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

August 2, 2007

Mr. Clifford Moy
Secretary of the Board of Zoning Adjustments
Office of Zoning
441 4th St. NW, Suite 210S
Washington DC 20001

Re: ANC 6A requests reconsideration of BZA Order #17532

Board of Zoning Adjustment Members:

On February 8, 2007, Advisory Neighborhood Commission (ANC) 6A, at its regularly scheduled and properly noticed meeting and with a quorum present, voted unanimously to authorize support of the Department of Consumer and Regulatory Affairs Zoning Administrator's administrative decision to deny an application for a building permit for AppleTree Institute for Education and Innovation, Inc. to construct a charter school at 138 12th Street, NE, Square 988, Lot 820. On July 25, 2007, BZA ordered the Zoning Administrator's decision be reversed and that the appeal is granted (see enclosure #1).

Pursuant to our initial authorization, we request that the BZA reconsider its order in BZA Appeal #17532 on the following grounds:

(1) BZA failed to consider the clear intent of Zoning Commission (ZC) Order #06-06 (see enclosure #2). The BZA failed to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless (see enclosure #3).
(2) The Findings of Fact introduced were not presented before or at the public hearing, nor was the "fact" discussed at the hearing (see enclosure #4).
(3) Subsequent ZC Case #07-03 (see attachment #5) has rendered this decision moot, and the BZA should set this order aside (see attachment #6).
(4) A new fact was made known to ANC 6A by a letter from Thomas Nida, Chair of the Public Charter School Board (see attachment #7). Mr. Nida states that no school has been authorized at 138 12th Street, NE (see attachment #8).
(5) Two members of the BZA failed to declare conflicts of interest (see attachment #9).

Based on the above, we formally request BZA reconsider Order #17532. If there are any questions on this matter, please contact Commissioner David Homes (e-mail holmes.anc6a03@gmail.com and 202-252-7079) or Commissioner Nick Alberti (e-mail alberti6a04@yahoo.com and 202-543-3512).

On behalf of the Commission,

Joseph Fengler
Chair, Advisory Neighborhood Commission 6A

Cc:
Councilmember Tommy Wells
Councilmember Phil Mendelson
Zoning Commission Board Members *via* Ms. Sharon S. Schellin, Secretary to the Zoning Commission
Mr. Matthew Le Grant, Acting Zoning Administrator, Department of Consumer and Regulatory Affairs

Enclosure #1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

★ ★ ★

Appeal No. 17532 of AppleTree Institute for Education Innovation, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to require BZA special exception approval for a proposed addition to an existing building to accommodate a public charter school use[1]. Appellant alleges that the Zoning Administrator erroneously relied upon the Zoning Commission's February 13, 2006 emergency rulemaking to require additional on-site parking spaces. The subject property is located in the R-4 District at premises 138 12th Street, N.E. (Square 998, Lot 820).

HEARING DATE: November 21, 2006
DECISION DATE: January 9, 2007

ORDER

PRELIMINARY MATTERS

This appeal was filed on June 27, 2006, by the AppleTree Institute for Education Innovation, Inc., ("Appellant"), which owns the property that is the subject of the appeal, 138 12th Street, N.E., Square 988, Lot 820, ("subject property"). The Appellant alleges that the Zoning Administrator ("ZA") erred in his decision to deny its February 9, 2006 application for a building permit. According to the April 28, 2006 letter communicating the Zoning Administrator's decision to the Appellant, he based his denial on the determination that the Appellant's proposed use of the property as a public school failed to meet the minimum requirements in an R-4 zone district for lot area, lot width, and number of parking spaces.

The Board held a public hearing on the appeal on November 21, 2006, at which the Appellant presented its case through counsel and the Zoning Administrator's decision was defended by the Zoning Administrator himself. Travis Parker, who was involved in reviewing this project with the Zoning Administrator, testified in support of the Zoning Administrator's decision, as did a representative of Advisory Neighborhood Commission ("ANC") 6A, the ANC within which the subject property is situated. The ANC also submitted a report in support of the Zoning Administrator's decision. A group of neighboring property owners, the "Northeast Neighbors for Responsible Growth" ("NNRG"), was granted opposition party status by the Board. At the end of the hearing, the Board set a decision date for January 9, 2007.

[1] The caption has been changed to delete the reference to "an addition to an existing public charter school". Based upon the record, the subject property was not being used as a public charter school at the time Appellant filed its application for a building permit.

After its deliberations at the January 9, 2007 public decision meeting, the Board voted 4-1-0 to grant the appeal and reverse the Zoning Administrator's decision to deny the building permit. An explanation of the facts and law that justify the Board's conclusion follows.

FINDINGS OF FACT

1. The Property. The subject property is located at 138 12th Street, N.E in the R-4 zone district and is improved with a building constructed prior to May 12, 1958, the date on which the modern version of the Zoning Regulations became effective ("1958 Regulations").
2. The subject property has been certified by the State Historic Preservation Officer as contributing to the character of the Capitol Hill Historic District.
3. The subject property is situated between rowhouses on a primarily residential street, but has been used for non-residential purposes at least since the enactment of the Zoning Regulations.
4. On the effective date of the Zoning Regulations, the building was used as an office facility for a heating-oil company.
5. The subject property was used as an office facility for a hospice in the mid- to late-1960s and as a private club by the Knights of St. John and Women's Auxiliary from 1969 until 2005, when the Appellant acquired the property.
6. The building includes 4,296 square feet of gross floor area, as well as a cellar area.
7. The lot underlying the building is a rectangle with a lot width of 36 feet and a lot area of 4,230 square feet.
8. The area of the lot behind the building is paved with asphalt. The paved area is somewhat less than 36 feet wide (due to encroachments by the immediate neighbors on both sides), and somewhat less than 77 feet deep (due to the space behind the building taken up by a fire escape descending from the second floor, an exterior staircase into the cellar, and two large air-conditioning units).
9. The paved area is separated from a 30-foot-wide public alley at the rear property line by a chain-link fence, which includes a pair of gates that open to allow access from the alley through a 12-foot gap.
10. The chain-link fence was erected in 1970 by the Knights of St. John, along the rear property line, pursuant to a building permit certifying that "this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia." Exhibit No. 32, Attachment 4.
11. No legal, striped parking spaces are marked on the paved area, and there is no evidence that any such spaces have ever been marked on the paved area.
12. Between 1958 and 1969, a large portion of the current paved area was occupied by a storage shed that was 15 feet wide and 49 feet long and provided no parking. In 1969,

the Knights of St. John razed that structure, pursuant to a permit that indicated that the previous use of the building was "Storage Garages No Parking."

13. The prior owner, Knights of St, John, would periodically use the paved area at the rear of the lot for stacked parking of up to approximately ten vehicles. Transcript of Nov. 21, 2006 Public Hearing at 399, lines 14-19 ("Transcript").

14. On February 9, 2006, the Appellant applied for a building permit to expand the existing building on the subject property by adding an addition on the back, which would increase the total gross floor and cellar floor area to 8,975 square feet and would occupy a portion of the paved area at the rear of the lot.

15. Under the Appellant's plans, the remainder of what is now the paved area would be occupied by a grassy area, a sidewalk, and three marked parking spaces roughly perpendicular to the rear property line and directly accessible from the public alley.

16. The Appellant also proposed changing the use of the property from a private club to a public charter school for approximately 50 pre-school and pre-kindergarten students and up to 15 teachers and staff members.

17. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. *See* 53 DCR 2017 (Mar. 17, 2006). It re-adopted the emergency rule on June 12, 2006, *see* 53 DCR 5898 (July 21, 2006), and adopted a permanent version on September 25, 2006. *See* 53 DCR 9580 (Dec. 1, 2006).[2]

18. The new rule: (a) expanded the definition of "public school" contained in 11 DCMR § 199.1 to include schools "chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board," (b) increased the minimum lot area for a public school in an R-4 zone district from 4,000 to 9,000 square feet, and the minimum lot width from 40 feet to 120 feet; and (c) established a parking formula for pre-elementary and pre-kindergarten schools or facilities of two spaces for every three teachers or staff members.

19. Pursuant to the new rule, a school employing 15 teachers would have to provide ten parking spaces ($15 \div 3 = 5$; $5 \times 2 = 10$).

---

[2]The Appellant contends that aspects of that rulemaking "exceeded [the Zoning Commission's legal] authorities in multiple ways," but the Appellant also contends that the Board may hear this appeal without addressing those contentions. The Zoning Administrator contends that "the validity of the Zoning Commission's action on adopting the emergency text amendment is not within the [Board's] jurisdiction." Transcript at 324, lines 12-14. The written report of the ANC does not directly address the question of jurisdiction, but the NNRG also contends that the Board lacks jurisdiction to address the validity of the emergency rule. *See*, Exhibit No. 23, ANC Report, and Exhibit No. 28, Reply Brief of Intervenor NNRG at 1–2. In this order, the Board assumes *arguendo* that the emergency rule is legally valid, without intending any prejudice to the Appellant's ability to press its arguments to the contrary elsewhere.

20. On April 28, 2006, the Zoning Administrator denied the Appellant's building permit application on grounds that the Appellant's proposed use failed to meet the minimum-lot-area requirement of "9,000 square feet," the minimum-lot-width requirement of "120 feet," and the minimum-parking-spaces requirement of "10 spaces." Exhibit No. 13.

21. Appellant asserted to the Zoning Administrator and asserts in this appeal that the property is exempt from the minimum lot area and lot width requirements pursuant to 11 DCMR § 401.1. That provision states:

> Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

22. Appellant asserted to the Zoning Administrator and asserts in this appeal that no more than three parking spaces are required.

23. Appellant relies on 11 DCMR 2100.5 as the legal authority for its parking space calculations.

24. Section 2100.5 exempts buildings certified as contributing to a historic district from providing additional parking.

25. At the hearing, the Zoning Administrator changed his position to assert that 7 parking spaces were required based on the theory that the previous club use required 7 spaces.

26. Neither the regulations in effect when the property changed from an office use to a private club use in 1969 nor the current regulations specify a parking space requirement for a private club.

27. In 1969, the Zoning Regulations contained a provision specifying that if the parking schedule contained no requirement for a particular structure, that structure was to provide the number of "parking spaces . . . required for a warehouse located in a C-M-1 District," Zoning Regulations of the District of Columbia §§ 7202.1, 7207.17 (1973 reprint) ("1973 Zoning Regulations"). In 1969, the parking requirement for a warehouse located in a C-M-1 District was one space "for each 2,400 square feet of gross floor area."

28. The private club use would therefore have required two parking spaces (4,296 ÷ 2400 = 1.79).[3]

29. DCRA computed the parking requirement for the private club use with the current catch-all requirement of one space for every 600 square feet of GFA, set forth in 11 DCMR

---

[3] The rules of interpretation for Chapter 21 provide that "whenever calculations based on the schedule set forth in § 2101 result in a fractional space, any fraction under one-half shall be disregarded and any fraction of one-half or over shall require one (1) parking space", 11 DCMR § 2118.6.

§2101, rather than with the catch-all requirement that was in effect when the private club use began.

30. The parties in Opposition claimed that ten spaces were required, based on observations that the private club periodically stacked ten cars in the lot. (See Finding of Fact ("FOF") 13.)

31. DCRA changed its position again in its Proposed Findings of Fact, No. 24, asserting that only five spaces were required on the theory that when the use changed, the parking requirement changed.

32. DCRA then based the five spaces requirement upon 11 DCMR § 2101.10, which reads as follows:

> In the case of a building or structure for which the Zoning Regulations now require more parking spaces than were required when the building or structure was built, the following shall be required:
>
> (a) If the existing number of parking spaces *now provided* is less than or equal to the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced; and
>
> (b) If the existing number of parking spaces *now provided* is more than the minimum number of parking spaces now required by this chapter, the number of parking spaces cannot be reduced below the minimum number of parking spaces required by this chapter.

33. Although there are currently no parking spaces marked in the paved area in the rear of the building (as would be required by 11 DCMR § 2117.3), up to three angled spaces could be placed there while still allowing sufficient space for a 17-foot aisle and screens from contiguous residential properties (as required by 11 DCMR §§ 2117.5 and 2117.12).

34. The Zoning Administrator claimed that six legal parking spaces could fit in the paved area. He conceded, however, that one of those supposed spaces was impermissibly placed in the midst of a fixed fire-escape staircase from the second floor. Transcript at 347, lines 12-14; 350, lines 7-9; and 368–69, lines 21-22 and 1. He also conceded that two of the remaining five spaces — located perpendicular to and immediately adjacent to the alley — would not actually be accessible without changing the existing chain-link fence. Transcript at 361, lines 4-9.

35. The Appellant is planning to provide three parking spaces in the rear paved area and has secured a long-term lease in a nearby parking lot for a minimum of another ten parking spaces.

CONCLUSIONS OF LAW AND OPINION

The Board has jurisdiction to hear an appeal from any administrative decision of a District official "based in whole or in part on any zoning regulation." D.C. Official Code § 6-641.07(f) (2001). It may "reverse or affirm, wholly or partly, or may modify the order . . . , decision, determination, or refusal appealed from, . . . and to that end shall have all the powers of the officer or body from whom the appeal is taken." *Id.* § 6-641.07(g)(4); *see also* 11 DCMR § 3100.4.

This appeal was timely under 11 DCMR § 3112.2(a), because it was filed within 60 days of the date the Appellant had notice or knowledge of the decision being appealed.

There are two principal issues on appeal:

(1) Whether the building on Appellant's lot may be enlarged for the purpose of accommodating a public school use without regard to the lot area limitations applicable to that use; and

(2) Whether a change in the building's use to a public school requires the provision of any parking spaces on site.

For the reasons stated below, the Board concludes that the proposed change in use does not require adherence to either the lot size or parking requirements for the new use.

As set forth in the findings of facts above, on February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools. This rule was readopted as an emergency rule on June 12, 2006, and then adopted as a permanent rule on December 1, 2006. The new rule, in relevant part, amended the definition of public schools in § 199.1 to include charter schools, amended Chapter 4 of the Zoning Regulations to increase minimum lot area and width requirements in Residence Districts, and amended Chapter 21 of the Zoning Regulations to require parking for pre-elementary schools and pre-kindergarten schools or facilities. This appeal arises from the Zoning Administrator's denial of Appellant's application for a building permit on April 28, 2006 on grounds that the proposed use as a public charter school did not meet the requirements set forth in the new regulation. Specifically, the Zoning Administrator determined that the proposed use did not meet the minimum lot area and width requirements, nor the parking requirements.

1. Compliance with the Lot Requirements for a Public School.

Appellant argues that the subject property is exempt from the requirements of the new area restrictions by reason of 11 DCMR § 401.1. That section states as follows:

> Except as provided in chapters 20-25 of this title, in the case of a building located on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the

> building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

The Board interprets this section to mean simply, that a building that was located on a lot on May 12, 1958, that does not meet the lot area or width of lot requirements prescribed in § 401.3 may be enlarged or replaced, provided it complies with all other provisions of the Zoning Regulations.

