GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17532-A of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require Board of Zoning Adjustment special exception approval for a proposed addition to an existing building to accommodate a public charter school use. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 district at premises 138 12th Street, N.E. (Square 988, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007
RECONSIDERATION DATE: August 17, 2007

ORDER DENYING RECONSIDERATION

By order issued July 25, 2007, the Board of Zoning Adjustment ("BZA" or "Board") granted an appeal by AppleTree Institute for Education Innovation, Inc. ("Appellant" or "AppleTree"), finding that the Zoning Administrator erred in denying AppleTree's application for a building permit on the grounds that the proposed use of the subject property as a public school failed to meet minimum requirements for lot area, lot width, and number of parking spaces. Parties in this proceeding were the Appellant, Advisory Neighborhood Commission ("ANC") 6A, and Northeast Neighbors for Responsible Growth.

By letter dated August 2, 2007, ANC 6A requested reconsideration of the Board's decision on the grounds that: (i) the Board failed to consider the clear intent of Zoning Commission Order No. 06-06, and "failed to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless"; (ii) the Findings of Fact in the Board's order granting the appeal introduced material that was not presented before or at the public hearing; (iii) subsequent Zoning Commission Case No. 07-03 rendered the Board's decision moot, and the Board should set the Order aside; (iv) a new fact was made known to ANC 6A by a letter from Thomas Nida, chair of the Public Charter School Board, who stated that that no school was authorized at the subject property; and (v) two members of the Board failed to declare conflicts of interest.

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On August 6, 2007, the Appellant submitted a response in opposition to the ANC's motion for reconsideration. According to AppleTree, none of the five grounds mentioned by the ANC warranted reconsideration of the Board's Order.

At a special public meeting on August 17, 2007, the Board voted to deny the motion for reconsideration by a vote of 3-0-2.

CONCLUSIONS OF LAW

ANC 6A submitted a timely request for reconsideration of the Board's order in this proceeding. A motion for reconsideration must state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought. 11 DCMR § 3126.4. No request for rehearing shall be considered by the Board unless new evidence is submitted that could not reasonably have been presented at the original hearing. 11 DCMR § 3126.6.

Alleged conflicts of interest. ANC 6A argued that the Board should rehear AppleTree's appeal because two members of the Board failed to declare possibly disqualifying conflicts of interest arising from their participation on the boards of certain charter schools and an organization that had "sought action against the [Zoning Commission's] proposed charter school regulation." According to the ANC, the Board lacked a valid quorum at the decision meeting on January 9, 2007, since two of the four members present allegedly had conflicts that had not been disclosed, giving the parties no opportunity to object to their participation.

In its response, AppleTree asserted that "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." Contrary to ANC 6A's allegation that one Board member had a conflict of interest arising from his association with an organization that had opposed the Zoning Commission's rulemaking undertaken in Z.C. Case No. 06-06, AppleTree argued that, even if the organization's position could be imputed to the Board member, "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." According to AppleTree, the participation of the chairman of the Zoning Commission in both the rulemaking and the appeal – without objection from the parties in opposition – demonstrated that the alleged conflict of interest was "non-existent." With regard to alleged conflicts involving the service of the Board's former chairman on the boards of directors of two public charter schools, AppleTree noted that the ANC did not "suggest that either of those schools would be affected in any way by the result in this proceeding."

The District of Columbia Court of Appeals has held that:

> There is no controlling statute or board regulation governing the disqualification of board members. In order to insulate the administrative process and its decision makers from prejudice and bias, it has generally been recognized that the same

> rules requiring the recusal of judicial officers are applicable to administrative officers who act in an adjudicative or quasi-judicial capacity. . . . In the absence of a statute providing otherwise, a judge must recuse himself when his alleged bias arises from a source outside the "four corners of the court-room," and results "in an opinion on the merits on some basis other than what a judge learned from his participation in the case."

Morrison v. D.C. Board of Zoning Adjustment, 422 A.2d 347, 349 (D.C. 1980) (citations omitted). A legally sufficient claim of personal bias requires that: (i) the facts (alleged) must be material and stated with particularity; (ii) the facts must be such that, if true, would convince a reasonable person that a bias exists; and (iii) the facts must show the bias is personal, as opposed to judicial, in nature. *In re Bell*, 373 A.2d 232, 234 (D.C. 1977); *Vann v. D.C. Board of Funeral Directors and Embalmers*, 441 A.2d 246, 250 (D.C. 1982).

