

District of Columbia Government  
Advisory Neighborhood Commission 6A  
Box 75115  
Washington, DC 20013



September 24, 2007

Chairman Vincent C. Gray  
Council of the District of Columbia  
1350 Pennsylvania Avenue, N.W  
Suite 504  
Washington, D.C. 20004

Chairman Gray:

At our regularly scheduled public meeting on September 13, 2007, with a quorum present, our Commission voted to recommend the Council of the District of Columbia oppose the nomination of Mr. Curtis Etherly to the Zoning Commission. Reference PR 17-328, Zoning Commission for the District of Columbia Curtis L. Etherly, Jr. Confirmation Resolution of 2007 September 26, 2007.

Let us preface our remarks by stipulating that Curtis Etherly has been generous in donating his time for the good of the city and Ward Six through educational initiatives. Our opposition is based on key rulings regarding condominium conversion and charter schools as well as conflict of interest and public meeting notice requirements during his tenure on the Board of Zoning Adjustment (BZA).

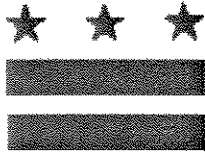
We believe in our Councilmember's vision for Capitol Hill – we want a “livable and walkable” community, one where development interests are weighed equally against residential interests. In that test, Etherly fails and his nomination should be rejected for the following reasons:

**Public Meeting Transparency.** In his role as Vice Chair of the BZA, on August 9, 2007, the Board of Zoning Adjustment (BZA) notified our Commission via electronic e-mail of a public meeting on August 16, 2007, to rule on an appeal filed by our Commission regarding BZA Order #17532 regarding AppleTree Institute for Education Innovation's attempt to construct a charter school at 138 12th Street, NE. On August 16, 2007, BZA notified our Commission that the public meeting would be delayed one day to August 17, 2007.

We believe these hastily scheduled August BZA meetings violated the following:

- (1) Section 13(a)-(c) of the Advisory Neighborhood Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code Section 1-309.10(a)-(c)(collectively, the ANC Act) sets forth that proposed government action for which ANCs are to receive thirty (30) days advance written notice.
- (2) Title 11, Chapter 31 Board of Zoning Adjustment Rules of Practice and Procedure, Section 3124.3 that states notice of further hearing shall be forwarded to any party who participated in the earlier proceedings or to representative parties at least ten (10) days prior to the date set for further hearing.

By calling for a meeting instead of a hearing as required by Title 11, BZA skirted the requirement to provide a 10-day public notice to our Commission. According to Title 11, for post-hearing procedures, which applies to all appeals and applications filed with the BZA, notice of further hearing shall be forward to any party who participated in the earlier proceedings at least (10) ten days prior to the date for



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a future hearing. So, despite the initial seven day notice that failed to adhere to either the ANC Act or Title 11, the one day notice to change the meeting from a Thursday to a Friday is as equally problematic and certainly not in the spirit of an open, transparent city board or commission.

Setting aside how many days notice should have been provided, our appeal of the BZA order qualifies as a post-hearing procedure. We obtained new facts relevant to the case and according to Title 11, we were entitled to a hearing -- not a meeting -- to present those facts. To be clear, a meeting offers no opportunity for the Commission to testify. A BZA meeting does not allow anyone to address the board. By using a meeting, BZA did not follow the stated procedures to dispose of an official appeal of an order in both terms of notice and testimony.

Accordingly, our Commission has requested the Office of Inspector General (OIG) to investigate whether or not BZA complied with the ANC Act and Title 11, Chapter 31. We have received confirmation that OIG is investigating the BZA action (please see attachment #1 - BZA impropriety). At a minimum, Etherly's confirmation hearing should be delayed until the OIG has finished their investigation and issued their report.

**Conflict of Interest.** Etherly failed to recuse himself from participation in the Board of Zoning Adjustment (BZA) hearing and vote on AppleTree Institute's appeal of the decision of the Zoning Administrator (BZA #17532).

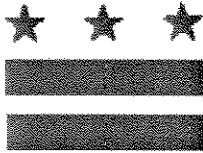
The accepted standard for recusal is that a judge shall recuse himself in any proceeding in which his impartiality may be reasonably questioned. The failure to recuse himself strikes at the core of public belief in the ethical action of the City's boards and commissions.

