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June 12, 2006

Sharon Schellin
Acting Secretary
Zoning Commission
441 4th Street, N.W., Suite 200
Washington, D.C. 20001

Re: Z C Case No. 06-06. Text Amendments—Charter Schools
“Extension of Emergency Rulemaking”

Dear Ms Schellin:

Late last week, the Zoning Commission amended the agenda for its June 12 public meeting by adding a line for Case No 06-06 that referred to an “Extension of Emergency Rulemaking.” I write to address the troubling prospect that the Commission is about to compound the unlawfulness of these rulemaking proceedings by extending the applicability of its emergency rule

The May 10 comment letter submitted by AppleTree Institute for Education Innovation (“AppleTree”) noted that the Commission had failed to describe, as required by D.C. Code and regulations, why emergency action in this rulemaking was “necessary for the immediate preservation of the public peace, health, safety, welfare, or morals.” D.C. Code § 2-505(c); D.C. Mun. Regs. tit. 1, § 311.4(e) (2004). Now—more than 30 days later—the skepticism about the alleged “emergency” expressed by Commissioners Parsons and Jeffries at the February 13 hearing remains justified. We are still aware of no evidence that the emergency rule has affected any pending building-permit application other than AppleTree’s.

Even assuming that there really was an emergency on February 13, the relevant provision of the D.C. Administrative Procedure Act makes perfectly clear that the Commission’s exceptional ability to adopt a rule without notice and comment is carefully limited. In particular, section 2-505(c) of the D.C. Code commands that “No [emergency] rule shall remain in effect *longer than 120 days* after the date of its adoption” (emphasis added). There is no authority under D.C. law for the Zoning Commission to flout the plain intent of that provision by “exten[ding]” the effectiveness of an emergency rule for more than 120 days.

Moreover, to the extent that any “emergency” has persisted for more than 120 days, the continuation of the emergency is a product of the Commission’s own conduct. There is no reason the Commission could not have ensured that a temporary or permanent rule was adopted by now through the usual process required by the Administrative Procedure Act (including the notice-and-comment procedures that were not used by the Commission before its February 13 hearing and do not seem to be contemplated before the so-called “emergency” is extended).

ZONING COMMISSION
District of Columbia
CASE NO. 06-06
EXHIBIT NO. 49

Indeed, the Commission's June 12 meeting will be its *eighteenth* public hearing during the 120 days that the emergency rule was in effect.

The Commission's apparent intention of "exten[ding]" an "emergency" that never existed in the first place is a transparently unlawful attempt to avoid the requirements of the APA. It could place in further jeopardy the entire rulemaking process in this case. *See, e.g., Wheelchair Carriers Ass'n, Inc v District of Columbia*, Civ. Action No. 00-1586 (GK), 2002 U.S. Dist. LEXIS 4617, at *14-15 (D.D.C. Mar. 12, 2002) (holding that an invalid Emergency Rule cannot provide the legal underpinning for a valid Final Rule).

We urge the Commission to acknowledge that the "emergency" rule will expire as a matter of law on June 13. At the very least, the Commission should exempt from the emergency rule's scope any building-permit applications that were filed before the emergency rule became effective.

Respectfully yours,

A handwritten signature in black ink that reads "Russ Williams". The signature is written in a cursive, flowing style.

Russ Williams
Managing Director
AppleTree Institute for Education Innovation

cc: Alan Bergstein, Esq.