BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of AppleTree Institute for Educational Innovation	BZA Appeal No. 17532

REPLY BRIEF OF INTERVENOR
NORTHEAST NEIGHBORS FOR RESPONSIBLE GROWTH

Northeast Neighbors for Responsible Growth (NNRG) is group of property owners living in the immediate vicinity of the subject property at 138 12th Street, N.E. NNRG submitted its Party Status Application to the Board of Zoning Adjustment on November 7, 2006, in accordance with §§ 3106.2 and 3112.15 of the Board's Rules of Practice and Procedure. NNRG recently obtained and reviewed a copy of the Brief filed by AppleTree Institute for Educational Innovation (the "Appellant") and, on behalf of NNRG, we request the Board's indulgence to accept this Reply Brief.

In the instant appeal the Appellant challenges the decision of the Zoning Administrator in denying its application for a building permit to enlarge an existing building in the R-4 zone district to accommodate a charter school. Appellant has also contested the validity of the Zoning Commission's adoption of emergency rules in Case No. 06-06, which became effective on February 13, 2006 and were later extended and made final (the "Emergency Rules"). The Emergency Rules provided the basis for the Zoning Administrator's denial of the building permit application on April 28, 2006. NNRG does not in this Reply Brief address the Appellant's claims with respect to the legality of the Zoning Commission's action or procedures in adopting the Emergency Regulation, as we believe that this Board lacks the authority to address this particular question.

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The proper forum for Appellant's in that regard is the District of Columbia Court of Appeals.

I. Appellant's Misapplies Section 401.1 of the Zoning Regulations

As the Board has previously determined, §§ 401.1 and 401.2 are "grandfathering provisions that afford protection against the application of what were then new lot dimension rules in circumstances when no other protection was available."[1] In essence, when it legislated the current scheme of zoning regulation in 1958, the Zoning Commission recognized that the effect of certain requirements would make certain lots and certain uses in the District of Columbia nonconforming. To avoid the consequent hardship of being deemed nonconforming, §§ 401.1 and 401.2 created a limited degree of latitude for improved and unimproved lots, respectively. In the new scheme of zoning adopted in 1958, the size of a lot directly related to the use to which that lot could be put. In this instance, the subject building was by virtue of the width of its lot and its commercial use in violation of the new zoning scheme for the R-4 district.[2]

By adopting the Emergency Rules, the Zoning Commission created a new use of land in the R-4 zoning district which did not exist in 1958 (i.e., public charter schools), and prescribed a minimum set of development parameters for such a use in order to minimize

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[1]BZA Appeal No. 17034 of Advisory Neighborhood Commission 2E, dated November 25, 2003.

[2]We rely upon the Appellant's architects reference to the ownership of the subject building by L.P. Steuart Brothers since 1916 and its use as an office prior to being sold to the Archdiocese of Washington in 1960. See undated letter of dBF Associates, Architects to Appellant attached as Exhibit 1.

adverse impacts on residential districts.[3] Appellant now seeks to nullify the effect of the Emergency Rules and seek refuge in a regulations adopted to protect uses of land envisioned in 1958.

If Appellant's construction of the Zoning Regulations prevails, it would have the paradoxical effect of allowing any nonconforming building in any residence district, not meeting the minimum lot area or width requirements of May 12, 1958, to be converted to a public charter school as a matter of right. That interpretation would deny to a conforming property the same right unless it met the more restrictive requirements of the Emergency Rules. To read § 401.1 in this manner produces an absurd result, clearly not intended by the Zoning Commission when it adopted the Emergency Rules. Without a doubt, the Zoning Regulations are a complicated, interrelated set of changing rules, which in spite of best efforts is not entirely seemless. The task of the Board, in every instance, is to read and construe the separate sections of the zoning scheme together in a manner designed to carry out the intent of the Zoning Commission and to protect the general welfare.

In NNRG's view, the Emergency Rules, by implication, supercede the provisions of § 401.1 on the grounds that the Zoning Commission established and authorized a new use of land in the R-4 district and prescribed minimum standards for the development of such use. The Zoning Administrator was correct in concluding that Appellant's application for a building permit did not satisfy those requirements with respect to lot width or street frontage.

