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VIA FACSIMILE (202 727 6072) AND U.S. MAIL

Sharon Schellin
Secretary to the Zoning Commission
Office of Zoning
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:

I write to comment on the Zoning Commission's proposed rulemaking in Case No. 07-03, 54 D.C. Reg. 5331 (May 25, 2007). I represented AppleTree Institute for Education Innovation in the BZA appeal that — according to Chairperson Mitten's explanation at the Commission's April 5, 2007 public hearing — led to this rulemaking (BZA Appeal No. 17532).

If adopted, the proposed rule would effectively overturn the construction of section 401.1 of the Zoning Regulations that ***the BZA unanimously adopted*** at its January 9, 2007 meeting. (Chairperson Mitten dissented on a different ground, related to the number of parking spaces, *see* BZA Transcript at 60-61 (Jan. 9, 2007), and has publicly indicated her intention to seek *sua sponte* review by the Commission of the parking question.)

At its May 14 public meeting, the Commission considered AppleTree's request to add a savings clause specifically tailored to 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, while still ensuring that no party is able to take unfair advantage of the BZA's decision about section 401.1.

Chairperson Mitten initially indicated that there is no need for such a savings clause, because she "always had understood" that an application would be judged based on the "text and map" that were in place at the time of the application. Z.C. Transcript (May 14, 2007). In other words, she assumed as a matter of course that the rulemaking would apply on a general basis, but not to AppleTree's long-pending proceeding. She did not, however, account for the technicality that, in AppleTree's case, the original permit application was denied by then-Zoning Administrator Bill Crews, and, although the application is now more than 16 months old, it has still not been granted.

When informed of this, Chairperson Mitten indicated that she did not think that AppleTree should be able to rely on a "loophole" that "existed because of an oversight" by the Zoning Commission. It is not accurate, however, to characterize the current form of section 401.1 as an "oversight." The relevant portion of section 401.1 is essentially unchanged since the 1958 Zoning Regulations. Like countless other prior applicants, AppleTree relied on section 401.1, and cited it, in its February 2006 application.

More importantly, the Zoning Commission and the Office of Planning have long known about AppleTree's straightforward reading of section 401.1. As AppleTree explained in a March 6, 2006 letter:

> Although AppleTree's lot . . . would not appear to satisfy [the new minimum lot size requirements in the emergency rulemaking in Case No. 06-06], it is exempted from them by the operation of § 401.1. . . . ***The emergency rulemaking did not purport to alter § 401.1.*** As the Board of Zoning Adjustment explained in one of its 2002 decisions, that provision "means that a replacement for a pre-1958 building on a nonconforming lot is permitted so long as it meets all zoning requirements 'other' than lot width."

Z.C. Case No. 06-06, Exh. No. 5 at 2 (March 6, 2006) (emphasis altered; citation omitted); *see also* Z.C. Case No. 06-06, Exh. No. 18 at 3 n.1 (May 10, 2006) ("as [AppleTree] 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").

Because AppleTree fully explained its reading of section 401.1 to the Commission more than 15 months ago, and because the BZA has now unanimously agreed with that reading, I urge the Commission not to penalize AppleTree due to the fact that the Zoning Administrator originally denied rather than granted AppleTree's permit.

To avoid that pernicious effect — and also reduce the threat that the Commission itself might be deprived of the ability to conduct a *sua sponte* review of the important parking issue in AppleTree's appeal — I suggest that the Commission should postpone its final decision in Case No. 07-03, to allow time for a permit to be granted, ***or*** should adopt the minor amendment proposed in the comment letter filed by Russ Williams on April 19, 2007. In short, the Commission could 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 any date that would protect the final outcome of AppleTree's long-pending appeal: for example, the date of last year's original emergency rulemaking about public schools (February 13, 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).

The Commission routinely acts to prevent rule changes from having drastic effects on pending projects, and it should do so in this instance as well.

Very truly yours,

Curtis E. Gannon

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