

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17769 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator granting zoning and environmental disciplines contained in building plan review status tracking number 3758 A 2006, allowing a public charter school (AppleTree Institute for Education Innovation) in the R-4 district at premises 138 12th Street, N.E. (Square 988, Lot 820).

HEARING DATE: June 3, 2008

DECISION DATE: July 1, 2008

DECISION AND ORDER

This appeal was submitted December 24, 2007 by Advisory Neighborhood Commission 6A, (“Appellant”), which challenged a decision by the Department of Consumer and Regulatory Affairs “to grant Zoning and Environmental Disciplines contained in the Building Plan Review Status Tracking Number 3758 A 2006,” concerning the proposed public charter school use of property located at 138 12th Street, N.E. by the AppleTree Institute for Education Innovation (“AppleTree”). Following a public hearing, the Board voted at its public meeting on July 1, 2008 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated January 4, 2008, the Office of Zoning provided notice of the appeal to the Office of Planning; the Zoning Administrator, at the Department of Consumer and Regulatory Affairs (“DCRA”); Advisory Neighborhood Commission (“ANC”) 6A, the ANC in which the subject property was located; and Single Member District/ANC 6A04. Pursuant to 11 DCMR § 3112.14, on March 12, 2008 the Office of Zoning mailed letters or memoranda providing notice of the hearing to the Appellant, the Zoning Administrator, and AppleTree. Notice was also published in the D.C. Register on March 21, 2008 (55 DCR 2823).

Party Status. The parties in this proceeding were the Appellant, ANC 6A; DCRA; and AppleTree, the owner of the property that was the subject of the appeal. There were no additional requests for party status.

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Appellant's Case. The appeal challenged a decision made by DCRA's Building and Land Regulation Administration to approve Zoning and Environmental Disciplines contained in the Building Plan Review Status Tracking Number 3758 A 2006, and the subsequent issuance of a building permit to AppleTree.¹ ANC 6A asserted that DCRA erred in issuing the building permit to AppleTree on October 26, 2007 because the reviews of two disciplines were then incomplete, and because the dimensions of the subject property did not comply with the Zoning Regulations in effect on that date, in light of an amendment to § 401.3 adopted by the Zoning Commission in Z.C. Order No. 06-06. According to ANC 6A, the newly adopted requirements applied even in the case of a building that existed prior to 1958 because of another recent amendment to the Zoning Regulations, adopted by the Zoning Commission in Case No. 07-03. ANC 6A contended that DCRA should be required to "revoke the Zoning and Environmental Disciplines and any approved building and construction permits for Permit No. 89587," and to "deny the pending zoning and certificate of occupancy requests based on the fact that the property under consideration does not [meet] the minimum lot dimension requirements (lot area and lot width) of Title 11 DCMR § 401.3."

Zoning Administrator. The Department of Consumer and Regulatory Affairs argued that the appeal submitted by ANC 6A did not allege any error committed with respect to zoning, because the building permit was not issued by the Zoning Administrator. The Zoning Administrator described the process for approval of an application for a building permit, stating that an application must be reviewed and approved by approximately 20 separate disciplines (such as environmental, electrical, structural, mechanical, and historic preservation reviews) in addition to zoning before a permit is finally issued by the director of DCRA's permit center or a designee. The Zoning Administrator, whose review is not contingent upon the completion of other disciplines, is required to certify that a project will comport with the Zoning Regulations before an application is approved.

The Zoning Administrator testified that the amendments to the Zoning Regulations cited by ANC 6A, which became effective in September 2007, did not apply to AppleTree's application for a building permit. Pursuant to § 3202.6, the Zoning Administrator had processed AppleTree's application in accordance with the regulations in effect on August 6, 2007, the date of an order of the Board that had authorized the permit.

Intervenor. AppleTree concurred with the Zoning Administrator that its application for a building permit was not subject to the zoning text amendments that became effective in September 2007. AppleTree asserted that its permit application had complied with applicable zoning requirements since it was filed, and noted that the Board had previously voted to grant AppleTree's appeal of the Zoning Administrator's initial decision to deny the application.