The new public school regulations added public school to the chart set forth in § 401.3. There is no factual dispute that the subject building was located on the lot on May 12, 1958 and that the lot does not meet the lot area or width of lot requirements prescribed in § 401.3 for use as a public school.

Accordingly, the only issues before the Board with respect to the lot requirements are whether the subject property is exempt from the public school lot requirements set forth in § 401.3 and whether the property complies with all other provisions of the Zoning Regulations. The new public school regulations, while amending several regulations in Chapter 4, including § 401.3, in particular, leave § 401.1 intact. The Zoning Administrator and the parties in opposition ask this Board to treat the omission to amend this regulation as an "oversight" on the part of the Zoning Commission and to read the inapplicability of § 401.1 to buildings used for public schools as consistent with the Zoning Commission's intent with respect to the new public school regulations. The Board notes that the Zoning Commission specifically reviewed the regulations in Chapter 4 when adopting the new regulations, and that § 401.1 was a part of the regulatory scheme it was reviewing. Further, there is evidence in the record that this specific issue was brought to the attention of the Office of Planning prior to final action, (Exhibit 33, Attachment. N). Accordingly, the Board finds that it is beyond its purview to assume that the omission to amend § 401.1 was an oversight on the part of the Zoning Commission.

As stated by the Chair of the Zoning Commission, who participated in this decision:

> To the extent that 401.1 is ultimately inconsistent with the Commission's intent but remains meaningful on its own terms, then it is the flaw of the Commission interacting (sic) [in enacting] the rulemaking, not an area of interpretation for the ZA.

The Board further recognizes that any such flaws of rulemaking are not for the Board to fix, in an appeal case, but rather within the authority of the Zoning Commission to correct in a rulemaking proceeding.

The Board therefore reverses the determination of the Zoning Administrator that the building on the Appellant's lot may not be expanded because its lot has less area and width than is required for a public school.

2. Compliance with all other Provisions of the Zoning Regulations

To be successfully invoked, § 401.1 requires not only that the building have been on the lot as of May 12,1958, but that the property comply with all other provisions of the Zoning Regulations (other than the lot area and width of lot requirements.) The Zoning Administrator and the parties in opposition allege that Appellant is not in compliance with the parking regulations. The Zoning Administrator argues ultimately that five parking spaces are required. Appellant will only be providing three, which Appellant argues is in compliance with the parking regulations. Appellant relies on 11 D CMR § 2100.5 for this conclusion, which the Board finds is controlling. § 2100.5 provides as follows:

> No additional parking spaces shall be required for a historic landmark or a building or structure located in a historic district that is certified by the State Historic Preservation Officer as contributing to the character of that historic district.

There is no dispute that the building has been certified by the State Historic Preservation Officer as contributing to the character of the historic district. Accordingly, the issue in the first instance is whether "additional parking" refers to additional to the number of spaces required for the previous use or additional to what currently exists on the lot. As set forth below, the Board finds that the Applicant is compliant under either scenario and will be providing the maximum number of legal spaces that can fit on the lot, which is the greater number of the two scenarios.

The previous use of the building was that of a private club. The property changed to a private club use in 1969. Under the parking regulations in effect at that time, the parking requirement for the private club on this lot would have been two spaces. (See FOFs 27 and 28.) Accordingly, pursuant to § 2100.5, appellant's parking requirement would be two spaces.[4]

The Board finds unpersuasive the opposition parties' argument that the required parking for the previous use was ten spaces based on the neighbors periodically seeing ten cars stacked on the lot. The Board's task is to determine the number of legally required parking spaces on the lot, not how many could be packed onto the lot.

Finally, the Board finds that only three lawful spaces can be accommodated on this lot. Of the potential five spaces identified by the Zoning Administrator, two would not actually be accessible without changing the existing chain-link fence. (That chain link fence was erected in 1970 pursuant to a building permit certifying that **"this fence will not obstruct any accessible parking area required by the Zoning Regulations of the District of Columbia."**)

---

[4] Because the Appellant has agreed to provide three spaces, one more space than is required, the Board need not determine whether any parking spaces were credited or grandfathered from the original 1958 use.

The Board finds that based on the size of the surface area, the existence of the egress stairs, the air conditioning units and the gate which creates the drive aisle, no more than three regulation size parking spaces will fit on the lot.

As "§ 2100.5 provides that no additional parking shall be required, Appellant is meeting this requirement by providing three spaces on the lot.

The Zoning Administrator relied on 11 DCMR § 2101.10 for his final determination that five spaces are required. That regulation provides that whenever the use of a property changes to a use that requires more parking than was previously required, additional parking spaces must be required to make up the difference.

The Board finds that this provision is not applicable to the property because § 2100.5 is controlling for properties that have been certified by the State Historic Preservation Officer. No additional spaces are required regardless of whether the additional spaces would be triggered by a structural addition or by a change in use. Any other interpretation would negate the protection to historic properties afforded by this provision. *See BZA Order No. 17459 of DC Hampton LLC*, (2006) (self-certified application for a parking variance dismissed because "§ 2100.5 operates to waive the requirement for additional parking spaces for new construction" in such instances); *See also. BZA Order No. 16307 of National Child Research Center* (1998) (parking variance not needed because § 2100.5 exempts such historic structures from providing additional parking when the use is changed.); and *BZA Order No. 16071* of the *Washington International School* (1995) (pursuant to § 2100.5 no parking spaces required for the change of use of a school building to an apartment building.)

Great Weight to the ANC

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations of the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The ANC submitted a report in support of the Zoning Administrator's decision in which it also argued that the Appellant did not meet the parking regulations. The ANC offered two bases for that assessment: First, it alleged that the property previously accommodated ten cars. The Board has already addressed that issue, finding that stacking ten cars does not equate with the provision of lawfully required parking spaces. Second, the ANC argues that the Appellant's proposal to place a charter school in the existing structure is prohibited by 11 DCMR § 2002.3 and § 2002. 5 These provisions regulate the expansion of nonconforming uses. In essence, the ANC argues that the charter school is a nonconforming use for that building because the building does not meet the lot area or lot of width requirements of §401.3. However, those nonconformities are structural. They are not nonconformities as to use. The use as a public charter school is a matter of right use in the R-4 zone. Accordingly, the ANC's arguments with respect to nonconforming use are misplaced.

The Board therefore concludes that the Zoning Administrator erred in determining that the Appellant needed to provide any more than three parking spaces for its contributing building.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proving that the Zoning Administrator erred in denying the Appellant's building permit application. The Board has carefully considered the issues and concerns stated in the written report of the ANC and, for the reasons stated above, finds them unpersuasive.

It is hereby **ORDERED** that the Zoning Administrator's decision is **REVERSED,** and it is further **ORDERED** that this appeal is **GRANTED**.

