition of "school, public" includes a building "chartered by ... the District of Columbia Public Charter School Board for educational purposes" 11 DCMR §199.1.

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D.C. Official Code § 6-641.07(g)(1) (2008 Supp.). Such appeals may be taken “by any person aggrieved ... by any ... administrative decision *based* in whole or in part upon any zoning regulation.” D.C. Official Code § 6-641.07(f).

The administrative decision in this case is the decision by the Department of Consumer and Regulatory Affairs to withdraw a notice of revocation⁴ based upon its interpretation of the Construction Codes, not the Zoning Regulations.

As the Board has held several times, the Board has no authority to hear an appeal that is not based upon an interpretation of a zoning regulation. In fact, one such instance involved a prior appeal by this ANC Appellant (*Appeal No. 17769 of ANC 6A*, [56 DCR 156 (2009)]). In that case, this Board indicated that it lacked the subject matter jurisdiction to consider the claim that DCRA misapplied environmental requirements in issuing a building permit because those requirements were not part of the Zoning Regulations. *Accord, Appeal No. 18154 of Capitol Hill Restoration Society*, 58 DCR 3655 (2011) (“Board has no authority to hear an appeal that is not based to some degree upon an interpretation of a zoning regulation”); *citing Appeal No. 17444 of Kuri Brothers, Inc.*, 55 DCR 4442 (2008) (“The Board has no jurisdiction to hear allegations of error concerning the DCRA Director’s interpretation of a provision not contained in the Zoning Regulations.”)

Similarly, the decision to withdraw the revocation was not based in whole or in part on the Zoning Regulations. Rather, the withdrawal of the revocation notice, was based solely upon the Construction Codes. The language of the revocation notice makes this clear, stating “[t]he Construction Code does not allow an extension of the existing building permit beyond a total of eighteen months from the original building permit”. (Finding of Fact 6.)

Because the alleged error is not based upon the Zoning Regulations, the Board lacks subject matter jurisdiction to hear or decide this appeal, and must dismiss it.

It is hereby **ORDERED** that this appeal be **DISMISSED**.

VOTE: 4-0-1 (Nicole C. Sorg, Lloyd J. Jordan, Jeffrey L. Hinkle, and Konrad W. Schlater to dismiss; Meridith H. Moldenhauer, not voting, being necessarily absent)

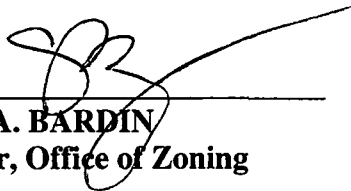
⁴ Among other arguments, AppleTree and DCRA also questioned the Appellants’ ability to appeal the withdrawal of a notice of revocation. However, since the Board lacked subject matter jurisdiction, it did not reach the question. Nevertheless, the Board wishes to note its past precedent that “once a building permit is issued, no subsequent communication from DCRA may be appealed unless it contains a new decision.” *See, BZA Order, Appeal No. 16982 of J. Brendan Herron, Jr. and ANC 3F*, 52 DCR 3904 (2005); *BZA Order, Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer*, 53 DCR 2495 (2006), *affirmed, Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008), *BZA Order, Appeal No. 17966 of Stephen Bruce*, 57 DCR 3140 (2010).

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BY ORDER OF THE BOARD OF ZONING ADJUSTMENT

A majority of the Board members has authorized the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER **FEB 17 2012**

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.