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November 7, 2006

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VIA HAND DELIVERY

Jerrily R. Kress, FAIA
Director, Office of Zoning
441 4th Street, N.W., Suite 210
Washington, DC 20001

Client No.
C 04753-00001

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DC OFFICE OF ZONING
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Re: BZA Appeal No. 17532 — *Authorization of Representation and
Brief of Appellant*

Dear Ms. Kress:

In relation to Appeal No. 17532 before the Board of Zoning Adjustment, I am enclosing
for filing the following documents:

- (1) Written authorization from the appellant's managing director, pursuant to § 3106.1 of
the Zoning Regulations, for Gibson, Dunn & Crutcher LLP to appear on the
appellant's behalf in this proceeding; and
- (2) Thirteen copies of the Brief of Appellant, filed pursuant to § 3112.10 of the Zoning
Regulations.

Thank you for handling these items. Please let me know if you have any questions.

Very truly yours,



Curtis E. Gannon

Enclosures

cc: Bill Crews, Zoning Administrator
Advisory Neighborhood Commission 6A

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17532

EXHIBIT NO. 21

Board of Zoning Adjustment
District of Columbia
CASE NO. 17532
EXHIBIT NO. 21



AppleTree Institute

for Education Innovation

1000 17th Street, NW, Washington, DC 20036

November 7, 2006

District of Columbia Office of Zoning
Board of Zoning Adjustment
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: BZA Appeal No. 17532, Authorization for Representation

To the Board:

AppleTree Institute of Education Innovation, Inc. hereby authorizes the law firm of Gibson, Dunn & Crutcher LLP to represent it in the proceedings before the Board in Appeal No. 17532, in which AppleTree is the appellant. This authorization includes the power to bind AppleTree in its case before the Board.

Sincerely,

Jack McCarthy,
Managing Director

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D.C. OFFICE OF ZONING

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

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In re AppleTree Institute for
Education Innovation, Inc.

Appeal No. 17532

BRIEF OF APPELLANT

The building on the Subject Property is situated between rowhouses on a predominantly residential street but, in its 90-year existence, has never itself been used as a residence. Rather, it is a commercial building that has been used for a variety of non-residential purposes, most recently as an assembly hall for a private club. The current property owner, Appellant AppleTree Institute for Education Innovation, Inc. (“AppleTree”), seeks to renovate and expand the building, which has been an unoccupied eyesore, and use it for a small, public charter school that will teach language and literacy skills to three- and four-year-old children.

This appeal involves discrete legal questions about the interpretation of provisions of the Zoning Regulations that were not affected by the Zoning Commission’s recent efforts to amend provisions in the Zoning Regulations that apply to public schools. In particular, § 401.1 of the Zoning Regulations allows a pre-May 12, 1958 building to be enlarged even if its underlying lot has a “lot area or width of lot, or both, less than that prescribed in § 401.3,” and § 2100.5 declares flatly that “[n]o additional parking spaces shall be required” for a building that is certified as contributing to the character of a historic district. This appeal requires the Board to decide only whether those two provisions mean what they say — and what the Board has previously interpreted them to mean. Adhering to settled precedent requires reversal of the Zoning Administrator’s denial of AppleTree’s application for a building permit.

SUMMARY OF FACTS

The Subject Property is located in the R-4 District at premises 138 12th Street, N.E. (Square 988, Lot 820). The lot is 36 feet wide and 117.5 feet deep, or 4230 square feet. The existing building is 36 feet wide and 40 feet deep. *See* Exhibit No. 4 in this case (appellant's set of plans); Exhibit No. 5 in this case (D.C. Surveyor's plat). It "was constructed sometime in the 19-teens, first appearing in city directories in 1916 when it . . . functioned as an office facility." Historic Preservation Review Board, Staff Report and Recommendation, *Re: 138 12th Street, NE* at 1 (Dec. 2005) (attached as Exhibit A). More recently, it was used as an assembly hall for the Knights of St. John and Women's Auxiliary. As the staff of the Historic Preservation Review Board concluded, "[t]he building retains a high degree of integrity and appears to have experienced only minor cosmetic modifications on the front façade." *Id.*

Appellant AppleTree is a D.C.-based not-for-profit corporation that has created and supported several successful education programs, including some public charter schools, in the District since 1996. It supports the AppleTree Early Learning Public Charter School, which has been granted a charter by the D.C. Public Charter School Board and has been operating at a location in Southwest. The school is open to all three- and four-year-old children in the District, and employs an intensive early-education program intended to provide them with the language, early literacy, and social skills they need to transition successfully into kindergarten. After conversations with officials in the Department of Consumer and Regulatory Affairs in which oral (but not written) advice established that the Subject Property would, after renovation, be suitable for matter-of-right use as a public charter school, AppleTree purchased it from the Knights of St. John, with the intention of renovating the premises as an additional location for the school.

In fall 2005, AppleTree sought approval from the Historic Preservation Review Board for its proposed plans to expand the building at the Subject Property by building a three-story exten-

sion on the back of the building. After meeting with Advisory Neighborhood Commission 6A and some of the neighbors, AppleTree voluntarily withdrew its plans, replacing them with plans for a smaller extension that would provide classroom space for about 50 pre-school and pre-kindergarten students. With the planned renovations, the building would be no deeper than the shallowest of its two neighbors, and the third story would not be visible from the street. On December 15, 2005, the Historic Preservation Review Board voted 9-1 to approve AppleTree's plans with minor modifications.

AppleTree filed its building permit application on February 9, 2006. In the "zoning data summary" on the cover sheet of the plans submitted with the application, and in a follow-up letter to the Zoning Administrator, AppleTree's architect explained how AppleTree's proposed project complies with the height, area, and density regulations for the R-4 zone district and with onsite parking requirements. *See Exhibits B and C.*

On April 28, 2006, the Zoning Administrator denied AppleTree's application, concluding that it fails to meet three requirements in the Zoning Regulations: minimum lot area, minimum lot width, and minimum parking spaces. *See Exhibit D (identical to Exhibit No. 13 in this case).*¹

¹ The Zoning Administrator's decision referred to the Zoning Regulations and to the "Zoning Commission's adoption of an Emergency Text Amendment defining charter schools as public schools, and changing various requirements for public schools to locate in the R-4 Residential District as matter of right on February 13, 2006." Exhibit D at 1. The Emergency Text Amendments were published in the *D.C. Register* on March 17, 2006, and set to expire after 120 days. *See* 53 DCR 2017. On June 12, the Zoning Commission voted to "re-adopt[]" the February 13 emergency rulemaking. *See* 53 DCR 5898 (July 21, 2006). By its own terms, the 120-day emergency rule approved on June 12 expired on October 10. On September 25, 2006, the Zoning Commission approved a final rulemaking that was similar to the emergency rule, but, as of November 7, the final rule has not yet been published in the *D.C. Register*.

Although AppleTree contends that the Commission's rulemaking actions exceeded its authorities in multiple ways, it also believes that the Board may resolve this appeal without addressing the legality of the Commission's recent rulemaking actions. None of the text amendments purported to alter the key provisions at issue in this appeal: §§ 401.1 and 2100.5.

On June 27, 2006, AppleTree timely filed an appeal with this Board, indicating that it would challenge the Zoning Administrator's denial of its permit application. *See* Exhibit No. 1 in this case (Form 125); Exhibit No. 2 in this case (Exceptions to Administrative Decision).

LEGAL ARGUMENTS

The Zoning Administrator contested only three aspects of AppleTree's application: minimum lot area, minimum width of lot, and minimum parking spaces. Exhibit D at 1. But his conclusions were based on legal error. He applied the general rules for each of those parameters without taking account of two facts: first, that the building was located on the lot on May 12, 1958, and, second, that the building has also been certified as contributing to the character of a historic district. Those two undisputed facts trigger legal exceptions from all three of the requirements invoked by the Zoning Administrator in denying AppleTree's application.

I. Under 11 DCMR § 401.1, AppleTree's Pre-1958 Building Is Exempt from Minimum-Lot-Area and Minimum-Lot-Width Requirements

The Subject Property is 4230 square feet in area and 36 feet wide. According to the table in 11 DCMR § 401.3, the general minimum lot area for a public school in an R-4 district is either 4000 or 9000 square feet, depending on whether the Zoning Commission's February 13, 2006 emergency rulemaking or subsequent final rulemaking applies to the evaluation of AppleTree's permit application (an issue that is discussed further in Part III, below). The general minimum lot width is either 40 feet or 120 feet (again depending on the validity and applicability of this year's purported rulemakings). Thus, the Subject Property would be too small on one or both of the dimensions made generally applicable to public schools by § 401.3. But the analysis cannot stop there.

Untouched by the Zoning Commission's recent rulemaking efforts about public schools, § 401.1 of the Zoning Regulations has consistently read as follows:

Except as provided in chapters 20 through 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.

AppleTree’s architect highlighted this provision in the permit application and in a follow-up letter to the Zoning Administrator. *See* Exhibit B (detail from cover sheet on plans submitted with building-permit application, citing § 401.1 and noting that building existed as of May 12, 1958); Exhibit C at 2 (letter from Daniel J. deBettencourt to Bill Crews, explaining operation of § 401.1 independent of any effect of the emergency rulemaking). Construed properly, this provision means that AppleTree’s proposal need not satisfy the “lot area or width of lot, or both, . . . prescribed by §401.3,” so long as it “complies with all *other* provisions” of the Zoning Regulations.

That result follows directly from the plain text of the rule, and that interpretation is supported by the internal structure of § 401.1, the way it relates to § 401.2, and this Board’s practice in construing both provisions. The internal structure of § 401.1 reveals that it is primarily a prohibition on enlarging or replacing a pre-1958 building. It expressly addresses “the case of a building located, on May 12, 1958, on a lot” that fails to have the minimum “lot area or width of lot, or both” that is currently required by § 401.3 for the building’s location.² But that prohibi-

² It could perhaps be argued that the lack of conformity with area or width requirements should be judged as of May 12, 1958, and therefore that § 401.1 exempts AppleTree only from the 40-foot width requirement, which was already in place in 1958, but not the new 9000-square-foot area requirement from the 2006 rulemaking efforts, because the Subject Property’s lot, at 4230 square feet, met the area requirement that was in place in 1958. But such an argument would fly in the face of the provision’s construction. It contains two relevant segments: (1) “in the case of a building located, on May 12, 1958, on a lot,” and (2) the phrases that modify “lot” (*i.e.*, “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 modifying phrases discussing area and width are accompanied by the present-

tion on enlarging or replacing pre-1958 buildings has two exceptions: first, as the initial clause indicates, those “provided in Chapters 20 through 25 [of the Zoning Regulations],” and, second, when the project “complies with all *other* provisions of this title” (emphasis added).

This Board has expressly concluded that, pursuant to § 401.1, a pre-1958 building *can* be enlarged or replaced even if its lot fails to meet the minimum-lot-width requirement in § 401.3. As the Board explained in its March 5, 2002 Decision and Order in Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price, § 401.1 “means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements ‘other’ than lot width.” Exhibit F at 5. (Although lot area was not relevant in that case, § 401.1 clearly creates a parallel exception from the minimum-lot-area requirement by referring to “lot area or width of lot, or both.”) The Board correctly noted that requiring an applicant to satisfy the lot-area or lot-width requirements would betray the regulation’s text by treating it “as if the word ‘other’ did not exist.” *Id.*

tense reference to “*is located*.” This is a clear signal that lot area and width are to be judged by current standards.

Moreover, the reference to area and width requirements “prescribed in § 401.3” would be anachronistic if applied to May 12, 1958, because the Zoning Regulations were numbered differently in 1958. It would be especially odd to expect someone in 2006 to read a reference to “§ 401.3” as if it said “§ 3301.1 of the Zoning Regulations, as they existed on May 12, 1958.”

The conclusion that § 401.1 refers to the *current* rather than historical lot-area and lot-width requirements is supported by a comparison between § 401.1 and the somewhat-parallel grandfather clause contained in § 401.2. Both provisions contain one clause that has no verb but contains a date in the past, followed by another clause that includes present-tense forms of the verb “to be” and mentions area and width standards. This Board has sensibly construed § 401.2 as creating one inquiry about 1957 (whether the lot “*was* both unimproved and in single ownership on November 1, 1957”) and another inquiry about the present (whether it “*today* does not adjoin another unimproved lot in the same ownership” and “*has* a lot width or lot area which *is* at least 80% of the required minimum”). BZA Order in Appeal No. 17034 of Advisory Neighborhood Commission 2E at 5 (May 12, 2004) (emphases added) (attached as Exhibit E).

Thus, it is irrelevant that the Subject Property happened to comply with the area requirements in 1958. The pre-1958 building may still be enlarged if it meets all requirements “other” than lot area and width — as the Subject Property does.

In AppleTree's case, apart from lot area and lot width, the Zoning Administrator identified no "other" provision with which AppleTree's application fails to comply, except the one for onsite parking. As explained below in Part II, it is clear that AppleTree's application did not fail to comply with the parking requirements. Accordingly, AppleTree's application falls within the exception to § 401.1's prohibition on enlarging a pre-1958 building, and the Zoning Administrator erred in finding it does not meet the minimum-lot-area and minimum-lot-width requirements.

II. Under This Board's Consistent Interpretation of 11 DCMR § 2100.5, AppleTree's Building, Which Is Certified as Contributing to a Historic District, Requires No Additional Parking Spaces

AppleTree's building-permit application explained that the lot has room for only 3 onsite parking spaces (both before and after the proposed expansion), and that AppleTree had secured a long-term lease in a nearby parking lot for 10 additional spaces. The Zoning Administrator concluded that AppleTree's proposed use of the Subject Property — a public charter school for pre-kindergarten students with 15 staff members — would require 10 parking spaces. In doing so, he flouted this Board's consistent and authoritative interpretation of 11 DCMR § 2100.5, which was specifically invoked by AppleTree's permit application and a follow-up letter from its architect. *See* Exhibit B (detail from application's cover sheet, citing § 2100.5 and noting that building has been certified); Exhibit C at 2–3 (letter to Zoning Administrator).

Section 2100.5 says:

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.

The Subject Property has in fact been certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic Preservation District. *See* Exhibit No. 15 in this case (copy of certification); Exhibit A at 1 (Staff Report for Historic Preservation and

Review Board referring to property as “contributing” to the Capitol Hill Historic District). Accordingly, the Board should conclude, just as § 2100.5 declares, that “[n]o additional parking spaces [are] required.”

Prior decisions of this Board amply demonstrate that § 2100.5 eliminates the need for new parking spaces for historic structures not only when there is a change in use but also when there is new construction.³ In its July 7, 2006 Summary Order about Application No. 17459 of DC Hampton LLC, the Board noted that there are “many decisions of this Board finding and concluding that Section 2100.5 operates to waive the requirement for additional parking spaces for new construction” whenever a site “includes a historically significant building that is certified as contributing to the character of [a historic district]” (attached as Exhibit I). As the Board further explained: “This has been a long-standing consistent interpretation by this Board, as well as by the Office of the Zoning Administrator, since Section 2100.5 was enacted by the Zoning Commission in 1985.” *Id.* at 2. Furthermore, the Board specifically rejected the Zoning Administrator’s recent attempts to defy its settled interpretation:

The Office of the Zoning Administrator has recently called this interpretation into question. The Board finds that its prior reasoning is sound, and that there is no reason to reverse this long-standing interpretation. Indeed it is the Board, and not the Zoning Administrator, which has the final administrative authority to interpret the Zoning Regulations. *Murray v. D.C. Bd. of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990).