VOTE: **4-1-0** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to grant; Carol J. Mitten to deny.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 25 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

★ ★ ★

BZA APPEAL NO. 17532

As Director of the Office of Zoning, I hereby certify and attest that on JUL 25 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Curtis E. Gannon, Esq.
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

Mr. Russ Williams
Managing Director
AppleTree Institute for Education Innovation
400 7th Street, S.E.
Washington, D.C. 20003

George R. Keys, Jr., Esq.
Jordan & Keys, LLP
1400 16th Street, N.W., Suite 520
Washington, D.C. 20036

Chairperson
Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, D.C. 20013

Single Member District Commissioner 6A04
Advisory Neighborhood Commission 6A
P.O. Box 75115
Washington, D.C. 20013

Matthew LeGrant, Acting Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Tommy Wells, City Councilmember
Ward Six
1350 Pennsylvania Avenue, N.W., Suite 408
Washington, D.C. 20004

Harriet Tregoning, Director
Office of Planning
801 North Capitol Street, N.E., 4th Floor
Washington, D.C. 20002

Alan Bergstein, Esquire
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

Jill Stern, Esquire
General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR

Enclosure #2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 06-06
Z.C. Case No. 06-06
(Text Amendments – 11 DCMR)
(Charter Schools Text Amendments)
September 25, 2006

The Zoning Commission for the District of Columbia (the "Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01); having held a public hearing as required by § 3 of the Act (D.C. Official Code § 6-641.03); and having referred the proposed amendments to the National Capital Planning Commission for a 30-day period of review pursuant to § 492 of the District of Columbia Charter; hereby gives notice of the adoption of amendments to § 199 (Definitions), § 201 (Uses as a Matter of Right (R-1)), § 206 (Public and Private Schools and Staff Residences), § 400 (Height of Buildings or Structures (R)), § 401 (Minimum Lot Dimensions (R)), § 403 (Percentage of Lot Occupancy (R)), § 501 (Uses as a Matter of Right (SP)), § 601 (Uses as a Matter of Right (CR)), § 771 (Floor Area Ratio (C)), § 901 (Uses as a Matter of Right (W)), Chapter 21 (Off-Street Parking Requirements), and Chapter 31 (Board of Zoning Adjustment Rules of Practice and Procedure) of the Zoning Regulations (Title 11 DCMR). The amendments change the definition of "Schools, public" in the Zoning Regulations to include charter schools; amend the building height, lot area, lot width, and lot occupancy requirements for public schools in Residence Districts; allow collocation of school uses with other uses and sharing of recreation facilities; permit schools in Residence Zones not meeting the requirements of Chapter 4 to be allowed as special exceptions; allow public schools in SP, CR, and W Zone Districts; amend density limits for public schools in Commercial Districts; and create parking standards for preschools. The Commission took final action to adopt the amendments at a public meeting held on September 25, 2006.

Only one substantive change was made to the text of the Corrected Revised Notice of Proposed Rulemaking published in the August 18, 2006 edition of the *D.C. Register*, namely the elimination of an exception from the lot dimension requirements for schools of sixteen (16) or fewer students. As discussed later in this Order, the change was made in response to public comment, and, therefore does not require publication of a new Notice of Proposed Rulemaking.

This final rulemaking is effective upon publication in the *D.C. Register*.

Existing Regulations

The existing regulations neither define charter schools nor provide standards for their development. The existing definition of public school defines public schools as being operated or maintained by the Board of Education. Charter schools do not fall within that description. Although charter schools may be similar to public schools, the District of Columbia Court of Appeals has ruled that the Zoning Administrator may not "interpret defined uses in the Zoning Regulations to encompass other uses that are functionally comparable … if they are outside the definition," *Chagnon v. District of Columbia Board of Zoning Adjustment*, 844 A.2d 345, 348 (D.C. 2004). Thus, without these amendments, charter schools would be disallowed in most zone districts.

Description of Text Amendment

The Commission initiated this rulemaking to respond to the Zoning Administrator's concerns regarding charter schools. The amendments change the definition of "Schools, public" in the Zoning Regulations to include charter schools; amend the building height, lot area, lot width, and lot occupancy requirements for public schools in Residence Districts; allow collocation of school uses with other uses and sharing of recreation facilities; permit schools in Residence Zones not meeting the proposed requirements to be allowed as special exceptions; allow public schools in SP, CR, and W Zone Districts; amend density limits for public schools in Commercial Districts; and create parking standards for preschools.

Relationship to the Comprehensive Plan

The text amendments are not inconsistent with any of the Comprehensive Plan themes, goals, objectives, or policies. No policies specifically address the placement or impacts of public schools. The major themes of the Plan tend to promote maintaining or improving the character of neighborhoods as well as enhancing public safety. The proposed changes further the goals of both of these themes and are not inconsistent with any specific areas of the Plan.

Set Down, Emergency Action, Public Hearing, and Proposed Action

At its regularly scheduled public meeting on February 13, 2006, the Commission decided to set down the proposed changes to the Zoning Regulations for a public hearing, to adopt a portion of the proposed text on an emergency basis, and to publish all of the amendments for public comment in a notice of proposed rulemaking. The combined Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on March 17, 2006 at 53 DCR 2017 along with a notice of the public hearing.

The Commission held a public hearing on the case May 11, 2006. At the hearing, more than a dozen persons and organizations testified, both in favor and against the proposed rule. Those in favor stressed the compromise between educational opportunities and the protection of existing neighborhoods. Witnesses testifying in opposition fell into two categories, those who thought the proposed action was too restrictive on schools and those who thought it was not restrictive enough. Several charter school proponents and groups testified that they were concerned that the regulations would make the siting and development of charter schools much more difficult than at present. Other opponents, including representatives of ANC 3C, expressed concern that the new regulations would allow matter-of-right schools in established neighborhoods with no community input. The chair of the D.C. Public Charter School Board testified to the role of his Board and their willingness to work with the Commission on communication and addressing community concerns regarding new schools. No representative of the District of Columbia Board of Education or District of Columbia Public Schools testified.

The Office of Planning, through testimony and a written report, suggested that the Commission:

- Add a new § 401.9 to clarify the lot width requirement for public schools on corner and through lots;
- Add a new § 401.10 to clarify that public schools locating on existing split-zoned lots can use the lot area and width standards of the less restrictive zone;
- Remove the lot area requirements for public schools in R-5-C, R-5-D, and R-5-E Zone Districts;
- Reduce the minimum lot width requirement for public schools to 80 feet in all R-5 Zone Districts; and
- Treat public schools as residential uses for purposes of calculating density in Commercial Zone Districts.

After the hearing, the Office of Planning filed a supplemental report suggesting that the Commission add a new § 401.11 to exempt public schools with 16 or fewer students from the residential lot requirements.

The Commission took proposed action on July 10, 2006 to approve the proposed text with the modifications suggested by the Office of Planning at the hearing and in its supplemental report.

Because the text of the proposed rule differed in several respects from that published in March 2006, a Revised Notice of Proposed Rulemaking was published in the *D.C. Register* on July 21, 2006 at 53 DCR 5888, for a 30-day notice and comment period. A Corrected Revised Notice of Proposed Rulemaking was published on August 18, 2006 at 53 DCR 6860.

The majority of the comments received expressed opposition to the proposed exception from residential lot requirements for schools of 16 or fewer students, believing that the exemption would destabilize existing residential neighborhoods due to the potential negative impacts of very small schools.

ANC 3C submitted a resolution dated August 22, 2006 in opposition to the text amendment. The resolution recommended that all charter schools require special exception approval in order to assure full participation by affected residents. It further listed nine reasons for the ANC's opposition to the proposed regulation, including the potential destabilization of residential areas, lack of limits on the number of schools in a neighborhood, lack of community input in the existing chartering process, and the lack of a citywide plan for educational institution location.

An August 24, 2006 letter from Mr. Lindsley Williams described three areas that he believes need further clarification. Two of the issues concerned text already in the Zoning Regulations. First, he suggested that the extent to which a public school may allow community uses should be more clearly defined. Second, he questioned why the current regulation (and three provisions in the proposed text) refers to compliance with Chapter 21 (Off-Street Parking Requirements) but not Chapter 22 (Off-Street Loading Facility Requirements). As to the proposed text, he recommended clarifying the definition of "employees" for the purposes of calculating the parking standards for pre-elementary and pre-kindergarten schools, given the extent to which contractors and other third parties service such facilities.