Etherly appropriately disclosed that he was on the Board of Washington Mathematics, Science and Technology Public Charter High School, a charter school, and our ANC did not object to his participation because of that affiliation. He failed, however, to disclose his board membership with DC Action for Children (DCAC), an organization that opposed the Zoning Commission's rules regulating charter schools in residential neighborhoods.

Etherly set a high standard for himself in a restaurant hearing before the BZA. He stated that he was recusing himself to enable the BZA to "...remain above any concerns regarding political posturing or favoritism.... (to) ...assure the integrity of this proceeding...".

Etherly failed this high standard in BZA #17532. His organization, DCAC, had joined in writing letters to the Zoning Commission (ZC) in opposition to the Commission's consideration of changes to regulations that would prohibit charter schools from locating on inadequate lots (Exhibit 90 of the ZC file on Case #06-06, see attachment 2). The director of DCAC also sent a message out to the organization's listserv (see attachment 3), calling for letters and other actions to prevent the ZC's adoption of these new regulations. These are matters that inevitably come before the BZA, should the regulations proposed by the Office of Planning be adopted by the ZC.

As a DCAC Board member, it is difficult to believe that Etherly did not know of the organization's actions on a matter of such importance to the charter school community; that the letter on behalf of DCAC sent to the ZC did not circulate to him; or that he did not read his organization's listserv or any email from DCAC on this topic directly addressed to him. He was either aware of DCAC's lobbying



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effort or failed to disclose, or he was amazingly inattentive to his responsibilities as a DCAC Board member.

Etherly's membership on the board of an organization lobbying the Zoning Commission is an obvious conflict of interest. His failure to disclose his board membership in this case to all of the parties for discussion was a fundamental administrative error. Had we known this at the time, we would certainly have objected to his participation in the BZA hearing or vote. He cannot both advocate against the adoption of Zoning Commission regulations, and be impartial about the administration of those regulations.

Etherly's participation was also a violation of the city's conflict of interest requirements for employees. Members of the BZA are employees since they receive \$6,000 per year compensation from the city.

The BZA's Chair, Ruthanne G. Miller, stated on August 17, 2007, that "...here (sic) is no controlling statute or Board regulation governing the disqualification of Board Members". We believe that is wrong in fact, yet points to a severe inadequacy in the Board's own rules. As a matter of policy, the BZA, or the City Council on behalf of the Board, should adopt a firm bright-line standard for dealing with conflicts of interest.

The City's conflict of interest regulation reads in pertinent part:

"DC Personnel Regulations, Chapter 18, Part I, 1804.1: An employee may not engage in any outside employment or other activity which is not compatible with the full and proper discharge of his or her duties and responsibilities as a government employee. Activities or actions which are not compatible with government employment include, but are not limited to, the following:

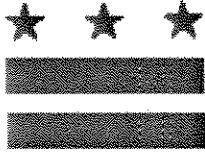
(d) Maintaining financial or economic interest in or *servicing (with or without compensation) as an officer or director of an outside entity if there is any likelihood that such entity might be involved in an official government action or decision taken or recommended by the employee;*"

We believe Etherly and any other person empowered as a Board member or Commissioner should be required to disclose to all parties in administrative hearings any fiduciary relationship or any membership in organizations which advocate on matters relevant to measures under consideration by their Board or Commission. It should be a requirement of their appointments.

Regulation 1804.1 was not followed in this case by Etherly and, as previously shown, he did not follow the normal standard for recusal. Accordingly, on this point alone, we must challenge Etherly's appointment to the Zoning Commission and ask you not to confirm him to serve.

Notwithstanding the two issues above that speak to transparency and accountability during to Etherly's service on BZA, our Commission has serious reservations regarding his views on key zoning regulations that negatively impact the vision of a livable and walkable community.

