

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



**Appeal No. 04-0001** of the administrative determination of the District of Columbia Department of Consumer and Regulatory Affairs Office of Adjudication (Elizabeth Ayres Whitman, Administrative Law Judge) made on August 18, 2003 upholding a notice of civil infraction issued to William Robinson, based upon his failure to obtain a building permit for property located at 1610 H Street, SE.

**HEARING DATE:** September 28, 2004

**DECISION DATE:** September 28, 2004

**DECISION AND ORDER**

**Background**

William Robinson (the Appellant or Mr. Robinson) was served with a notice of infraction by the Department of Consumer and Regulatory Affairs (DCRA) pursuant to section 301 of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code § 2-1802.01 (2001)). The notice of infraction alleged that he had done construction work at his home without a demolition permit and stated that Mr. Robinson was required to respond to the DCRA Office of Adjudication (OAD) within 15 days of service. Although Mr. Robinson maintains that he responded to this notice, a second notice of infraction was served after 15 days had elapsed without an acknowledged response. Mr. Robinson appeared at OAD on the hearing date contained in the second notice of infraction, but OAD found that he was not entitled to a hearing on the merits due to his failure to respond to either the first or second notices of infraction.<sup>1</sup> The OAD Administrative Law Judge (ALJ) found that Mr. Robinson was subject to the maximum fine of \$500, plus a penalty equal to double the amount of the fine in the amount of \$1,000, and issued a written decision to this effect on or about August 18, 2003.

The present appeal is an appeal of the ALJ's decision and order. However, it follows a previous appeal to the Board of Appeals and Review (the BAR), which declined to hear the case. In a Decision and Order dated December 10, 2003, the BAR<sup>2</sup> stated that Mr. Robinson "chose the wrong forum" and found that the appeal properly lies before this Board, the Board of Zoning Adjustment (BZA). Following the BAR's decision, Mr. Robinson appealed to this Board only to find that DCRA now challenged the BZA's jurisdiction. Thus, Mr. Robinson is confronted with another jurisdictional hurdle, and this Board must determine whether it has subject matter jurisdiction over the appeal. For reasons explained in this Decision and Order, we find the BZA

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<sup>1</sup> Under 16 DCMR 3103.13 & 3105.5(a), a merits hearing requires that good cause be shown for failing to respond to the notice of infraction. OAD found that Mr. Robinson made no such showing for his failure to respond.

<sup>2</sup> Since the time this appeal was filed, BAR's jurisdiction has been transferred to the newly established Office of Administrative Hearings.

lacks subject matter jurisdiction over this appeal and that jurisdiction properly lies before the Office of Administrative Hearings.

### **FINDINGS OF FACT**

On or about May 10, 2003, DCRA served a "Notice of Infraction" on Mr. Robinson alleging that he had engaged in construction without a building permit in violation of section 10 of the Zoning Act of 1938, approved June 20, 1938, (52 Stat. 797; D.C. Official Code § 6-641.09). On its face, the notice provided for a \$500 fine.<sup>3</sup>

Although Mr. Robinson states to the contrary, OAD found that Mr. Robinson failed to respond to either this Notice of Infraction or a second Notice of Infraction that was issued by DCRA on or about June 19, 2003.

A Decision and Order was issued by OAD on or about August 18, 2003 that imposed the maximum fine of \$500, penalties totaling \$1,000, and a hearing fee of \$40.

The Decision and Order also provided Mr. Robinson with instructions advising him of his right to appeal. The instructions stated, in part:

"In general all civil infraction orders are appealable to the BOARD OF APPEALS AND REVIEW. There are a few exceptions . . .

. . . If your matter concerns a violation of D.C. Zoning Regulations or chapter 4 (Zoning and Height of Buildings) of Title 5 of the D.C. Code<sup>4</sup>, then your matter is appealable to the BOARD OF ZONING ADJUSTMENT."

### **CONCLUSIONS OF LAW**

DCRA asserts that the appeal properly lies before the D.C. Office of Administrative Hearings (OAH), the forum that acquired jurisdiction from the Board of Appeals and Review (BAR). On the other hand, the BAR declined to hear the appeal, finding that the BZA has jurisdiction under the language of D.C. Official Code § 2-1803.01 (2001). The text of § 2-1803.01 appears to give the BZA authority over appeals, such as this one, that involve civil infractions of Chapter 6 of D.C. Code Title 6. However, as we explained in *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (2004), § 2-1803.01 of the D.C. Code is not controlling because it incorrectly codified the law that was actually passed by the D.C. Council

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<sup>3</sup> The civil infraction fine schedule makes violations of section 10 a class 2 civil infraction 16 DCMR § 3231.1. The fine for a class 2 infraction is \$500 for the first offense, 16 DCMR § 3201.1(b).

<sup>4</sup> The reference is to the 1981 edition of the D.C. Code. The comparable reference to the 2001 edition would be Chapter 6 of Title 6.

