

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17465 of Advisory Neighborhood Commission 3D, pursuant to 11 DCMR §§ 3100 and 3101, from the decision of an Administrative Law Judge (ALJ) to dismiss a DCRA/BLRA Notice of Violation for the construction of an unpermitted horse stable. Appellant alleges that the ALJ erred on October 20, 2005, by overturning a DCRA/BLRA notice of violation issued to Dorchester Associates. Appellant contends that the construction of the stable violates sections 204 and 208 of the Zoning Regulations. The subject property is located in the CB/UT/R-1-A District at premises 2762 Chain Bridge Road, N.W. (Square 1425, Lot 822).

Hearing Date: May 9, 2006

Decision Date: May 9, 2006

DECISION AND ORDER

ANC 3D ("Appellant") filed this appeal purporting to challenge a written order issued by an Administrative Law Judge dismissing Notice of Civil Infraction N100086 ("NOI") issued by the Department of Consumer and Regulatory Affairs ("DCRA") to Dorchester Associates and Morton Bender (hereinafter collectively referred to as "Property Owners"). The NOI charged the Property Owners with constructing a stable without a building permit in violation of the Zoning Act of 1938. As will be explained in the findings of fact that follow, the Appellant actually filed this appeal to compel the Property Owners to request a special exception for the alleged stable. For the reasons stated below, the Board dismisses the appeal because it lacks the subject matter jurisdiction over civil infraction appeals not involving violations of the Zoning Regulations or the Height Act or appeals of decisions not made by a District official. In addition, the Board has no authority to compel a property owner to file an application for a special exception.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for May 9, 2006. In accordance with 11 DCMR § 3113.14, the Office of Zoning published a notice of the hearing in the

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17465

EXHIBIT NO. 16

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D.C. Register, mailed notice of the hearing to the Appellant (who was also the affected ANC) and the property owner, and posted the calendar of cases to be heard by the Board in the Office of Zoning.

Parties

The Appellant is ANC 3D. The Appellee is DCRA. As an owner of the property, Dorchester Associates is automatically a party under 11 DCMR § 3199.

Motion to Dismiss

Dorchester Associates moved to dismiss the appeal, arguing that the appeal was untimely, that the Appellant lacked standing to bring the appeal, and that the arguments presented in the appeal (which argue primarily that Dorchester Associates should be required to file for a special exception) lack merit because these issues were not the subject of the decision that was appealed.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located in the CB/UT/R-1-A zone district at premises 2762 Chain Bridge Road, N.W. (Square 1425, Lot 822) ("the Property").
2. Beginning in the fall of 2005, neighbors noticed a structure on the Property they believed to be a horse stable constructed without a building permit.
3. After a series of complaints made to the Zoning Administrator, the Property Owners filed for a building permit in early 2005, but were directed by the Zoning Administrator to seek a special exception from this Board.
4. On April 20, 2005, following the Property Owners' failure to follow the directive, DCRA served them with Notice of Infraction ("NOI") N100086. The NOI charged the Property Owners with constructing a stable without a building permit in violation of § 10 of the Zoning Act of 1938, codified at D.C. Official Code § 6-641.09 (2001) and sought a civil fine of \$500. No other violations of any other statute or any regulation were alleged.
5. The Property Owners denied the infraction and requested an evidentiary hearing before the Office of Administrative Hearings ("OAH").
6. The Appellant was not a party to the proceeding.

7. At the evidentiary hearing on the NOI, held on September 29, 2005, DCRA was not prepared to prove its case because the inspector who issued the NOI failed to appear. The Administrative Law Judge dismissed the case, with prejudice.

8. OAH mailed the written dismissal order to the parties in the case on October 25, 2005. The order indicated that a "party" had 15 calendar days from the mailing date to appeal to the BZA.

9. On December 5, 2005, ANC 3D filed this appeal with the Office of Zoning.

10. In its "Response" to the Motion to Dismiss, the Appellant stated that it was "not appealing the ruling dismissing the notice of infraction." Response at 3. Instead, the appeal was filed in order "to bring [the Property Owners] before the BZA to seek a special exception for the construction of a stable on the property." Response at 4.