**Condominium Conversions.** Etherly's support of the appeal in BZA 17468 essentially stated that any contractor can expand a "non-conforming" use, without the required special exception public hearing, as long as the building was built prior to 1958. The case at hand dealt with a developer buying a three unit apartment and converting the building into a six unit condominium without the required minimum lot area conversion requirement of 900 square feet per apartment or condominium. Etherly's support for this



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order allows any developer to buy an older building and add as many units as the market will bear. This negatively impacts a “livable” community because this type of unchecked development places sanitation, utility and infrastructure requirements that many of our residential streets can not withstand. As a result, our ANC had to appeal our case to the Zoning Commission over the course of 18 months to have this decision overturned. The final Zoning Commission order to reverse the Etherly supported decision was published September 14, 2007 (ZC Case No 06-47).

**Charter Schools.** In BZA Case #17532, Etherly voted with the majority to allow a public charter school to be developed in an R-4 zoned district as a matter-of-right. In this case, AppleTree applied for building permits under the exception of a public school. However, charter schools do not fall within that description of the zoning regulations. Prior to Etherly voting in BZA Order #17532, the Zoning Commission issued two orders to clarify the zoning text. First, ZC Order 06-06 to clarify the fact that public charter schools do not qualify as matter of right development in an R-4 zoned district. Second, ZC Order 07-03 was issued to clarify the lot area and width requirements for buildings being converted for a use that would require more lot area and lot width than in on the building lot. Despite these ZC orders, Etherly voted to allow AppleTree Institute to apply for permits to build a public charter school *without* requiring a special exception hearing that would trigger a formal public review process.

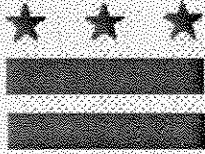
The only saving grace from Etherly’s decision is that ZC #07-03 was published in the DC Register on September 14, 2007, before the Department of Consumer and Regulatory Affairs issued the final permits to AppleTree Institute. As ZC #07-03 order overturns BZA Order #17532, the negative impact to placing a public school in the middle of a residential street has been averted. However, Etherly’s position was completely refuted by the Zoning Commission. While a large victory for our community in this case, confirming Etherly to serve on the Zoning Commission causes great concern for those that have witnessed first hand his views on residential and commercial development.

In close, based on his decisions that set precedents for developers to avoid applying for special exceptions and the recent conflict of interest and transparency challenges, we ask the Council of the District of Columbia, at a minimum, to delay the confirmation hearing for Mr. Curtis Etherly to serve on the Zoning Commission scheduled for September 26, 2007, until the OIG report has been issued. Absent that delay, we strongly oppose the Etherly nomination and would encourage the Council to do the same.

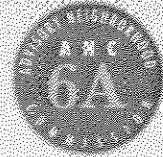
On behalf of the Commission

Joseph Fengler, Chair  
Advisory Neighborhood Commission 6A

Cc: District of Columbia Councilmembers



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Attachment #1

----- Original Message -----

From: Sean McCaney <sean.mccaney@dc.gov>  
To: Fengler6a02@yahoo.com  
Sent: Tuesday, August 28, 2007 3:50:05 PM  
Subject: BZA impropriety

August 28, 2007

Joseph Fengler  
[Fengler6a02@yahoo.com](mailto:Fengler6a02@yahoo.com)

Dear Chairman Fengler:

This correspondence will acknowledge receipt of your August 21, 2007, electronic mail message requesting that this Office review the propriety of a meeting conducted by the Board of Zoning Adjustment.

Your request has been forwarded to the Audit Division of this Office for review and action, as appropriate.

Please be advised that our investigative files are not public documents, and we do not provide updates regarding ongoing investigations or unsolicited resolution reports once our cases have been resolved. However, if you wish to obtain the status of a case, you may obtain documentation from the investigative files by making a D.C. Freedom of Information Act (FOIA) request pursuant to D.C. Code §§ 2-531 to 2-539 (2001). You should address your FOIA request to:

**ATTN: FOIA Officer**  
The D.C. Office of the Inspector General  
717 14<sup>th</sup> Street, N.W. , Fifth Floor  
Washington , D.C. 20005

A response to this electronic mail message is not necessary.

I hope this information is helpful to you. If we may be of further assistance, please do not hesitate to contact this Office. Thank you for bringing this matter to my attention.