II. Appellant's Plans Do Not Meet the Parking Requirements

Appellant makes the argument in its brief that because the existing building is certified as a contributing structure in an

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[3]See the preamble text in the Notice of Emergency and Proposed Rulemaking in Z.C. Case No. 06-06 (Text Amendments - Charter Schools), February 13, 2006.

historic district it cannot be required to provide additional parking spaces. Appellant's argument with respect to parking is specious and rests on an incomplete reading of the applicable regulations and conceals relevant facts about the existing building.

The analysis should begin with an assessment of what currently exists based upon the last use of the subject property. Appellant acquired the subject property in 2005 from the Knights of Saint John and Women's Auxiliary, which had used the property as a "private club". Since "private club" is not expressly identified in § 2101.1, the table of parking requirements in § 2101.1 would classify the use under the "All Other Uses". Under this category, one (1) parking space is required for each 600 square feet of gross floor area and cellar floor area.[4] According to Appellant's computations, the existing building comprises 4,296 square feet of gross floor area and cellar floor area, and thus requires seven (7) parking spaces to support the "private club" use.

Appellant makes no reference to the existing number of parking spaces required for the subject property or to the number of parking spaces currently existing. The subject building occupies only 34% of the 4,230 foot lot and is situated face on the property line along 12th Street, N.E., therefore, the rear yard is 77' x 36', or 2,772 square feet. The subject property abuts a 30-foot wide public alley at the rear and the available rear yard could accommodate the parking spaces required for the "private club" use. In fact, the entire rear year area behind the building is a paved, asphalt surface and was used by the prior user for parking. According to a neighbor on 11th Street, S.E. whose property abuts

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[4]Although Appellant's plans describe the lower level of the building as a "basement", it is in fact a 'cellar" under § 199 of the Zoning Regulations as the ceiling is less than four feet above the adjacent finished grade.

the public alley across from the subject property, as many as ten (10) vehicles used the parking area in the rear yard during the times when the "private club" was in use.

Appellant proposes to enlarge the existing building by increasing the lot occupancy to sixty percent (60%), thereby eliminating rear yard space for existing parking burden of seven (7) spaces. The Zoning Administrator calculated that based upon the proposed charter school use and staffing levels, Appellant would require ten (10) parking spaces. Appellant attempts to finesse the parking requirement by using § 2100.5 as a shield, even though by its own action in enlarging the building it is removing the necessary parking. In support of its view, Appellant relies upon the language of § 2100.5, which provides that:

> No additional parking spaces shall be required for ... a building or structure ... that is certified ... as contributing to the character of {a} historic district. (emphasis added)

The clear implication of the cited regulation is that a change of use in a contributing building should not result in an increased parking burden, not as Appellant contends that the regulation removes any parking requirement.

Appellant proposes to provide only three (3) parking spaces, taking full advantage of its misreading of § 2100.5 and avoiding entirely any mention of the actual elimination of the existing parking burden associated with the prior use of the building. In so doing Appellant ignores the plain requirement of 2100.10(a), which prohibits the reduction of parking spaces if the existing number of parking spaces is less than now required by the Zoning Regulations. Appellant is by its enlargement of the existing building, in effect, eliminating parking spaces and relying in error upon § 2100.5 to shirk its responsibility to provide parking for its proposed use. The Zoning Administrator was correct in

requiring Appellant to seek special exception or variance relief form this Board in order to proceed with its plans.

Conclusion

NNRG urges this Board to deny the instant appeal and uphold the Zoning Administrator's interpretation of the Emergency Rules and require the Appellant to seek appropriate relief by way of variance or special exception in order to proceed with its plans for the subject property.

Respectfully submitted,

JORDAN & KEYS, LLP

By: George R. Keys, Jr.

George R. Keys, Jr.

Dated: November 21, 2006

EXHIBIT

1

dBF Associates, Architects

Apple Tree Institute
138 12th Street, NE
Washington, DC 20002

DESCRIPTION OF PROJECT

Background:
Apple Tree Institute has acquired the property with the intention of converting the facility into an early language and literacy program serving three and four year olds. Apple Tree currently has one facility serving 35 children in Southwest Washington, DC and ten families from the hill have applied for enrollment. Apple Tree is looking to expand the program to locally serve residents throughout the City.

