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JUN 30 2006

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OPM

June 22, 2006

Mr Stanley Jackson
Deputy Mayor for Planning and Economic Development
1350 Pennsylvania Avenue, NW, Suite 317
Washington, DC 20004

#06-06

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DC OFFICE OF ZONING

Dear Mr Jackson

Thank you for meeting with us and other early childhood education advocates yesterday. It was reassuring to hear the Administration's commitment to early learning programs, and particularly the importance of neighborhood schools for young children. As you left the meeting you indicated concerns with the "emergency" amendments proposed by Planning and passed by the Zoning Commission at their February 13 meeting. For your additional information, I am enclosing 3 letters

- 1 A letter my colleague Jack McCarthy submitted regarding the Office of Planning's proposed action on February 9, 2006. In that letter, we explained why there is no "emergency" justifying the Zoning Commission's decision to outlaw neighborhood schools without engaging in the ordinary course of notice-and-comment rulemaking.
- 2 A letter dated May 10, 2006 to the Zoning Commission reiterating our concern regarding their use of an "emergency" designation with the proposed amendments.
- 3 A letter dated June 12, 2006 to the Zoning Commission questioning the intent to extend the emergency rulemaking when the DC Administrative Procedure Act is clear that "no emergency rule shall remain in effect longer than 120 days."

We remain extremely concerned that the emergency designation was actually designed to stop a particular project (AppleTree's proposed neighborhood school) as Planning did not define why the emergency designation was "necessary for the immediate preservation of the public peace, health, safety, welfare, or morals" as the DC Administrative Procedure Act requires. To this day, neither Planning nor the Zoning Commission have offered a satisfactory explanation for their "emergency" actions, which have served only to impede the education of young children in the District.

Sincerely,



Russ Williams

cc Patrick Canavan, DCRA
Travis Parker, Office of Planning

ZONING COMMISSION
District of Columbia

CASE NO. 06-06
ZONING COMMISSION
District of Columbia
EXHIBIT NO. 59
CASE NO. 06-06
EXHIBIT NO. 59

AppleTree Institute for Education Innovation

400 7th Street, SE
Washington, DC 20003

February 9, 2006

Chairwoman Carol J Mitten
Zoning Commission for the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Chairwoman Mitten

On behalf of the AppleTree Institute for Education Innovation and AppleTree Early Learning Public Charter School ("AppleTree"), I write to urge the Zoning Commission to reject the Office of Planning proposal to amend the treatment of public schools under the Zoning Regulations on an "emergency" basis

There is no "emergency" that compels immediate revisions to the Zoning Regulations. The *only* basis for emergency action cited in the Office of Planning report is that "[t]his text is needed to clear up an existing ambiguity regarding charter schools in the Zoning Regulations." [OP Report, p.7] But there is no such "ambiguity." As the same report recites earlier, "[t]he United States Congress has *mandated* that the District of Columbia *treat charter schools the same as public schools* for the purposes of the Zoning Regulations." [OP Report, pp.1-2 (emphasis added)] Under the Zoning Regulations, public schools for the past 50 years have had "of right" development status; as we have previously explained in letters to Mr. Crews, since charter schools were authorized by federal law in 1996 they have been "public schools" entitled to equivalent treatment for zoning purposes. [Oct. 28, 2005 Letter from Mr. Williams to Mr. Crews, Nov. 21, 2005 Letter from Mr. Perry to Mr. Crews] This has been the law for the past 10 years, and has caused no difficulty in administration

AppleTree's proposed development does not constitute an "emergency". AppleTree has received a charter to operate a school for pre-kindergarten and pre-school children, ages 3-5, and has purchased a commercial property in Northeast to house the school. Today, AppleTree has filed an application for construction permits. Under the Zoning Regulations, those permits should issue as a matter of right. A small group of neighbors and community activists, who object to the use of this property as a charter preschool emphasizing early language and literacy, have made repeated efforts to block this project – going so far as to file a lawsuit against the District of Columbia. It appears that the proposed amendments to the Zoning Regulations are yet another weapon that this small group intends to use to stop our one project, and that the "emergency" designation proposed by the Office of Planning is nothing other than an ill-considered response to a concentrated effort by a small, but influential group, to stop AppleTree from educating children in this neighborhood. But a single school development, which is clearly

permissible under current law—and has been so for 10 years, does not constitute an “emergency” justifying the waiver of procedural rules, particularly where such a waiver would clearly prejudice AppleTree.