¹ Originally the appeal also alleged that "DCRA has failed to adequately review or evaluate the environmental impact as required by D.C. Law 8-86 'District of Columbia Environmental Policy Act of 1989' and the rules promulgated by DCRA for projects of this magnitude and scope." The Appellant did not pursue this allegation before the Board, which has jurisdiction to consider only claims of error in the administration the Zoning Regulations.

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According to AppleTree, the Zoning Administrator properly processed the permit application in accordance with the regulations in effect on the date of the Board's order in the appeal case, which occurred before the Zoning Commission amended the regulations.

Request for Postponement. By letter dated May 23, 2008, ANC 6A requested a postponement of the hearing for at least 30 days to allow the Office of Administrative Hearings ("OAH") time to issue a decision in a proceeding concerning an appeal brought by AppleTree to challenge a decision by DCRA to revoke AppleTree's building permit (OAH Case No. CR-C-07-100087). By letter dated May 27, 2007, AppleTree opposed the request for postponement, stating that further delay would prejudice AppleTree and that nothing in the OAH proceeding could affect the outcome of ANC 6A's appeal to the BZA. By response submitted May 29, 2005, DCRA also opposed the ANC's request for a continuance, citing a final order issued May 29, 2008 by OAH that dismissed the proceeding for lack of subject matter jurisdiction. At the public hearing on June 3, 2008, ANC 6A withdrew its request for postponement.

FINDINGS OF FACT

1. T
The subject property is located at 138 12th Street, N.E. (Square 988, Lot 820) in the Capitol Hill neighborhood. The lot is 36 feet wide and has an area of 4,230 square feet, and is zoned R-4.
2. The subject property is improved with a commercial building that was constructed in the 1910s. The building has been used for non-residential purposes at least since the promulgation of the current version of the Zoning Regulations; on May 12, 1958, the effective date of the Zoning Regulations, the building was used as an office facility for a heating oil company.
3. The property is owned by AppleTree Institute for Education Innovation, Inc., a non-profit that focuses on pre-literacy education for three- and four-year-old children. AppleTree purchased the property in 2005 to serve as the location of a three-classroom public charter school.
4. On February 9, 2006, AppleTree applied for a building permit to construct a rear addition onto the existing building at the subject property.
5. On February 13, 2006, the Zoning Commission adopted an emergency rule pertaining to public schools (Z.C. Case No. 06-06; Notice of Emergency and Proposed Rulemaking, 53 DCR 2017). The emergency rule was re-adopted on June 12, 2006 (53 DCR 5895), and a Notice of Final Rulemaking, adopting a new permanent rule, was published December 1, 2006 (53 DCR 9580). In relevant part the new rule increased the minimum lot area for a public school (defined to include charter schools) in an R-4 zone from 4,000 square feet to 9,000 square feet, and the minimum lot width from 40 feet to 120 feet.

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6. On April 28, 2006, the Zoning Administrator denied AppleTree's permit application on the grounds that the proposed use of the subject property failed to meet the minimum lot area requirement of 9,000 square feet, the minimum lot width requirement of 120 feet, and minimum parking requirement of 10 spaces. AppleTree appealed the Zoning Administrator's decision to the Board.
7. By order issued July 25, 2007 in Appeal No. 17532, the Board concluded that the Zoning Administrator had erred in denying AppleTree's permit application. The Board concurred with AppleTree that the subject property was exempt from the new area restrictions by reason of § 401.1 of the Zoning Regulations, which then stated that, with certain exceptions, "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 concluded that a building that was located on May 12, 1958 on a lot that does not meet the prescribed lot area or lot width requirements may be enlarged or replaced, provided that the property complies with all other provisions of the Zoning Regulations. After concluding that the subject property complied with all other provisions of the Zoning Regulations, the Board reversed the determination of the Zoning Administrator that the building on the subject property could not be expanded because the lot did not meet the area and width requirements for a public school.
8. In accordance with § 3125.6, the Board's order in Appeal No. 17532 became final on July 25, 2007, upon the filing of the order in the record and its service upon the parties. Pursuant to §§ 3125.9 and 3110, the order became effective on August 6, 2007.
9. By order effective September 14, 2007 in Case No. 07-03, the Zoning Commission amended § 401.1 to state as follows:

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 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. Notwithstanding the above, the lot area requirements of § 401.3 must be met when the building is being converted to a use or replaced by a building intended to house a use that would require more lot area or lot width than is on the building's lot.