The proposed rulemaking was also referred to the National Capital Planning Commission ("NCPC") pursuant to § 492 of the District of Columbia Charter. The NCPC Executive Director, by delegated action dated August 8, 2006, found the proposed text amendments would not affect the identified federal interests in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital.

The Office of the Attorney General determined that this rulemaking meets its standards of legal sufficiency.

Final Action

The Commission took final action to adopt the rulemaking at its regularly scheduled public meeting on September 25, 2006.

The Commission decided to remove the proposed new § 401.11 that created an exception from the lot dimension requirements in Residence Districts for public schools with no more than sixteen students. The Commission believes that ANC 3C offered persuasive advice regarding the potential negative impacts the exemption would have on residential neighborhoods. Moreover, after the Commission added this provision, it learned that no existing public school (including any charter school) was small enough to qualify for the exception and it is unlikely that any future school of that size would be established. The Commission concluded that the combination of these factors warranted the elimination of the proposed exception. The remaining concerns of the ANC pertain to actions of District agencies that are not under the control of the Zoning Commission. The District government has decided to allow Charter Schools. The Commission began this case because that use was undefined. The Commission cannot wait for other

processes to occur before allowing these schools in the areas they are intended to serve, under conditions that will mitigate any potential adverse impact.

The Commission also noted that while Mr. Williams' comments were meritorious, further study was needed before they could be implemented. Rather than delaying the permanent implementation of this rule, the Commission requested that the Office of Planning study the issues raised by Mr. Williams' comments and report the results to the Commission.

Based on the above, the Commission finds that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby **APPROVES** the following amendments to Chapters 1, 2, 4, 5, 6, 7, 9, and 21 of the Zoning Regulations, Title 11 DCMR. Added wording is underlined, and deleted wording is shown in strike-through lettering:

A. Chapter 1, THE ZONING REGULATIONS, § 199.1, is amended as follows:

School, public - A building or use within a building operated ~~and maintained~~ or chartered by the District of Columbia Board of Education or the District of Columbia Public Charter School Board for educational purposes and other such community uses as deemed necessary and desirable.

B. Chapter 2, R-1 RESIDENCE DISTRICT USE REGULATIONS, is amended as follows,

1. By amending § 201.1(k) to read as follows:

(k) Public school, subject to the provisions of chapter 21 of this title; public schools may collocate with other permitted schools or uses provided all applicable requirements of this title are met. Public schools may share common on-site recreation space including gymnasiums, playgrounds, and fields, and these shared recreational spaces may count toward the minimum lot area provided that the school is adjacent to the shared recreation space; on-site office use must be ancillary and necessary to the operation of the particular school.

2. By amending § 206 to read as follows:

206 PUBLIC AND PRIVATE SCHOOLS AND STAFF RESIDENCES (R-1)

206.1 Use as a public school that does not meet the requirements of chapter 4 of this title or as a private school, but not including a trade school, and

residences for teachers and staff of a private school, shall be permitted as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section.

206.2 The school shall be located so that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions.

206.3 Ample parking space, but not less than that required in chapter 21 of this title, shall be provided to accommodate the students, teachers, and visitors likely to come to the site by automobile.

C. Chapter 4, RESIDENCE DISTRICTS: HEIGHT, AREA, AND DENSITY REGULATIONS, is amended as follows:

1. By amending §§ 400.10 and 400.11 to read as follows:

400.10 In an R-1, R-2, R-3, and R-4 District, a public school building or structure may be erected to a height not exceeding sixty feet (60 ft).

400.11 In an ~~R-3, R-4,~~ R-5-A, R-5-B, and R-5-C District, a public school building or structure may be erected to a height not exceeding ninety feet (90 ft).

2. By amending the table in § 401.3 to read as follows:

ZONE DISTRICT AND STRUCTURE	**MINIMUM LOT AREA** (square feet)	**MINIMUM WIDTH OF LOT** (feet)
R-1-A Public School	15,000	120
R-1-A All other structures	7,500	75
R-1-B Public School	15,000	120
R-1-B All other structures	5,000	50
R-2 Public School	9,000	120

R-2 One-family semi-detached dwelling	3,000	30
R-2 All other structures	4,000	40
R-3 Public School	9,000	120
R-3 Row dwelling	2,000	20
R-3 One-family semi-detached dwelling	3,000	30
R-3 All other structures	4,000	40
R-4 Public School	9,000	120
R-4 Row dwelling and flat	1,800	18
R-4 One-family semi-detached dwelling	3,000	30
R-4 Conversion to apartment house	900/apartment or bachelor apartment	None prescribed
R-4 All other structures	4,000	40
R-5-A Public School	9,000	80

R-5-A All other structures	As prescribed by the Board pursuant to § 3104	As prescribed by the Board pursuant to § 3104
R-5-B Public School	9,000	80
R-5-C, R-5-D, R-5-E Public School	None prescribed	80
R-5-B, R-5-C, R-5-D, R-5-E All other structures	None prescribed	None prescribed

3. By adding new §§ 401.8 through 401.10 to read as follows:

401.8 For public schools, minimum lot area may include adjacent parcels under the same ownership that are separated only by a public alley.

401.9 For public schools on a corner lot or through lot, minimum lot width may include the measurement of all street frontages.

401.10 For public schools on split-zoned lots, the minimum lot width and minimum lot area requirements if any, of the less restrictive zone shall apply to the entire lot as long as the lot was in existence as of February 13, 2006.

4. By amending § 403.1 to read as follows:

403.1 A public school building may occupy the lot upon which it is located in excess of the permitted percentage of lot occupancy prescribed in §403.2; provided, that the portion of the building excluding closed courts exceeding the lot coverage shall not exceed twenty feet (20 ft.) in height or two (2) stories; and provided further, that direct pedestrian access not less than ten feet (10 ft) in width from at least two (2) public rights-of-way shall be provided to each roof area used for these purposes. The roof area shall be used only for open space, recreation areas, or other athletic and field equipment areas in lieu of similarly used space normally located at ground level. In the R-2, R-3, and R-4 zones, the total lot occupancy shall not exceed 70 percent.

D. Chapter 5, SPECIAL PURPOSE DISTRICTS, is amended by adding a new §501.1(i) to read as follows:

(i) Public School, subject to the provisions of chapter 21 of this title.

E. Chapter 6, MIXED USE (COMMERCIAL RESIDENTIAL) DISTRICTS, is amended by adding a new §601.1(u) to read as follows:

(u) Public School, subject to the provisions of chapter 21 of this title.

F. Chapter 7, COMMERCIAL DISTRICTS, is amended as follows:

1. By amending the heading of the table in § 771.2 to read as follows:

ZONE DISTRICT	APARTMENT HOUSE OR OTHER RESIDENTIAL USE OR PUBLIC SCHOOL	OTHER PERMITTED USE	MAXIMUM PERMITTED (FAR)

2. By adding a new § 771.10 to read as follows:

771.10 In a C-1 District, the maximum floor area ratio requirements may be increased for specific public school buildings or structures, but shall not exceed the floor area ratio 1.8.

G. Chapter 9, WATERFRONT DISTRICTS, is amended by adding a new § 901.1(v) to read as follows:

(v) Public School, subject to the provisions of chapter 21 of this title.

