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January 3, 2007

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Client No.
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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

Re: BZA Appeal No. 17532 — *Proposed Findings of Fact and Conclusions of Law Submitted by Appellant*

Dear Ms. Kress:

I am enclosing for filing in the above-captioned matter the original and 20 copies of the Proposed Findings of Fact and Conclusions of Law Submitted by Appellant.

At the public hearing on November 21, the Board set a deadline of 3 pm on January 3, 2007 for all parties to submit proposed findings of fact and conclusions of law. On December 28 and 29, Mr. Sinclair Long, Counsel for the Office of the Zoning Administrator, asked whether we would object to an extension of that deadline. We said we would not object to his request for an extension to January 8, but we would object to a longer extension because it would preclude the Board from deliberating about this case at its January 9 public meeting. Having seen no written request from Mr. Long nor any order from the Board indicating its acquiescence in an extension, we are filing the appellant's proposed findings by the original deadline. We will be present at the Board's public meeting on January 9.

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

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17532
EXHIBIT NO. 35

Very truly yours,

Curtis E. Gannon

Board of Zoning Adjustment
District of Columbia
CASE NO. 17532
EXHIBIT NO. 35

Enclosures

cc: Bill Crews, Zoning Administrator
Nicholas Alberti, c/o Advisory Neighborhood Commission 6A
George R. Keys, Jr., Esq.

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY APPELLANT

As invited by the Board at its November 21 public hearing in this appeal, Appellant AppleTree Institute for Education Innovation, Inc. submits the following Proposed Findings of Fact and Conclusions of Law.

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

The appellant contends that the Zoning Administrator erred because, under 11 DCMR § 401.1, it may enlarge a pre-1958 building without regard to minimum-lot-width or minimum-lot-area requirements when its proposed use complies with "all other provisions" of the Zoning Regulations. The appellant also contends that the Zoning Administrator erred in concluding that it failed to propose sufficient parking because, under 11 DCMR § 2100.5 of the Zoning Regulations, it is not required to provide "additional parking spaces" for the subject property, which has been certified as contributing to the character of the Capitol Hill Historic District, and the three parking spaces it proposed to provide are at least as many as can be legally attributed to the current property.

The Board held a public hearing on the appeal on November 21, 2006, at which the appellant presented its case through counsel and the Zoning Administrator's decision was defended by the Zoning Administrator himself, by a member of the Office of Planning testifying in support of the Zoning Administrator, by a representative of Advisory Neighborhood Commission 6A, and, through counsel, by a group of neighboring property owners, the "Northeast Neighbors for Responsible Growth" ("NNRG"), which was granted party status by the Board in a vote taken near the beginning of the public hearing.

After deliberating about this appeal at its January 9, 2007 public meeting, the Board voted to reverse the Zoning Administrator's permit denial.

FINDINGS OF FACT

1. The subject property is located in the R-4 District at 138 12th Street, N.E.

2. The subject property is located in the Capitol Hill Historic District, and the building on the site has been certified by the State Historic Preservation Officer as contributing to the character of that historic district.

3. Although situated between rowhouses on a predominantly residential street, the building on the site has been devoted to a series of non-residential uses since at least 1916, including use as an office facility for a heating-oil company (until the early 1960s), use as an office facility for a hospice (in the mid- to late-1960s), and use as a private club by the Knights of St. John and Women's Auxiliary (from 1969 until 2005, when the appellant acquired the property).

4. The current building includes 4,296 square feet of gross floor area and cellar area.

5. The underlying lot is a rectangle that is 36 feet wide and 4,230 square feet in total area.

6. The area of the lot behind the current building is paved with asphalt. The paved area is somewhat less than 36 feet wide (due to encroachments by the immediate neighbors on both sides), and somewhat less than 77 feet deep (due to the space behind the building taken up by a fire escape descending from the second floor, an exterior staircase into the cellar, and two large air-conditioning units). The paved area is separated from a 30-foot-wide public alley at the rear property line by a chain-link fence, which includes a pair of gates that open to allow access from the alley through a 12-foot gap.

7. No parking spaces are marked on the paved area, and there is no evidence that any spaces have ever been marked on the paved area.

8. As indicated in official records of the Department of Consumer and Regulatory Affairs which were submitted for the record by the NNRG, between 1958 and 1969, a large portion of the current paved area was occupied by a storage shed that was 15 feet wide and 49 feet long and included no parking. In 1969, the Knights of St. John razed that structure, pursuant to a permit.

