

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



August 21, 2007

Charles J. Willoughby
Inspector General
District of Columbia
717 14th Street, NW, Fifth Floor
Washington, DC 20005

Re: Sunshine laws regarding the Board of Zoning Adjustment

Inspector General Willoughby:

On August 9, 2007, the Board of Zoning Adjustment (BZA) notified our Commission via electronic e-mail of public meeting on August 16, 2007 (Attachment #1), to rule on an appeal filed by our Commission regarding BZA Order #17532 regarding AppleTree Institute for Education and Innovation's attempt to construct a charter school at 138 12th Street, NE. (Attachment #3). On August 16, 2007, BZA notified our Commission that the public meeting would be delayed one day to August 17, 2007 (Attachment #2). Accordingly, I request that your office review these BZA notifications as executed by Ms. Ruthanne Miller and Mr. Curtis Etherly, Jr. as Chair and Vice Chair, respectively, of BZA, to determine if they were executed in accordance with:

- (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.

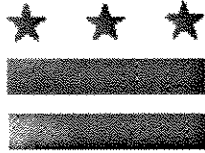
Based on the above dates, it appears that BZA did not comply with either the ANC Act or the rules that govern the BZA by providing less than ten (10) days notice of the initial hearing as well as only one (1) day notice of the change of date. As the decision on our appeal was made at this meeting, your swiftest possible review to determine if proper notice was executed is appreciated. Moreover, I request your office to determine if that decision would be null and void for lack of proper public notice and if a new public meeting is required to rule on our appeal.

Regards,

Joseph Fengler

Chair, Advisory Neighborhood Commission 6A

Cc: Councilmember Wells
Councilmember Cheh
Councilmember Mendelson
Attorney General Singer



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Attachment #1

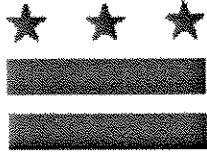
From: "Nero, Richard (DCOZ)" <richard.nero@dc.gov>
To: Joseph Fengler <fengler6a02@yahoo.com>
Cc: "Moy, Clifford (DCOZ)" <Clifford.Moy@dc.gov>; "Rose, Tracey (DCOZ)" <tracey.rose@dc.gov>
Sent: Thursday, August 9, 2007 9:41:13 AM
Subject: BZA Public Meeting on Appletree

Mr. Fengler:

Please be advised that the Board of Zoning Adjustment has scheduled a public meeting on Thursday, August 16, 2007 to consider a couple of matters including the ANC's Motion for Reconsideration of the AppleTree decision. The meeting will start at 10:00 AM.

Regards,

Rick Nero
Richard S. Nero, Jr.
Deputy Director of Operations
Government of the District of Columbia
Office of Zoning
441 4th Street, N.W., Suite 200-S
Washington, D.C. 20001
Tel:(202) 727-6311
Fax: (202) 727-6072
richard.nero@dc.gov
www.dcoz.dc.gov



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Washington, DC 20013



Attachment #2

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

From: "Moy, Clifford (DCOZ)" <Clifford.Moy@dc.gov>

To: Joseph Fengler <fengler6a02@yahoo.com>; David Holmes <holmes.anc6a03@gmail.com>

Cc: "Moy, Clifford (DCOZ)" <Clifford.Moy@dc.gov>; "Nero, Richard (DCOZ)" <richard.nero@dc.gov>

Sent: Wednesday, August 15, 2007 1:59:24 PM

Subject: BZA Special Public Meeting Rescheduled Date

Gentlemen:

This is your notice that the BZA's Special Public Meeting on Thursday, August 16, 2007 has been rescheduled to Friday, August 17, 2007. The 10:00 a.m. starting time is unchanged.

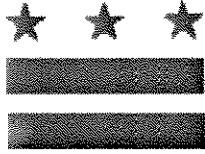
If you have any questions, please call me.

Cliff Moy



Clifford W. Moy
Secretary of the
Board of Zoning Adjustment
District of Columbia Office of Zoning
441 4th Street, N.W.
Suite 200-210 South
Washington, D.C. 20001
U.S.A.