Rushing these amendments through is an abuse of the public process We take no position on whether it would be advisable for the Zoning Commission to adopt, on a *prospective* basis, revised Regulations governing *all* public schools That is an important policy question that warrants public comment and debate To date, however, there has been no opportunity for such a process Setting down the proposed amendments in the usual course, without the “emergency” designation, would be a more appropriate, and lawful, course of proceedings Declaring a false and implausible “emergency,” by contrast, would cause irreparable harm to AppleTree, which has adhered to the Zoning Regulations, received approval from the Historic Preservation Review Board, and followed established processes to obtain permits to renovate our property so that it is fit for the education of young children

There is a clear and compelling emergency that *should* guide the Zoning Commission as it considers this matter

- 1 Nine out of every ten District of Columbia fourth graders cannot read with proficiency Seven of every ten cannot read with a basic level of understanding at their grade level. (Source: National Assessment of Educational Progress 2005)
- 2 Over 100 DC Public Schools are failing under the provisions of No Child Left Behind (Source: United States Department of Education)
- 3 One out of every four children enrolled in a DC public school attends a charter school. (Source: Friends of Choice in Urban Schools)
- 4 Five million square feet of space in buildings owned by the District of Columbia Public Schools are unoccupied—yet unavailable to charters as a matter of policy,

The emergency I write about is real and documented by the grim picture of the human toll of an education system that is failing too many. A decision to adopt this report would tell parents who live in our city, pay taxes and send their children to public charter schools that the playing field is unfair by design and that policy makers protect influential special interests at the expense of the obvious, greater good.

This need not be the case. In the final analysis, no harm will result from considering these amendments through the normal processes of the DC Office of Planning and the Zoning Commission Therefore I urge the Zoning Commission to not adopt the text amendments on an emergency basis.

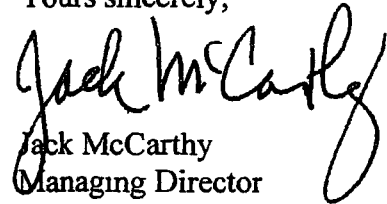
The same special interests that advocate this unnecessary emergency action have already brought an unusual, pre-emptive lawsuit against the District of Columbia that is also intended to deny AppleTree the rights to develop real property for public school uses that other organizations enjoy

We prefer to be aligned with the District of Columbia government in the interest of providing children with the quality public education they are entitled to But, if that isn’t possible—if the Zoning Commission takes the unusual and unjustified step of

adopting these amendments on a rushed basis under the guise of a false "emergency" then we are prepared to exercise our rights and intend to point out the abuses that this Administration used to shut down a small public charter preschool for reasons that cannot be justified by any objective measure

In light of the foregoing concerns, the Office of Planning's failure to identify any legitimate "emergency" in its report, and the fact that the "emergency" designation appears to be directed solely at AppleTree's proposed school development, AppleTree respectfully requests an opportunity to be heard on this issue at the public meeting on February 13, 2006.

Yours sincerely,



Jack McCarthy
Managing Director

Copies to

Anthony J Hood, Vice Chair, DC Zoning Commission
Gregory N. Jeffries, DC Zoning Commission
John G Parsons, DC Zoning Commission
Michael G Turnbull, DC Zoning Commission
Honorable Anthony Williams, Mayor
Honorable Sharon Ambrose, Councilmember Ward 6
Honorable Kathy Patterson, Councilmember Ward 3
Greg McCarthy, Deputy Chief of Staff for Policy and Legislative Affairs
Patrick Canavan, Director, DCRA
Ellen M McCarthy, Director, Office of Planning
William Crews, Zoning Administrator
Jerrily Kress, Office of Zoning
Sharon Schellin, Office of Zoning
Deborah Gist, DC State Education Office
Andy Saindon, Office of the Attorney General
Thomas Nida, DC Public Charter School Board
Robert Cane, Friends of Choice in Urban Schools
Joseph Bruno, DC Public Charter Schools Association