9. In 1970, the Knights of St. John erected the current chain-link fence along the rear property line, pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia."

10. At all times between 1958 and 1970 (*i.e.*, between the introduction of parking requirements under the Zoning Regulations and the last change in use of the subject property that was reflected in a building permit or certificate of occupancy), the Zoning Regulations did not require more than two parking spaces for the uses to which the property was devoted. At those times, the schedule of parking requirements did not specify a requirement for any of the relevant uses (*e.g.*, use as an office or private club) in an R-4 zone. Accordingly, the relevant requirement was the catch-all provision, which

was equivalent to the number of "parking spaces . . . required for a warehouse located in a C-M-1 District," which was one space "for each 2,400 square feet of gross floor area." Zoning Regulations of the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). Disregarding any grandfathering provisions or effects created by the storage garage that was present until 1969, that formula required no more than two parking spaces, because the gross floor area was at most 4,236 square feet.[1]

11. Under the current Zoning Regulations, use as a private club in an R-4 district is still covered by the catch-all provision in the parking schedule, though, owing to subsequent amendments to the schedule, the catch-all provision now requires one parking space for each 600 square feet of gross floor area and cellar floor area. 11 DCMR § 2101.1. Excluding any grandfathering provisions, that formula would require seven parking spaces if the current building were newly converted today to use as a private club.

12. According to testimony presented at the public hearing by the President of the NNRG, in the period between 1986 and 2005, the Knights of St. John would "periodically, sometimes twice a month, sometimes once a month," use the paved area at the rear of the lot for stacked parking, which would allow the paved area to accommodate, "[o]n average, . . . between nine and ten cars." Transcript of Nov. 21, 2006 Public Hearing at 399 ("Transcript"). The written report filed by the ANC also contends that "[t]he previous use of this property includes a paved rear parking lot that accommodates a minimum of 10 vehicles."

13. In its application for a construction permit, filed on February 9, 2006, the appellant proposed expanding the current structure at the subject property by building an addition on the back, which would increase the total gross floor and cellar floor area to 8,975 square feet and would occupy a portion of the paved area at the rear of the lot. Under the appellant's plans, the remainder of the paved area would be occupied by a grassy area, a sidewalk, and three marked parking spaces perpendicular to the rear property line and directly accessible from the public alley. The appellant also proposed changing the use of the property from a private club to a public charter school for approximately 50 pre-school and pre-kindergarten students and up to 15 teachers and staff members.

14. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. *See* 53 DCR 2017 (Mar. 17, 2006). It re-adopted the emergency rule on June 12, 2006. *See* 53 DCR 5898 (July 21, 2006). The appellant contends that aspects of that rulemaking "exceeded [the Zoning Commission's legal] authorities in multiple ways," but the appellant also contends that the Board may resolve this appeal in its favor without addressing those arguments. The Zoning Administrator contends that "the

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[1] This calculation includes the 1,432 square feet contained in the lowest story of the building, even though the NNRG has pointed out that it is a cellar rather than a basement, and it was clear by 1962 that cellars were not included in "gross floor area." *See* 11 DCMR § 199.1 (excluding cellars from "gross floor area" and attributing this exclusion to a 1962 case). Without the cellar, the gross floor area was only 2,864 square feet, which would have required only one parking space. *See* 1973 Zoning Regulations § 7207.15 (disregarding fractional spaces under one-half).

validity of the Zoning Comission's action on adopting the emergency text amendment is not within the [Board's] jurisdiction." Transcript at 324. The NNRG also contends that the Board lacks jurisdiction to address the validity of the emergency rule, and that the appellant should raise such issues only on further appeal to the D.C. Court of Appeals. Reply Brief of Intervenor NNRG at 1–2. The written report of the ANC does not address the question of our jurisdiction, but defends the emergency rule by claiming "it was imperative to immediately update the zoning regulations." In the remainder of this order, the Board assumes *arguendo* that the emergency rule was legally valid, without intending any prejudice to the appellant's ability to press its arguments to the contrary on further appeal or in separate proceedings.

15. The emergency rule modified the definition of "public school" contained in 11 DCMR § 199.1 to include schools "chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board." As the Setdown Report from the Director of the Office of Planning explained to the Zoning Commission about the proposed emergency rule, that change had been "mandated" by the "United States Congress."