We explained in *Choharis* that under the original Civil Infractions Act, appeals of civil infractions must be heard by the BAR unless they stem from the Height Act or the Zoning Regulations. The appeal in *Choharis*, like this appeal, does not stem from Zoning Regulations but from the Zoning Act. While the codified version of the Civil Infractions Act references appeals stemming from Chapter 6 of Title 6 (within the Zoning Act), we explained that the original text of the Act is inconsistent with the codified version and that the original text must prevail. We stated:

As it appeared in the *D.C. Register* (32 DCR 4454-4455) and at page 549 of the 1985 volume of the District of Columbia Statutes-at-Large, section 303 of the Civil Infractions Act provided that all appeals under the Act would go to the Board of Appeals and Review:

*except that appeals involving infractions of the Act to regulate the height of buildings in the District of Columbia, approved March 1, 1899 (30 Stat. 923; D.C. Code sec. 25-101 et. seq.) [the Height Act], or the District of Columbia Zoning Regulations shall be entertained and decided by the District of Columbia Board of Zoning Adjustment . . . . (Emphasis Added)*

In other words, the codified text is inconsistent with the text of the same provision as it was originally published in the D.C. Statutes-at-Large...

the text of a provision contained in the D.C. Statutes at Large (or in the organic law) prevails over the text of the same provision as codified in the D.C. Code. Therefore, ... reliance on the text of D.C. Official Code § 2-1803.01 is misplaced...

Whenever the language of a codified statute differs from the language of the law enacted by the legislature, the language used by the legislature prevails. *See, Sutherland, Statutes and Statutory Construction*, 6<sup>th</sup> ed., vol. 1A, § 28:02 (2000). Section 207 of the District of Columbia Codification Act of 1975, effective October 8, 1975 (D.C. Law 1-19; D.C. Official Code § 2-605), requires that “[a]ll courts within the District of Columbia shall take judicial notice of the acts and resolutions published in the District of Columbia Statutes-at-Large.” Thus “when the District of Columbia Statutes-at-Large are inconsistent with the Code ... the former must prevail”. *Burt, et al., v. District of Columbia*, 525 A.2d 616, 619 (D.C. 1987).

*Id. at 8211-8212..*

To reiterate our holding in *Choharis*, The Civil Infractions Act does not confer jurisdiction on the BZA over administrative appeals unless the appeals stem from violations of the Height Act or the Zoning Regulations. The present appeal does not result from either type of violation, but arises from a violation of the Zoning Act itself. Neither the Zoning Act nor the Civil Infractions Act gave the BZA jurisdiction with respect to such a violation. As a result, the BZA lacks subject matter jurisdiction and must dismiss the appeal. The fact that the D.C. Code

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and DCRA's own notice may have led Mr. Robinson to believe otherwise cannot create jurisdiction over his appeal.

A court by its own words cannot create or extinguish its own subject matter jurisdiction. Rather, the source of jurisdiction is 'the constitutional and statutory provisions by which it is created'.

*Appeal of A.H.*, 590 A.2d 123, 129 (D.C.1991). *quoting Demar v. Open Space & Conservation Comm'n*, 211 Conn. 416, 423-27, 559 A.2d 1103, 1107- 08 (1989).

Because BAR's jurisdiction has been transferred to the Office of Administrative Hearings (OAH), the Board agrees with DCRA that jurisdiction properly lies there. *See*, D.C. Official Code § 1831 (2004).

The Board appreciates the frustration Mr. Robinson must feel at having been denied a hearing by the BAR on the grounds that the BZA was the proper forum for hearing his appeal, only to be informed by this body that the BAR was wrong. However, this Board cannot confer jurisdiction upon itself where it has none. In light of the legal clarification set forth in *Choharis*, *supra*, and restated here, it is hoped that OAH will quickly hear and decide this appeal, so that Mr. Robinson will have the due process to which he is entitled.

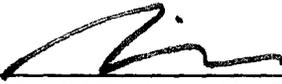
For the reasons stated above, it is hereby **ORDERED** that the appeal is **DISMISSED**.

**VOTE:**            4-0-1            (Geoffrey H. Griffis, Ruthanne G. Miller, John Mann II, and Curtis L. Etherly, Jr., in favor of the motion to dismiss, the Zoning Commission member not present, not voting)

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

Each concurring member has approved the issuance of this Decision and Order.

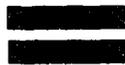
ATTESTED BY: \_\_\_\_\_

  
**JERRILY R. KRESS, FAIA**  
Director, Office of Zoning

**FINAL DATE OF ORDER:** MAR 19 2005

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



**BZA APPEAL NO. 04-0001**

As Director of the Office of Zoning, I hereby certify and attest that on MAR 13 2005 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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**ATTESTED BY:**

  
**JERRILY R. KRESS, FAIA**  
Director, Office of Zoning