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May 10, 2006

Ms Sharon Schellin
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

Dear Ms. Schellin:

On behalf of the AppleTree Institute for Education Innovation (“AppleTree”), I write to comment on the Commission’s Notice of Emergency and Proposed Rulemaking dealing with Charter Schools. This written comment supplements testimony that will be given by AppleTree representatives at the Commission’s May 11 public hearing.

In particular, I write to object to the “emergency” designation that the Commission invoked at its February 13, 2006 meeting—a designation that has recently been cited by the Zoning Administrator as the basis for denying a building permit application submitted by AppleTree. The Commission did not permit public comment on the “emergency” designation, and it was clear then, and is even clearer now, that there was no “emergency” justifying immediate implementation of the proposed amendments. Rather, a key part of the “emergency” designation appears to have been designed for the sole purpose of denying a single permit: AppleTree’s.

Background

AppleTree is a D C -based, non-profit organization that is working to provide accelerated early language and literacy programs to the thousands of underserved preschoolers in Washington, D.C., to raise the trajectory of their future learning success. We have developed a high quality early literacy program that we believe will help close the achievement gap and break the cycle of poverty in Washington, D.C. Our vision is that students from all backgrounds should enter first grade able to read and ready to succeed. We already operate a public charter school in South West that serves pre-school and pre-kindergarten children, ages 3-4, and we have received approval from the District of Columbia Charter School Board to open another location for that school.

Last summer (after consulting with District officials about relevant zoning and construction restrictions), AppleTree purchased a property at 138 12th Street, N.E. The property

is zoned R-4 and is located on a block comprising mostly row houses, but the building that AppleTree owns has not been used for residential purposes since it was built more than 90 years ago

We believe the building is well suited for our school, and we hope to renovate it soon so that it will be able to accommodate about 50 pre-school and pre-kindergarten students. (Our planned renovations would expand the back of the building so that it would be as deep as the shallowest of its two neighbors and would also add a third story not visible from the street.) In October, we began discussing our plans with members of the community. Between October 25, 2005 and early December we attended an ANC6a Zoning Committee meeting, a full ANC6a meeting and two meetings of the Capitol Hill Restoration Society's Historic Preservation Committee. On December 15, the D.C. Historic Preservation Review Board voted 9-1 to approve AppleTree's plans.

Meanwhile, however, acting at the request of ANC Commissioner Cody Rice, Zoning Administrator Bill Crews departed from nearly ten years of settled practice and determined that he was unsure whether charter schools are "public schools" under the Zoning Regulations. Up until that point, no such doubts had ever posed an obstacle for the *more than 50* charter schools operating in the district as "public schools"—sometimes with the express approval of prior Zoning Administrators or Acting Zoning Administrators. But a vocal group of AppleTree's neighbors had obviously inspired an effort to prevent us from using the Zoning Regulations as they existed when we bought our building, when we received approval from the Historic Preservation Review Board, and when we applied for a building permit.

A group purporting to represent AppleTree's neighbors even filed a lawsuit in Superior Court on February 2, arguing that the District Government could not issue a building permit to AppleTree until the Zoning Commission and the Board of Zoning Adjustment ruled on AppleTree's permit application and until the Zoning Commission had ruled on the emergency rulemaking. At that point, AppleTree had not applied for a building permit and the Office of Planning *had not even issued its setdown report*. Yet the papers in the lawsuit predicted that the Commission would issue the new rules on February 13, 2006.

AppleTree filed its building permit application on February 9. On February 13, the Commission considered the Office of Planning's Setdown Report and adopted portions of it on an emergency basis, including provisions that would dramatically increase the minimum-lot-area and minimum-lot-width requirements that generally apply to public schools in R-1 to R-5 zone districts.