³ For example, in its March 3, 1999 Summary Order upon Rehearing of Application No. 16307 of the National Child Research Center, the Board concluded that § 2100.5 “exempts such historic structures from providing additional parking when the use is changed” (attached as Exhibit G). Similarly, in Application No. 16487, Planned Parenthood Federation of America proposed repairing a façade and gutting and rebuilding the interior of a building while changing the use from a medical clinic to an office; with regard to parking, this Board’s October 29, 1999 Order said: “The subject property has no onsite parking and none is required for the proposed use in accordance with Section 2100.5 which provides that no additional parking spaces are required for historic structures” (attached as Exhibit H).

Id.; see also BZA Summary Order in Application No. 17531 of D.C. Office of Aging (Oct. 11, 2006) (attached as Exhibit J) (unanimous decision noting, in the context of a proposed addition to and change of use, that the “building has been designated a historic landmark and therefore is exempt from parking requirements pursuant to 11 DCMR § 2100.5”).

Notably, the Board’s re-affirmations of its common-sense interpretation of § 2100.5 came after the Office of Planning had petitioned, through a set-down report, for a text amendment that would purportedly “clarify” that § 2100.5 applies only to a “use change.” See ZC Case No. 06-33 (set-down at July 10, 2006 meeting).⁴ The first public hearing about that potential text amendment is scheduled for November 27, 2006. See 53 DCR 7641 (Sept. 22, 2006). Of course, even if the Zoning Commission ultimately changes the rule underlying this Board’s consistent interpretation, that change should have no effect on AppleTree’s application, which was pending long before the set-down occurred. See 11 DCMR §§ 3202.4, 3202.5(a).

This Board should hew to its longstanding interpretation of § 2100.5 and conclude that AppleTree’s application complies with Chapter 21 of the Zoning Regulations.

⁴ Chairperson Mitten discussed the potential text amendment related to historic parking at a May 11, 2006 public hearing of the Zoning Commission and a July 10, 2006 public meeting of the Zoning Commission, indicating that she supports amending the text to something that would depart from the BZA’s consistent interpretation of the current regulation. In her capacity as a member of the BZA, however, she had recently *agreed* with the consistent interpretation of the Board discussed above. During the Board’s May 2, 2006 public hearing, she stated: “I would just concur that we have said this in all those other cases and don’t see any reason to interpret the regulations any differently. I’m not sure why that’s not clear to the Zoning Administrator but if this helps me get clearer today by reaffirming that, then so be it. That’s a good thing.” Tr. of May 2, 2006 BZA Public Hearing at 290 (attached as Appendix K); see also *id.* at 292 (statement of Ms. Mitten noting that § 2100.5 deals with historic landmarks and certified buildings and is distinct from § 2100.6, which deals with pre-1958 structures); ZC Order No. 940, Case No. 00-33C, at 4 (May 11, 2001) (unanimous order of the Zoning Commission, signed by Chairperson Mitten, citing § 2100.5 for the proposition that “a historic landmark located in a historic district . . . is not subject to otherwise applicable parking . . . requirements”).

III. The Board Cannot Rely on the Zoning Commission's February 13, 2006 "Emergency" Rulemaking, Its Extension of the Emergency, or the Final Rulemaking To Deny AppleTree's Application

As the preceding discussion demonstrates, the Board should reverse the Zoning Administrator's permit denial (or exercise the full powers of the Zoning Administrator and grant the permit application). D.C. Code § 6-641.07(g)(4); 11 DCMR § 3100.4. Moreover, it may do so without having to consider the validity of the Zoning Commission's February 13, 2006 emergency rulemaking, its June 12, 2006 re-adoption of the emergency rulemaking, its September 25, 2006 final rulemaking, or the effect that any of those actions might have had on the pendency of AppleTree's permit application. None of those actions affected the text of §§ 401.1 and 2100.5, which are sufficient to determine that the Zoning Administrator erred in denying AppleTree's application.

If, however, the Board were somehow to affirm the Zoning Administrator's denial of AppleTree's application and base its decision on the Zoning Commission's emergency rulemaking, it would be impermissibly relying on a legal nullity, as AppleTree has consistently explained to the Zoning Commission. *See* Letters from Jack McCarthy and Russ Williams AppleTree, to the Zoning Commission, *Re: ZC Case No. 06-06* (Feb. 9, May 10, and June 12, 2006) (collectively attached as Exhibit L).

There was in fact no emergency that necessitated a change to the minimum-area requirements for public schools. Even a cursory look at the justifications provided by the Zoning Commission suffices to show that it did not meet its obligation to explain "clearly" why an instant tripling of the lot-width and doubling of the lot-area requirements for public schools in R-4 zone districts was "*necessary for the immediate preservation of the public peace, health, safety, welfare, or morals.*" 1 DCMR § 311.4(e) (emphases added). The Commission's public notices for the two emergencies asserted an unsubstantiated (and unlikely) chance that, without such

emergency action, there would have been an “immediate proliferation of Charter Schools in residence districts” that would have some unquantified “potential” for “adverse impacts.” 53 DCR 2017 (Mar. 17, 2006); 53 DCR 5895 (July 21, 2006). That failure to specify the potential adverse impacts — or even to claim that they had any relation to the public peace, health, safety, welfare, or morals — was obviously inadequate to meet the Commission’s obligation to provide a clear explanation of the necessity of an emergency rule. *Cf. Wheelchair Carriers Ass’n, Inc. v. District of Columbia*, Civ. No. 00-1586, 2002 U.S. Dist. LEXIS 4617 (D.D.C. Mar. 12, 2002) (invalidating emergency rulemaking because there was insufficient support in the record for the kind of public health crisis that had supported prior emergency rulemakings).

In addition, the “emergency” rules could not be applied for “longer than 120 days” under § 2-505(c) of the D.C. Code. The Zoning Commission’s “re-adoption” of the “emergency” rulemaking on June 12, 2006 is a legal nullity because the D.C. Code makes no provision for such an extension, because there was still no “emergency” at that date, and because no clear explanation of any “emergency” appeared in the July 21 *D.C. Register* notice.

Finally, even if the emergency amendments were found to apply to AppleTree’s application, they could not be enforced against AppleTree, because doing so would amount to arbitrary and capricious agency action. The amendments themselves were not logically constructed to achieve their stated objectives, and they were adopted (on an emergency basis) specifically to defeat AppleTree’s pending application. As D.C. Council Member Kathy Patterson recognized in an e-mail message when the proposals were first being drawn-up: “[i]f my understanding of possible emergency action is correct . . . the govt would appear to be responding with policy to a particular not a general concern.” E-mail message from Kathy Patterson to Ellen McCarthy,

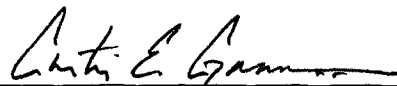
Office of Planning, *Re: charters & matter of right* (Jan. 3, 2006, 8:38 PM) (obtained by AppleTree in response to FOIA request to the Office of Planning) (attached as Exhibit M).

CONCLUSION

Because AppleTree's application complied with all applicable zoning requirements on the date the Zoning Administrator made his decision (or, in the alternative, after the "emergency" text amendment expired on June 13 or October 10, 2006), it should be granted without regard to any future rulemakings, because § 3202.4 of the Zoning Regulations provides that the applicable rules are those "in effect on the date that the permit is issued," and the Board should conclude that the permit should have been issued at one of those times.

Respectfully Submitted,

Dated: November 7, 2006

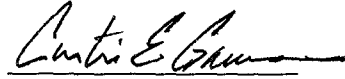


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*Attorneys for Appellant AppleTree Institute for
Education Innovation, Inc.*

PROOF OF SERVICE

On November 7, 2006, I sent a copy of the foregoing Brief of Appellant, with its attached exhibits, by first-class mail, to the Zoning Administrator for the District of Columbia and to Advisory Neighborhood Commission 6A.

A handwritten signature in black ink, appearing to read "Curtis E. Gannon", written over a horizontal line.

Curtis E. Gannon

Appeal No. 17532

List of Exhibits Attached to the Brief of Appellant

Historic Preservation Review Board, Staff Report and Recommendation, <i>Re: 138 12th Street, NE</i> (Dec. 2005)	A
“Zoning Data Summary,” Detail from Cover Sheet of Proposed Design for the AppleTree Early Learning Public Charter School, Submitted to Department of Consumer and Regulatory Affairs with Application for a Building Permit (Feb. 9, 2006).....	B
Letter from Daniel J. deBettencourt, dBF Associates, Architects, to Bill Crews, Zoning Administrator, <i>Re: Building Permit Application for Public Charter School at 138 12th Street, N.E. (Tracking Number 3758-A-6)</i> (Mar. 6, 2006).....	C
Letter from Bill Crews, Zoning Administrator, to Russ Williams, Managing Director, AppleTree, <i>Re: 138 12th St. N.E.</i> (Apr. 28, 2006) (identical to Exhibit No. 13 in this case)	D
BZA Order re Appeal No. 17034 of Advisory Neighborhood Commission 2E (May 12, 2004)	E
BZA Decision and Order re Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price (Mar. 5, 2002)	F
BZA Summary Order upon Rehearing re Application No. 16307 of the National Child Research Center (Mar. 3, 1999).....	G
BZA Order re Application No. 16487, Planned Parenthood Federation of America (Oct. 29, 1999)	H
BZA Summary Order re Application No. 17459 of DC Hampton LLC (July 7, 2006)	I
BZA Summary Order re Application No. 17531 of D.C. Office of Aging (Oct. 11, 2006).....	J
Transcript of May 2, 2006 BZA Public Hearing, pages 280–93	K
Letters from Jack McCarthy and Russ Williams, AppleTree, to the Zoning Commission, <i>Re: ZC Case No. 06-06</i> (Feb. 9, May 10, and June 12, 2006).....	L
E-mail message from Kathy Patterson to Ellen McCarthy, Office of Planning, <i>Re: charters & matter of right</i> (Jan. 3, 2006, 8:38 PM) (obtained by AppleTree in response to FOIA request to the Office of Planning).....	M

A

**HISTORIC PRESERVATION REVIEW BOARD
STAFF REPORT AND RECOMMENDATION**

Property Address:	138 12th Street, NE	X	Agenda
Landmark/District:	Capitol Hill Historic District		Consent Calendar
			Concept Review
Meeting Date:	December 15, 2005	X	Alteration
H.P.A. Number:	05-522		New Construction
Staff Reviewer:	Emily Paulus		Demolition
			Subdivision

The applicant, DBF Associates Architects for the AppleTree Institute for Education, seeks approval to construct a three-story with partial rooftop addition to the rear of a contributing two-story former commercial property in the Capitol Hill Historic District in order to accommodate the conversion of the property into a charter school. The addition would be largely invisible from 12th Street, but would be visible from the rear alley.

The property is situated mid-block on the west side of 12th Street, NE, just north of Lincoln Park. The immediate vicinity is composed of two and three-story rowhouses and is predominantly residential in character; the subject property appears to be the only commercial/institutional use on the block. The existing building on the site was constructed sometime in the 19-teens, first appearing in city directories in 1916 when it was owned by L.P Steurart Brothers and functioned as an office facility. Subsequently, it was occupied by the Knights of Saint John and Women's Auxiliary and used as a community facility. The building retains a high degree of integrity and appears to have experienced only minor cosmetic modifications on the front façade. The existing building footprint measures 40 by 36 feet, totaling approximately 4,200 square feet.

Project Description

The applicant originally submitted the project for review in November, at which time the addition measured 54 by 36 feet and totaled approximately 6,800 square feet; the lot occupancy would have increased from 34% to 80%. The plans also included outdoor play/recreation space atop the rear of the second floor addition. The applicants electively withdrew this proposal after receiving negative feedback from the community and HPRB staff, who felt the applicant's program was simply too aggressive for the building and site and the proposed addition simply too large to be considered compatible.

The applicants have spent the last month scaling back the proposal to 60% lot occupancy, with the revised footprint measuring 30 by 36 feet. In addition, the rooftop play area has been eliminated in favor of a sunken courtyard at the basement level. The partial third floor remains and includes a classroom, bathroom, staircase, and elevator shaft; it would be set back approximately 26 feet from the front façade and extend approximately 44 feet deep. Approximately 12 feet of the third floor addition would sit atop the existing building; the elevator shaft would be housed within the new addition, rather than slicing

through the historic building. The front elevation of the third floor addition would be finished in stucco while the rear wall would be finished in brick and include a secondary entrance at the first floor, with paired double-hung windows topped by segmental brick arches at the first and second floors. In addition to the sunken courtyard, the rear yard would include accommodation for three parking spaces.

On the front façade, only minor cosmetic alterations are proposed, including new doors, replacement windows, and awnings atop the first floor apertures.

Evaluation and Recommendation

The most fundamental aspects of the proposal – including the rehabilitation of the front façade and the very basic notion of adding to the rear of the existing building – are not inconsistent with the character of the Capitol Hill Historic District, or with previously-approved projects on similar buildings. The staff's previous reservations with the proposed size and mass of the addition in relation to its immediate context have been substantially and satisfactorily addressed. The addition's depth is now consistent with the sizes of other additions in this single-family residential neighborhood, and the resulting open rear yard more characteristic of the historic district. The partial third floor addition is compatible among the varied heights of buildings and additions along the alley, and is consistent with other partial rooftop additions approved in this and other historic districts. The fact that the third floor stands less than a full floor higher than the adjacent buildings also mitigates the overall visual impact on the allyscape. The staff takes no issue with the overall design or material use proposed for the rear addition, which while perhaps more decorated than most rear facades, seems generally compatible with the character of the neighborhood.

In addition, the staff's previous concerns about visibility and demolition of historic fabric have largely been addressed through moving the elevator shaft into the addition and thus further back from the front façade. Nevertheless, because the submitted sight line section only addresses visibility from directly across the street, the staff would recommend including additional views that illustrate visibility from oblique vantage points. Ultimately, the applicant may want to conduct a flag test for the staff's review and consideration prior to finalizing an acceptable setback.

Zoning Considerations

While not within the purview of this Board, it should be noted that there are some zoning issues that, at the moment, remain unresolved. The applicant maintains they are considered a "public school" for zoning purposes, and thus can build to 80% lot occupancy with capacity for 72 students and 16-20 staff by right, or, without the need for zoning relief; this understanding was apparently confirmed through a preliminary meeting with a previous Zoning Administrator earlier this year. According to ANC 6A and others in the neighborhood, however, the facility does not meet the definition of what constitutes a public school for zoning purposes because it is not operated, maintained, or chartered by the District of Columbia Board of Education. Rather, they contend, it should be recognized as a "child development center," which is allowed by right in the subject

zoning district provided it serves no more than 16 children and occupies no more than 40% of the lot. The applicant has met with the current Zoning Administrator and, until very recently, was awaiting an advisory opinion on this issue; however, the Department of Consumer and Regulatory Affairs (DCRA) has indicated that the Zoning Administrator's Office will not be issuing an advisory opinion, but rather will make a ruling on a case-by-case basis once the permit application is submitted. In the meantime, the Office of Planning intends to work on zoning text to clarify the issue and address potential impacts and hopes to get this to the Zoning Commission sometime in early 2006. It should be stressed here that the Historic Preservation Review Board's action is completely separate from that of the Zoning Commission or Board of Zoning Adjustment, and any approvals should not be construed as an endorsement of the necessary zoning variances or zoning relief.