16. The emergency rule also altered certain height, area, and density regulations applicable to public schools in R-1, R-2, R-3, R-4, R-5-A, R-5-B, R-5-C, R-5-D, and R-5-E zone districts. As relevant to this appeal, the emergency rule amended the table in 11 DCMR § 401.3 to increase the minimum lot area for a public school in an R-4 zone district from 4,000 to 9,000 square feet, and the minimum lot width for a public school in an R-4 zone district from 40 feet to 120 feet. Finally, the emergency rule also specified for the first time a parking formula for pre-elementary schools and pre-kindergarten schools or facilities (identical to the preexisting one for elementary schools, which required two spaces for every three teachers or staff members).

17. In the cover sheet of its building-permit application, the appellant cited 11 DCMR § 401.1 in the section addressing minimum lot dimensions and expressly stated that the building at the subject property existed as of May 12, 1958. In the section of the cover sheet addressing parking, the appellant cited 11 DCMR § 2100.5 and claimed that no additional parking was required because the building had been certified as a contributing element in the Capitol Hill Historic District. It noted that no existing parking is indicated at the property, but it also "[a]ssume[d] 3 spaces" would fit on the existing lot with angled parking that conforms to chapter 21 of the Zoning Regulations.

18. On March 6, 2006, the appellant's architect submitted a letter to the Zoning Administrator further explaining that, even assuming that the intervening emergency rulemaking applied to the appellant's application, the new lot dimension and parking requirements for pre-kindergarten public schools in R-4 zone districts would not justify denial of the application due to the operation of §§ 401.1 and 2100.5.

19. On April 28, 2006, the Zoning Administrator denied the appellant's application. Without addressing § 401.1 or § 2100.5, his letter declared that, under the emergency rule, the appellant's proposed use failed to meet the minimum-lot-area requirement of "9,000

square feet," the minimum-lot-width requirement of "120 feet," and the minimum-parking-spaces requirement of "10 spaces."

20. At the public hearing in this appeal, the appellant presented a diagram of the paved area at the rear of the subject property, illustrating how it had reached its conclusion that, although there are currently no parking spaces marked on the lot (as required by 11 DCMR § 2117.3), up to three angled spaces could be placed there while still allowing sufficient space for a 17-foot aisle and screens from contiguous residential properties (as required by 11 DCMR §§ 2117.5 and 2117.12).

21. At the public hearing, the Zoning Administrator also presented his own diagram of the paved area at the rear of the subject property. He claimed that the diagram showed how six legal parking spaces could fit in the paved area. In his testimony, however, the Zoning Administrator conceded that one of those supposed spaces was impermissibly placed in the midst of a fixed fire-escape staircase from the second floor. Transcript at 347, 350, 368–69. He also conceded that two of the remaining five spaces — located perpendicular to and immediately adjacent to the alley — would not actually be accessible without changing the existing chain-link fence. Transcript at 361.

CONCLUSIONS OF LAW

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

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

Parking Spaces

The appellant argues that the question of parking is governed by § 2100.5 of the Zoning Regulations, 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." It is undisputed that the subject property includes a building that was certified as contributing to a historic district while it was being used as a private club by the previous owner, the Knights of St. John. The remaining questions about parking can be reduced to the following: (1) does § 2100.5 apply when there is new construction and a change in use, and (2) what number of parking spaces should serve as the baseline for determining that "no additional spaces" are required?

With regard to the first question, the Zoning Administrator's April 28, 2006 decision was based on the assumption that § 2100.5 does *not* apply when there is a change in use. Transcript at 372–73. But the Board affirmatively rejected that assumption in its July 7, 2006 Summary Order resolving Application No. 17459 of DC Hampton LLC, which noted that there have been "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]." The Board further explained that 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," and, although the Zoning Administrator had "recently called this interpretation into question," the Board found "no reason to reverse this long-standing interpretation."

At the public hearing, the Zoning Administrator did not press his former interpretation of § 2100.5 (nor does the NNRG or the written report of the ANC), and, notwithstanding a proposal currently pending before the Zoning Commission to amend the text of § 2100.5, the Board again reaffirms its long-standing interpretation. No additional parking spaces are required for new construction or for a change of use associated with an historic landmark or building or structure that is certified as contributing to the character of a historic district.