H. Chapter 21, OFF STREET PARKING REQUIREMENTS, is amended by adding the following to the chart found in § 2101.1:

SCHOOLS	
Pre-elementary schools and pre-kindergarten schools or facilities:	2 for each 3 teachers and other employees

I. Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended by adding to the table of special exceptions in §3104.1, in the proper alphabetical order, the following new entry:

TYPE OF SPECIAL EXCEPTION	ZONE DISTRICT	SECTIONS IN WHICH CONDITIONS ARE SPECIFIED
Public school (not meeting the Requirements of Chapter 4).	Any R District	206

Vote of the Zoning Commission taken at its public meeting on July 10, 2006, to **APPROVE** the proposed rulemaking by a vote of **4-0-1** (Carol J. Mitten, Gregory N. Jeffries, John G. Parsons, and Michael G. Turnbull to approve; Anthony J. Hood, not participating, not voting).

This Order was **ADOPTED** by the Zoning Commission at its public meeting on September 25, 2006, by a vote of **3-0-2** (Carol J. Mitten, Gregory N. Jeffries, and Michael G. Turnbull in to adopt; John G. Parsons, not present, not voting; Anthony J. Hood, not participating, not voting).

In accordance with the provisions of 11 DCMR § 3028.9, this Order shall become effective upon publication in the *D.C. Register*; that is, on DEC - 1 2006.

CAROL J. MITTEN
CHAIRMAN
ZONING COMMISSION

JERRILY R. KRESS, FAIA
DIRECTOR
OFFICE OF ZONING

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 06-06
Z.C. Case No. 06-06
(Text Amendments – 11 DCMR)
(Charter Schools Text Amendments)
September 25, 2006

The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

Z.C. CASE NO.: 06-06

As Director of the Office of Zoning, I hereby certify that on DEC 05 2006 copies of this Z.C. Notice of Final Rulemaking & Order No. 06-06 were mailed first class, postage prepaid or sent by inter-office government mail to the following:

1. *D.C. Register*
2. All ANC Chairs (see attached list)
3. Gottlieb Simon
   ANC
   1350 Pennsylvania Ave., N.W.
   Washington, D.C. 20004
4. All Councilmembers (see attached list)
5. Office of Planning (Ellen McCarthy)
6. Ken Laden, DOT
7. Zoning Administrator (Bill Crews)
8. Office of the Attorney General (Alan Bergstein)
9. Jill Stern, Esq.
   General Counsel - DCRA
   941 North Capitol Street, N.E.
   Suite 9400
   Washington, D.C. 20002

ATTESTED BY: Sharon S. Schellin
Sharon S. Schellin
Secretary to the Zoning Commission
Office of Zoning

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #3

Point #1. *BZA failed to consider the clear intent of Zoning Commission (ZC) Order #06-06 (see enclosure #2). The BZA failed to attempt to reconcile statutes it felt to be in conflict, rendering a more recently adopted regulation meaningless.*

We assert that the BZA failed to consider the clear intent of the Zoning Commission in Zoning Commission (ZC) Order #06-06. **It sought to avoid the language and intent of the Emergency Regulations by a reliance not on §206.1, but instead on only the superseded language of §401.1.** Even if the BZA refused to countenance the more recent regulation as the governing rule in this proceeding, the Board should have attempted to reconcile §206.1 and §401.1, rather than ignore §206.1. To quote a letter we have received from the DC Office of the Attorney General, "...the rule of statutory interpretation (is) that every effort must be made to reconcile allegedly conflicting statutes and to give effect to the language and intent of both." The BZA ignored this rule in their decision.

The Zoning Commission amended §206.1 to provide:

> Use **as a public school that does not meet the requirements of chapter 4 of this title or** as a private school, but not including a trade school, and residences for teachers and staff of a private school, shall be permitted as a special exception in an R-1 District if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section. (emphasis added to show amended text)

The Emergency Rule also promulgates further amendments to chapter 4 and created the new requirements for public schools applicable to the R-4 zone district: 120 feet minimum width of the lot (§ 401.3), 9,000 square foot minimum lot area (§ 401.3), and a maximum of 70% lot occupancy (§ 403.1).

The Zoning Commission by adopting the Emergency Rules subjected public schools, not meeting the minimum requirements, to a special exception process. The Commissioners found that emergency rulemaking was required, especially for R-2, R-3 and R-4 zones because they have the smallest lots, minimal areas and street frontage, and the greatest potential for adverse impacts (see February 13, 2006 transcript, p. 33-34).

The intention of the Commission was unambiguous. To hold otherwise is to believe that the Commission sought to accomplish (by any failure to amend 401.1) the direct opposite of the lucid language of #06-06. Moreover, the Board's action should have been based upon the latest regulation. By setting aside §206.1, the Board interposed itself over the appropriate administrative body that determines the regulations that the BZA is charged to interpret.

To quote then Board Menber, Ruthanne G. Miller, at the BZA hearing of May 4, 2004, (page 9, appeal of Advisory Neighborhood Commission 5B: Application #16998)

> "And I also believe that this Board has erred as a matter of law and this wasn't raised by the parties in their motions, but I believe that the Board has erred in relying on a narrow reading of the legislative history of the regulation instead of the plain words of the regulation. And by doing so, they have rendered a regulation meaningless, which adjuratory (sic) boards are not supposed to do if can be avoided at all."

> Continuing on the same topic on page 12, Ms. Miller said: "There is a large body of case law that says that the plain meaning of the statute prevails and the statute may not be interpreted to render it meaningless. The most recent Court of Appeals case was Chagnon, which is March, it came out in March of 2004, which reverts the Board on another case in which they were reading into the statute words that weren't there. In this case, I think they want us to try to read the plain meanings of the words and I think that this Board has gone too far to ignore

> them and look at a situation that existed 30 years ago. The law is intended to apply many years ahead of time, unless it can't have any meaning whatsoever, I think we need to apply the plain meaning. So for that reason, I would move to -- I mean, I vote against this motion and would support the motion for reconsideration."

Ms. Miller's words in 2004 are directly apt to the BZA's decision in this case.

In despite of the purpose of the Emergency Rules, the Board ruled that §401.1 grandfathers any pre-1958 structure even if located on a lot whose dimensions are inadequate under the new Rules, from any restrictions preventing its expansion or rebuilding. Our community is thus prevented from raising the many issues of safety, transportation, noise, and appropriateness – issues that led to the adoption of the Emergency Rules.

If a traditional public school were to be sited in our community, it would be subject to public hearings, and to the scrutiny of our elected school board member and our Councilmember. A process of community examination and input over a course of several months will have sifted out the community's concerns, and the school board will have, through community consultation, reached a consensus about the choice of the site.

Public charter schools have not been subject to the same scrutiny. There has been no opportunity for community input; charter schools suddenly appear, often in dangerous and very inappropriate locations. The instant case is a prime example. Located on a narrow residential street with no room for pick-up or drop-off; surrounded, at the time of purchase, by three one-way commuter streets; with no playground; sharing common walls with residential neighbors; and minimal on-site parking available, AppleTree at 138 12th Street NE is the perfect illustration of shortsighted and inappropriate zoning, grandfathered despite a change of use. The ZC addressed the reality of unsuitable charter school location in residential neighborhoods in §206.1; the BZA undercuts the stated purpose of the ZC by relying only on §401.1.

This lack of oversight and of appropriate standards led the Zoning Commission to utilize the special exception process. This BZA decision removes the public scrutiny that was at the core of §206.1. Recent statements by the Chair of the Public Charter School Board suggesting to a charter school that a residential location would be an appropriate expansion site show the need for the regulation that the BZA vitiates.

We believe this case to have been wrongly decided by its defiance of, to use Ms. Miller's words, "the plain meaning" of the Zoning Commission's Emergency Rulemaking.

Chairman Griffis stated at the BZA meeting of January 9, 2007, "I obviously can't get into the head of the Zoning Commissioners but in many respects their decisions need to live beyond the persons that talked about it and have to be deliberate, or rather have to be usable in their written form. I think that we are left with 401.1 for today as it is written."