The staff recommends that the Review Board approve the project in concept as consistent with the purposes of the preservation act, with further study conducted to ensure invisibility of the third floor from 12th Street as described above, and delegate final approval to staff; however, any approvals should not be construed as an endorsement of any necessary zoning variances or zoning relief.

B

SECOND FLOOR	20	2,615 SF	20 N	0.2	19
THIRD FLOOR	20	1,497 SF	20 N	0.2	11

ZONING DATA SUMMARY

ZONE DISTRICT: R-4

USE: Public School - Conforming Use in District

BUILDING AREA SUMMARY:

FLOOR	EXISTING	PROPOSED	TOTAL
Basement	1,432	1,059	2,491
Basement	1,432	1,059	2,491
Basement	1,432	1,059	2,491
Third		1,502	1,502
TOTAL	4,296	4,679	8,975

SECTION 400: HEIGHT OF BUILDINGS OR STRUCTURES:

400.11 Public School may not exceed 90'
Actual Height: 33' measured from existing grade at front and rear of structure

SECTION 401: MINIMUM LOT DIMENSIONS:

401.1 Building existed as of May 12, 1958.
401.3 Minimum Lot Area: 4,000 sf Actual Lot area: 4,230 sf
Minimum Lot Dimension: 40' Actual Lot Dimension: 36'

SECTION 402: FLOOR AREA RATIO:

402.4 Maximum Floor Area Ratio (FAR) allowed in R-4 District: 1.8
Actual Floor Area Ratio: $2,491 + 2,491 + 1,502 / 4,230 = 1.53$

SECTION 403: PERCENTAGE OF LOT OCCUPANCY:

403.1 Public School may exceed permitted percentage provided that the portion in excess shall not exceed 20' in height or two stories
403.2 Public School Maximum Percentage of Lot Occupancy: 60%
Actual Percentage of Lot Occupancy: Building 2,491 sf 58.8%
Deck: 70 sf 1.6% *Deck < 20' high
TOTAL: 60.4%

SECTION 404: REAR YARD

Minimum Depth: 20'
Actual Depth: 47'

SECTION 405: SIDE YARD

Required: None
Actual: None

SECTION 406: COURTS

Actual: None

PARKING: Section 2100.5

2100.5 Building has been certified by the DCHPO as a contributing element in the Capitol Hill Historic District.
No additional Parking Required

EXISTING PARKING: None indicated
Lot width of 36' permits 45 degree angled parking only
Assume 3 spaces

PROVIDED PARKING: 3 SPACES

In addition to off street parking provided, applicant has secured a long term lease in a nearby parking lot for a minimum of ten spaces

2100.4 Intensity of use
Previous Use: Assembly
Occupant Capacity: B and 1st Floor: 110 Occupants
Parking Required: 11 spaces
Proposed Use: Public School
Staff: 15
Parking Standard: Elementary School
Parking Required: 2 spaces/ 3 employees
Parking Required: 10 spaces
No Additional Parking Required

Building 21

Structural Frame
Including column
trusses

Bearing Walls

Exterior

East

West

Interior

Non-Bearing
and Partitions

Exterior

South

North

Interior

Ceiling

Floor Construct
Including Support
and Joists

Roof Construct
Including Support
and Joists

Shafts-Exit

Shafts-Other

Corridor Separation

Occupancy Separation

Party/Fire Separation

Smoke Barrier

Tenant Separation

C

dBF Associates, Architects

March 6, 2006

Bill Crews
Zoning Administrator for the District of Columbia
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Re: Building Permit Application for Public Charter School at 138 12th Street, N.E.
(Tracking Number 3758-A-6)

Dear Mr. Crews:

I write with regard to the building permit application filed on February 9, 2006, on behalf of AppleTree Institute for Education Innovation. On March 6, AppleTree received notice that the "Northeast Neighbors for Responsible Growth, Inc." had named AppleTree as a defendant in a lawsuit that seeks to prevent you and others in the District of Columbia government from following the usual procedures in processing AppleTree's application. The papers they filed with the D.C. Superior Court included copies of e-mail correspondence in which you expressed the view that AppleTree's pending application would need to comply with the text adopted pursuant to an emergency rulemaking by the Zoning Commission at its meeting on February 13, 2006.

Before the February 13 meeting of the Zoning Commission, AppleTree expressed some of its grave concerns about the process by which the Commission adopted the emergency text amendment, and the course of the meeting itself did not allay those concerns. Nevertheless, I write to note that AppleTree's pending application meets all applicable zoning requirements—even assuming for the sake of argument that the emergency text amendment is in effect and applies to your evaluation of AppleTree's application.

The emergency amendment makes clear that charter schools are "public schools" for purposes of the Zoning Regulations, just as AppleTree's counsel, Mark A. Perry of Gibson, Dunn & Crutcher LLP, explained in a letter to you on November 21, 2005.

Some of the residential height, area, and density regulations would not be affected by the emergency rulemaking. Thus, no change would be made to §§ 402, 404, 405, and 406, each of which is satisfied by AppleTree's application. Under § 402.4, the maximum floor area ratio would remain 1.8, well above AppleTree's actual floor area ratio of 1.53. Under § 404.1, a rear yard must be at least 20 feet deep, and AppleTree's would be 47 feet deep. Under §§ 405.1 and 405.2, no side yard is or would be required, and AppleTree's development would have none. Section 406 is inapplicable because there would be no open or closed court.

dBF Associates, Architects

Other parts of Chapter 4 would be altered by the emergency text, but not to such a degree that AppleTree's proposed development would be non-compliant. Thus, under § 400.11, the permissible height for a public school in an R-4 district would be reduced from 90 feet to 60 feet—still much taller than AppleTree's building, which would be only 33 feet high. Similarly, under § 403.1, the maximum lot occupancy for a public school in an R-4 zone would be 70 percent, significantly more than the 60.4 percent that AppleTree's building would occupy (including 58.8 percent for the building and an additional 1.6 percent for a deck that would be less than 20 feet high and therefore meet the conditions of § 403.1).

The emergency text amendment would dramatically increase the minimum-lot-area and the minimum-lot-width requirements for public schools in R-4 districts. Under the amended version, the minimum lot area would jump from 4,000 square feet to 9,000 square feet, and the minimum lot width would triple by going from 40 feet to 120 feet. Although AppleTree's lot is 4,230 square feet in area and 36 feet wide, and would thus appear not to satisfy those requirements, ***it is exempted from them by the operation of § 401.1***. That long-standing provision reads in relevant part:

[I]n 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.

11 DCMR § 401.1 (2005) (emphases added). The emergency rulemaking did not purport to alter § 401.1. As the Board of Zoning Adjustment explained in one of its 2002 decisions, that provision "means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements 'other' than lot width." *Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price*, at 5 (BZA Mar. 5, 2002). (Although lot area was not relevant in that case, § 401.1 also creates a parallel exception from the minimum-lot-area requirement.) As AppleTree's building permit application noted, the building on AppleTree's lot existed as of May 12, 1958. Accordingly, AppleTree's development ***need not satisfy § 401.3*** unless it cannot meet some other zoning requirement.

The only other requirements that AppleTree could be alleged to fail are those in Chapter 21 governing parking. There again, however, a pre-existing exemption would, even under the emergency rulemaking, continue to apply to AppleTree's proposed development. Under the standard formula for elementary schools, AppleTree's 15 staff members would necessitate 10 parking spaces, while there is room for only 3 spaces on-site (though, as the application made clear, AppleTree has also secured a long-term lease in a nearby parking lot for a minimum of 10 parking spaces). Nevertheless, that requirement is made inapplicable by the exemption in § 2100.5, which reads 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.

11 DCMR § 2100.5 (emphasis added). As AppleTree's application noted, its building has been certified by the D.C. Historic Preservation Office as a contributing element in

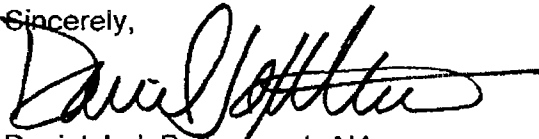
dbF Associates, Architects

the Capitol Hill Historic District. Accordingly, AppleTree would not even need to provide for both the 3 on-site and the 10 nearby parking spaces that it proposes.

In light of the foregoing, I trust that you will process AppleTree's application expeditiously and recognize that—even assuming the emergency rulemaking has taken effect and applies—AppleTree needs no special exception or variance to meet all applicable requirements of the Zoning Regulations.

Please do not hesitate to call me if you would like to discuss any of these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel deBettencourt', with a stylized flourish at the end.

Daniel J. deBettencourt, AIA

Cc: Zoning Commission Members

Andrew J. Saindon, Esq.

D

17532

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR



April 28, 2006

Mr. Russ Williams
Managing Director
Apple Tree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003

Re: 138 12th Street, N.E.

Dear Mr. Williams:

The Department of Consumer and Regulatory Affairs (DCRA) has reviewed your Application for Construction Permits on Private Property, regarding 138 12th Street, N.E. (File Job #3758-A), which was received on February 9, 2006.

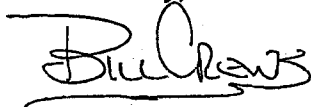
This letter serves to notify you that the above-referenced application does not meet applicable District of Columbia Zoning Regulations and therefore can not be approved. More specifically, the proposed use as a public charter school fails to meet the District of Columbia's R-4 residential zone district requirements for:

1. minimum lot area (9,000 square feet required),
2. minimum width of lot (120 feet required), and
3. minimum parking spaces (10 spaces required).

Our decision not to approve the submitted application is based on the District of Columbia Zoning Commission's adoption of an Emergency Text Amendment defining charter schools as public schools, and changing various requirements for public schools to locate in the R-4 Residential District as matter of right on February 13, 2006, and the District of Columbia Zoning Regulations codified at Title 11 of the District of Columbia Municipal Regulations (DCMR). The Zoning Commission's Emergency Text Amendment was effective immediately and applies to all pending applications on the date the text amendment was adopted.

Please be advised that decisions of the Zoning Administrator may be appealed to the Board of Zoning Adjustment, in accordance with DCMR Chapter 31.

Sincerely,



Bill Crews
Zoning Administrator

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17532

EXHIBIT NO. 13

E

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



Appeal No. 17034 of Advisory Neighborhood Commission 2E, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator in the issuance of a final and binding ruling letter dated July 12, 2001, to the law firm of Shaw, Pittman, confirming the ability to develop three lots on the east side of the 1500 block of 32nd Street, N.W. with three row dwellings. The R-3 zoned subject property is located in the 1500 block of 32nd Street, N.W. (east side) (Square 1270, Lots 19, 20 and 21).

HEARING DATE: November 18, 2003
DECISION DATES: November 25, 2003, December 2, 2003

ORDER

PRELIMINARY MATTERS

On May 9, 2003, appellant Advisory Neighborhood Commission ("ANC") 2E ("Appellant") filed this appeal with the Board of Zoning Adjustment ("Board"), alleging error in a July 12, 2001 letter decision of the then-Zoning Administrator, Michael Johnson ("ZA"). The appeal claimed that the ZA had erred in interpreting section § 401.2 of the Zoning Regulations, (Title 11 of the District of Columbia Municipal Regulations ("DCMR")), thereby erroneously concluding that construction could proceed as a matter of right on the three lots which comprise the property subject to this appeal. The subject property is in an R-3 zone.

Appellant alleged 6 grounds for its appeal, all of which stem from the ZA's interpretation of §401.2 of the Zoning Regulations. Section 401.2 carves out an exception to § 401.3's minimum allowable lot area and lot width, but in order to fall under the exception, a property must meet several conditions. The ZA determined that the 3 lots here met those conditions and the Appellant disagrees. Specifically, the Appellant claims: (1) the lots were not unimproved on November 1, 1957, (2) the lots were in the same ownership as of the date of the ZA's letter, (3) none of the lots have the minimum necessary lot width, (4) the ZA has no authority to use the 2% discretion he is given by § 407.1 on top of the exception carved out by § 401.2, (5) the ZA did not make the requisite finding that the 2% deviation allowed would not impair the purpose of the otherwise applicable Zoning Regulations, and finally, (6) the lots do not comply with the standards set out in § 401.3, contrary to the ZA's general finding in his letter.

The Board held a public hearing on the appeal on November 18, 2003 at which the Appellant presented its case and the owners of two of the lots, (19 and 20), represented by the law firm of Shaw Pittman, defended the decision of the ZA. Neither the ZA, nor any representative of the Department of Consumer and Regulatory Affairs ("DCRA"), of which the ZA is a part, appeared at the hearing. The owner of the third lot (21) did not appear, although all three property owners were automatically parties to the proceeding, pursuant to 11 DCMR § 3199.1.

The Board held a public decision meeting on November 25, 2003. After lengthy deliberation, a Board member moved to grant the appeal, but the motion failed for lack of a majority, the vote being 2-2-1, with one member abstaining. As one of the members voting against granting the appeal had not been present and had voted by absentee, the Chairman decided to hold a second decision meeting on December 2, 2003. The previously absent member was present at the second meeting, and, after a second deliberation, the Board voted 5-0-0 to grant the appeal.

For the reasons stated below, the Board finds that the exception to the minimum lot width requirement does not apply to these lots. As a result, the proposed development of three row houses may not proceed as a matter of right. Since the resolution of this one issue disposes of the appeal, it is unnecessary for the Board to address the other forwarded grounds.

FINDINGS OF FACT

The Subject Property

1. The subject property is comprised of 3 adjacent lots, numbers 19, 20 and 21, fronting on 32nd Street, N.W. All 3 lots are within Square 1270 and are in an R-3 zone district.
2. Lot 19 is owned by Strategic Georgetown, LLC. Lot 20 is owned by Georgetown 32nd Street, LLC. Lot 21 is owned by Herbert S. and Patrice R. Miller, who previously owned all 3 lots, but sold lots 19 and 20 to their current owners on October 18, 2002.
3. The 3 lots are proposed to be developed with one single-family row dwelling per lot.
4. Section 401.3 of the Zoning Regulations establishes minimum lot dimensions within residence zones. Except as provided in §§ 401.1 and 401.2, all R-3 lots with row dwellings must contain at least 2,000 square feet of lot area.
5. Each lot consists of approximately 1,573 square feet of lot area.

History of the Subject Property

6. Historically, the 3 lots, as well as the others in the Square, were part of the land associated with the Bowie-Sevier Mansion, which is located within Square 1270, just northeast of the subject property, at 3124 Q Street, N.W.
7. As a result of a lawsuit brought by one of the heirs to the Bowie-Sevier property, the land associated with the mansion was subdivided in May 1881. Many new lots were created within what is now Square 1270, including lots 19, 20 and 21. Exhibit No. 17.
8. A June 26, 1919 survey plat from the District of Columbia Surveyor shows that the first 30 feet of lots 19, 20, and 21 was subdivided for the purpose of constructing garages. Exhibit No. 18, Attachment F.