The Board finds no merit in the ANC's claims of potential conflicts of interest on the part of any Board member in this proceeding. Even assuming that the service by two Board members on the boards of directors of other public charter schools was a material fact, ANC 6A did not allege any facts that could show bias or an appearance of impropriety by any Board member arising from that service. There was no affiliation between AppleTree and the other charter schools, and no suggestion that those charter schools would be affected by the Board's decision on AppleTree's appeal. With regard to one Board member's service on the board of directors of an advocacy organization, that board of directors did not discuss or otherwise participate in the Zoning Commission's rulemaking (or in AppleTree's appeal to the Board), and had no knowledge that the organization's director of policy had taken a position on the rulemaking.[1] The Board concurs with AppleTree that the ANC did not demonstrate that the alleged conflicts would have warranted recusal, provided any relevant information outside the record, or in any way prejudiced the Board members' ability to be impartial in this case.

Intent of Zoning Commission. ANC 6A argued that the Board failed to consider the intent of Zoning Commission Order No. 06-06 and "failed to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless."[2] According to the ANC, the Board "sought to avoid the language and intent" of Z.C. Order No. 06-06 "by a reliance not on § 206.1, but instead on only the superseded language of § 401.1," when the Board "should have attempted to reconcile § 206.1 and § 401.1, rather than ignore § 206.1." The ANC asserted that, while the Zoning Commission had "addressed the reality of unsuitable charter school location in

[1] The director of policy for the organization, D.C. Action for Kids, sent an email appeal to similar advocacy groups to encourage them to express an opinion in opposition to the proposed rules governing the location of charter schools under consideration by the Zoning Commission in Case No. 06-06. Consistent with the organization's normal operations, neither the decision to send the email nor its contents was discussed by the organization's board, which had no prior knowledge of the email.

[2] In Z.C. Order No. 06-06, effective December 1, 2006 (53 DCR 9580), the Zoning Commission adopted text amendments to certain sections of the Zoning Regulations affecting public charter schools. Among other things, the amendments changed the definition of "Schools, public" to include charter schools, and amended the building height, lot area, lot width, and lot occupancy requirements for public schools in Residence zones.

residential neighborhoods" in the amendments to § 206.1 adopted in Z.C. Order No. 06-06, the Board "undercuts the stated purpose" of the Zoning Commission "by relying only on § 401.1."

In opposing the motion for reconsideration, the Appellant argued that the issue raised by the ANC was "squarely confronted" by the Board in its Order, in which the "Board correctly determined that the plain words of § 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."

The Board does not agree with ANC 6A that, in making its decision to grant AppleTree's appeal, the Board ignored § 206.1[3] or relied on any "superseded" provision of § 401.1.[4] The two provisions were not in conflict with each other and § 401.1 was not superseded by the amendment to § 206.1, but remained "meaningful on its own terms." *See* Order No. 17532 at 7. As explained in the Order, the Board found that § 401.1 was not ambiguous and was not affected by the amendment to § 206.1. In interpreting the plain meaning of § 401.1, the Board declined to assume that the Zoning Commission's omission to amend § 401.1 in Z.C. Case No. 06-06 was an oversight or to "fix" the Commission's rulemaking so as to give § 401.1 an interpretation arguably consistent with the Commission's intent. By statute, the Board lacks authority to amend any regulation, and would be exercising powers reserved to the Zoning Commission if it exempted any particular use from a regulation whose scope was not limited by the Zoning Commission. *Spring Valley Wesley Height Citizens Association v. D.C. Board of Zoning Adjustment,* 644 A.2d 434, 436 (D.C. 1994). The Board may interpret the meaning of the Zoning Regulations when their meaning is ambiguous or open-ended, but § 401.1 was not ambiguous or open-ended so as to require interpretation. *Draude v. D.C. Board of Zoning Adjustment,* 527 A.2d 1242, 1247 (D.C. 1987). Rather, the interpretation favored by the ANC would have changed the plain meaning of the regulation.