(Order No. 07-03 (54 DCR 8971).)
10. By order in Case No. 06-33, also effective September 14, 2007, the Zoning Commission adopted text amendments to chapter 21 of the Zoning Regulations to clarify the parking requirements applicable to buildings deemed "historic resources." (*See* Order No. 06-33 (54

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DCR 8959).) The application of the new rules to the subject property would not have resulted in an increased parking requirement.

11. The zoning approval of AppleTree's permit application was initially made on August 9, 2007 and was affirmed on August 23, 2007, when the Zoning Administrator determined that the application had been approved correctly with regard to zoning. On September 18, 2007, before the permit was issued, the Zoning Administrator placed a hold on the application so that it could be reviewed again in light of the two orders of the Zoning Commission that became effective on September 14, 2007 (that is, Order No. 06-33 and Order No. 07-03).
12. Building Permit No. 89587 was issued to AppleTree on October 26, 2007, allowing interior renovation of the existing building and construction of a three-story addition with basement. The permit was mistakenly issued in spite of the hold that had been placed on the application by the Zoning Administrator.
13. On November 15, 2007, DCRA issued a Notice of Revocation of Building Permit No. 89587, stating that the permit had been issued "in error, prior to completion of reviews by all of the disciplines required to approve the application, specifically environmental and zoning." The notice of revocation stated the necessary zoning review included "the impact of an amendment of the Zoning Regulations pursuant to Zoning Commission Order 06-33, published in the District of Columbia Register on September 14, 2007."
14. ANC 6A submitted its appeal to the Board on December 24, 2007. The ANC asserted that the permit issued by DCRA on October 26, 2007 did not comply with the Zoning Regulations, specifically the lot dimension requirements, in effect on that date, in violation of 11 DCMR § 3202.4. According to ANC 6A, the amendment to § 401.3 adopted by the Zoning Commission in Case No. 06-06 "stipulates that a property to be used as a 'public school' have a minimum lot size of 9,000 sq. ft. and a minimum lot width of 120 ft." while the amendment adopted by the Zoning Commission in Case No. 07-03 "stipulates that, even though the lot and building existed prior to 1958, it must meet the minimum lot area and minimum lot width requirements of § 401.3 if the building is being converted to a use that requires more lot area and lot width than is on the building's lot." ANC 6A asserted that the Board's order in Appeal No. 17532 did not authorize the issuance of a building permits as of the effective date of that order because AppleTree's application was not sufficiently complete, as required by § 3202.6 of the Zoning Regulations.
15. In reviewing AppleTree's application for a building permit, the Zoning Administrator determined that § 3202.6 was applicable.² According to the Zoning Administrator, the

² Pursuant to § 3202.6, "All applications for building permits authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated; provided, that all applications for building permits shall be accompanied by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation."

general rule set forth in § 3202.4 – that any construction authorized by a permit may be carried to completion pursuant to the provision of title 11 in effect on the date that the permit is issued – is subject to an exception set forth in § 3202.6, such that any application for a building permit that is authorized by the Board may be processed in accordance with the zoning regulations in effect on the date that the Board’s order is promulgated. The Zoning Administrator determined that AppleTree’s application had been authorized by the Board’s order in Appeal No. 17532, which became effective on August 6, 2007, and concluded that the zoning regulations in effect on that date were controlling for purposes of the application, and that any subsequent amendments to the regulations did not apply to the application. In March 2008, the Zoning Administrator ultimately concluded that AppleTree’s application complied with the Zoning Regulations in effect on August 6, 2007.

16. By letter to AppleTree dated April 28, 2008, DCRA indicated that the necessary environmental and zoning approvals had been obtained, and therefore withdrew the Notice of Revocation and confirmed the validity of Building Permit No. 89587 *nunc pro tunc*.