9. Upon her death in 1953, the descendant of the Sevier family left the mansion and its grounds, including lots 19, 20 and 21, to the Episcopal Church Home of the Diocese of Washington ("Home"). The Home restored and converted the mansion for use as a home for the elderly and razed buildings along 32nd Street in order to construct a nursing wing there.
10. On July 5, 1956, groundbreaking occurred for the about-to-be-built nursing wing. Exhibit No. 23, Attachments 2 and 5.
11. On September 26, 1956, a building permit was issued to the Home for an addition and alterations and repairs, presumably including the nursing wing. Exhibit No. 19, one of additional documents added after Attachment 10.
12. Construction of the nursing wing actually began in October 1956. *See*, Exhibit No. 23, Attachment 2. It was built partially on lots 19, 20 and 21 at issue here. *See*, Exhibit No. 19, Attachment 8.
13. In January 1957, a significant portion of the steel frame and brick façade of the nursing wing had been erected. Exhibit No. 23, Attachments 1 and 2.
14. The plat and wall check of the D.C. Surveyor's Office dated April 17, 1957, clearly shows a building, presumably the nursing wing, on parts of lots 19, 20 and 21. Exhibit No. 22.
15. On January 14, 1958, a Certificate of Occupancy was issued to the Home for a "Residence for the Aged with Convalescent Facilities" on lots, *inter alia*, 19, 20 and 21, in Square 1270. Exhibit No. 19, one of additional documents added after Attachment 10.
16. In July 1997, the Millers purchased the Bowie-Sevier mansion and its grounds, including lots 19, 20, and 21, with the nursing wing located on them, for reconversion to residential use. Exhibit No. 19, Attachment 10.
17. It appears from a letter sent by the Millers to their Georgetown neighbors that the nursing wing existed on parts of lots 19, 20 and 21 at least until February 1998. *Id.*

The ZA's Decision Letter

18. On July 12, 2001, the ZA, Michael Johnson, sent a letter to the Miller's attorney confirming that each of the lots could be developed as a matter of right, as conditioned in the letter. The "conditions" appear to be the requirements of § 401.2 of the Zoning Regulations. (The letter refers to an "Exhibit A" and an "Exhibit B," but neither is included in this record on appeal.) *See*, Exhibit No. 1, Attachment No. 1.
19. The ZA's letter interprets § 401.2 of the Zoning Regulations, which permits the erection of a structure on an undersized "unimproved lot in single ownership on November 1, 1957" if the lot "does not adjoin another unimproved lot in the same ownership" and if

- the "lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3."
20. The ZA's letter concludes that the subject property satisfies the conditions of § 401.2, and therefore matter of right construction of rowhouses could proceed despite the deficient lot areas. With respect to compliance with the conditions of § 401.2, the letter specifically states: "[t]he lots **are** unimproved, and **were** in single ownership on November 1, 1957." (Emphasis added.)
 21. The ZA decision makes no determination as to whether lots 19, 20, and 21 were unimproved on November 1, 1957.
 22. The letter makes it clear that the ZA knew that as of July 12, 2001, the lots were under common ownership, but that at the time of development, it was anticipated that the lots would be owned by separate entities, to avoid the stricture in § 401.2 that two adjacent unimproved lots not be in the same ownership.
 23. The ZA's letter applied the § 401.2 80% exception to the required minimum lot area of 2,000 square feet and determined that each lot of the subject property would need to be 1600 square feet in area to be developable as a matter of right under § 401.2.
 24. The ZA then applied a 2% deviation to the area requirements of § 401.3 pursuant to § 407.1 so that a lot with an area of 1,568 square feet would be developable as a matter of right under the conditions set forth in § 401.2.
 25. The ZA therefore determined that each of the 3 lots was ostensibly developable as a matter of right under § 401.2 as each, at approximately 1,573 square feet, was larger than the 1,568 minimum required.
 26. The ZA's decision letter is addressed to Mr. John T. Epting of the law firm of Shaw Pittman and there is no indication that it was sent to anyone else. It was not publicly disseminated.
 27. Through an e-mail from an unidentified neighbor, the Appellant found out about the decision letter in April, 2003. *See*, Hearing Transcript at 377. The appeal was filed on May 9, 2003, within the 60-day window for filing appeals with the Board. *See*, 11 DCMR § 3112.2.

CONCLUSIONS OF LAW

Procedural Issues

Section 8(f) of the Zoning Act of 1938 provides that appeals to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the zoning regulations. D.C. Official Code § 6-641.07(f) (2001). The ZA's decision letter was a decision of a District official in the administration and enforcement of the zoning regulations. It explained the reasoning behind the ZA's decision and

expressed his final determination as to the issues discussed in the letter. In order to be certain that the issues were ripe for appeal, OZ requested that the Appellant obtain a letter from DCRA confirming that the letter represents the ZA's final and binding decision with respect to the issues presented. The Appellant filed such a letter with OZ on June 24, 2003. Exhibit No. 8. Therefore, the Board finds that the ZA's letter was a proper subject for appeal.

The Board also concludes that the appeal is timely. Pursuant to 11 DCMR § 3112.2(a), an appeal must be filed within 60 days from the date the appellant had notice or knowledge of, or should have had notice or knowledge of, the decision to be appealed. The ZA's decision letter is dated July 12, 2001. It is addressed to Mr. John Epting of the law firm of Shaw Pittman and there is no indication that it was sent to anyone else. Nor was it publicly disseminated.

In April, 2003, the Appellant found out about the decision letter through an e-mail from an unidentified neighbor. This was the earliest that the Appellant had, or should have had, notice or knowledge of the letter. The appeal was filed on May 9, 2003, within the 60-day window for filing appeals and is therefore timely.

Substantive Issues

The ZA's conclusion that the subject property could be developed as a matter of right is premised on the property being eligible for the exception to minimum lot area permitted by § 401.2 of the zoning regulations. This subsection states:

Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than that specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.

11 DCMR § 401.2. Under the § 401.2 exception, if a lot, which was both unimproved and in single ownership on November 1, 1957, and which today does not adjoin another unimproved lot in the same ownership, has a lot width or lot area which is at least 80% of the required minimum, it may be built on as a matter of right. All of the criteria of § 401.2 must be met in order for the exception to apply.

The ZA, in his decision letter, concluded that the § 401.2 exception applies to the subject property because "[t]he lots are unimproved, and were in single ownership on November 1, 1957." The Board, however, does not read the regulation to require that the lots be unimproved now, while requiring that they be in single ownership as of November 1, 1957. That is not what the regulation says. The Board concludes, as a simple matter of reading the language of § 401.2, that the subject property must have been both unimproved and in single ownership on November 1, 1957, in order to get the benefit of the exception. Reading § 401.2 as the ZA did would permit

a lot owner with a too-small lot, whose lot was in single ownership on November 1, 1957, to demolish a structure on his lot, rendering it unimproved, and thereby eligible for the § 401.2 exception.

There was no dispute that lots 19, 20, and 21 were in single ownership on November 1, 1957. The Board concludes further that lots 19, 20, and 21 were not unimproved on November 1, 1957. There is ample evidence in the record showing that the nursing wing of the Episcopal Church Home of the Diocese of Washington existed on these lots on November 1, 1957. Construction of the nursing wing began in October 1956. A photograph from January 1957 shows that a significant portion of the steel frame and brick façade of the nursing wing had been erected. The April 1957 plat and wall check from the D.C. Surveyor clearly depicts a building straddling lots 19, 20, and 21. A Certificate of Occupancy for the nursing wing was issued on January 14, 1958.

Although there is no picture in the record depicting precisely how much of the nursing wing had been constructed by November 1, 1957, the Board concludes that even the amount of construction which existed on the subject property in January, 1957 suffices to make it "not unimproved." "Unimproved" is not defined in the zoning regulations, so the Board turns to Webster's Dictionary, as directed by § 199.2(g). Webster's defines "unimproved" with respect to land as follows: "not tilled, built upon, or otherwise improved for use: retained in the wild or natural state." *Webster's Third New International Dictionary of the English Language (Unabridged)*, 1961. On November 1, 1957, the subject property was "built upon" and was not "in the wild or natural state."

The Board disagrees with the property owners' argument that land is unimproved until a Certificate of Occupancy is issued for a structure on that land. Buildings, such as single-family dwellings, and structures, such as walls and fences, do not require a Certificate of Occupancy, and yet are improvements to land. The property owners' expert witness stated that the issuance of a Certificate of Occupancy "sanctions completion of the improvements on the lot." Exhibit No. 20, at 2. Clearly, the improvements existed on the lot before they were "completed." A partially constructed building, even one that would eventually require a Certificate of Occupancy, is an "improvement" to the land on which it is being constructed.

Section 401.2 is a grandfathering provision that afforded protection against the application of what were then new lot dimension rules in circumstances when no other protection was available. Under other provisions of the Zoning Regulations, the owner of an undersized lot was protected against the application of the rules with respect to any structure for which a building permit had been issued even if construction had not yet begun. But without § 401.2, the lot owner would not have been protected if his lot was vacant and no building permit had issued. Once the building permit was issued to the Home on September 26, 1956, whether or not a certificate of occupancy was issued before November 1, 1957 was irrelevant to the legitimacy of the building on these three lots. Thus, there is no reason to hinge the application of this rule on whether or not a C of O had been issued.

Because lots 19, 20, and 21 do not meet the minimum lot area requirement of 2000 square feet set forth in § 401.3, they can only be built on as a matter of right if they fall within the § 401.2

exception. The subject property, however, was not unimproved on November 1, 1957, and therefore is not eligible for the § 401.2 exception. The Board therefore concludes that the ZA erred in determining that the subject property could be built on as a matter of right, pursuant to the exception set forth in § 401.2.

Appellant's other claims of error arise out of the ZA's interpretation and application of § 401.2. The Board has determined as a threshold issue that because the subject property was not unimproved on November 1, 1957, § 401.2 does not apply to it. Therefore, the Board does not need to reach these other claims of error.

For the reasons stated above, the Board concludes that the Appellant has met its burden of demonstrating that the ZA erred in determining that the subject property fell within the § 401.2 exception and was therefore developable as a matter of right. It is hereby **ORDERED** that this appeal is **GRANTED**.

VOTE: **5-0-0** (Ruthanne G. Miller, Curtis L. Etherly, Geoffrey H. Griffis, David A. Zaidain, and Anthony J. Hood, to grant appeal.)

BY THE ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.

Each concurring 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: MAY 12 2004

PURSUANT TO 11 DCMR § 3125.6, THIS 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. LM/rsn

F

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 16830 of Advisory Neighborhood Commission 2A and Richard J. Price, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, in the issuance of a building permit (No. B 439442), dated October 17, 2001, to Farhad Nasserri to permit the construction of a one- family dwelling located at 909 Hughes Mews, N.W. (Square 16, Lot 888).

HEARING DATE: February 12, 2002

DECISION DATE: March 5, 2002

DECISION AND ORDER

This appeal was filed on December 3, 2001, by ANC 2A and Richard J. Price ("Appellants") challenging on two grounds the Zoning Administrator's decision to approve the issue of Building Permit No. B 439442, to Farhad Nasserri to construct a one-family dwelling at 909 Hughes Mews, N.W. The subject property is located in ANC 2A04. After a public hearing, the Board denied the appeal, affirming the Zoning Administrator's approval of the permit.

PRELIMINARY MATTERS

Parties. The co-appellants in this case are the ANC 2A and Richard J Price. Mr. Price represents himself and the ANC. The subject property is located within the area served by ANC 2A. Mr. Price is the single member district commissioner of ANC 2A02. Mr. Price lives at 2555 Pennsylvania Avenue, N.W., in close proximity to the subject property.

The property owner, Farhad Nasserri¹, is automatically a party to this appeal, pursuant to 11 DCMR § 3199.1. Mr. Nasserri is represented by Shaw Pittman, LLP.

The Office of the Corporation Counsel represented the Zoning Administrator.

Notice of Appeal and Notice of Public Hearing. By memoranda dated December 10, 2001, the Office of Zoning advised Appellants, the Zoning Administrator, the Ward 2

¹ When the building permit was applied for, Mr. Nasserri acted as the agent for Dr. Forest K Harris, who owned the subject property at that time. By the time the appeal was heard, Mr. Nasserri had purchased the subject property.

council member, the Office of Planning, and the Office of the Corporation Counsel of the filing of the appeal.

The Board scheduled a public hearing on the appeal for February 12, 2002. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on January 4, 2002, mailed ANC 2A and the Zoning Administrator notice of hearing. Notice of hearing was also published in the D.C. Register.

Appellants' Case. The Appellants allege two errors on the part of the Zoning Administrator, which form the basis for their argument that the building permit should not have been issued. These are:

- 1) The subject property does not conform to the minimum lot size for a single family dwelling in a FBOD/R-3 district; and
- 2) The alley adjacent to the subject property does not conform to the minimum alley width requirements for development of a one-family dwelling on an alley lot.

Property Owner's and Zoning Administrator's Case. The property owner and the Zoning Administrator claimed that the Appellants' misinterpreted the Zoning Regulations where 1) a lot, with a building that existed in 1958, that complies with all requirements but minimum lot size, may be developed with a one-family dwelling, and 2) not all alleys abutting the lot need be at least 30 feet in width.

Toye Bello, the acting Zoning Administrator from the Department of Consumer and Regulatory Affairs, testified as to his interpretation of the Zoning Regulations.

Gladys Hicks, a zoning consultant, also testified in favor of the Zoning Administrator's interpretation of the regulations and approval of the subject building permit. Ms. Hicks' resume was entered into the record.

ANC Report. In lieu of a report, the ANC 2A submitted a Pre-hearing Submission for Appellants Advisory Neighborhood Commission 2A and Richard J. Price on January 29, 2002, authored by Mr. Cornish Hitchcock, Esq.. On February 4, 2002, the ANC sent the Office of Zoning a letter stating that the ANC 2A, at its regularly monthly meeting on January 23, 2002, voted 5 to 1 to approve a resolution that appealed the subject building permit, authorized the hiring of Mr. Hitchcock to outline the ANC's position, and authorized Commissioner Richard J. Price to represent the ANC.

Closing of the Record. The record closed at the conclusion of the February 12, 2002, hearing, with the exception of submittal of a certified copy of the official plat record showing the width of Queen Anne's Lane, evidence by the appellants that establishes whether or not Queen Anne's Lane should be considered an alley, and proposed findings of fact and conclusions of law from the parties.

Decision Meeting. At its decision meeting on March 5, 2002, the Board, voting 3-1, with James Hannaham not voting, denied the appeal in all aspects.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this appeal is located at 909 Hughes Mews, N.W., Square 16, Lot 888, in an R-3 District, in the Foggy Bottom Overlay District ("FBOD"), 11 DCMR § 1521.
2. The FBOD became effective on April 17, 1992, 39 DCR 2741.
3. The Zoning Regulations define "row dwelling" as a "one family dwelling having no side yards". 11 DCMR § 199.1. The single dwelling to be constructed on the subject property has no side yards.
4. The property is approximately 1486 square feet.
5. Section 401.3 requires a minimum lot area in an R-3 district of 2000 square feet.
6. The Zoning Regulations provide that "in the case of a building located, on May 12, 1958, on a lot area or width of lot, or both, less than is 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". 11 DCMR 401.3 (emphasis added).
7. The Foggy Bottom Overlay District rules provide: "buildings constructed on or before the effective date of this rezoning regulations and existing legitimate uses within the buildings shall be deemed conforming, except that no addition, replacement, or expansion of the building, or change in use (except to a more conforming residential use other than dormitory) shall be permitted unless in conformance with the requirements of the underlying R-3 district." 11 DCMR § 1531.1.
8. The property is located behind 2513 I Street, N.W., and contained a garage on its northern half.