11. At the hearing on the Motion to Dismiss held on May 9, 2006, the Chair asked the Appellant to articulate the error that formed the basis of the Appeal. Appellant's representative responded:

Obviously I believe that [the Property Owner] erred in not doing filing [sic] for a special exception hearing However, I think we can set the record straight today by saying, "Okay, this is the Board saying, okay, we're going to hear this special exception request," and that's what we're asking you to do.

Transcript at 265.

CONCLUSIONS OF LAW

The Appellant alternatively claims error in the dismissal of an NOI charging the Property Owners with constructing a structure without a building permit in violation of section 10 of the Zoning Act of 1938, (D.C. Official Code 6-641.09, and also error in the failure of the property owner to seek a special exception that Appellant claims is needed.

The jurisdictional basis of the Board to hear and decide the first allegation of error derives from § 301 of the Department of Consumer and Regulatory Affairs Civil Infraction Act of 1985, (D.C. Law 6-42, § 301, 32 DCR 4450) ("Civil Infractions Act") which provides, in part:

Except as provided in D.C. Official Code § 2-1831.16 (2001 ed.), the District of Columbia Board of Appeals and Review shall entertain and determine appeals timely filed by persons aggrieved by orders issued by hearing examiners pursuant to this chapter or by the Mayor, except that appeals involving infractions of the Act to regulate the height of buildings in the District of Columbia¹, 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 determined by the District of Columbia Board of Zoning Adjustment.¹

In this case the appeal arises out of a violation of Section 10 of the Zoning Act, not a violation of the Height Act or the zoning regulations. (See Finding of Fact No. 4). Accordingly, this Board lacks subject matter jurisdiction to hear this appeal.

As the Board has twice held, the above language makes it clear that the Civil Infractions Act does not confer jurisdiction on the Board to hear appeals unless the underlying NOI charged a violation of the Height Act or the Zoning Regulations. *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (August 20, 2004); *Appeal of William Robinson*, BZA No. 04-0001, 52 DCR 3677 (April 8, 2005). In fact the *Choharis* decision involves the exact violation charged here. Because the NOI charged only a violation of the Zoning Act, the Board lacks the subject matter jurisdiction to review the order that dismissed it.²

This leaves the portion of the appeal alleging that the Property Owners erred in not seeking a special exception, and that asks the Board to compel the Property Owners to request that relief. A similar error was alleged in *Appeal No. 17329 of Georgetown Residence Alliance*, 53 DCR 5932 (2006), in which the Board held:

To the extent that the Appellant was also appealing the construction and demolition activities of the property owner, as opposed to the decisions made by District official with respect to those activities, the Board also has no jurisdiction. The Zoning Act limits the Board's appellate jurisdiction to

¹ The text as codified in the D.C. Official Code differs from the text of the organic act, and references Chapter 6 of D.C. Code Title 6 instead of the Height Act. However, when the language as codified differs from the language of the legislature, the language used by the legislature prevails. See *Burt et al. v. District of Columbia*, 525 A.2d 616, 619 (D.C. 1987).

² Because the Board does not have subject matter jurisdiction over this appeal, this order will not address the other bases for dismissal it articulated during its deliberations.

actions taken by District officials in carrying out and enforcing the Zoning Regulations, not to actions taken by private citizens.

Id. at 5937.

Because no error on the part of any District Official is alleged this portion of the instant appeal must also be dismissed. As to the request that the Board compel the Property Owners to request a special exception, neither the Zoning Act nor the Zoning Regulations grant the BZA such an extraordinary power. In the absence of an application for a special exception filed by a property owner, the Board may not decide or grant such relief. 11 DCMR §§ 3313.3 and 3313.4.

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

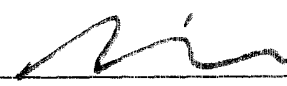
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis Etherly, Jr., John A. Mann II and John G. Parsons in favor of dismissal).

Vote taken on May 9, 2006.

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

Each concurrent 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 12 2007

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.