Description:
The program calls for a "by right" expansion of the existing structure, by extending the existing building to the rear. The site dimensions are 36' x 117.5' and the existing building is approximately 40'deep. The attached documents indicate a full two story plus partial third floor addition which will extend the building to 94' deep. The balance of the site will contain three parking spaces, consistent with other access from the alley
The building will contain two interior stairs and one elevator, all extending from the basement to the third floor, containing both a small meeting room and, to the rear, a rooftop outdoor play area, mandated for any educational use. The front of the limited third floor (which contains only 800s.f.) will be 32 feet back from the front of the building, and as one can see from the attached building section, will not be visible from 12th Street.
The exposed rear of the building will be red brick masonry (sample attached with this application) and struck with concave joints, similar to the adjacent structures. All openings will feature either masonry jack arches or curved arches, to recall the earlier rear façade. All windows will be white 1/1 operable units, either single, or in two cases, paired. A rear entry features a small covered porch with door and sidelight. In an effort to minimize massing, the rear is topped at the play area with a painted metal railing.
Following a brief meeting with the Capitol Hill District Historic Preservation Planner, the front elevation will be left essentially intact, with the exception of several modifications to the storefront. The center storefront entry has been modified to create a doorway flanked by two sidelights. Windows and transoms have been modified as indicated. A curved fabric awning has been introduced over the door, creating some relief on the elevation. The basement window well pipe rails have been replaced with ornamental railings consistent with the existing, and the entry to the basement has been eliminated. Any replacement gutter and downspout profiles, if required, will match the existing. All windows and storefront will be painted with off white color (see sample). All existing landscaping areas will remain and the walks leading to the entries will be replaced.

Attachments to the application include:
1. Existing plans
2. Proposed floor plans
3. Existing front elevation and proposed front and rear elevations
4. Captioned photographs
5. Aerial images from Google Earthworks
6. Sample brick
7. Manufacturer's literature on window units.
8. Paint color

McLean Charlottesville
6818 Tennyson Drive, McLean 22101 703.356.2215 fax 703.356-4304 dbfassociates.com

dBF Associates, Architects

Apple Tree Institute
138 12th Street, NE
Washington, DC 20002

DISCUSSION OF BUILDING

The existing building at 138 12th Street, NE is a two story plus basement structure containing approximately 1,440 square feet per floor. The 36' x 40' building consists of masonry party walls with wood floor framing topped by a single sloped roof structure. Floor to ceiling heights are 10'-4" at the first and second floor and 7'-2" at the basement floor. One internal stair connects all levels and a rear exterior fire escape serves the second floor. The heating and cooling system consists of hot water radiators with a gas furnace in the basement.

The known history of the building, through records provided during the recent acquisition, while limited, offers some insight into the current condition. At least by 1916 the building (actually comprised of two lots of record) was owned by L.P Steuart Brothers and used as an office facility. In 1960, the building was acquired by the Archdiocese of Washington and in 1968 the title was transferred to the Knights of Saint John and Women's Auxiliary, until title was passed to Apple Tree Institute in May, 2005. From 1968 to present, the building was used by the Knights as a community facility. It is also believed that, evidenced by a separate entry on the southern side of the front elevation and the interior plan arrangement, that a second floor residence existed, whether used by the Knights or not. At least since 1916, the building has been primarily in commercial/ institutional use.

The architectural style of the building is clearly unique to the dominant styles in the Capitol Hill Historic District. The rear of the building consists of traditional red brick masonry in a running bond, accentuated by single and double width arched openings in a pattern suggesting the possibility of two separate owners at some time. The front façade consists of a light brown brick, set in a raked joint running bond without soldier coursing, jack arches or any other variation in pattern. The façade is divided by four shallow pilasters with white capitals that extend above the second floor windows. The façade is topped with a partially cantilevered slate mansard, with a slight curve to the slope. The mansard, which extends roughly five feet above the roof, is topped with a copper roof roll and contains a semicircular painted gutter running the length of the mansard terminating in a painted metal downspout. Windows are painted wood counterweighted single pane double hung, with slightly projecting concrete sills. The center fenestration appears to invoke some type of storefront, with a center door, transoms and flanking large panes of glass. One light is placed over the door and directly above the light is a shallow relief opening mimicking the windows, while serving in the past as a sign backdrop. Two pipe rails flank the center door, protecting wells for basement windows. As previously discussed, a transomed doorway on the south (left) side serves the second floor and on the north side, steps lead down to a basement entry.