9. It is undisputed that the garage was located on the subject property since May 12, 1958.

10. A "building" is defined, in relevant part, in the Zoning Regulations as "a structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals, or chattel." 11 DCMR § 199.1.

11. The building owner received a permit from DCRA to demolish the existing garage, which has been replaced by a one-family dwelling.

12. The subject property faces an alley and not a street and is therefore an alley lot under the Zoning Regulations. 11 DCMR § 199.1.

13. Section 2507.2 of the Zoning Regulations provide:

A one-family dwelling shall not be erected or constructed on an alley lot unless the alley lot abuts an alley thirty feet (30 ft.) or more in width and has from the alley access to a street through an alley or alleys not less than thirty feet (30 ft.) in width.

14. The subject property is bound by an alley on two sides. On only one of the sides, the westernmost side, is the adjacent alley, as shown on the official surveyor's map submitted by the Zoning Administrator, at least 30 feet in width.

15. It is not necessary to use the easternmost portion of the alley abutting the subject property to gain access to the subject property.

16. Entrance from the street is via Queen Anne's Lane, which is depicted on the official plat record, a copy of which was submitted by DCRA. Queen Anne's Lane is at least 30 feet in width.

17. No part of the alley system that provides access to the subject property has a width of less than 30 feet.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §6-641.07(g)(1) (2001)) ("Zoning Act"), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map. This appeal is properly before the Board pursuant to 11

DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR § 3112 for the public hearing on the appeal have been met.

The appellants, ANC 2A and Richard J. Price, appeal the decision of the Zoning Administrator to approve the issuance of a building permit for a one-family dwelling on the grounds that the lot is too small and the adjacent alley is not a continuous thirty feet in width along the lot's perimeter, in contravention of the regulations governing R-3 districts.

The Foggy Bottom Overlay District allows that a building may be replaced in accordance with the requirements of an R-3 District, discussed below.

The property contained a garage before 1958, which still stood at the time the building permit was applied for. A garage meets the definition of "building" in the Zoning Regulations. (See Finding of Fact # 10). Therefore, the replacement of the garage with a one-family dwelling, also a building as that term is defined in the Zoning Regulations, is governed by 11 DCMR § 401.1.

As noted in Finding of Fact number 6, Section 401.1 of the zoning regulations provides that if a property containing a building that existed before May 12, 1958 "complies with all other provisions of this title" (emphasis added) it may be replaced. The Appellants' interpret the section as if the word "other" did not exist. Had the Zoning Commission intended for all zoning requirements to be met it would not have included the word "other". But the use of the "other" in conjunction with the phrase "on a lot area ... less than is prescribed in 401.3" means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements "other" than lot width. The Board therefore does not agree with the Appellants' assertion that § 401.1 provides that the minimum lot size established by § 401.3 must also be met before the subject building can be replaced.

As to the width of the alley, Appellants argue that § 2507.2 provides that an alley adjacent to an alley lot must be at least 30 feet wide, continuously, for the lot to be developed with a one-family dwelling. They therefore assert that, because the easternmost portion of the property abuts a portion of the alley that is less than 30 feet wide, their appeal should be granted. The Appellants support their interpretation by stating that the minimum alley width requirement addresses, among other things, the distance that a structure built on an alley lot should be set back from other nearby structures and lots.

However, the Board finds nothing in § 2507.2 that requires all portions of an alley abutting an alley lot to be at least 30 feet in width. Nor can the Board conceive of a reason to interpret the regulations as such, particularly where another regulation already

protects from such encroachment.² The intent of § 2507.2 is that any one-family dwelling in an alley lot be accessed by an alley that is a large enough to accommodate the use. To that end, access to the subject property must be possible through an alley that is at least 30 feet in width, as is the case with the property in question. It is immaterial that a portion of the alley system not necessary to access the property is less than 30 feet in width, even if that portion is adjacent to the subject property.

CONCLUSION

For the reasons stated above, the Board concludes that the appellants have not met their burden of proving by a preponderance of the evidence that the Zoning Administrator erred in approving the issuance of the building permit. It is hereby **ORDERED** that the appeal of the issuance of Building Permit number B 439442 filed by Richard J. Price and Advisory Neighborhood Commission 2A is **DENIED**.

VOTE: 3 - 1 - 0 (David W. Levy, Geoffrey H. Griffis, Curtis Etherly, to deny the appeal, Anne M. Renshaw to grant the appeal, James Hannaham, not voting, not present).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: **MAY 22 2002**

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.

rsn

² To ensure that a building on an alley lot is not encroaching on neighboring properties section 2507.4 provides "The height of building of a structure erected or constructed on an alley lot shall not exceed the distance from the opposition side of the abutting alley to the outside wall of the structure nearest the alley."

G

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16307 of National Child Research Center, pursuant to 11 DCMR 3108.1 and 3107.2 for a special exception under Section 205 to establish a child development center for 120 students ages 2 ½ to five years and 28 staff in the basement through third floor of an existing building, and a variance from the provisions of Section 2101 for off-street parking in an R-1-B District at premises 3209 Highland Place, N.W. (Square 2072, Lot 30 (855 & 866)).

HEARING DATE: January 21 and April 1, 1998

DECISION DATE: January 21, February 4 and May 6, 1998

SUMMARY ORDER UPON REHEARING

The application was amended at the public hearing to eliminate the variance from 11 DCMR 2101 for off-street parking. The applicant submitted into the record a letter dated November 12, 1997, from the State Historic Preservation Officer for the District of Columbia stating that the subject building is either a historic landmark in the D.C. Inventory of Historic Sites or is located within a historic district and contributes to the character of the historic district. The Board determined that a parking variance is not needed based on Subsection 2100.5 of the Zoning Regulations which exempts such historic structures from providing additional parking when the use is changed.

For the January 21, 1998 hearing, the Board provided notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3C and to owners of property within 200 feet of the site.

The site of this application is located within the jurisdiction of ANC 3C. ANC 3C, which is automatically a party to this application, submitted a written statement of issues and concerns in support of the application. However, on, February 3, 1998, ANC 3C submitted a letter dated January 27, 1998 protesting the inadequate public notice in the application and requested that a new public hearing be held after proper notice has been given. The ANC noted that the notices were received very late due to the holiday season and new hearing would allow for a full discussion about parking and child drop-off and pick-up.

The Board considered the request at its public meeting of February 4, 1998 and granted the rehearing. The new hearing was held on April 1, 1998.

For the April 1, 1998 hearing, the Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3C and to owners of property within 200 feet of the site.

As directed by 11 DCMR 3324.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a special exception pursuant to 11 DCMR 205. No person or entity appearing as a party to this case testified in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3108, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. It is therefore **ORDERED** that this application be **GRANTED**, **SUBJECT** to the following **CONDITIONS**:

1. Approval shall be for **EIGHT (8) YEARS**.
2. The applicant shall prepare a pamphlet, separate from other school notices, which will define clearly the school's policies and regulations with regard to traffic and parking. The pamphlet will recognize specifically the interests and concerns of neighbors regarding school-related traffic and parking. The pamphlet will be distributed at the start of the school year and three additional times during the school year to parents and child care providers. In addition, the pamphlet will be given to families that change caregivers, and the applicant will further distribute the pamphlet at such other times to individual drivers if violations of the policy are noted by the monitors or neighbors.
3. The applicant shall clearly define the carpool waiting line on Highland Place and any carpool waiting line, and the location of its starting point shall be marked with a traffic cone placed in the street at each scheduled pick-up time to minimize blocking of traffic, particularly at the curve on Highland Place. In this instance, "carpool" refers to any automobile used to pick up one or more NCRC students.
4. Formation of the carpool waiting line shall not be permitted prior to 10 minutes before dismissal time.
5. Clearly identifiable NCRC staff using walkie-talkies (or other communication technology) shall monitor drop-off and pick-up points on Highland Place and Ordway Street with specific attention to ensuring that driveways and traffic is not blocked.
6. The applicant and ANC 3-C shall jointly request that the Department of Public Works mark no-parking areas at all the corners of Highland and 33rd Places with both signs and pavement markings to indicate clearly the limit of parking close to these corners. They will further request that parking adjacent to the school property along Ordway Street be limited to 15 minutes on school days between 7:00 a.m. and 8:30 a.m. with appropriated signage and pavement markings.

7. The applicant's staff shall warn violators of traffic regulations and shall request enforcement by the Metropolitan Police if violations persist.
8. The applicant shall not object to or in any way discourage any extension of residential permit parking on streets within the area of the school (except with regard to the actual frontage of NCRC on Highland Place and Ordway Street, N.W.).
9. The hours and days of operation shall be between 8:00 a.m. and 5:00 p.m., Monday through Friday.

Pursuant to 11 DCMR 3301.1, the Board has determined to waive the requirement of 11 DCMR 3331.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

DECISION DATE: February 4, 1998

VOTE: 4-0 (Susan Morgan Hinton and Sheila Cross Reid to **APPROVE** the request to **REHEAR** the application; Betty King and Maybelle Taylor Bennett to approve by absentee vote).

DECISION DATE: May 6, 1998

VOTE: 3-0 (Betty King and Sheila Cross Reid to grant; Herbert M. Franklin to grant by absentee vote).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: 
SHERI M. PRUITT-WILLIAMS
Interim Director

Final Date of Order: MAR - 3 1999

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL

COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

16307ord/twr/ljp

H

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 16487 of the Planned Parenthood Federation of America, Inc. pursuant to 11 DCMR § 3108.1 (**new 3104.1**), for a special exception under Section 508 for administrative offices in an SP-2 District at premises 1780 Massachusetts Avenue, N.W. (Square 158, Lot 77)

HEARING DATE: September 15, 1999

DECISION DATE: October 6, 1999

ORDER

PRELIMINARY MATTERS:

1. The subject application was filed on June 1, 1999 and a public hearing on the application was scheduled for September 8, 1999.
2. On September 8, 1999, prior to the commencement of the hearing on the application, several residents in the area requested a postponement of the hearing contending that adequate notice of the hearing had not been provided. Two persons stated that although they were on the list of persons to whom written notice was mailed by the Board of Zoning Adjustment (BZA) staff, they did not receive such notice. Others asserted that the posted notice to be provided by the applicant on the subject property did not go up until one week prior to the public hearing instead of 15 days prior as required by § 3317.4 (**new 3113.14**) of the BZA Supplemental Rules of Practice and Procedure. The applicant presented an affidavit and the testimony of an eye-witness to the posting substantiating that the posting was timely. The Board granted a one week postponement of the hearing to compensate for the one week delay which the neighbors asserted took place in the actual notice which they received.
3. The public hearing then took place on September 15, 1999. Advisory Neighborhood Commission (ANC) 2B submitted a report dated August 13, 1999 indicating that it had no objection to the granting of the special exception based on the understanding that the use will be for office only and that the front driveway will not be used for parking.
4. One witness testified in support of the application. Six persons presented testimony in opposition to the application, citing the potential that the proposed use could be a target for

picketing and violent demonstrations, and expressing the desire that the prior medical clinic use be reinstated. The Board refused to hear testimony that focused on the mission or philosophy of Planned Parenthood because it was not relevant to the standard for granting a Special Exception.

FINDINGS OF FACT:

1. The property which is the subject of this application is known as premises 1780 Massachusetts Avenue, N.W. and consists of Lot 77 in Square 158. It is located on the south side of Massachusetts Avenue, N.W. at the corner of Massachusetts Avenue, N.W. and 18th Street, N.W. - one block to the east of Dupont Circle.
2. 1780 Massachusetts Avenue, N.W. is improved with a four-story structure. It is a turn-of-the-century building with a newer, two-story rear addition. The building contains approximately 22,000 square feet.
3. The subject building has been identified as a contributing historic structure in the Massachusetts Avenue Historic District by the Historic Preservation Review Board of the city's Department of Consumer & Regulatory Affairs (DCRA).
4. The land uses in the vicinity of the subject property include a mix of residential, institutional and office uses with office and institutional uses as the predominant uses especially on the south side of Massachusetts Avenue. Immediately adjacent to the subject property to the east is an office building. To the rear of the subject property is the Palladium Condominiums which is a ten-story, residential building containing two lower levels of commercial space. Directly across Massachusetts Avenue from the subject property are the offices of the National Trust for Historic Preservation, the Carnegie Institute and the Brookings Institution.
5. The subject property is zoned SP-2. The SP-2 District is designed to stabilize the areas adjacent to the C-4 District and to act as a buffer between adjoining commercial and residential areas. SP zoning is designed to preserve and protect areas adjacent to commercial districts which contain a mix of medium- to high density row houses, apartments, offices and institutions. Offices are permitted with BZA approval.
6. The property is currently vacant. The previous use was for a medical clinic occupied by the Yater Clinic. It contained several medical specialty clinics and a small laboratory.
7. Since the close of the Yater Clinic, the building has not been adequately maintained and its outside appearance has declined.
8. Prior to occupying the subject building, the applicant plans to substantially renovate the interior and improve its exterior appearance. Outside renovations will primarily consist of cleaning and repairing the façade, re-landscaping the street frontages and installing a new decorative wrought iron gate. The inside of the building will also be substantially gutted and rebuilt.

9. The applicant, Planned Parenthood Federation of America, Inc. (Planned Parenthood) is a not-for-profit voluntary reproductive health care organization. The Public Policy Division of Planned Parenthood currently occupies leased space at 1120 Connecticut Avenue, N.W. which is located only a few blocks away from the subject property. Planned Parenthood is also affiliated with the Alan Guttmacher Institute which is an independent, nonprofit corporation for reproductive health research, policy analysis and public education. The Alan Guttmacher Institute will relocate with the Public Policy Division to the subject property.

10. The Public Policy Division engages exclusively in administrative functions. The focus of the Public Policy Division is outreach and lobbying, entailing visits by the Planned Parenthood staff with others offsite. The building will be occupied by approximately 50 employees.

11. The applicant testified that the proposed use is compatible with neighboring properties which contain predominately office and institutional uses.

12. The establishment of the proposed use at the subject property will enhance neighboring properties by improving the appearance of the subject property and removing an eyesore from the block.

13. The proposed use will attract fewer visitors to the site than the previous clinic use. The proposed use therefore represents a de-intensification of the previous clinic use of the site.

14. The subject property is well served. The subject property has no onsite parking and none is required for the proposed use in accordance with Section 2100.5 which provides that no additional parking spaces are required for historic structures. At present, Planned Parenthood has no designated parking at its 1120 Connecticut Avenue location. The majority of its employees use public transportation to get to work and their current commuting patterns are not expected to change with the proposed move - only a few blocks away. The subject property is adequately served by mass transit. The Dupont Circle and Farragut North Metro Stations are easily accessed from the site and the applicant expects that its employees will be able to use mass transit or park in one of the commercial lots located in close vicinity to the site.

