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January 3, 2007

HAND-DELIVERED

Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 Fourth Street, N.W. - Room 210 South
Washington, D.C. 20001

Re: BZA Appeal No. 17532
The AppleTree Indsitute for Educational Innovation

Dear Mr. Griffis:

Pursuant to your instruction at the conclusion of the public hearing in the above-referenced special exception proceeding on November 21, 2006, we enclose for filing on behalf of the Intervenor Northeast Neighbors for Responsible Growth fifteen (15) copies of the its Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,

George R. Keys, Jr.

George R. Keys, Jr.

Enclosures

cc: Advisory Neighborhood Commission 6A
Curtis E. Gannon, Esq.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17532
EXHIBIT NO. 36

Board of Zoning Adjustment
District of Columbia
CASE NO. 17532
EXHIBIT NO. 36

INTERVENOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN BOARD OF ZONING ADJUSTMENT APPEAL NO. 17532
The AppleTree Institute for Educational Innovation

Appeal No. 17532 of The AppleTree Institute for Educational Innovation pursuant to 11 DCMR §§ 3100.2 and 3101 from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs to require BZA special exception approval for an addition to an existing building for use as a public charter school at subject property in R-4 Zone District at 138 12thvStreet, N.E. (Lot 820, Square 988).

HEARING DATES: December __, 2007
DECISION DATE: January 9, 2007

DECISION AND ORDER

INTRODUCTION

The AppleTree Institute for Educational Innovation ("Appellant") filed this appeal with the Board of Zoning Adjustment challenging the decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("ZA") to deny the issuance of a building permit for the subject property on the grounds that the proposed use as a public charter school failed to meet requirements of lot width, minimum lot area and off-street parking established by the Zoning Commission in emergency rule-making in Case No. 06-06 on February 13, 2006 (as extended, the "Emergency Rules").

Appellant contends that the ZA erred in failing to find that § 401.1 of the Zoning Regulations exempts the subject property from the lot width and lot area requirements and that as a contributing structure in a historic district the subject property requires no additional parking spaces. The Appellant also argues that the Emergency Rules adopted by the Zoning Commission were a legal nullity as the rule-making was impermissibly extended beyond 120 days, did not derive from a genuine "emergency" and were arbitrary and capricious administrative agency actions. For the reasons stated below, the Board finds Appellant's contentions regarding the Za's decision without merit and denies the appeal. Further, the Board declines to rule on the Appellant's legal challenge to the Emergency Rules, as the Board lacks any jurisdiction to adjudicate the actions of the Zoning Commission.

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The Board held a public hearing on November 21, 2006. At the close of the hearing the Board set a decision date of January 9, 2007. At the decision meeting, the Board voted ___-___ to deny the appeal and uphold the decision of the Zoning Administrator.

PRELIMINARY MATTERS

Request for Party Status. The subject property is located within the area served by Advisory Neighborhood Commission 6A ("ANC 6A), which is automatically a party to this Application. In addition, upon proper application the Board granted party status as an intervenor to Northeast Neighbors for Responsible Growth, a District of Columbia nonprofit organization ("NNRG"), which is made up of persons living in the immediate vicinity of the subject property who have personal knowledge of the historic uses of the subject property.

FINDINGS OF FACT:

1. The subject property is located at 138 12th Street, N.E. (Lot 820, Square 988) and is zoned R-4.

2. The subject property is a lot 36 feet wide, 117.5 feet deep and comprises an area of 4,230 square feet.

3. The subject property is improved by a two-story building of non-residential appearance which occupies the full width of the lot and extends 40 feet from the front property line. The building has a footprint of approximately 1,440 square feet.

4. The rear yard of the subject property is entirely covered by asphalt parking surface and abuts a 30-foot public alley and entry is secured by 7-foot chain link fence with a double gate.

5. The building located on the subject property was certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic District.

6. Appellant submitted a building permit application on February 9, 2006, which proposed the use of the subject property for a public charter school for 50+ pre-school aged students and 15 staff. Appellant proposed to enlarge the building with a three-story addition which would enlarge the gross floor area of the building from 4,296 square feet to 6,484 square feet, or to an FAR of 1.53. The proposed building would have a footprint of 2,491 square feet and occupy 58.8% of the lot area of the subject property. Appellant's plans provide for 3 off-street parking spaces at the rear of the subject property.

7. Appellant's plans were reviewed and approved by the Historic Preservation Review Board ("HPRB") on December 15, 2005 in HPA No. 05-522, as to consistency with the objections of the historic district.

8. Prior to February 13, 2006, for non-residential structures in the R-4 District, § 401.3 required a minimum lot area of 4000 square feet and a minimum lot width of 40-feet. Section 403.2 limited the lot occupancy for "row dwelling, flat, church or public school" to 60% and for "all other structures" to 40%.

