DISTRICT OF COLUMBIA'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, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs to require Board of Zoning Adjustment "special exception" approval for an addition to an existing building for use as a public charter school in an R-4 Zone District situated at 138 12th Street, N.E. (Lot 820, Square 988).

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HEARING DATES: November 21, 2006

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 (ZA) for the Department of Consumer and Regulatory Affairs 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 and minimum lot area established by the Zoning Commission in emergency rule-making Case No. 06-06 February 13, 2006 (as extended, the "Emergency Rules") and off-street parking.

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 set forth below, the Board finds Appellant's contentions regarding the ZA's decision without merit and accordingly denies the appeal. Further, the Board declines to rule on the Appellant's legal challenge to the Emergency Rules, as the Board lacks jurisdiction to adjudicate the actions of the Zoning Commission.

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 ZA.

BOARD OF ZONING ADJUSTMENT
District of Columbia
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Board of Zoning Adjustment
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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 Appeal. Upon proper motion, the Board granted party status as an intervener to Northeast Neighbors for Responsible Growth, a District of Columbia nonprofit organization ("NNRG"), which consists of persons living in the immediate vicinity of the property having personal knowledge of its historic use.

FINDINGS OF FACT:

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

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

3. The property is improved by a two-story building, 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. On December 27, 1961, a Certificate of Occupancy was issued for a Hospice and Apartment for Director which would have required two parking spaces – one for the office and one for the apartment.

5. On January 29, 1969, a Certificate of Occupancy was issued to the Knights of St. John. Based on the Certificate of Occupancy use, the Knights of St. John required seven parking spaces as determined on the square footage of the building. *See* 11 DCMR §2101.1.

6. The Knights of St. John applied for and received a building permit (Permit No. B185372) 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.

7. After the removal of the storage garage, the Knights of St. John received a building permit (Permit No. B90629) 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."

8. Appellant submitted a building permit application on February 9, 2006, which proposed the use of the subject property for a public charter school for fifty plus pre-school aged students and fifteen staff. Appellant proposes to enlarge the building with a three-story addition that 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 building would have a footprint of 2,491 square feet and occupy

58.8% of the lot area of the property. Appellant's plans provide for three off-street parking spaces at the rear of the property.

9. The rear yard of the property is entirely covered by asphalt and abuts a 30-foot public alley. Entry is secured by a 7-foot chain link fence and a double gate.

10. The ZA testified that the lot could accommodate at least five regulation-size parking spaces.

11. There was testimony from the neighbor who stated that parking in the past has been "stacked" and consisted of approximately nine or ten cars on the lot with spill over parking in the alley.

12. Prior to February 13, 2006, for non-residential structures in the R-4 District, § 401.3 required a minimum lot area of 4,000 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%.

13. Under the Emergency Rules (effective February 13, 2006), the Zoning Commission clarified that public charter school are "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 a minimum lot width of 120 feet for the R-4 District.

14. Emergency Rules were in effect from February 13, 2006 through June 13, 2006. Since the ZA's decision was made on April 28, 2006, the ZA was required to make his decision based on the Emergency Rules in effect at that time. *See* 11 DCMR § 3202.4.

15. The Emergency Rules became permanent September 25, 2006.

16. Section 401.1 states "[e]xcept as provided in chapter 20 through chapter 25 of this title, 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 section 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."

17. 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...."

18. The immediate prior use of the subject property was pursuant to Certificate of Occupancy No. B68565, issued on January 29, 1969, which authorized the Knights of St. John and Women's Auxiliary to use the subject property as a "private club".[1]

19. Section 2101.1 does not specifically list private club so it is classified as all other uses which requires one off-street parking space for each 600 square feet of gross floor area and cellar floor area in all zoning districts.

20. The gross floor area and cellar floor area of the subject property total 4,296 square feet, which would require seven parking spaces for the Knights of St. John.

21. Under § 2100.10 in the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following are required:

> If the existing number of spaces now provided is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced; and
>
> If the existing number of parking spaces now provided is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.

22. Appellant did not provide any evidence or testimony of any "grandfathered" parking credits for the subject property.

23. The Knights of St. John use was non-conforming at the time based on failure to provide required parking.

24. Once the use is changed, the Appellant must comply with the required parking for the new use. Therefore, Appellant must have at least five parking spaces.

25. Under the Zoning Commission text amendment in effect on April 28, 2006, a public school in an R-4 residential district required a lot size of at least 9,000 square feet and a lot width of 120 feet. Appellant has neither.

26. Appellant agrees that it does not comply with the required parking for the existing use. As a result, Appellant would not be able to use § 401.1 to be grandfathered in for the lot

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

size. Appellant's position is an overly broad interpretation of §401.1 and is contrary to the required interpretation.

CONCLUSIONS OF LAW AND OPINION

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. This appeal is properly before the Board pursuant to 11 DCMR § 3100.2.

This Board is required to determine if § 401.1 exempted the Appellant from the Zoning Commission Emergency Rules. First, § 401.1 does not apply because the Appellant is not in compliance with Chapter 20 through 25. Furthermore, the Appellant's challenge to the Zoning Commissions Emergency rules is not properly before this Board. Finally, the Board determines that the Emergency Rules do apply to this property due to the change in use.

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] In adopting the Emergency Rules, the Zoning Commission prescribed a minimum set of development parameters for use as a public school in order to minimize adverse impacts on residential districts.[3]

Appellant maintains it is entitled as a matter of right to enlarge the building structure at the premises. However, the Appellant fails to recognize that a change of use requires compliance with the requirements of the new use.

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.[4] In their deliberations February 13, 2006, when the Emergency Rules were first adopted, the Commissioners accepted and endorsed the argument of the Office of Planning that emergency

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

[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]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".

rulemaking was required, 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.[5]

Furthermore, Appellant's strict reliance and interpretation that it is not subject to the Zoning Commission's Emergency Rules is misplaced. The decision was made when the Zoning Commission Emergency Rules were in affect. The Board does not have jurisdiction over the Zoning Commission and its decision to adopt Emergency Rules. Therefore, it is improper to challenge the legality of the Zoning Commission's Emergency Rules before this Board.

The Board agrees with the Intervener's position that 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 lots covered by § 401.1, have a means to demonstrate an appropriate regard for potential adverse impacts of development on substandard lots.

In addition, the Appellant does not qualify under § 401.1 because the current use does not comply with the requirements of Chapter 21 because only five of seven spaces are available. Appellant only proposes to put three spaces reducing the five available spaces in violation of § 2100.10.

The ZA properly determined that the required number of parking spaces is determined by the use. The measurement is the number of parking spaces regardless of the criteria utilized in the determination of the number of spaces.

From the prior use of the subject property as a "private club", the Knights of St. 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 St. John should have provided not less than seven off-street parking spaces. While the required parking is not designated on the certificate of occupancy, parking is still required.

The Board does credit the testimony of Mr. Herb Faling which proved that the Knights of St. John used the rear yard for parking. The submitted building permits show that the Knights of St. John removed an accessory building and installed a chain link fence with a double gate and paved the entire rear yard in order to provide the required parking.

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

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

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 10 parking spaces, based on the number of personnel in the public charter school.

The Board finds that the limitation of § 2100.5 is irrelevant to the analysis because no additional parking is required beyond the existing parking. Appellant's proposed plans violate § 2100.10 by eliminating existing required parking spaces on the property.

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. Moreover, §401.1 does not apply because the existing building does not comply with Chapter 21.

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.