An administrative decision must usually be defended on the grounds by which it was justified at the time it was made, but the Zoning Administrator makes the fallback argument in this case that the baseline number of parking spaces for applying § 2100.5 is more than three, even if it is not the ten spaces claimed in his April 28, 2006 denial letter.

The appellant claims that the appropriate baseline can be no more than three parking spaces because there are currently zero legally marked spaces, and, although as many as nine or ten cars may have been simultaneously parked on the paved area at periodic times in the past, § 2100.5 cannot be reasonably construed as requiring the preservation of purported parking spaces that do not even comply with the provisions in chapter 21 of the Zoning Regulations that establish permissible sizes and layouts for parking spaces.

As noted above in paragraph 21 of the findings of fact, the Zoning Administrator ultimately contended that the appropriate baseline is five parking spaces. He submitted evidence gathered as recently as the morning of the public hearing, Transcript at 344, and concluded that five legal parking spaces could conceivably fit in the paved area at the rear of the subject property, so long as the existing chain-link fence were removed. In its written submission, the NNRG contended that the baseline number was seven spaces, because that is how many spaces would be required under the current Zoning Regulations for a private club not eligible for any grandfathering protections. The written report of the ANC concluded that "ten parking spaces" are required because the "paved rear parking lot" "accommodates a minimum of 10 vehicles" and the appellant would otherwise "be free to eliminate existing parking."

The Board rejects the suggestion that the relevant baseline for applying § 2100.5 can be greater than the number of legal parking spaces that can exist on the lot as it is currently configured and the number of spaces that was legally required when the last use of the property was established before the structure was declared to be a contributing one. Concluding otherwise would thwart the fundamental requirement of § 2100.5 that "[n]o additional parking spaces shall be required," because it would literally require the owner of a contributing structure to create new parking spaces that have never existed on the property (and were not required to exist when it was declared to be a contributing structure). This compels rejection of the ANC's argument, because

there is no serious suggestion that ten parking spaces were ever required for any of the prior uses, or that ten lawfully configured parking spaces can fit on the paved area. It also requires rejection of the NNRG's argument, which is predicated on the assumption that the prior use as a private club established an "existing parking burden of seven (7) spaces." But the fact that private club members might have jammed seven cars onto their rear yard once or twice a month no more establishes that it includes seven "parking spaces" under the Zoning Regulations than would intermittent use of a front yard for overflow parking. To the contrary, as explained above in paragraph 10 of the findings of fact, when the previous use was established (pursuant to a 1969 certificate of occupancy and a 1970 permit to construct a chain-link fence), no more than two parking spaces were legally required for a private club that included less than 6,000 square feet of gross floor area.

Finally, the Board rejects the Zoning Administrator's argument that the correct baseline for application of § 2100.5 is five spaces, because he has not shown that there are actually five conforming parking spaces on the lot. As described above in paragraph 21 of the findings of fact, the Zoning Administrator concedes that the fourth and fifth spaces depicted in his diagram of the paved area would not actually be accessible as parking spaces unless part of the chain-link fence were removed or replaced with a sliding gate. But the chain-link fence predates the establishment of the underlying historic district, and the fence was permitted on the express condition that it would "not obstruct any accessible parking area required by the Zoning Regulations." Requiring the appellant to remove or significantly alter the configuration fo the fence while claiming that "no additional parking spaces" were being required would be tantamount to declaring that the previous use was itself illegal at the time it was established (which was before the property became a contributing structure). Under the circumstances, the Board sees nothing to justify such a conclusion.

Because the appellant's plans provide for three parking spaces, the Board does not need to decide whether the lack of any striping on the current lot (as required by 11 DCMR § 2117.3) or the 1970 requirement for only two parking spaces would allow the baseline to be either zero or two.

On the basis of § 2100.5 and the record in this appeal, the Board concludes that the Zoning Administrator erred in determining that the appellant needed to provide any more than three parking spaces for its contributing structure.

Minimum Lot Dimensions

The appellant claims that the other two grounds of denial cited by the Zoning Administrator — minimum lot area and minimum lot width — are both defeated by § 401.1 of the Zoning Regulations, which reads 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.