9. Under the Emergency Rules, the Zoning Commission clarified that public charter school were "public schools" within the meaning of the Zoning Regulations and established new minimum lot requirements for public schools. In pertinent part, the Zoning Commission established a minimum lot area of 9,000 square feet and minimum lot width of 120 feet for the R-4 District and amended §2101.1 to provide for 2 off-street parking spaces for each three teachers or other employees.

10. The HPRB Staff Report noted that the building on the subject property first appeared in the city directories in 1916 and was built "sometime in the 19-teens".

11. Section 401.1 is a grandfathering provision, adopted at the time the current scheme of the Zoning Regulations was imposed in 1958, which exempts buildings existing prior to May 12, 1958 and located on lots "with a lot are or width of lot, or both, less than prescribed in 401.3" from restrictions which would prevent the enlargement or replacement of such buildings.

12. Section 2100.5 provides that, for buildings certified as contributing structures in a historic district, no additional parking shall be required.

13. Section 2100.10 provides that for pre-1958 buildings, "... if the existing number of parking spaces now provided is less than or equal to the number of parking spaces now required [by Chapter 21], the number of parking spaces cannot be reduced..."

14. The immediate prior use of the subject property was pursuant to Certificate of Occupancy No. B-68565, issued on January 29, 1969, which authorized the Knights of Saint John and Women's Auxiliary to use the subject property as a "private club".[1]

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[1]The term "private club" is not used in the Certificate, however, we can infer the nature of its use from the fraternal

15. The Knights of Saint John applied for and received a building permit (Permit No. B-185372) on November 7, 1969 to raze a "storage garage no parking" which occupied approximately 800 square feet of the rear yard of the subject property.

16. After the removal of the storage garage, the Knights of Saint John then received a building permit (Permit No. B-90629) to erect a chain link fence across the rear of the subject property. The conditions of the permit stated, in part: "Entirely upon the land of the owner this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia."

17. Section 2101.1 classified a "private club" as "All Other Uses" and required one off-street parking space for each 600 square feet of gross floor area and cellar floor area in all zoning districts.

18. The gross floor area and cellar floor area of the subject property totals 4,296 square feet.

CONCLUSIONS OF LAW AND OPINION

Section 401.1 and the Emergency Rules

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(1) (2001 ed.) to hear and decide appeals where it is alleged that there is error in any order, requirement, decision, determination, or refusal made by the Zoning Administrator in the enforcement 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."[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

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nature of the owner and the definition of "private club" in §199.1 of the Zoning Regulations which permits offices for the organization in addition to a venue for its fraternal activities.

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

development parameters for such a use in order to minimize 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 where no other protection was available.

Appellant relies on a strict and isolated construction of § 401.1 to completely remove the subject property from the reach of the Emergency Rules. While zoning regulation is in derogation of the rights of property owners and is generally strictly construed against the municipality, there are clear exceptions.

> The maxim of strict construction, usually applicable to zoning regulations, does not apply with equal force when the regulation limits the expansion of a nonconforming structure.[4]
>
> While a zoning ordinance which restricts the use of land should be strictly construed, the language of a variance which enlarges the uses which are permissible should be construed with a view to the purposes of the whole zoning ordinance.[5]

The express intent of the Zoning Commission in adopting the Emergency Rules was to subject "public schools" not meeting the minimum requirements to a special exception process.[6] In their deliberations on February 13, 2006, when the Emergency Rules were first adopted, the Commissioners accepted and endorsed the argument of the Office of Planning that emergency rulemaking was required,

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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.

[4]Albert v. Board of Standards & Appeals, 89 App Div 2d 960, 454 NYS2d 108 (1982, 2d Dept), cited at 3 Anderson's American Law of Zoning § 18.4, fn. 42 (4th Ed.)

[5]Blum v. McGraw, 92 Misc 2d 781, 401 NYS2d 127 (1977), cited at 3 Anderson's American Law of Zoning § 18.4, fn. 42 (4th Ed.)

[6]In the text of the Corrected Revised Notice of Proposed Rulemaking, Z.C. Case No. 06-06 (Charter School Text Amendments) at 47 DCR 6860 (August 18, 2006), the Zoning Commission stated among its purposes: "... permit school in Residence Zones not meeting the proposed requirements to be allowed as special exceptions".

especially for R-2, R-3 and R-4 zones because they have the smallest lots, minimal areas and street frontage and the greatest potential for adverse impacts.[7]

If, as Appellant contends that, § 401.1 trumps the Emergency Rules, it does so only because, as Appellant argues, there is an apparent conflict between the two sets of provisions and the Zoning Commission had the chance but did not explicitly amend the 1958 regulation in question. In the view of this Board, the Zoning Commission did by implication amend § 401.1 by creating a special exception process for all substandard lots not meeting all of the requirements for a "public school". To hold otherwise would mean that the Zoning Commission intended to permit by means of the loophole of § 401.1, the exact harm -- i.e., public schools being developed in residential districts in a manner causing adverse impacts -- which the Emergency Rules were tailored to prevent. We see the "public school" special exception process created by the Emergency Rules as being a mechanism whereby, even those lots covered by § 401.1, have a means to demonstrate an appropriate regard for potential adverse impacts of development on substandard lots.