Despite the rushed emergency designation, it took the Zoning Administrator several weeks longer than the presumptive 30 days to deny AppleTree's pending application, claiming that it did not comply with the new minimum-lot-area and minimum-lot-width requirements (as

well as a parking requirement) adopted as part of the emergency rulemaking. We intend to appeal that denial to the Board of Zoning Adjustment.¹

Discussion

We believe that other commenters will describe in detail why the proposed amendments are bad public policy that contravenes the letter and the spirit of the charter school laws passed by both Congress and the District of Columbia Council. AppleTree expects in particular that the submissions or testimony by the Friends of Choice in Urban Schools and the Center for Education Reform will explain the flaws in the proposed amendments and the deleterious impact they would have on public school education in the District.

Even if the Commission determines to adopt the proposed amendments, or some variant thereof, on a permanent basis, AppleTree respectfully submits that such amendments should be applied only *prospectively* to permit applications filed after their adoption. The balance of this submission will explain why this is so.

At the February 13 hearing, Mr. Bergstein of the Attorney General's office raised "the procedural question as to whether or not [the Commission] would want this emergency [amendment] to apply to or not apply to persons which have applied for building permits before DCRA, absent some saving language." 02/13/06 Tr. 18:13-17 (attached as Exhibit A). That question, which was well posed then, was never answered by the Commission on February 13. It should be answered before any of the proposed amendments are finally adopted. And the right answer is that the proposed amendments, if adopted, should *not* apply to any person or entity with a permit application on file *before* February 13, 2006.

The Zoning Commission should address this issue because the Zoning Administrator has taken the position that the "emergency" amendment made to the zoning regulations on February 13 "was effective immediately and applies to all pending applications on the date the text amendment was adopted." Letter from Bill Crews, Zoning Administrator, to Russ Wilhams, Managing Director, AppleTree, *Re: 138 12th Street, N.E.* (Apr. 28, 2006) (attached as Exhibit B). If the "emergency" designation was incorrectly applied, however, the amendments would not become effective until after final adoption and publication. D.C. Code § 2-505(a) (2001). And it is abundantly clear that there was no "emergency," within the meaning of the D.C. Administrative Procedure Act, on February 13 or thereafter.

¹ As AppleTree explained to the Zoning Administrator, and as it will explain to the BZA, in light of sections 401.1 and 2100.5 of the Zoning Regulations, its permit application does not fail to meet the terms of the Zoning Regulations, even with the emergency text amendments in effect. Nevertheless, AppleTree submits this comment and opposes the Commission's rulemaking out of an abundance of caution and a firm conviction that the rulemaking is, from a procedural standpoint, irreparably flawed and, from a substantive standpoint, bad public policy and inconsistent with the manifest intent of the Public Charter Schools Act.

A court reviewing the Commission's use of the "emergency" exception to bypass the ordinary requirements of notice-and-comment rulemaking will carefully scrutinize the record to ensure that an "emergency" actually existed and was adequately documented at the time. *See, e.g., Wheelchair Carriers Ass'n, Inc. v. District of Columbia*, Civ. Action No. 00-1586 (GK), 2002 U.S. Dist. LEXIS 4617 (D.D.C. Mar. 12, 2002) (holding that there was no "prospect of government-wide financial instability" and therefore no justification for emergency rule, which in turn required invalidation of final rule); *see also* D.C. Code § 2-505(c) (defining emergency as requiring "the *immediate* preservation of the public peace, health, safety, welfare, or morals") (emphasis added); D.C. Mun. Regs. tit. 1, § 311.4(e) (2004) (requiring notice of rulemaking to contain a "statement giving the justification for emergency rulemaking action which clearly explains why the action is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals"). Under that standard, the Commission's invocation of its "emergency" power on February 13 was clearly *ultra vires*.