The appellant maintains that this provision means a property owner *may* "enlarge[] or replace[]" a building that was "located, on May 12, 1958," on a lot that now has "a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located," as long as the proposed use "complies with all other provisions of this title." The appellant notes the Board has previously concluded that requiring an applicant to satisfy a lot-area or lot-width requirement in § 401.3 would betray the text of § 401.1 by treating it "as if the word 'other' did not exist." Decision and Order in Appeal No. 16830 of Advisory Neighborhood Commission 2A (Mar. 5, 2002). The appellant further stresses that the text of § 401.1 mentions nothing about being limited by the use of the pre-1958 building or by whether that use would be changed in conjunction with the enlargement or replacement of the building.

In response, the Zoning Administrator makes three arguments: (1) that § 401.1 applies only when the lot is smaller than the minimum sizes prescribed in § 401.3 for *every single use* permitted in the district in which the lot is located, Transcript at 336; (2) that § 401.1 is inapplicable in the case of a public school because the February 13, 2006 emergency rulemaking indicated "that the intent of the Zoning Commission was to require public schools to be located on lots of minimum size," Transcript at 364; *see also id.* at 377; and (3) that § 401.1 is not applicable to this case because the property is currently non-compliant with the default amount of parking that would be required for the prior use as a private club if § 2100.5 did not apply, Transcript at 326–30.

We agree with the appellant's construction of § 401.1. First, there is no indication in the text of the provision that it should apply only when a lot is too small for *every single use* permitted in the district in which it is located. Although the provision was intended to provide relief for owners of substandard lots that were improved on May 12, 1958, the Zoning Administrator's construction would mean that no enlargement or replacement could ever have been allowed under § 401.1 for any of the non-residential uses to which the building was ever devoted, simply because the lot had always been large enough for some (but not all) residential uses. It would also require the phrase "less than that prescribed in § 401.3" to be read as if it said "less than *the lowest number* prescribed in § 401.3 *for any use*." The Board is reluctant to interpolate extra words in the absence of any clear indication that they were intended when the provision was originally adopted in 1958 or on any of the subsequent occasions when it was amended or recodified.

Second, the Board cannot conclude that a proposed use as a "public school" makes a building uniquely ineligible for the application of § 401.1 in light of the emergency rulemaking. This argument of the Zoning Administrator is echoed in the NNRG's contention that § 401.1 was "*by implication*, supercede[d]" by the emergency rulemaking in the case of public charter schools, because that use cannot have been contemplated when § 401.1's predecessor was originally adopted in 1958. NNRG Reply at 3 (emphasis added). There is simply no precedent for singling out conforming uses — such as public schools in residential zones — as being explicitly or implicitly exempted from the usual interaction between § 401.1 and § 401.3. Moreover, the interpretive methodology favored by the Zoning Administrator and the NNRG has no logical starting or stopping point. It is not suggested by anything in the text of the emergency rule, and there is nothing in that text (or anywhere else) to indicate whether the allegedly implicit exception to § 401.1 would apply only to public charter schools, or to all public schools, or only to uses in the R-4 district, or to *any* future amendments to § 401.3, or to anything else. And, because there is no established tradition of making use-specific exceptions to § 401.1, there is

nothing to limit that methodology to § 401.1 itself. Allowing the Zoning Administrator to construe the Zoning Regulations in such an untethered and unpredictable way would deprive the public of the benefit of having written regulations and be inconsistent with the Board's established practice of treating the text of the Zoning Regulations as if it matters.

The best evidence of whether the Zoning Commission intended to effect a partial repeal of the long-standing background rule in § 401.1 is, of course, the text of its emergency amendments, which, significantly, left § 401.1 intact while making changes to several provisions just before and just after it. The obvious inference to be drawn from the Commission's decision to amend §§ 400.10, 400.11, and 401.3, and to add new provisions as §§ 401.8 and 401.9, while not amending § 401.1 in any way, is that the Commission did not mean to affect the operation of § 401.1 or its long-standing interaction with § 401.3. That inference is only strengthened by the fact that the Commission did not change course when it re-adopted the emergency rule on June 12, 2006 or when it adopted a permanent version of the rule on September 25, 2006, *see* 53 DCR 9580 (Dec. 1, 2006) — both long after the Commission, the Zoning Administrator, and the Office of Planning were made well aware that the appellant in this case was relying on § 401.1 to argue that it was exempt from the new lot-area and lot-width requirements for public schools.