The Zoning Commission acts in a quasi-legislative role in its rulemaking capacity.[8] The hallmark of statutory construction is to determine the intent of the legislature and to interpret legislation is such a way as to give effect to all of its provisions.[9]

> Under the statutory construction act, specific provisions contained within ordinances control over general ones and when two clauses are irreconcilable, the later in time or position prevails.[10]

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[7]Transcript of February 13, 2006 public meeting at p. 33-34.

[8]Ruppert v. Washington, 366 F. Supp. 686 (1973), *affirmed* 543 F.2d 416, 177 U.S.App.D.C. 269 (1976).

[9]3 Anderson's American Law of Zoning, § 18:2 (4th ed.). "The polestar for construction of a statute or ordinance is the intention of the legislature." Appeal of Neshaminy Auto Villa, Ltd., 25 Pa Cmwlth 129, 358 A2d 433 (1976).

[10]Heck v. Zoning Hearing Bd., 39 Pa Cmwlth 570, 397 A2d 15 (1979).

In view of the foregoing, the Board concludes that the Zoning Administrator was correct in relying on the Emergency Rules and directing the Appellant to seek special exception approval for its plans on the grounds that the subject property lacked sufficient lot width and lot area to be used as a "public school" as a matter-of-right.

Applicability of Parking Requirements.

From the prior use of the subject property as a "private club", the Knights of Saint John would have been required by the Zoning Regulations to provide off-street parking for its use. Based upon the requirement of § 2101.1 that one space be provided for each 600 square feet of gross floor area plus cellar floor area, the Knights of Saint John should have provided not less than seven (70 off-street parking spaces. The Board has been shown nothing in the official records of DCRA, including without limitation the Certificate of Occupancy No. B-68565 or the application therefor, that specifically mandate this particular parking requirement; however, the Board finds persuasive the behavior of the Knights of Saint John, shortly after their acquisition of the subject property in razing the structure occupying the rear yard, erecting a chain link fence with a double gate and paving the entire rear yard. Although nothing in the record evidences that the rear yard was ever striped for parking spaces, or how many parking spaces might have been lawfully used, it is clear from the testimony of the neighbor to the rear of the subject property that the Knights of Saint John used the rear yard for parking automobiles, and did so intensely by stacking the automobiles.

Testimony at the hearing was inconclusive about the number of parking spaces which could be legally accommodated in the rear yard, as configured in 1969 when the Knights of Saint John commenced their use of the subject property; but this Board cannot ignore the fact that the subject property was burdened by a parking requirement for at least seven (7) vehicles.[11] The Board is inclined to accept the ZA's estimate of how much parking could fit

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[11]Mr. Crews, the Zoning Administrator, testified that by his calculation six (6) vehicles could be legally parked in the rear yard, although he acknowledged some uncertainty about the placement of an exterior fire stair affecting one of those spaces. The Appellant's architect prepared a plan showing that only three (3) angled parking spaces could fit within the rear yard.

within the rear yard: likely between five or six spaces, but certainly more than three.

Applying § 2100.10 to these circumstances, the Board concludes that the Appellant may not, by its proposed construction of an addition to the building, remove the parking spaces required by a prior use, which are, in fact, less than the number which were required by the prior use or required by the Appellant's proposed use. We note in that regard that the ZA has calculated that the Appellant's proposed use would require ten (10) parking spaces, based on the number of teachers in the public charter school.[12]

Contrary to Appellant's view, we find that the limitation of § 2100.5 is irrelevant to our analysis as, in the Board's judgment, no additional parking is being required of the Appellant beyond that already inferred to exist on the subject property based upon its prior use. Appellant's proposed plans violate § 2100.10 by eliminating required parking spaces at the subject property. Even if § 401.1 otherwise applied to this application, the Appellant's application does not comply with the provisions of Chapter 21, which governs parking requirements. On this ground alone, the ZA was obligated to deny the Appellant's request for a building permit and to refer Appellant to this Board for appropriate zoning relief.

Accordingly, it is ORDERED that this appeal is DENIED:

VOTE: __-__-__ (_____, to deny the appeal; _____, to sustain the appeal)

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

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

FINAL DATE OF ORDER: _____, 2007

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.

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[12]In fact, the number of parking spaces required may be more than ten (10) as the ZA based his calculation on the teacher census alone, while the Emergency Rules revised § 2101.1 to includes the number of teachers and other employees.