We aver that there was no need for the Chair or the Board to "get into the head" of members of the ZC, the matter could and should have been set aside pending a request for clarification by the ZC. These are not intended to be hostile, uncommunicative bodies. The ZC is the superior body with respect to issuance and clarification of regulations. Where the Rule is new, and the BZA feels it to be insufficiently clear, why should the Board act in ways that accomplish the very result the Zoning Commission sought to prevent. Surely the sensible, collegial action is to set the matter aside briefly while clarity is sought from the ZC. And, just as clearly, the BZA, where the choices are difficult and unclear, should follow the intent expressed in the language of, and the debate prior, to the adoption of the most recent relevant regulation.

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #3

We believe the BZA has misinterpreted the intent of the statutes that "grandfather" uses/properties existing prior to 1958. These statutes were written to allow a person with uses/properties, made nonconforming by the 1958 regulations, the ability to take the same actions, with respect to their properties, that are allowed to persons with conforming uses/properties. This ruling (#17532) turns the grandfather statutes on their head, by allowing persons with nonconforming uses/properties privileges that are not allowed persons with conforming uses/properties. We believe that "grandfathering" is intended to protect only a continuation of current use through a change of ownership.

Grandfathering through a change of use is always egregious; grandfathering by use of superseded §401.1 defies clearly expressed language by the ZC's Emergency Rules in §206.1.

Point #2. *The Findings of Fact introduce material not presented to us before or at the public hearing, nor was the "fact" discussed at the hearing. We had no opportunity to dispute this Finding or those Findings which are based upon it.*

Point 27 in the Findings of Fact appears to introduce new material not presented to us for response at the time of the hearing nor was it raised in the public hearing. The BZA states as settled fact a conclusion evidently taken from an AppleTree document not available to us for counterargument. As a matter of equity, the proceedings should be reopened to allow us an opportunity to dispute this crucial Finding and the Findings of Fact that proceed from it.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PROPOSED RULEMAKING
Z.C. Case No. 07-03
(Text Amendment – 11 DCMR)
(Minimum lot dimensions in Residential Districts)

The Zoning Commission for the District of Columbia, pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.01 (2001 ed.)), hereby gives notice of its intent to amend § 401 of the Zoning Regulations (Title 11 DCMR). The proposed amendment clarifies § 401 by stating explicitly that a building on a lot made substandard by the enactment of the 1958 Regulations may not be converted to a use requiring a greater lot area or width than is on the building's lot.

Final rulemaking action shall be taken in not less than thirty (30) days from the date of publication of this notice in the D.C. Register

The following rulemaking action is proposed:

Title 11 DCMR is amended as follows. Added wording is shown **bolded** and underlined:

1. Chapter 4, RESIDENCE DISTRICTS: HEIGHT, AREA AND DENSITY REGULATIONS, § 401.1 is amended to read as follows:

401.1 Except as provided in chapters 20 through 25 of this title **and in the second sentence of this subsection**, in the case of a building located, on May 12, 1958, on a lot with a lot area or lot width, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title. **Notwithstanding the above, the lot area requirements of § 401.3 must be met when the building is being converted to a use that would require more lot area or lot width than is on the building's lot.**

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, 441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address. **FOR FURTHER INFORMATION, YOU MAY CONTACT THE OFFICE OF ZONING AT (202) 727-6311.**

Point #3. *Subsequent ZC Case #07-03 (see attachment #5) has rendered this decision moot, and the BZA should set it aside.*

ANC 6A asks that the Board of Zoning Adjustment find the decision in #17532 moot and set it aside. AppleTree Institute, if given authorization to do so by the Public Charter School Board (PCSB), should now begin fresh and pursue a special exception process under the new regulations adopted by the ZC. The action of the ZC in #07-03 and related rulings will prohibit the Department of Consumer and Regulatory Affairs from issuing a permit for the construction of a school at 138 12th Street, NE, in the absence of a special exception. **There is no savings clause that would exempt the AppleTree request for a permit from subsequent actions that have been taken by the Zoning Commission** clarifying #06-06. To make this previous sentence clear, here is a passage from the ZC proceeding on May 14, 2007 at page 93 and following:

> CHAIRPERSON MITTEN:
> Okay.
>
> In this case we have a letter from Apple Tree Institute for Education Innovation regarding a request for basically a savings clause to exempt their application, the application that they had made to DCRA for a building permit that was appealed and because they don't want the -- if this amendment is passed, they don't want this amendment to be applied to their application. And Mr. Bergstein, I always had understood that whatever was in place, text and map was at the time of an application was what the application would be judged based on. Is that not correct?
>
> MR. BERGSTEIN: I don't believe that is correct. There's no vesting at the time an application is filed. What 3202.4 says is that a building that's authorized by a building permit may be constructed in accordance with the zoning regulations as of the date the building permit is issued. So if at any time while a building permit is being processed, there is a change to zoning regulations whether it's by emergency rulemaking or if there is a permit rule that becomes effective through the publication of an order, that does become the zoning regulations and that **a building permit cannot be issued until the application, its plans and its uses is in accordance with the zoning regulations as in effect on the date it is to be issued** (emphasis added).
>
> CHAIRPERSON MITTEN: Okay. Thanks for the clarification. I'll certainly make note of that for the future.
>
> So in this case, this request to basically be exempted from the application of this rule, should it pass, to me, in sitting on the appeal case, I had taken responsibility as a Zoning Commissioner for the fact that there had been an oversight and it was in attempting to remedy the oversight that this case was brought forward by the Office of Planning.
>
> And so if in the -- at the end of the day, if the Commission's intent is met, then that is what I'm most interested in, not in sort of preserving a loophole that was -- that existed because of an oversight. So I'm not inclined to provide the savings clause. And I'm ready to move forward on the text amendment, but I'll hear from my colleagues if there are any different opinions. (No response.)
>
> All right, then I move approval of Case No. 07-03 and ask for a second.
>
> COMMISSIONER PARSONS: Second.

CHAIRPERSON MITTEN:
Thank you, Mr. Parsons. Any discussion? All those in favor, please say aye.
(Chorus of ayes.)
Those opposed, please say no.
Ms. Schellin?

MS. SCHELLIN: Staff would record the vote 5 to 0 to 0 to approve proposed action in Zoning Commission Case No. 07-03.

District of Columbia Public Charter School Board

March 2, 2007

Councilmember Tommy Wells
The John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Councilmember Wells:

The D.C. Public Charter School Board (the "Board") received your letter dated February 26, 2007. In response, I am drafting this letter on behalf of the Board to (1) state that the Board has no jurisdiction over the AppleTree Institute for Education Innovation; (2) clarify the role of the Board regarding the selection and location of facilities of the charter schools it authorizes; and (3) invite you to discuss with the Board the general charter school facility selection issues you raise in your letter.

First, please be advised that the AppleTree Institute for Education Innovation (the "Institute") is a D.C. non-profit organization and is not a public charter school. The Board has issued a charter to AppleTree Early Learning Public Charter School (the "Charter School"), a separate legal entity. The Charter School is located at 680 I Street, SW.

The Board recognizes that the commercial property in question, 138-140 12th Street, NE, has been the subject of an ongoing controversy between the Institute and some residents of the neighborhood, and that the site was acquired by the Institute with the plan to complete renovations and to lease the facility to the Charter School. However, to date the Board has received no petition from the Charter School to modify its charter agreement to approve an additional campus at this site.