CONCLUSIONS OF LAW

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration the Zoning Regulations. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. *Id.*

An appeal must be filed within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). The Board may extend the 60-day deadline in case of exceptional circumstances outside the appellant’s control. 11 DCMR § 3112.2(d). In this case, the Appellant filed an appeal on December 24, 2007 that challenged a building permit issued October 26, 2007; the appeal was filed within the 60-day deadline and therefore was timely.³

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in any decision made in the administration of the Zoning Regulations with respect to the approval of AppleTree’s application for a building permit and the issuance of Building Permit No. 89587. The ANC initially argued that the permit should not have been issued prior to completion of reviews by the environmental and zoning disciplines. As noted earlier, the Zoning Regulations do not require environmental compliance as a prerequisite to the issuance of a building permit. Only compliance with the zoning regulations must be found. 11 DCMR § 3202.1. The Board also notes that DCRA concurred that the permit had been issued in error, but the errors were cured and DCRA ultimately withdrew its notice of revocation and confirmed the validity of the permit once the necessary environmental and zoning approvals were obtained.

³ The record contains conflicting information as to whether the permit was issued October 26, 2007 or October 29, 2007. The Board concludes that ANC 6A’s appeal of the permit was timely filed in either event.

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With regard to this contention, the Board concludes that ANC 6A did not state a claim of zoning error.

ANC 6A also challenged the Zoning Administrator's determination that AppleTree's permit application was authorized by the Board's order in Appeal No. 17532 and was not subject to zoning amendments that went into effect subsequently. Pursuant to § 3202.6, all applications for building permits "authorized by orders of the Board of Zoning Adjustment may be processed in accordance with the Zoning Regulations in effect on the date those orders are promulgated...". This section applies so long as an application is "accompanied by the plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation."

The ANC's contention that AppleTree's application was not sufficiently complete, as required by § 3202.6, apparently refers to the mistaken issuance of the permit prior to completion of all the necessary reviews; that is, the ANC seems to assert that the application could not be processed – and thus the permit could not be issued – until complete information, including that gleaned from the reviews of all the various disciplines, was available. The Board was not persuaded by this argument. As previously noted, the permit was mistakenly issued prior to completion of all necessary reviews, but those reviews occurred subsequently and the defect was cured *nunc pro tunc* to the original date of issuance. Moreover, § 3202.6, specifically refers to plans and other information required by § 3202.2, which shall be sufficiently complete to permit processing. The ANC did not show that AppleTree had not complied with § 3202.2, which requires each applicant for a building permit to supply the specific information necessary to "determine compliance with the provisions of" the Zoning Regulations. Thus, the Board does not agree with ANC 6A that AppleTree's application was not sufficiently complete to allow issuance of a building permit.

The Board concludes that the Zoning Administrator properly processed AppleTree's application for a building permit in accordance with the Zoning Regulations in effect on August 6, 2007, the effective date of the order of the Board that authorized the permit by granting AppleTree's appeal of the Zoning Administrator's initial decision to deny the application. As already noted, the Board finds that AppleTree's application was accompanied by the plans and information required by § 3202.2, and was sufficiently complete to permit processing without substantial change or deviation. The amendments to the Zoning Regulations cited by ANC 6A did not become effective until September 14, 2007, and thus do not apply to AppleTree's application.

The Zoning Administrator noted that § 3202.6 allows some discretion in deciding whether to apply any recent zoning amendments, in that an application for a building permit authorized by an order of the Board *may* be processed in accordance with the Zoning Regulations in effect on the date the order is promulgated. In this case, the Board concurs with the Zoning Administrator's decision to apply the regulations in effect on the date of the Board's order, particularly since the Board indicated its interpretation of the relevant zoning provisions in its

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decision on AppleTree's appeal and the Zoning Administrator then carried out that interpretation in processing the permit application.

For the reasons stated above, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in the decision by the Department of Consumer and Regulatory Affairs to approve a building permit application for the proposed public charter school use of property located in the R-4 zone at 138 12th Street, N.E. by the AppleTree Institute for Education Innovation. Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-0-1** (Ruthanne G. Miller, Mary Oates Walker, Shane L. Dettman, and Curtis L. Etherly, Jr. (by absentee vote) voting to deny the appeal; Marc D. Loud not present, not voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this order.

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 18 2008

PURSUANT TO 11 DCMR § 3125.6, THIS 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



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As Director of the Office of Zoning, I hereby certify and attest that on **DECEMBER 18, 2008**, 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:

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