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August 6, 2007

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Client No.
C 04753-00001

VIA HAND DELIVERY

Mr. Clifford Moy
Secretary of the Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, DC 20001

Re: BZA Appeal No. 17532 — *Appellant's Response to Request For Reconsideration*

Dear Mr. Moy:

I am enclosing for filing in the above-captioned matter the original and 20 copies of the Appellant's Response to Request For Reconsideration.

Thank you for handling this item. Please let me know if you have any questions.

Very truly yours,

Curtis E. Gannon

Curtis E. Gannon

Enclosures

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

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17532
EXHIBIT NO. 48

Board of Zoning Adjustment
District of Columbia
CASE NO. 17532
EXHIBIT NO. 48

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

APPELLANT'S RESPONSE TO REQUEST FOR RECONSIDERATION

Appellant AppleTree Institute for Education Innovation, Inc. ("AppleTree") hereby responds to the request for reconsideration that was apparently filed on August 2, 2007 by ANC 6A ("ANC Request"). Neither AppleTree nor its counsel has yet received a service copy of that request, but AppleTree has reviewed the version of the request and its enclosures that is posted on the ANC's website (at http://www.anc6a.org/ATtoOZreconsiderationRqst.pdf) and wants to assure the Board expeditiously that none of the five grounds mentioned by the ANC warrants reconsideration of the Board's July 25 order in this appeal.

I. The Board Has Already Considered The Effect Of The Zoning Commission's Prior Rulemaking

First, the ANC claims that the Board "failed to consider the clear intent" of Zoning Commission Case No. 06-06 and that the Board's interpretation of section 401.1 of the Zoning Regulations has rendered "a more recently adopted regulation meaningless." (ANC Request at 1.) In Enclosure 3 to its request, the ANC further argues that the Board should rely on "the plain words" of a regulation rather than its legislative history.

This question was squarely confronted by the Board in its opinion, which actually followed the methodology that the ANC supports. The Board correctly determined that the plain words of section 401.1 trump any implicit attempt the Zoning Commission may have made to

supersede them in the case of public schools with ZC Case No. 06-06. Indeed, as the Board's opinion notes (at page 7), Chairperson Mitten herself recognized that the reading advanced by the ANC was beyond the Board's legitimate powers of interpretation.

II. No Error Or Prejudice Occurred In The Recitation Of Parking Standards In The 1973 Edition Of The Zoning Regulations

Second, the ANC claims that paragraph 27 in the Board's findings of fact was not made available before the public hearing in this case in November 2006. The "fact" in question became relevant in light of questions that Board members asked at the public hearing about grandfathering of parking spaces from prior uses (*see*, *e.g.*, BZA Transcript at 318 (Nov. 21, 2006)), and it was included in the proposed findings of fact and conclusions of law that were submitted to the Board by AppleTree—and served on all parties, including the ANC—on January 3, 2007.

More importantly, the "fact" in question is merely a recitation of the catch-all parking-space requirement under the 1973 edition of the Zoning Regulations, which was applicable in 1969. That fact is of course a public one, available to anyone who peruses the prior edition of the Zoning Regulations, and the ANC can hardly claim to have been prejudiced in not having attention called to it before the public hearing.

Finally, although the ANC claims it deserves an "opportunity to dispute this crucial Finding" (ANC Request at Enclosure 4), it has not suggested any way in which it could effectively dispute what the 1973 Zoning Regulations said about parking. The ANC has thus failed to satisfy the requirement in section 3126.4 of the Zoning Regulations that it "state specifically" the respect in which the Board's decision "is claimed to be erroneous." AppleTree does not believe that there is any plausible argument that the Board has misrepresented the parking standards for "a warehouse located in the C-M-1 District" under the 1973 Zoning Regulations.

III. A Recent Rulemaking Has Not Rendered This Case Moot Because It Has Not Yet Become Effective

Third, the ANC argues that the Board's decision has been rendered moot by Zoning Commission Case No. 07-03. But the final rule adopted in that case—in *response* to the Board's decision in this appeal—has not yet been published in the *D.C. Register*. Thus, that rule is not yet effective and was irrelevant to the Board's July 25 opinion. *See* 11 D.C. Mun. Reg. § 3028.9 ("A written order setting forth a final action [of the Zoning Commission] shall become final and effective upon publication in the *D.C. Register*, unless the Commission specifies a later effective date.").

IV. Zoning Approval Need Not Come After Separate Approval By Another Governmental Entity (Here, The D.C. Public Charter School Board)

Fourth, the ANC claims that it has learned a "new fact": that AppleTree has not yet been authorized by the D.C. Public Charter School Board to operate a public charter school at the subject property.

AppleTree's building-permit application and its appeal were based upon its *proposed* use of the subject property as a public charter school. Whether it obtains separate regulatory approval that might be necessary to operate such a school is irrelevant to the legal question whether the Zoning Administrator should have concluded that its building-permit application satisfied the requirements of the Zoning Regulations.

Indeed, the ANC has already brought this issue to the attention of the Zoning Commission, where the Chair correctly explained that "there are numerous occasions where there are multiple layers of licensing," and that the approval or lack of approval by the D.C. Charter School Board "isn't germane to either the Board's or the Commission's consideration" of AppleTree's appeal. Z.C. Transcript at 132–33 (May 14, 2007).

V. Newly Alleged Conflicts Of Interest Indicate No Error In This Case

Finally, the ANC alleges that two Board members "failed to declare conflicts of interest." (ANC Request at 1.) There is no reason to believe that the alleged conflicts would have warranted recusal, provided those members with relevant information outside the record, or in any way prejudiced their ability to be impartial in this case.

With regard to Mr. Etherly, the ANC claims he has a conflict arising from his association with an organization that had opposed the Zoning Commission's rulemaking in Case No. 06-06. Of course, even assuming that position could be imputed to Mr. Etherly himself, a prior position on the merits of that rulemaking by the Commission does not reveal a conflict about the legal issues raised in this appeal before the Board. If it did, Ms. Mitten—who had personally and repeatedly taken positions on Case No. 06-06—would have had to reveal a potential conflict of interest. Her participation in the rulemaking was well known to all the parties in this case, and the fact that she sat on the appeal without question or objection demonstrates that Mr. Etherly's alleged conflict is non-existent.

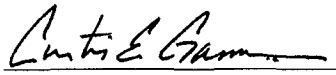
With regard to Mr. Griffis, the ANC objects that he failed to disclose his memberships on two public-charter-school boards who were not parties to this proceeding. The ANC does not suggest that either of those schools would be affected in any way by the result in this proceeding. In light of that, and the fact that Mr. Etherly sat on the case despite his membership on other charter-school boards, any suggestion of a conflict at the hearing would have been fruitless.

CONCLUSION

For the foregoing reasons, the Board should deny the ANC's request for reconsideration.

Respectfully Submitted,

Dated: August 6, 2007



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PROOF OF SERVICE

On August 6, 2007, I sent a copy of the foregoing Appellant's Response to Request for Reconsideration, by first-class mail, to the following:

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