Finding of Fact No. 27. ANC 6A argued that Finding of Fact No. 27[5] in the Board's Order introduced new material not presented to the ANC before or at the public hearing, and that the

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[3] As amended by Z.C. Order No. 06-06, § 206.1 provides:

> Use as a public school that does not meet the requirements of chapter 4 of this title or as a private school, but not including a trade school, and residences for teachers and staff of a private school, shall be permitted as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section.

[4] At the time of the Board's decision in this proceeding, § 401.1 provided:

> 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.

[5] Finding of Fact No. 27 states:

> In 1969, the Zoning Regulations contained a provision specifying that if the parking schedule contained no requirement for a particular structure, that structure was to provide the number of "parking spaces...required for a warehouse located in a C-M-1 District," Zoning Regulations of

"fact" was not discussed at the hearing, so that the ANC had no opportunity to dispute the Finding. According to the ANC, the Board stated "as settled fact a conclusion evidently taken from an AppleTree document not available to [the ANC] for counterargument." In response, the Appellant asserted that the finding in question, which was included in the proposed findings of fact and conclusions of law submitted by AppleTree on January 3, 2007, was publicly available as "a recitation of the catch-all parking-space requirement under the 1973 edition of the Zoning Regulations, which was applicable in 1969."

The Board concurs with AppleTree that Finding of Fact No. 27 did not introduce "new material" that was unavailable prior to the hearing. The Board also agrees with AppleTree that ANC 6A's contention with respect to the finding of fact did not satisfy the requirements for reconsideration, in that the ANC did not state the respect in which the Board's decision was claimed to be erroneous or indicate how the ANC could dispute the Order's statement of the 1973 zoning provision.

Effect of Z.C. Case No. 07-03. ANC 6A asserted that the Board should set aside its Order in this proceeding because the decision was rendered moot by Z.C. Case No. 07-03, in which the Zoning Commission amended § 401.1. In response, AppleTree noted that the Commission's final decision in Case No. 07-03 had not yet become effective as of the date that the Board's order did.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) (quoting *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004)) (other citations omitted). As of August 6, 2007, the date when the BZA order became effective pursuant to 11 DCMR § 3125.9, no notice of final rulemaking amending § 401.1 had been published in the *D.C. Register*. That event did not occur until September 14, 2007 (54 DCR 8971). It was only then that the amendment became effective. As noted, a motion for reconsideration must identify the erroneous aspects of a Board decision. Since no basis existed upon which the Board could have determined that this appeal was rendered moot on or before August 6th, the motion fails on this ground. Whether the Commission's subsequent amendment to § 401.1 negated the Board's ruling as stated in its Order is not for this Board to decide through a motion for reconsideration.

"New" Fact. ANC 6A argued that a new fact was made known in a letter from Thomas Nida, chair of the Public Charter School Board, who stated that that no school was authorized at the subject property. The letter, dated March 2, 2007 and addressed to Councilmember Tommy Wells, stated that: (i) the Public Charter School Board lacks jurisdiction over the AppleTree Institute for Education Innovation, which is a nonprofit organization and a separate legal entity from AppleTree Early Learning Public Charter School; and (ii) the Public Charter School Board

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the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). In 1969, the parking requirement for a warehouse located in a C-M-1 District was one space "for each 2,400 square feet of gross floor area."

had not yet received a petition from the public charter school for approval of a campus at the subject property. In response, the Appellant indicated that its application for a building permit was based on its proposed use of the subject property as a public charter school. The Board concurs with the Appellant that the need for separate regulatory approval to operate a public charter school at the subject property is not germane to the Board's consideration of the zoning issues attendant to AppleTree's building permit application and subsequent appeal. The zoning requirements applicable to a use may be satisfied without reference to any licensing requirements that may also apply to that use.

The Board was not persuaded that the motion submitted by ANC 6A provided sufficient grounds to cause the Board to reconsider its decision to grant the appeal submitted by AppleTree. Having articulated with precision the issues and concerns expressed by the written motion of the ANC, and having explained why it found those issues and concerns unpersuasive, the Board afforded ANC 6A the "great weight" required under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(A)). Accordingly, it is therefore **ORDERED** that the motion for reconsideration is **DENIED**.

VOTE: **3-0-2** (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II voting to deny reconsideration; Carol J. Mitten not present, not voting; one Board member not participating, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 24 2008

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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