GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 03-0001 of the administrative determination of the District of Columbia Department of Consumer and Regulatory Affairs Office of Adjudication (James Harmon, Attorney Examiner) made on April 4, 2003, upholding a notice of civil infraction issued to Peter Choharis based upon his failure to obtain a building permit for property located at 2771 Woodley Place, N.W.

HEARING DATE: April 13, 2004
DECISION DATE: April 20, 2004

DECISION AND ORDER

Background

Peter Choharis (the Appellant or Mr. Choharis) 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 removed the steps of his porch without a building permit. Mr. Choharis contested the notice of infraction, and the matter was heard by the DCRA Office of Adjudication (OAD). The OAD Attorney Examiner found that Mr. Choharis had unlawfully removed the steps and issued a written decision to this effect. Mr. Choharis appealed this decision to the Board of Zoning Adjustment (the BZA), and both he and DCRA filed briefs and presented argument to the BZA. The threshold question is whether the BZA has subject matter jurisdiction over this appeal. For reasons explained in this Decision and Order, the BZA finds that it lacks subject matter jurisdiction and must dismiss the appeal.

FINDINGS OF FACT

1. On or about October 28, 2002, DCRA served a "Notice of Infraction" on Mr. Choharis alleging that he had removed the steps of his porch 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.[1]

2. Mr. Choharis requested a hearing and the matter was heard by DCRA's Office of Adjudication on or about January 22, 2003. A Decision and Order upholding the Notice of Infraction and fine was issued on or about April 4, 2003.

[1] 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).

ZONING COMMISSION
District of Columbia
CASE NO.03-0001
EXHIBIT NO.

3. The Decision and Order also provided Mr. Choharis 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[2], 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. Board of Appeals and Review (BAR), not the Board of Zoning Adjustment (BZA).[3] Appellant maintains that the BZA is authorized to hear this appeal under D.C. Official Code § 2-1803.01 (2001 because its text references violations of Chapter 6 of D.C. Code Title 6, references that indisputably incorporate the Zoning Act. Appellant is correct that D.C. Official Code § 2-1803.01 (2001) includes the Zoning Act reference. However, the text of the law actually passed by the Council of the District of Columbia contained no reference to the Zoning Act. In other words, the codified text is inconsistent with the text of the same provision as originally passed by the Council of the District of Columbia and published in the D.C. Statutes-at-Large. As will be explained below, 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, Appellant's reliance on the text of D.C. Official Code § 2-1803.01 is misplaced.

Pertinent Legal Provisions

The BZA's jurisdiction is set out in section 8(f) of the Zoning Act, presently codified at D.C. Official Code § 6-641.07(f). It states, in pertinent part, that appeals may be taken by any person aggrieved by any "administrative decision based in whole or in part upon any *zoning regulation or map* adopted under this act" (emphasis supplied).[4] The plain words of this provision limit BZA appeals to issues arising from decisions related to the Zoning Regulations or Map. They do not encompass appeals related to the Zoning Act.

As noted above, Appellant's argument stems from a section of the D.C. Code that appears to carve out BZA jurisdiction for Zoning Act violations. This section (§ 2-1803.01) is part of the codified version of the Civil Infractions Act. However, as also noted above, the original text of the Civil Infractions Act is inconsistent with the codified version. 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

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[2] 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.

[3] Since the time this appeal was filed, BAR's jurisdiction has been transferred to the newly established Office of Administrative Hearings. However, this fact has no bearing on the legal issue before the BZA.

[4] The current D.C. Code text actually says "adopted under this subchapter and subchapter V of this chapter".

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[5] (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.[6]

Although § 301 of the Civil Infractions Act has been amended twice since 1985, no reference to the Zoning Act has ever been added.

Section 301 of the Civil Infractions Act specifically carves out of the BAR's jurisdiction infractions of the Zoning Regulations, but not infractions of the Zoning Act (*i.e.* the type of violation presently before the BZA). Consistent with this statutory scheme, the civil infraction fine for violating section 10 of the Zoning Act appears in the schedule of civil infraction fines for "DCRA Building Construction Branch Infractions" (16 DCMR § 3231, not in the schedule of fines for "DCRA Zoning Division Infractions" (16 DCMR § 3229).

The Version of Section 301 as Published in the D.C. Statutes-at-Large Prevails over the D.C. Code Codification of the Civil Infractions Act

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*, 6th 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). Applying *Burt* to the question before the BZA, the language of § 301 as published in the D.C. Statutes at Large must prevail over the D.C. Code language cited by Mr. Choharis.

Conclusion

Section 301 of 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 confers jurisdiction on the BZA to hear appeals regarding such a violation. Accordingly, the BZA must dismiss the appeal for lack of subject matter jurisdiction . While the Board finds it reasonable

[5] A later amendment corrected this date to June 1, 1910.
[6] Other exceptions were made for infractions involving alcoholic beverages, professional occupations, and housing.

for the appellant to have relied on language incorrectly codified in the Official D.C. Code the Board is not empowered to create jurisdiction where it has none.

> 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).

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

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr., and Carol J. Mitten by absentee ballot, in favor of the motion to dismiss)

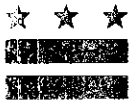
BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER : JUL 2 3 2004

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.SG/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 03-0001

As Director of the Office of Zoning, I hereby certify and attest that on JUL 23 2004 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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