15. Planned Parenthood has not experienced significant security problems with respect to its administrative operations.

CONCLUSIONS OF LAW AND OPINION:

The applicant is seeking a special exception under Section 508 to permit office use of the subject property by Planned Parenthood. The Board is authorized to grant a special exception where, in the judgment of the Board based on a showing through substantial evidence, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the

Zoning Regulations and Zoning Maps, subject to the conditions specified in Section 508 DCMR § 3108.1(new 3104.1). Section 508 states that the Board may approve an office use in the SP-2 District if:

- (a) The use, height, bulk and design are in harmony with existing uses and structures on neighboring property (Section 508.3); and
- (b) the use will not create dangerous or other objectionable traffic conditions (Section 508.4).

The Board concludes that the applicant has met the tests for the granting of a special exception because the proposed use is in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.

With respect to whether the use, height, bulk and design are in harmony with existing uses and structures on neighboring properties, the Board notes that the subject building is an improved property. The building is a contributing historic structure, the design, height and bulk of which is clearly compatible with neighboring properties. The proposed use is also in harmony with neighboring properties which are primarily devoted to offices uses (Finding of Fact 11).

With respect to objectionable traffic conditions, the Board concludes that the applicant's use of the subject property will not significantly change or increase traffic in the vicinity. The majority of the building's occupants will take public transportation to and from the site (Finding of Fact 14), and the proposed use will attract fewer visitors than the previous use (Finding of Fact 13). As a result, the proposed use is not likely to create any objectionable traffic conditions. Rather than adversely affecting the use of neighboring property, the subject property is likely to improve property values and will enhance the appearance of the area.

As for the security concerns expressed by some opposition witnesses, the Board concludes that the applicant's past experience with its administrative office (Finding of Fact 15) does not indicate a likelihood that the proposed use will pose a security threat to the neighborhood. Further, in the high-density, high-intensity, diverse office area at issue, which contains numerous political think-tank and chancery uses, the Board concludes that the security issues associated with the proposed use are no greater than those associated with existing uses.

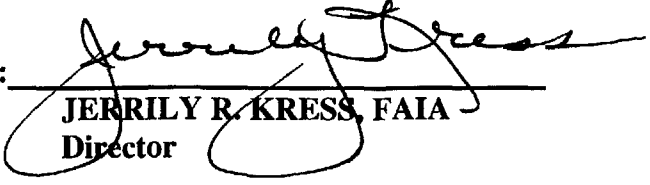
In the light of the foregoing, the Board hereby **ORDERS** that the application be **GRANTED**.

VOTE: 4-0-1 (Betty King, Sheila Cross Reid, Robert Sockwell, and Jerry H. Gilreath to grant; Anthony Hood not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring 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

FINAL DATE OF ORDER: OCT 29 1999

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE I, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCTION OF THIS ORDER.

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS (10) AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AFFAIRS.

ord16487/JKN

I

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17459 of DC Hampton LLC, pursuant to 11 DCMR § 3103.2, for a variance from the residential recreation space requirements under section 773, to allow the construction of a 27 unit multiple dwelling in the Arts/C-3-A District at premises 1446-1454 Church Street, N.W. (Square 209, Lots 911 and 917).

NOTE: Upon advice from the Office of the Zoning Administrator, the Applicant amended the application to request variance relief from the parking requirement. However, the Applicant indicated its view that the relief was not necessary. The Board concurred that relief from subsection 2101.1 (Off-Street Parking Requirements) was unnecessary.

HEARING DATE: May 2, 2006
DECISION DATE: June 6, 2006

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 2F, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 2F. The ANC submitted a report recommending that the Board approve the residential recreation space relief and deny the off-street parking relief. The OP submitted a report recommending that the Board approve the residential recreation space relief and denial the off-street parking relief.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2. No parties appeared at the public hearing in opposition to the variance from the residential recreation space requirements. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the evidence of record, and upon the Board's own previous rulings, the Board finds that a parking variance is not required in this instance. The record contains evidence that the subject site includes a historically significant building that is certified as contributing to the character of the Greater 14th Street Historic District. Section 2100.5 of the Zoning Regulations states that "no additional parking spaces shall be required for a historic landmark or a building ... located in a historic district that is certified ... as contributing to the character of that historic district." The record in this case contains citations to many decisions of this Board finding and concluding that Section 2100.5 operates to waive the requirement for additional parking spaces for new construction in such instances. This has been a long-standing consistent interpretation by this Board, as well as by the Office of the Zoning Administrator, since Section 2100.5 was enacted by the Zoning Commission in 1985. The Office of the Zoning Administrator has recently called this interpretation into question. The Board finds that its prior reasoning is sound, and that there is no reason to reverse this long-standing interpretation. Indeed it is the Board, and not the Zoning Administrator, which has the final administrative authority to interpret the Zoning Regulations. *Murray v. D.C Bd. of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990).

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2 and 773, that there exists an exceptional or extraordinary situation or condition related to the property that creates an undue hardship for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED**.

VOTE: 3-0-2 (Geoffrey H. Griffis, Ruthanne G. Miller and John A. Mann II to approve, Curtis L. Etherly, Jr. not hearing the case, not voting and Carol J. Mitten hearing the case, but not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member has approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA

Director, Office of Zoning

FINAL DATE OF ORDER: JUL 07 2006

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE

TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17531 of D.C. Office of Aging, pursuant to 11 DCMR §3104.1, for a special exception to allow an addition to and use of a former public school building (the former Hayes Elementary School) to house the headquarter offices of the D.C. Office of Aging under section 222, and a special exception to allow a senior wellness center under section 205, in the R-4 District at premises 1005 5th Street, N.E. (Square 830, Lot 816).

HEARING DATE: October 3, 2006
DECISION DATE: October 3, 2006 (Bench Decision)

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The former public school building has been designated an historic landmark and therefore is exempt from parking requirements pursuant to 11 DCMR. §2100.5. Applicant is none-the-less providing a 25-space parking lot at the rear and to the east of the building to accommodate the reasonable needs of staff, program participants and other visitors.

The senior wellness center will operate from 9 a.m. to 3 p.m.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register and by mail to Advisory Neighborhood Commission (ANC) 6C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application. ANC 6C submitted a report in support of the application. The Office of Planning (OP) also submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under sections 222 and 205. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 222 and 205, that the requested relief can be granted being in harmony

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with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**, in accordance with the plans presented, except that Applicant shall have flexibility as it relates to the landscaping of the site.

VOTE: 5-0-0 (Curtis L. Etherly, Jr., John A. Mann II, Geoffrey H. Griffis, Ruthanne G. Miller and Gregory N. Jeffries to approve)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA

Director, Office of Zoning 

FINAL DATE OF ORDER: OCT 11 2006

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

MAY 2, 2006

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice- Chairperson
CURTIS L. ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSSION MEMBERS PRESENT:

CAROL J. MITTEN	Chairperson
GREGORY N. JEFFRIES	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLY BAILEY	Sr. Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

JOHN MOORE
STEVEN RICE

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The transcript constitutes the minutes
from the Public Hearing held on May 2, 2006.

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C-O-N-T-E-N-T-S

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1 this time you can both make yourselves comfortable.
2 We are going to call you up for a presentation. As
3 you are getting back to your seats, let me restate the
4 fact that we have not made a judgment on any of the
5 elements that were put into the record but we'll look
6 forward to hearing their persuasive testimony.

7 With that, Mr. Collins, we are going to
8 turn it over to you for a presentation of the case.

9 MR. COLLINS: Thank you, Mr. Chairman, and
10 members of the Board. Again, Mr. Collins with Holland
11 and Knight. This is an application for redevelopment
12 of a site in the Arts Overlay zone on Church Street,
13 N.W. This is a vibrant community with many new
14 buildings built in the last five years.

15 This site is small by comparison to the
16 others on the street. It contains an historic
17 building on the northeast quadrant of the site that
18 must be retained. The applicant's architect designed
19 a plan that responds to the historic building on the
20 site with the use of setbacks and industrial elements
21 and cues from other buildings with shapes and stepping
22 of elements to break up the mass to respect the
23 historic building.

24 The ANC reviewed this project in 2004 and
25 unanimously supported it as did the Logan Circle

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1 Community Association and the HPRB granted concept
2 approval for the project in December of 2004.

3 Our BZA application was filed for
4 residence recreation space variance originally.
5 Recently we were made aware of a possible change by
6 the Zoning Administrator's office in a long-standing
7 interpretation of Section 2100.5 of the zoning
8 regulations. So in order to avoid a notice problem
9 and out of an abundance of caution, we have filed a
10 request for variance for parking but we don't think we
11 need it and we would ask the Board for clarification
12 as to whether a variance is even necessary.

13 This building has been certified as
14 contributing to the character of the historic district
15 and we have copies of that which we can submit. This
16 Board has consistently ruled that when the same issue
17 has been raised, contributing buildings to the
18 character of the historic district, that it is not
19 required -- parking is not required in instances such
20 as this when an addition is being put on the building.
21 We would request that this Board reaffirm that long-
22 standing interpretation. I'll come back to that in a
23 second.

24 As the residence recreation space variance
25 that we have requested, we are pleased that the ANC

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1 and the Office of Planning have both determined to
2 support this variance request.

3 As for parking, we are providing six
4 parking spaces on the site. If parking was required,
5 if the regulations apply, then 11 would be required.
6 We have a commitment from the owner of the building
7 next door, the new building under construction next
8 door, that will have a commercial parking garage that
9 our residents can lease parking spaces in that
10 commercially operated garage.

11 We have verbal commitments for lease of
12 additional spaces several blocks away. We are in
13 discussions with an owner of a property about a block
14 away about several more parking spaces on that site.

15 We believe that if the parking
16 requirements were applied, were required here, we
17 could meet the test for variance relief but we
18 question whether 2100.5 applies in this case. Your
19 determination goes far beyond just this case. You
20 have made this same determination many, many times and
21 I'm about to give you a series of cases in which you
22 have made that determination.

23 There has been a consistent 20-year
24 interpretation of this section since 1985 when it was
25 enacted. There has been no change in the language of

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1 the regulation. There has been no change in the BZA's
2 interpretation. The only indication where change came
3 from the Zoning Administrator's office in a verbal
4 communication which has not yet been finalized as far
5 as I know.

6 That question is still a live question
7 before the ZA's office and the reason that we filed in
8 this case because we had this hearing date. We didn't
9 want to lose this hearing date so out of an abundance
10 of caution in order to protect the record we filed the
11 request of the variance. Office of Planning, I
12 believe, also is taking the same position.

13 I'll go right to it. We have many, many
14 cases, or you have decided many cases and we would
15 like to submit for the record a series of cases where
16 the Board has made this same determination. I'll wait
17 a minute to have those submitted for the record.

18 CHAIRPERSON GRIFFIS: Can you print out
19 those cases as certification as historic preservation
20 officer?

21 MR. COLLINS: We have that as well.

22 CHAIRPERSON GRIFFIS: Right. Let's do
23 that first as that's going through. Mr. Collins, let
24 me just perhaps exercise a little bit else. Do you
25 have other comments on that or are we just waiting for

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1 this and then we'll review it?

2 MR. COLLINS: So you can have that.

3 CHAIRPERSON GRIFFIS: Okay. Mr. Collins,
4 anything else on that?

5 MR. COLLINS: Yes. I'm about to go
6 through the issue. You did -- what we are handing up
7 is a compilation with 15 tabs. I will not go through
8 all of them. They are all highlighted and marked
9 where the applicable discussion was indicated either
10 in the transcript or in the case itself. I will just
11 raise four of them for you. I'll begin because you
12 can just follow along with this. It's fairly simple.
13 Under Tab 1 that was the case of Pauline Nay that no
14 order has been issued but this Board discussed that
15 issue.

16 CHAIRPERSON GRIFFIS: Recently.

17 MR. COLLINS: Recently, six weeks ago. On
18 page 246 of the transcript the Chairman after a long
19 discussion about whether parking applied in that case,
20 the Chairman made the following statement, "The
21 Board's position is that is correct, that additions to
22 historic buildings will not be required to have
23 additional parking spaces." That does arise out of
24 Section 2100.5. If you read the regulations, and I
25 think Ms. Brown said it correctly, we have a

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1 voluminous record in our deliberations of this.

2 Tab 2 I won't read but that is the Rainbow
3 Lofts case. That is another case on the street
4 directly across the site from here where no parking
5 was required. There was no variance requested for
6 parking. That did get the parking waiver, although
7 parking is required on that site as it is on our site.

8 Tab 3 is a case for 1301 9th Street, N.W.
9 At page 126 of the record, Mr. Chairman, that is where
10 you are stating the plain language in Section 2100.5
11 which begins with, "A designation that is unique,
12 distinct, and very direct. That is, no additional
13 parking spaces shall be required for an historic
14 landmark." On page 128 you continue on. "When I go
15 on to read that, it makes absolute sense to me."

16 Then Ms. Miller on page 129 states, "I
17 guess I'll put on the record that I concur with the
18 Chairman's conclusions about the interpretation of
19 Section 2100.5. The regulation is very clear on its
20 face that no additional parking spaces are required
21 for historic structures and/or landmarks and there is
22 no reason to reverse any long-standing interpretations
23 that the Board has been holding with respect to that
24 regulation."

25 CHAIRPERSON GRIFFIS: Who stated that?

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1 MR. COLLINS: That was the Vice Chair.

2 CHAIRPERSON GRIFFIS: Indeed.

3 MS. MITTEN: Where was that?

4 CHAIRPERSON GRIFFIS: Page 129 he said.

5 Okay.

6 MR. COLLINS: Yes, sir. And then the rest
7 go on. They are all highlighted. They are all there.
8 They all respond to your comment about the very
9 voluminous record on this issue so I will not belabor
10 the point.

11 The Board has been through this issue time
12 and again. It is up to the Board to interpret the
13 regulations and not the zoning administrative. There
14 is a case called Murray vs. District of Columbia and
15 I'll hand up copies of that as well. In the Murray
16 case the D.C. Court of Appeals said on page 1058 which
17 is highlighted in this copy you're getting, "It is the
18 Board, not the Zoning Administrator which has final
19 administrative responsibility to interpret the zoning
20 regulations."

21 Then it has a citation, "See D.C. Code
22 Section 5-424(g)(4)." I have attached 5-424(g)(4) so
23 you can see what it says. It says, "Upon appeals the
24 Board of Zoning Adjustment shall have the following
25 powers."

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1 Now, the word appeals, you know from your
2 experience, early on when this law was enacted back in
3 1938 every case was called an appeal so under Section
4 (g), which is under 5-424 which you have, "Upon
5 appeals the Board of Zoning shall have the following
6 powers." Under Subsection 1 it talks about hearing
7 and deciding appeals. No. 2, about special
8 exceptions. No. 3, about variances.

9 No. 4 it says, "In exercising the above-
10 mentioned powers, the Board of Zoning Adjustment may
11 in conforming with the provisions of Section (such and
12 such) reverse or affirm wholly or in part or may
13 modify the order requirement decision to determination
14 or refusal appeal from, or may make such other order
15 as may be necessary to carry out its decision or
16 authorization and to that end shall have all the
17 powers of the office or body from whom the appeal is
18 taken."