The Zoning Administrator's third argument requires little comment. He contends that the appellant's application does not "compl[y] with all other provisions of [the Zoning Regulations]," as required by § 401.1, because the property fails to include the seven parking spaces that are currently required for a private club under § 2100.1. This argument simply fails to account for the fact that the previous use was established at a time when seven parking spaces were not required (*see* paragraph 10 of the findings of fact above) and that § 2100.5 operates as an exception from § 2100.1.

The Board is also not persuaded by the ANC's arguments about § 401.1. The ANC first argues that "§ 401.1 clearly speaks to whether or not a structure can be enlarged for its current use if that use existed at the time of the enactment of Title 11." But there is no such limitation in the text of § 401.1. The only reference to 1958 is to the fact that a building was located on the lot at that time. Subsequent phrases are in present tense (*e.g.*, "the district in which it *is* located") and the cross-reference to § 401.3 uses its current citation rather than something backward-looking, such as "§ 3301.1 of the Zoning Regulations, as they existed on May 12, 1958." There is thus no reason to believe that § 401.1 looks back to 1958 for anything other than the fact that the lot was improved at that time — something that is not disputed in this case.

Second, the ANC agues that the applicability of § 401.1 is "questionable" when "the proposed future use represents a change from a previously conforming use to a nonconforming use." But that does not obtain in this case. Public schools are a matter of right use in an R-4 district. *See* 11 DCMR §§ 201.1(k), 300.3(a), 320.3(a), 330.5(a). Thus, the appellant's proposed future use is a conforming one.

Third, the ANC argues that § 401.1 does not apply unless the proposed enlargement complies with 11 DCMR §§ 2002.3 and 2002.5, which apply, respectively, to extensions of "nonconforming use[s]" and to enlargements of "structure[s] devoted to nonconforming use[s]." Again, these provisions are inapplicable because the appellant has not proposed extending any nonconforming use or devoting any portion of its enlarged structure to a nonconforming use.

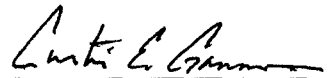
Fourth, the ANC suggests that the opening clause of § 401.1 requires independent satisfaction of all the provisions in chapters 20 through 25. That suggestion misreads § 401.1, which is constructed as a prohibition on enlarging or replacing a pre-1958 building, with two categories of exceptions: first, those "provided in chapters 20 through 25," and, second, instances when the project "complies with all other provisions of this title" besides lot width, lot area, or both. Such double exceptions (including introductory clauses that refer to chapters 20 through 25) are quite common in the Zoning Regulations, and there is generally no confusion about the fact that someone need not fulfill both categories of exception to be released from the underlying prohibition. *See* 11 DCMR § 200.4 (prohibiting all uses in R-1 districts, "[e]xcept as provided in chapters 20 through 25 of this title" and "except for one (1) or more of the uses listed in this chapter"); *see also, e.g., id.* §§ 300.2, 320.2, 330.4, 350.3, 500.5.

The Board thus concludes that § 401.1 applies in this case as it is written. Notwithstanding the emergency rule, which we assume to have been in effect when the Zoning Administrator made his decision, a building that existed on a lot before May 12, 1958 may be enlarged without regard to the lot-area and lot-width requirements specified in § 401.3 as long as the provision complies with all other provisions of the Zoning Regulations. Apart from lot area and width, the only alleged non-compliance in this case involves parking spaces, but, as explained above, the proposal complies with the parking requirements in chapter 21 by virtue of § 2100.5. Accordingly, it complies with "all *other* provisions" of the Zoning Regulations and is effectively exempted from the 9,000 square foot area requirement and 120 foot width requirement that would otherwise apply to a public school in an R-4 district under § 401.3.

For the reasons stated above, the Board concludes that the appellant has met its burden of proving that the Zoning Administrator committed legal error in each of the grounds on which he denied the appellant's building-permit application. It is hereby **ORDERED** that the Zoning Administrator's decision is **REVERSED,** and it is further **ORDERED** that the appellant's application is **APPROVED** with regard to all issues arising under the Zoning Regulations.

Respectfully submitted,

Dated: January 3, 2007



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Attorneys for Appellant AppleTree Institute for Education Innovation, Inc.

PROOF OF SERVICE

On January 3, 2007, I sent a copy of the foregoing Proposed Findings of Fact and Conclusions of Law of Appellant, by first-class mail, to the following:

Mr. Bill Crews
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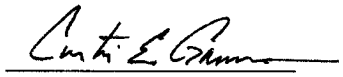

Curtis E. Gannon

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