At our last monthly meeting, on February 26, 2007, the Board did approve a request from the Charter School for an enrollment increase. For your information, I have enclosed copies of our Decision Memorandum for the approval of the recent enrollment increase request by the Charter School. In addition, the Charter School provided us with preliminary information on two additional sites under negotiation – in a new building under construction in Columbia Heights, and in a potential co-location with St. Thomas More Catholic School in Washington Highlands. In order to operate at either or both of these prospective new sites, the Charter School must receive Board approval.

Because we have had no request from the Charter School to add a new campus located at 138-140 12th Street, NE, this Board has no jurisdiction to intervene in the matter. As mentioned above, the Institute is not a charter school, and the Board has no jurisdiction over the operations of the organization, including where it chooses to locate.

3333 14th St., NW • Suite 210 • Washington, DC 20010 • Office 202-328-2660 • Fax 202-328-2661 • www.dcpubliccharter.com

Finally, the Board shares your concerns for the safety and welfare of D.C. school children, and considers the location of charter school facilities to be an important one. Since you raise other general issues regarding the availability of space for charter school facilities, the Board welcomes the opportunity to meet with you, to discuss these issues further, and to establish a direct line of communication between us.

Sincerely,

Thomas Nida
Chair

Enclosure

cc: Victor Reinoso
Advisory Neighborhood Commission 6A
Appletree Early Learning Public Charter School

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD

DECISION MEMORANDUM

PREPARED BY : **Corey Carter**

SUBJECT : **Enrollment Increase Request – Appletree Early Learning Public Charter School**

DATE : **February 15, 2007**

BACKGROUND

As a part of their charter, schools under the authority of the PCSB establish enrollment ceilings for years 1-5 of their charters. During the course of a school's first five years, it may be desirable to increase the school's enrollment to exceed the approved ceiling to accommodate the demand for a school or in order to obtain a facility. Additionally, schools in their fifth year may want to establish a higher sixth year enrollment ceiling, and would have to do so in their fifth year prior to establishing new five-year enrollment projections.

The PCSB grants increases in enrollment ceilings based on the following criteria:

1. access to a facility to accommodate the projected enrollment;
2. a history of meeting enrollment projections;
3. demand for the school, as indicated by a waiting list;
4. in good standing; and
5. submission of timely audits.

PROPOSAL

Appletree Early Learning Public Charter School is a second year school that serves students in grades PS-PK. The School was granted an enrollment increase to ninety students for the 2006-07 school year, but did not meet the enrollment due to their inability to secure a facility to accommodate the increase. The school proposes to increase its enrollment from 36 students at its location on 680 I Street SW, to 180 students who will be housed at a location on 14th and Girard Streets NW, and at 4265 4th Street SE in addition to the I street location.

	2006-07	2007-08
Current	36	
Proposed	90	180

The school's current facility cannot accommodate the projected enrollment. However, the school has executed a Memorandum of Understanding subject to PCSB approval for the site on 4th Street SE and has signed a Letter of Intent for the location on in The Lofts of Columbia Heights on the corner of 14th and Girard NW. The school currently has a waiting list and indicates demand as evidenced by market research but has not elaborated on recruitment plans for the proposed increase. The school is currently in good standing and they have submitted timely financial statements to the PCSB, per their charter.

RECOMMENDATIONS OF STAFF

Based on the established criteria, staff recommends conditional approval of Appletree Early Learning PCS's request pending clarification of recruitment plans, and acquisition of facilities on a timeline suitable for a seamless transition to accommodate the enrollment increase.

ANC 6A requests reconsideration of BZA Order #17532
August 2, 2007
Enclosure #8

Point #4. *A new fact was made known to ANC 6A by a letter from Thomas Nida, Chair of the Public Charter School Board (see attachment #7). Mr. Nida states that no school has been authorized at 138 12th Street.*

A public charter school requires the issuance of a charter or explicit permission to modify a charter, and is linked to a specific address. Since no charter, either then or now, has been issued to AppleTree Public Charter School or the AppleTree Institute for Education Innovation, Inc. for 138 12th Street, NE, AppleTree Institute can not claim a "by-right" ability to build or modify any structure at that address. As Mr. Nida states in his letter, "...the Institute is not a charter school..."

In that letter, Mr. Nida states that no school has been authorized at 138 12th Street, NE. We assert that no permit for a school may be granted in the absence of authority from the PCSB to locate a school at a specific address. A mere claim that a school is to be located at a particular site should not be used to allow modifications to take place that would be in defiance of the Regulations.

A charter school cannot be located without the explicit permission of the PCSB, the chartering authority. No such permission has yet been given. There is not even a showing that there is a contract, either lease or purchase, for the transfer of this property to the AppleTree Public Charter School, a separate entity from the applicant. Since no charter, either then or now, has been issued to AppleTree Public Charter School or the AppleTree Institute for Education Innovation, Inc. for 138 12th Street, NE, AppleTree Institute can not claim a "by-right" ability to build or modify any structure at that address.

A developer could, under the guise of by-right school construction, over-mass, expand lot coverage, and increase FAR. Should the PCSB decide not to issue a charter or expansion authority, the property would remain modified and inappropriate for its neighborhood. .

Point #5. *Two members of the BZA failed to declare conflicts of interest. Since only four members of the Board were physically present when the vote was taken, and since only two, Ms. Miller and Mr. Mann, would then have been left eligible to vote, a quorum was not present.*

It is a fundamental principle of adjudicatory proceeding that those who sit in judgment inform all parties of potential conflicts, and that they recuse themselves where reasonable persons would judge them to have such a conflict. ANC 6A asks that the Board rehear #17532, first because there was not a valid quorum at the January 9, 2007 meeting where the vote was taken and, second, because neither we nor Northeast Neighbors for Responsible Growth heard from two BZA members about possibly disqualifying conflicts of interest.

The Chair, Geoffrey Griffis, should have disclosed that he was a member of Young American Works Public Charter School board, and also a member of the board of the Capitol City Public Charter School of Washington. While Mr. Curtis Etherly, Jr. disclosed his membership on the board of the Washington Mathematics Science and Technology Public Charter High School, Mr. Griffis sat silent.

The lack of disclosure by the Chair taints the Board, the proceedings of that day, and any subsequent vote. The parties had the right to hear of his relationship and either object or agree to his continued presence. **His failure to declare while holding the gavel and giving shape to the BZA's discussions, both in the hearing rooms and during the Board's preliminary discussions, irrevocably taints the process**.

Mr. Etherly, as mentioned, appropriately disclosed his charter school board position, but he failed to disclose that he is a board member of DC Action for Children (DCAC), also known as "DC Kids". DCAC has taken positions and has sought action against the ZC's proposed charter school regulation while it was under consideration by that Commission. **Had we known this at the time, we would certainly have objected to Mr. Etherly's participation in the BZA hearing or vote**. His service as a volunteer on this board is laudatory, nor do we know of any reason to believe DCAC is not a worthwhile organization. But for the organization on which he serves as a board member to take a position in opposition to pending action upon which he subsequently adjudicates again taints the hearing and the decision.

As an example of the conflict of interest, the following is an email sent by Susan Cambria, a staff person for DC Action for Children to the DC Kids listserv:

> *From:* Susie Cambria [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."

This failure to disclose by the Chair and by a member of the BZA leads us to conclude that the BZA decision in #17532 is irrevocably flawed and invalid.

The failure to fully disclose and allow us, as a party, the opportunity to object to their participation leads to a second inevitable conclusion. **At the BZA meeting where the vote was taken, two of four members of the Board were ripe for disqualification, leaving only two members fully eligible to vote**. Ms. Mitten was not physically present. This number is insufficient for a quorum, and no valid action can have taken place at that meeting.