19 That statement is what was being referred
20 to by the Court of Appeals in the Murray. They said
21 that it's you, the Board of Zoning Adjustment, and not
22 the Zoning Administrator who has the final authority
23 in those situations to make those decisions in not
24 only appeals but also in applications.

25 We have submitted evidence and testimony

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1 in support of the parking variance in our prehearing
2 statements which we proffer to the Board and we are
3 prepared to put on testimony, but we do request a
4 ruling consistent with all of your prior rulings that
5 a variance would not be required in this case.

6 CHAIRPERSON GRIFFIS: Good. Anything else
7 on that issue?

8 MR. COLLINS: Not on that issue.

9 CHAIRPERSON GRIFFIS: Excellent. Let's
10 take that up immediately then. We appreciate this.
11 This is actually an impressive amount of work in terms
12 of establishing what is, and I dare say, a very
13 consistent ruling from this Board.

14 I also appreciated the legal analysis and
15 assessment of the jurisdiction of interpretation. I
16 think it is appropriate to bring in light of what we
17 should I think quickly dispense with here.

18 Your comment was absolutely correct that
19 the Board has asked numerous times and probably and
20 possibly in different iterations but the same
21 question. I go directly to the regulations of which
22 we are charged to review and then obviously to rule
23 based upon that.

24 In the direct reading of this I don't see
25 why we would have any question or why we would be

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1 moved to act differently than we have in our own
2 consistency of ruling and interpretation and
3 understanding and that of numerous years even prior to
4 all of our standings on the Board.

5 2100.5 reads, "No additional parking
6 spaces shall be required for historic landmark or
7 building or structure located in the historic district
8 that is certified by the State Historic Preservation
9 Officer as contributing to the character of that
10 historic district. One might say, well, sure, but
11 you've got to read the rest of the chapter and
12 section, and I will but not now.

13 However, knowing full well what .6, .7,
14 .8, .9, and .10 do it is very clear that the most
15 specific element is listed in .5, 2100.5. It is very
16 specific to the landmark status or contributing status
17 and how that is established. It is established by a
18 certification by the SHIPO, the State Historic
19 Preservation Officer, which in this case has been
20 provided for us.

21 .6 and .7, 2100.8 and .9 all go into other
22 elements, intensity of use for buildings that have
23 different designations. Buildings that were built
24 prior to 1958 and after 1958 the intensity of use, all
25 of which qualified those buildings or structures as

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1 existing before May 12, 1958 differing from historic
2 or contributing. It's a bright line for me and I
3 don't see anything that has been presented that we
4 would move from that. I'll take other comments from
5 Board members here today if they have any additionally
6 on this issue.

7 MS. MITTEN: I would just concur that we
8 have said this in all those other cases and don't see
9 any reason to interpret the regulations any
10 differently. I'm not sure why that's not clear to the
11 Zoning Administrator but if this helps me get clearer
12 today by reaffirming that, then so be it. That's a
13 good thing. I think the law is clear also as to who
14 has the final authority between the ZA and the BZA.
15 I think that Mr. Collins has done a great job in
16 compiling this all together and I thank you.

17 CHAIRPERSON GRIFFIS: If there is nothing
18 further, let me just add to it. I think if you took
19 -- as I said before, if you read these separate
20 paragraphs in 2100, you could glean and you could try
21 to interpret and you could essentially torture these
22 sections and pull them together to try and figure out
23 how it is.

24 Rightly or wrongly that is what the
25 regulations read in terms of 2100.5. But then I look

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1 at why that would be. Why would the regulations have
2 this? Why would we have this distinction? We can
3 always point to this kind of extreme, this element,
4 this project that maybe doesn't fit to what the
5 regulation we are supposed to monitor but that is not
6 why what we write regulations for.

7 We write them for the general, the
8 consistent pattern. Where am I going with this? If
9 you have an historic structure and you modify it and
10 that modification steps into the zoning and,
11 therefore, requires some sort of relief, are we then
12 going to require it to come up to the standards of the
13 regulations for the parking.

14 It would fly in the face so many times, I
15 think, with Historic Preservation themselves we would
16 be set up against their historic preservation wanting
17 to maintain these buildings or keep them and the
18 ability to modify them or update them meaning are we
19 going to have an historic structure as ours would be
20 a higher authority require that the front facade be
21 removed up to 20 feet so we could have dry valves that
22 go into this historic structure?

23 It seems to get to an absurd level and
24 that is why it's interesting that one element, or one
25 of several, probably a few, in the zoning regulations

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1 that seem to understand that there were other elements
2 of control and review and, therefore, set itself aside
3 and said that Historic Preservation would take
4 precedent in this specific issue in terms of our
5 calculation of parking. We would relieve that then
6 and let the historic structure stand as long as we had
7 certification and there are two sorts of
8 certification.

9 If it's an historic structure, it has been
10 certified. Or if it's contributing obviously, the
11 State Historic Preservation Officer registers it that
12 way. Okay. That's all I need to say on this issue, I
13 think, for evening unless there are other comments.

14 MS. MITTEN: I don't want to rediscuss
15 this too many times but I would just say I can
16 understand how some people might get confused upon the
17 reading of the regulations. What helped me was
18 looking at the distinction between 2100.5 and 2100.6.
19 2100.5 specifically talks about historic landmarks and
20 buildings that are certified by State Historic
21 Preservation officials, where 2100.6 talks about
22 buildings existing before structures existing before
23 May 12, 1958.

24 That is a larger category. There are
25 historic buildings in that category and then there are

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1 others. We interpret that provision as applying to
2 the others because they are addressed separately in
3 2100.5 and 2100.6.

4 CHAIRPERSON GRIFFIS: Excellent. In which
5 case we will move forward and we would concur with our
6 previous decisions and review of applications and move
7 ahead with a variance for a residential recreation
8 space in this application 17459, if I remember the
9 number correctly.

10 Ms. Hughes, I noticed your hand was up.
11 We will let you address that issue in your testimony
12 if you would like. Certainly we will take some -- we
13 will look for that. With that we will turn it over to
14 the applicant for presentation of their case.

15 MR. COLLINS: Thank you. This project is
16 consistent with the goals of the Arts Overlay District
17 and there are several I would like to highlight for
18 you. These are listed in Section 1900.2 of the
19 regulations.

20 "The purposes of the Arts Overlay District
21 are to: (b) Require uses that encourage pedestrian
22 activity, specially retail entertainment and
23 residential uses. (d) Expand the area's housing
24 supply in a variety of rent and price ranges. (e)
25 Expand business and job opportunities, encourage

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L

AppleTree Institute for Education Innovation
400 7th Street, SE
Washington, DC 20003

February 9, 2006

Chairwoman Carol J. Mitten
Zoning Commission for the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

#06-06

2006 FEB 10 AM 11:21

DC OFFICE OF ZONING

RECEIVED

Dear Chairwoman Mitten:

On behalf of the AppleTree Institute for Education Innovation and AppleTree Early Learning Public Charter School ("AppleTree"), I write to urge the Zoning Commission to reject the Office of Planning proposal to amend the treatment of public schools under the Zoning Regulations on an "emergency" basis.

There is no "emergency" that compels immediate revisions to the Zoning Regulations. The *only* basis for emergency action cited in the Office of Planning report is that "[t]his text is needed to clear up an existing ambiguity regarding charter schools in the Zoning Regulations." [OP Report, p.7] But there is no such "ambiguity." As the same report recites earlier, "[t]he United States Congress has *mandated* that the District of Columbia *treat charter schools the same as public schools* for the purposes of the Zoning Regulations." [OP Report, pp.1-2 (emphasis added)] Under the Zoning Regulations, public schools for the past 50 years have had "of right" development status; as we have previously explained in letters to Mr. Crews, since charter schools were authorized by federal law in 1996 they have been "public schools" entitled to equivalent treatment for zoning purposes. [Oct. 28, 2005 Letter from Mr. Williams to Mr. Crews; Nov. 21, 2005 Letter from Mr. Perry to Mr. Crews] This has been the law for the past 10 years, and has caused no difficulty in administration.

AppleTree's proposed development does not constitute an "emergency". AppleTree has received a charter to operate a school for pre-kindergarten and pre-school children, ages 3-5, and has purchased a commercial property in Northeast to house the school. Today, AppleTree has filed an application for construction permits. Under the Zoning Regulations, those permits should issue as a matter of right. A small group of neighbors and community activists, who object to the use of this property as a charter preschool emphasizing early language and literacy, have made repeated efforts to block this project – going so far as to file a lawsuit against the District of Columbia. It appears that the proposed amendments to the Zoning Regulations are yet another weapon that this small group intends to use to stop our one project, and that the "emergency" designation proposed by the Office of Planning is nothing other than an ill-considered response to a concentrated effort by a small, but influential group, to stop AppleTree from educating children in this neighborhood. But a single school development, which is clearly

CASE NO. 06-06

EXHIBIT NO. 2

permissible under current law—and has been so for 10 years, does not constitute an “emergency” justifying the waiver of procedural rules, particularly where such a waiver would clearly prejudice AppleTree.

Rushing these amendments through is an abuse of the public process. We take no position on whether it would be advisable for the Zoning Commission to adopt, on a *prospective* basis, revised Regulations governing *all* public schools. That is an important policy question that warrants public comment and debate. To date, however, there has been no opportunity for such a process. Setting down the proposed amendments in the usual course, without the “emergency” designation, would be a more appropriate, and lawful, course of proceedings. Declaring a false and implausible “emergency,” by contrast, would cause irreparable harm to AppleTree, which has adhered to the Zoning Regulations, received approval from the Historic Preservation Review Board, and followed established processes to obtain permits to renovate our property so that it is fit for the education of young children.

There is a clear and compelling emergency that *should* guide the Zoning Commission as it considers this matter:

1. Nine out of every ten District of Columbia fourth graders cannot read with proficiency. Seven of every ten cannot read with a basic level of understanding at their grade level. (Source: National Assessment of Educational Progress 2005)
2. Over 100 DC Public Schools are failing under the provisions of No Child Left Behind (Source: United States Department of Education).
3. One out of every four children enrolled in a DC public school attends a charter school. (Source: Friends of Choice in Urban Schools).
4. Five million square feet of space in buildings owned by the District of Columbia Public Schools are unoccupied—yet unavailable to charters as a matter of policy,

The emergency I write about is real and documented by the grim picture of the human toll of an education system that is failing too many. A decision to adopt this report would tell parents who live in our city, pay taxes and send their children to public charter schools that the playing field is unfair by design and that policy makers protect influential special interests at the expense of the obvious, greater good.

This need not be the case. In the final analysis, no harm will result from considering these amendments through the normal processes of the DC Office of Planning and the Zoning Commission. Therefore I urge the Zoning Commission to not adopt the text amendments on an emergency basis.

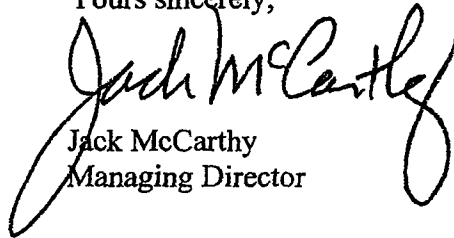
The same special interests that advocate this unnecessary emergency action have already brought an unusual, pre-emptive lawsuit against the District of Columbia that is also intended to deny AppleTree the rights to develop real property for public school uses that other organizations enjoy.

We prefer to be aligned with the District of Columbia government in the interest of providing children with the quality public education they are entitled to. But, if that isn’t possible—if the Zoning Commission takes the unusual and unjustified step of

adopting these amendments on a rushed basis under the guise of a false "emergency" then we are prepared to exercise our rights and intend to point out the abuses that this Administration used to shut down a small public charter preschool for reasons that cannot be justified by any objective measure.

In light of the foregoing concerns, the Office of Planning's failure to identify any legitimate "emergency" in its report, and the fact that the "emergency" designation appears to be directed solely at AppleTree's proposed school development, AppleTree respectfully requests an opportunity to be heard on this issue at the public meeting on February 13, 2006.

Yours sincerely,



Jack McCarthy
Managing Director

Copies to:

Anthony J. Hood, Vice Chair, DC Zoning Commission
Gregory N. Jeffries, DC Zoning Commission
John G. Parsons, DC Zoning Commission
Michael G. Turnbull, DC Zoning Commission
Honorable Anthony Williams, Mayor
Honorable Sharon Ambrose, Councilmember Ward 6
Patrick Canavan, Director, DCRA
Ellen M. McCarthy, Director, Office of Planning
William Crews, Zoning Administrator
Jerrily Kress, Office of Zoning
Sharon Schellin, Office of Zoning
Thomas Nida, DC Public Charter School Board
Robert Cane, Friends of Choice in Urban Schools
Joseph Bruno, DC Public Charter Schools Association

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ZONING COMMISSION
District of Columbia

CASE NO. 06-06

May 10, 2006

EXHIBIT NO. 18

Ms. Sharon Schellin
Secretary
Zoning Commission
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: Z.C. Case No. 06-06: Text Amendments—Charter Schools

Dear Ms. Schellin:

On behalf of the AppleTree Institute for Education Innovation ("AppleTree"), I write to comment on the Commission's Notice of Emergency and Proposed Rulemaking dealing with Charter Schools. This written comment supplements testimony that will be given by AppleTree representatives at the Commission's May 11 public hearing.

In particular, I write to object to the "emergency" designation that the Commission invoked at its February 13, 2006 meeting—a designation that has recently been cited by the Zoning Administrator as the basis for denying a building permit application submitted by AppleTree. The Commission did not permit public comment on the "emergency" designation, and it was clear then, and is even clearer now, that there was no "emergency" justifying immediate implementation of the proposed amendments. Rather, a key part of the "emergency" designation appears to have been designed for the sole purpose of denying a single permit: AppleTree's.

Background

AppleTree is a D.C.-based, non-profit organization that is working to provide accelerated early language and literacy programs to the thousands of underserved preschoolers in Washington, D.C., to raise the trajectory of their future learning success. We have developed a high quality early literacy program that we believe will help close the achievement gap and break the cycle of poverty in Washington, D.C. Our vision is that students from all backgrounds should enter first grade able to read and ready to succeed. We already operate a public charter school in South West that serves pre-school and pre-kindergarten children, ages 3-4, and we have received approval from the District of Columbia Charter School Board to open another location for that school.

Last summer (after consulting with District officials about relevant zoning and construction restrictions), AppleTree purchased a property at 138 12th Street, N.E. The property

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MAY 11 2006
ZONING COMMISSION

is zoned R-4 and is located on a block comprising mostly row houses, but the building that AppleTree owns has not been used for residential purposes since it was built more than 90 years ago.

We believe the building is well suited for our school, and we hope to renovate it soon so that it will be able to accommodate about 50 pre-school and pre-kindergarten students. (Our planned renovations would expand the back of the building so that it would be as deep as the shallowest of its two neighbors and would also add a third story not visible from the street.) In October, we began discussing our plans with members of the community. Between October 25, 2005 and early December we attended an ANC6a Zoning Committee meeting, a full ANC6a meeting and two meetings of the Capitol Hill Restoration Society's Historic Preservation Committee. On December 15, the D.C. Historic Preservation Review Board voted 9-1 to approve AppleTree's plans.