The staff report on which the Commission acted on February 13 contained a single paragraph regarding the "emergency" nature of the proposed amendments. It recommended that the rule be made effective immediately because "[t]his text is needed to clean up an existing ambiguity regarding charter schools in the Zoning Regulations. . . . and clarify the guidelines for public school buildings." Office of Planning, Setdown Report at 7 (attached as Exhibit C). Of course, cleaning up the ambiguity applied only to the amendment to section 199.1 (expressly including charter schools within the definition of public schools), not to the attempts to change the sizes of the lots where charter schools would be allowed to locate, which could not be characterized as attempts to "clarify" the rules, because they were transparently intended to *change* the rules significantly.

At the Commission's February 13 hearing, no members of the public were permitted to comment on the "emergency" designation, even though it was not clear to several members of the Commission what the "emergency" was. *E.g.*, 02/13/06 Tr. 21:13-17 (Commissioner Parsons: "I'm not convinced I understand the emergency here. . . . What is the citywide emergency . . . ?"); *id.* at 37:9-11 (Commissioner Jeffries: "I'd like to feel that there's an emergency. And I'm not quite feeling it."). The staff again offered the ostensible rationale about "clarify[ing] the guidelines," *id.* at 17:3-6, which still meant *changing* the rules. They also suggested that schools needed to be given "as much advance notice" of potential changes as possible. *Id.* at 37:4. Still, this did not identify or explain the "immediate" threat to "the public peace, health, safety, welfare, or morals." D.C. Code § 2-505(c).

Similarly, the Notice of Emergency and Proposed Rulemaking purported to identify two rationales for the "emergency" adoption of the amendments on February 13: (1) that "immediate action is required to . . . permit these new Charter Schools to be constructed by the start of the next school year," and (2) that "the immediate proliferation of Charter Schools in residence districts has the potential for adverse impacts." 53 D.C. Reg. 2017, 2017 (Mar. 17, 2006). Again, the permission required by the first rationale would be contained in the modifications to section 199.1, not the additional changes the Commission adopted. Moreover, the Commission did not identify any evidence in support of (or reason to believe) its second rationale that there would be an "immediate proliferation of Charter Schools in residence districts." The suggestion in the notice of "adverse impacts" was so general as to be meaningless. It did not even give lip service to the notion that the unspecified "adverse impacts" were potentially so severe as to pose

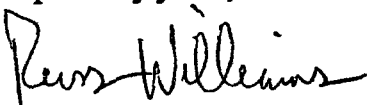
an “immediate” threat to “the public peace, health, safety, welfare, or morals.” Such vague, *post hoc* rationalizations do not satisfy the D.C. Code or the regulation governing emergency rulemaking notices, and thus could not survive judicial review.

In truth, the so-called “emergency” appears to have been manufactured by opponents of school choice to stop one project—AppleTree’s—from proceeding. For nearly a decade, charter schools had been considered public schools under the existing Zoning Regulations, which allowed them to locate as a matter of right in residential districts so long as they complied with the relevant height, area, and density regulations. No hint of a problem (much less a citywide emergency) existed until AppleTree began the process of seeking approval for its remodeling plans.

It is the essence of arbitrary and capricious government action to retrospectively change the rules of the game. The unsupportable “emergency” designation raises serious constitutional concerns. Legislation presumptively operates only prospectively in order to avoid upsetting settled expectations. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-73 (1994). The “emergency” designation does away with that presumption, giving rise to potential claims against the District under the Takings and Due Process Clauses. *See, e.g., Shenk v. Zoning Comm’n*, 440 F.2d 295, 297 (D.C. Cir. 1971).

To the best of our knowledge, the “emergency” designation has affected only one pending application. In light of that impact, AppleTree would, if necessary, be fully prepared to challenge the rulemaking in court. But if the Commission does not decide to reject the emergency and proposed amendments on a permanent basis, the more efficient course for the Commission, the District Government at large, and the community, would be simply to lift the “emergency” designation, apply only prospectively any amendments that the Commission elects to adopt, and allow AppleTree’s application to be processed under the regulations that were in effect on its filing date.

Respectfully yours,



Russ Williams
Deputy Managing Director
AppleTree Institute for Education Innovation

cc: Andrew J. Saindon, Esq.
Alan Bergstein, Esq.

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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)

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