Sincerely,

Charles J. Willoughby  
Inspector General

CJW/sm

September 15, 2006

Zoning Commission  
Attn: Sharon Schellin, Secretary  
441 4<sup>th</sup> Street, NW, Suite 200 South  
Washington, DC 20004

SEP 15 2006 2:51

ZONING COM  
District of Columbia

CASE NO. 06-06

EXHIBIT NO. 90

Dear Ms. Schellin:

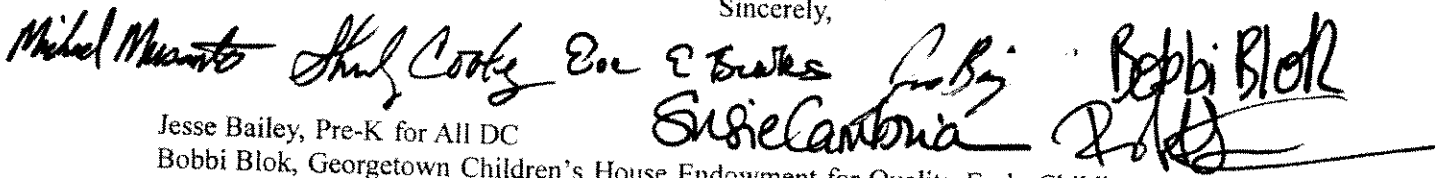
Zoning Commission case 06-06 is a deeply flawed proposal that would dramatically change the ways that small schools and early education centers could operate in the District. We collectively advise the Zoning Commission not to adopt it as a final rule because greater care should be taken to accommodate the interests of affected stakeholders. We believe the Office of Planning could, and should, improve the proposal by engaging in outreach efforts that would enable *all* affected communities — not just the special interests who initiated these changes — to provide input. Given the city-wide impact of this rulemaking, and the tensions it will create with existing education policy, anything less would bring into question the integrity of D.C.'s rulemaking processes. Taking action on this proposal later this month would exacerbate the disturbing pattern of rushing this flawed proposal through the administrative process to the detriment of families and children in the District.

We strongly oppose the adoption of ZC Case No. 06-06 and collectively request the following actions be taken in regards to the proposed 06-06 zoning amendments:

1. Update the Zoning Code to define charter schools as public schools; this would suffice to solve the only purported problems ever identified as being fixed by the emergency rule that was first adopted in February.
2. Remand the balance of the proposed text amendments back to the Office of Planning and demand they hold a series of public meetings throughout the city to solicit inputs from all stakeholders (neighborhoods, schools, early education centers, DC Government agencies responsible for education policy, etc.).

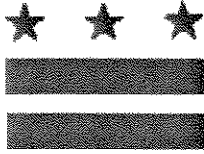
The children of the District of Columbia deserve a thoughtful and meaningful proposal developed in the public eye — not the flawed proposal you currently have, which was drafted under a non-existent emergency and without inputs from the D.C. agencies responsible for education policy.

Sincerely,



Jesse Bailey, Pre-K for All DC  
 Bobbi Blok, Georgetown Children's House Endowment for Quality Early Childhood Education  
 Eve Brooks, Center for Student Support Services  
 \* Susie Cambria, DC Action for Children  
 Robert Cane, Friends of Choice in Urban Schools  
 Shirley Cooley, Washington Associations of Child Care Centers  
 Debbi Hall, DC Association for the Education of Young Children  
 Michael Musante, Center for Education Reform

*Debbi Hall*



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Attachment #3

An email sent by Susan Cambria, Executive Director for DC Action for Children to the DC Kids listserv:

\*From:\* Susie Cambria [mailto:[scambria@dckids.org](mailto:scambria@dckids.org)]

\*Sent:\* Thursday, July 06, 2006 6:11 PM

\*To:\* 'Susie Cambria'

\*Subject:\* Stop the Zoning commission from making public policy for kids!

\*Stop the Zoning commission from making public policy for kids!\*

On July 10, the Zoning Commission plans on making permanent the decision to outlaw virtually all neighborhood schools, in particular public charter preschools and small early childhood education programs.

DC Action for Children and others have sent a letter to Deputy Mayor Stan Jackson urging him to delay the implementation of this backward-thinking plan. You, too, can take action on this important issue – read more about the issue and what you can do in the July 6, 2006 edition of "Calling All Child Advocates."