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April 19, 2007

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

Re: Z.C. Case No. ~~07-03~~: Text Amendment to Minimum Lot Dimensions in Residential Districts

Dear Ms. Schellin:

At the Zoning Commission's April 5 public hearing about Case No. 07-03, Chairperson Mitten explained that this potential amendment to section 401.1 of the Zoning Regulations grows out of the appeal to the Board of Zoning Adjustment by AppleTree Institute for Education Innovation (BZA Case No. 17532), in which the BZA has voted to apply section 401.1 in a situation involving a change in use, but in which no written decision has yet issued. A few days later, at the Commission's April 9 public meeting, Chairperson Mitten indicated that she would be asking the Commission to exercise *sua sponte* review of a completely separate aspect of that BZA decision (involving parking spaces) once the ruling is formally released. I have already written to urge the Commission not to approve the proposed text amendment in Case No. 07-03.

I now write to advise the Commission that, if it is going to propose and adopt a rulemaking in this matter, it should modify the text amendment slightly in order to prevent the underlying BZA appeal from being mooted or nullified.

AppleTree's BZA appeal has its roots in last year's emergency rulemaking involving public schools (Z.C. Case No. 06-06). AppleTree filed an application for a building permit on February 9, 2006. A few days later, the Commission adopted an emergency text amendment that significantly increased the minimum lot area and lot width generally required for public schools in R-4 and other residential areas. When the Commission considered the emergency text amendment, Mr. Bergstein, from the Attorney General's office, raised "the procedural question as to whether or not [the Commission] would want this emergency [amendment] to apply or not apply to persons which have applied for building permits before DCRA, absent some saving language." 02/13/06 Z.C. Tr. 18:13-17. That question was well posed, but never answered.

Several months later, the Zoning Administrator denied AppleTree's building-permit application, rejecting AppleTree's argument that section 401.1 exempted it from the lot-width and lot-area requirements in the emergency text amendment. The BZA's impending ruling is expected to reject that reading of section 401.1. (Although Chairperson Mitten dissented from

ZONING COMMISSION
District of Columbia

ZONING COMMISSION
District of Columbia
CASE NO. 07-03
EXHIBIT NO. 14

the BZA's decision, she dissented on a separate issue involving parking spaces; in the statement delivered at the BZA's January 9, 2007 meeting, she did not dissent from this reading of section 401.1, on the basis of its current text. *See* 01/9/07 B.Z.A. Tr. 60:21-22.)

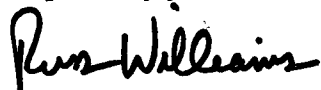
Depending on the outcome of the Commission's expected *sua sponte* review and any subsequent appeal of that decision, AppleTree may or may not ultimately prevail in its appeal. But, if the Commission is going to amend the text of section 401.1, it should also act to protect the ultimate result of AppleTree's appeal for the parties themselves (and help ensure that they have the incentive to pursue the case to a logical conclusion). The Commission may achieve that laudable end by doing what Mr. Bergstein suggested more than a year ago in the predecessor rulemaking: adopting a savings clause that would exempt certain pending applications from the operation of Case No. 07-03. The Commission could, for example, add an additional sentence to the end of revised section 401.1 reading as follows:

The second sentence of this subsection does not apply to any project for which an application for a building permit was pending before the Zoning Administrator or on appeal before the Board of Zoning Adjustment on [DATE X].

In this instance, "DATE X" could be the date of last year's original emergency rulemaking about public schools (February 13, 2006), or the date the final rule in that proceeding was adopted (September 25, 2006), or the date it became effective (December 1, 2006), or the date that the BZA voted on AppleTree's appeal (January 9, 2007), or the date that Case No. 07-03 was set down by the Commission (February 12, 2007).

Any of those dates would ensure that no party was able to take unfair advantage of the BZA's decision about section 401.1, and would still establish the common-sense proposition that AppleTree — a non-profit organization that has spent more than a year diligently pursuing a building permit — will be able to receive whatever benefit flows from the ultimate outcome of its appeal.

Respectfully yours,



Russ Williams
Deputy Director
AppleTree Institute for Education Innovation

cc: Neil Albert, Deputy Mayor for Planning and Economic Development
Peter Nickles, Office of the General Counsel