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Attachment #3

From: Joseph Fengler [mailto:fengler6a02@yahoo.com]
Sent: Thursday, August 02, 2007 1:21 PM
To: Clifford (DCOZ) Moy
Cc: Tommy Wells (Council); Phil Mendelson; Sharon (DCOZ) Schellin; Matt (DCRA) LeGrant; Nicholas Alberti; Mary Beatty 6a05); David Holmes; Gladys Mack; omar mahmud; Raphael Marshall 6A01); Elizabeth Nelson; Stephanie Nixon 6a08); Drew Ronneberg; William Schultheiss ANC 6A06)
Subject: ANC 6A requests reconsideration of BZA Order #17532

Mr. Moy, please accept this signed, electronic copy until the original can be hand delivered to your office by close of business Friday, August 3, 2007.

Our Commission believes that the recent decision by the Zoning Commission (Case 07-03) closes the loop hole that would stop "McCharter" development in residential zoned communities that do not have the basic infrastructure to support converting houses to charter schools. The leading example of this approach is AppleTree Institute for Education and Innovation's attempt to construct a charter school at 138 12th Street, NE.

Given the recent Zoning Commission order on July 9, 2007, we are very troubled by the subsequent Board of Zoning Adjustment ruling on July 25, 2007, where four of the members appear to close their eyes, ears and mind to the ruling of the Zoning Commission. While our Commission has a right to believe this -- as any person or organization that loses an argument -- there are very serious errors of omission by AppleTree, subterfuge in the finding of fact issued by BZA, and a failure to declare conflicts of interest by two of the BZA members.

We hope the new chair of BZA will look favorable upon our request for reconsideration to stem the decreasing confidence our community has in the Board's ability to fairly execute its authority on behalf the residents of this city.

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).

Ms. Nelson, please post to our website.

Regards,

Joseph Fengler, ANC Commissioner 6A02

Phone: 202-423-8868

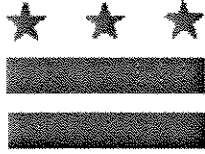
fengler6a02@yahoo.com

Please visit our website - www.anc6a.org

Text of attachment:

August 2, 2007

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



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



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 Holmes (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

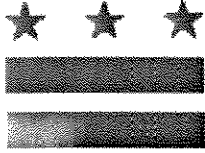
Cc:

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

There are nine enclosures:

Enclosure 1. The text of BZA Order #17532 of AppleTree Institute for Education Innovation, Inc was provided in the original letter. This Order can be found on the DC Zoning Website: http://dcoz.dc.gov/orders/17532_998-820.pdf

Enclosure 2. The text of ZC Order #06-06 was provided in the original letter. This Order can be found on the DC Zoning Website: <http://dcoz.dc.gov/orders/06-06.pdf>



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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).

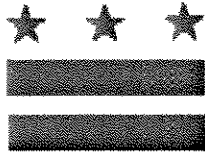
The Zoning Commission by adopting the Emergency Rules subjected public schools, not meeting the minimum requirements, to a special exception process. The Commissioners found that emergency rulemaking was required, especially for R-2, R-3 and R-4 zones because they have the smallest lots, minimal areas 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 Member, 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 adjutory (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



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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



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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.

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.

Enclosure 4.

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.

Enclosure 5.

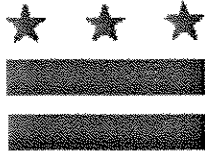
**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
 NOTICE OF PROPOSED RULEMAKING
 Z.C. Case No. 07-03
 (Text Amendment - 11 DCMR)
 (Minimum lot dimensions in Residential Districts)**

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:



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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.**

Enclosure 6.

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

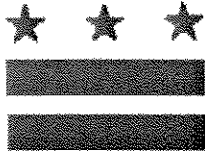
ANC 6A asks that the Board of Zoning Adjustment find the decision in #17532 moot and set it aside. AppleTree Institute, if given authorization to do so by the Public Charter School Board (PCSB), should now begin fresh and pursue a special exception process under the new regulations adopted by the ZC. 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



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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.

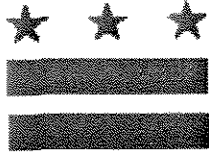
Enclosure 7. The letter was included in the original letter. We have potted the letter from the Public Charter School Board at: <http://www.anc6a.org/ATnidaToWells.pdf>

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.



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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. .

Enclosure 9.

***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.*

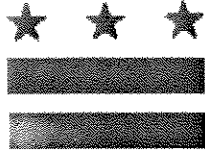
It is a fundamental principle of adjudicatory proceeding that those who sit in judgment inform all parties of potential conflicts, and that they recuse themselves where reasonable persons would judge them to have such a conflict. ANC 6A asks that the Board rehear #17532, first because there was not a 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:



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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.