Meanwhile, however, acting at the request of ANC Commissioner Cody Rice, Zoning Administrator Bill Crews departed from nearly ten years of settled practice and determined that he was unsure whether charter schools are "public schools" under the Zoning Regulations. Up until that point, no such doubts had ever posed an obstacle for the *more than 50* charter schools operating in the district as "public schools"—sometimes with the express approval of prior Zoning Administrators or Acting Zoning Administrators. But a vocal group of AppleTree's neighbors had obviously inspired an effort to prevent us from using the Zoning Regulations as they existed when we bought our building, when we received approval from the Historic Preservation Review Board, and when we applied for a building permit.

A group purporting to represent AppleTree's neighbors even filed a lawsuit in Superior Court on February 2, arguing that the District Government could not issue a building permit to AppleTree until the Zoning Commission and the Board of Zoning Adjustment ruled on AppleTree's permit application and until the Zoning Commission had ruled on the emergency rulemaking. At that point, AppleTree had not applied for a building permit and the Office of Planning *had not even issued its setdown report*. Yet the papers in the lawsuit predicted that the Commission would issue the new rules on February 13, 2006.

AppleTree filed its building permit application on February 9. On February 13, the Commission considered the Office of Planning's Setdown Report and adopted portions of it on an emergency basis, including provisions that would dramatically increase the minimum-lot-area and minimum-lot-width requirements that generally apply to public schools in R-1 to R-5 zone districts.

Despite the rushed emergency designation, it took the Zoning Administrator several weeks longer than the presumptive 30 days to deny AppleTree's pending application, claiming that it did not comply with the new minimum-lot-area and minimum-lot-width requirements (as

well as a parking requirement) adopted as part of the emergency rulemaking. We intend to appeal that denial to the Board of Zoning Adjustment.¹

Discussion

We believe that other commenters will describe in detail why the proposed amendments are bad public policy that contravenes the letter and the spirit of the charter school laws passed by both Congress and the District of Columbia Council. AppleTree expects in particular that the submissions or testimony by the Friends of Choice in Urban Schools and the Center for Education Reform will explain the flaws in the proposed amendments and the deleterious impact they would have on public school education in the District.

Even if the Commission determines to adopt the proposed amendments, or some variant thereof, on a permanent basis, AppleTree respectfully submits that such amendments should be applied only *prospectively* to permit applications filed after their adoption. The balance of this submission will explain why this is so.

At the February 13 hearing, Mr. Bergstein of the Attorney General's office raised "the procedural question as to whether or not [the Commission] would want this emergency [amendment] to apply to or not apply to persons which have applied for building permits before DCRA, absent some saving language." 02/13/06 Tr. 18:13-17 (attached as Exhibit A). That question, which was well posed then, was never answered by the Commission on February 13. It should be answered before any of the proposed amendments are finally adopted. And the right answer is that the proposed amendments, if adopted, should *not* apply to any person or entity with a permit application on file *before* February 13, 2006.

The Zoning Commission should address this issue because the Zoning Administrator has taken the position that the "emergency" amendment made to the zoning regulations on February 13 "was effective immediately and applies to all pending applications on the date the text amendment was adopted." Letter from Bill Crews, Zoning Administrator, to Russ Williams, Managing Director, AppleTree, *Re: 138 12th Street, N.E.* (Apr. 28, 2006) (attached as Exhibit B). If the "emergency" designation was incorrectly applied, however, the amendments would not become effective until after final adoption and publication. D.C. Code § 2-505(a) (2001). And it is abundantly clear that there was no "emergency," within the meaning of the D.C. Administrative Procedure Act, on February 13 or thereafter.

¹ As AppleTree explained to the Zoning Administrator, and as it will explain to the BZA, in light of sections 401.1 and 2100.5 of the Zoning Regulations, its permit application does not fail to meet the terms of the Zoning Regulations, even with the emergency text amendments in effect. Nevertheless, AppleTree submits this comment and opposes the Commission's rulemaking out of an abundance of caution and a firm conviction that the rulemaking is, from a procedural standpoint, irreparably flawed and, from a substantive standpoint, bad public policy and inconsistent with the manifest intent of the Public Charter Schools Act.

A court reviewing the Commission's use of the "emergency" exception to bypass the ordinary requirements of notice-and-comment rulemaking will carefully scrutinize the record to ensure that an "emergency" actually existed and was adequately documented at the time. *See, e.g., Wheelchair Carriers Ass'n, Inc. v. District of Columbia*, Civ. Action No. 00-1586 (GK), 2002 U.S. Dist. LEXIS 4617 (D.D.C. Mar. 12, 2002) (holding that there was no "prospect of government-wide financial instability" and therefore no justification for emergency rule, which in turn required invalidation of final rule); *see also* D.C. Code § 2-505(c) (defining emergency as requiring "the *immediate* preservation of the public peace, health, safety, welfare, or morals") (emphasis added); D.C. Mun. Regs. tit. 1, § 311.4(e) (2004) (requiring notice of rulemaking to contain a "statement giving the justification for emergency rulemaking action which clearly explains why the action is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals"). Under that standard, the Commission's invocation of its "emergency" power on February 13 was clearly *ultra vires*.

The staff report on which the Commission acted on February 13 contained a single paragraph regarding the "emergency" nature of the proposed amendments. It recommended that the rule be made effective immediately because "[t]his text is needed to clean up an existing ambiguity regarding charter schools in the Zoning Regulations. . . . and clarify the guidelines for public school buildings." Office of Planning, Setdown Report at 7 (attached as Exhibit C). Of course, cleaning up the ambiguity applied only to the amendment to section 199.1 (expressly including charter schools within the definition of public schools), not to the attempts to change the sizes of the lots where charter schools would be allowed to locate, which could not be characterized as attempts to "clarify" the rules, because they were transparently intended to *change* the rules significantly.

At the Commission's February 13 hearing, no members of the public were permitted to comment on the "emergency" designation, even though it was not clear to several members of the Commission what the "emergency" was. *E.g.*, 02/13/06 Tr. 21:13-17 (Commissioner Parsons: "I'm not convinced I understand the emergency here. . . . What is the citywide emergency . . . ?"); *id.* at 37:9-11 (Commissioner Jeffries: "I'd like to feel that there's an emergency. And I'm not quite feeling it."). The staff again offered the ostensible rationale about "clarify[ing] the guidelines," *id.* at 17:3-6, which still meant *changing* the rules. They also suggested that schools needed to be given "as much advance notice" of potential changes as possible. *Id.* at 37:4. Still, this did not identify or explain the "immediate" threat to "the public peace, health, safety, welfare, or morals." D.C. Code § 2-505(c).

Similarly, the Notice of Emergency and Proposed Rulemaking purported to identify two rationales for the "emergency" adoption of the amendments on February 13: (1) that "immediate action is required to . . . permit these new Charter Schools to be constructed by the start of the next school year," and (2) that "the immediate proliferation of Charter Schools in residence districts has the potential for adverse impacts." 53 D.C. Reg. 2017, 2017 (Mar. 17, 2006). Again, the permission required by the first rationale would be contained in the modifications to section 199.1, not the additional changes the Commission adopted. Moreover, the Commission did not identify any evidence in support of (or reason to believe) its second rationale that there would be an "immediate proliferation of Charter Schools in residence districts." The suggestion in the notice of "adverse impacts" was so general as to be meaningless. It did not even give lip service to the notion that the unspecified "adverse impacts" were potentially so severe as to pose

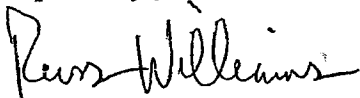
an “immediate” threat to “the public peace, health, safety, welfare, or morals.” Such vague, *post hoc* rationalizations do not satisfy the D.C. Code or the regulation governing emergency rulemaking notices, and thus could not survive judicial review.

In truth, the so-called “emergency” appears to have been manufactured by opponents of school choice to stop one project—AppleTree’s—from proceeding. For nearly a decade, charter schools had been considered public schools under the existing Zoning Regulations, which allowed them to locate as a matter of right in residential districts so long as they complied with the relevant height, area, and density regulations. No hint of a problem (much less a citywide emergency) existed until AppleTree began the process of seeking approval for its remodeling plans.

It is the essence of arbitrary and capricious government action to retrospectively change the rules of the game. The unsupportable “emergency” designation raises serious constitutional concerns. Legislation presumptively operates only prospectively in order to avoid upsetting settled expectations. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-73 (1994). The “emergency” designation does away with that presumption, giving rise to potential claims against the District under the Takings and Due Process Clauses. *See, e.g., Shenk v. Zoning Comm’n*, 440 F.2d 295, 297 (D.C. Cir. 1971).

To the best of our knowledge, the “emergency” designation has affected only one pending application. In light of that impact, AppleTree would, if necessary, be fully prepared to challenge the rulemaking in court. But if the Commission does not decide to reject the emergency and proposed amendments on a permanent basis, the more efficient course for the Commission, the District Government at large, and the community, would be simply to lift the “emergency” designation, apply only prospectively any amendments that the Commission elects to adopt, and allow AppleTree’s application to be processed under the regulations that were in effect on its filing date.

Respectfully yours,



Russ Williams
Deputy Managing Director
AppleTree Institute for Education Innovation

cc: Andrew J. Saindon, Esq.
Alan Bergstein, Esq.

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Tel: 202.488.3990 | Fax 202.48.3991

June 12, 2006

Sharon Schellin
Acting Secretary
Zoning Commission
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: Z.C. Case No. 06-06: Text Amendments—Charter Schools
“Extension of Emergency Rulemaking”

Dear Ms. Schellin:

Late last week, the Zoning Commission amended the agenda for its June 12 public meeting by adding a line for Case No. 06-06 that referred to an “Extension of Emergency Rulemaking.” I write to address the troubling prospect that the Commission is about to compound the unlawfulness of these rulemaking proceedings by extending the applicability of its emergency rule.

The May 10 comment letter submitted by AppleTree Institute for Education Innovation (“AppleTree”) noted that the Commission had failed to describe, as required by D.C. Code and regulations, why emergency action in this rulemaking was “necessary for the immediate preservation of the public peace, health, safety, welfare, or morals.” D.C. Code § 2-505(c); D.C. Mun. Regs. tit. 1, § 311.4(e) (2004). Now—more than 30 days later—the skepticism about the alleged “emergency” expressed by Commissioners Parsons and Jeffries at the February 13 hearing remains justified. We are still aware of no evidence that the emergency rule has affected any pending building-permit application other than AppleTree’s.

Even assuming that there really was an emergency on February 13, the relevant provision of the D.C. Administrative Procedure Act makes perfectly clear that the Commission’s exceptional ability to adopt a rule without notice and comment is carefully limited. In particular, section 2-505(c) of the D.C. Code commands that “No [emergency] rule shall remain in effect *longer than 120 days* after the date of its adoption” (emphasis added). There is no authority under D.C. law for the Zoning Commission to flout the plain intent of that provision by “exten[ding]” the effectiveness of an emergency rule for more than 120 days.

Moreover, to the extent that any “emergency” has persisted for more than 120 days, the continuation of the emergency is a product of the Commission’s own conduct. There is no reason the Commission could not have ensured that a temporary or permanent rule was adopted by now through the usual process required by the Administrative Procedure Act (including the notice-and-comment procedures that were not used by the Commission before its February 13 hearing and do not seem to be contemplated before the so-called “emergency” is extended).

ZONING COMMISSION
District of Columbia

CASE NO.

EXHIBIT NO.

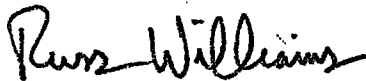
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Indeed, the Commission's June 12 meeting will be its *eighteenth* public hearing during the 120 days that the emergency rule was in effect.

The Commission's apparent intention of "exten[ding]" an "emergency" that never existed in the first place is a transparently unlawful attempt to avoid the requirements of the APA. It could place in further jeopardy the entire rulemaking process in this case. *See, e.g., Wheelchair Carriers Ass'n, Inc. v. District of Columbia*, Civ. Action No. 00-1586 (GK), 2002 U.S. Dist. LEXIS 4617, at *14-15 (D.D.C. Mar. 12, 2002) (holding that an invalid Emergency Rule cannot provide the legal underpinning for a valid Final Rule).

We urge the Commission to acknowledge that the "emergency" rule will expire as a matter of law on June 13. At the very least, the Commission should exempt from the emergency rule's scope any building-permit applications that were filed before the emergency rule became effective.

Respectfully yours,

A handwritten signature in black ink that reads "Russ Williams". The signature is written in a cursive, flowing style.

Russ Williams
Managing Director
AppleTree Institute for Education Innovation

cc: Alan Bergstein, Esq.

M

Steingasser, Jennifer (OP)

From: McCarthy, Ellen (OP)
Sent: Wednesday, January 04, 2006 9:56 AM
To: KathyPatterson (COUNCIL)
Cc: Steingasser, Jennifer (OP)
Subject: RE: charters & matter of right

We have some ideas that we think will be acceptable to all. Would be happy to share and get comments. Would you like us to give you or your staff a call?

-----Original Message-----

From: KathyPatterson (COUNCIL)
Sent: Tue Jan 03 20:38:06 2006
To: McCarthy, Ellen (OP)
Subject: charters & matter of right

Hi -- It's my understanding that OP is looking at recommending an emergency rule-making to clarify when a public school/public charter school can locate in a residential area as a matter of right. Is that correct? I assume you're aware of the Christ Church issue in Ward 3 as well as the Appletree application on the Hill. We discussed options for clarifying the charter school law (as distinct from zoning regs) at an oversight hearing in the fall, in response to the legitimate concerns about the state of the law right now, prompted by concerns in both neighborhoods. We don't have language yet; I'm waiting for a General Counsel opinion on what the law says today. (Beyond saying that public charters are public schools some of the time and not other times!)

Senator Landieu has been increasingly prescriptive in how and when the city turns public properties over to charters, based on both the Board of Ed and the Exec being slow to respond to facility needs. The five surplus resolutions at the Council now should have been acted on a year ago; she raised this again in our appropriation this past time -- threatening, again, prescriptive language regarding the five schools. She pulled back with commitments by the CA and me that we will address the five surplus properties. CM Orange continues to delay reporting these resolutions and at the end of a hearing last month (on 4 of the 5) he said he would only move forward with two or three. If all five don't go fairly quickly to charters -- as the law comes close to directing -- we will hear again from Landrieu. It's that context in which an emergency zoning action would be seen as an attack.

If my understanding of possible emergency action is correct, I have two concerns: one, that the govt would appear to be responding with policy to a particular not a general concern and, second, that something that has the effect of saying "no" to a charter school will prompt a reaction from the charter community and, immediately thereafter, the Hill. Landrieu in particular. It still may be the appropriate course; but it would be useful to run language by some of us who have been closely engaged in working on better relationships and better site acquisition with and for charters -- Deborah Gist, Gregory McCarthy, me and my staff, a couple of Board of Ed members. I am assuming that an emergency rulemaking would be followed by a thoughtful public hearing process that would give all concerned an opportunity to weigh in. It would also be useful to have land use regs from the zoning regulators be consistent with statutory changes that we will consider.

Thanks.