

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING AND ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

APRIL 20, 2004

+ + + + +

The Special Public Meeting was convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:17 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
JOHN A. MANN II	Board Member (NCPC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Acting Secretary
BEVERLY BAILEY	Zoning Specialist
JOHN K. A. NYARKU	Zoning Specialist

OFFICE OF CORPORATION COUNSEL PRESENT:

SHERRY GLAZER, ESQ.

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C-O-N-T-E-N-T-S

AGENDA ITEM

BZA Case 03-001, DCRA Case No. 03-OAD-1234-E, Peter
Choharis versus the Department of Consumer and
Regulatory Affairs

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P-R-O-C-E-E-D-I-N-G-S

9:17 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the special public meeting of the Board of Zoning Adjustment of the District of Columbia. This is 20 April '04. I am Geoff Griffis, Chairperson. Joining me is Vice Chair Ms. Miller. Representing the National Capital Planning Commission is Mr. Mann.

I'm going to dispense with my opening remarks in the public meeting and will reiterate those, or actually state them when I call the public hearing to order. With that, let's call the first case forward, decision making.

MR. BASTIDA: Mr. Chairman, for the record, my name is Alberto Bastida with the Office of Zoning. This is BZA Case 03-001 which is a civil infraction appeal case. The DCRA Case No. is 03-OAD-1234-E, Peter Choharis versus the Department of Consumer and Regulatory Affairs for front porch and stairs removed without a permit at premises, 2771 Woodley Place, NW. That is located in Square 2206, Lot 87.

You discussed this case last week at your

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1 regular hearing date and you decided to try to make a
2 decision this morning regarding this matter. The
3 issue was if the Board had jurisdiction over this
4 appeal or not. Thank you.

5 CHAIRPERSON GRIFFIS: Thank you very much.

6 Indeed, the Board is well aware we have a motion
7 before us to dismiss based on lack of jurisdiction. I
8 think we can jump into this deliberation very quickly.

9 It does involve the different language of the
10 statutes and the regulations that are before us and
11 what gives us jurisdiction over what matters to hear
12 and appeal.

13 Civil infractions, of course, are a unique
14 animal for us and we do hear civil infractions but of
15 particular pertinence to the zoning regulations. This
16 one seems to try and span the difference and I would
17 like to hear from others in terms of their
18 interpretation.

19 We have been briefed from both sides on
20 this. I think that we do. And it seems to be
21 apparent to me that we find the language of the
22 statute differs from the language of the law that was,
23 in fact, enacted by legislature. I think that's an
24 important point to look to in what regulates. I think
25 it is fairly clear that the legislation would, which

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1 may well, move us in a direction for action on the
2 motion to dismiss. Let me open it up to others for
3 brief deliberations.

4 Ms. Miller.

5 VICE CHAIR MILLER: Mr. Chairman, yes.
6 The issue before us is whether or not this Board has
7 subject matter jurisdiction to hear and a PL of a
8 decision of the DCRA Office of Adjudication involving
9 an infraction based on D.C. Code 6-641.09 which in
10 relevant part makes it illegal to alter any building
11 or structure without a building permit. This was the
12 infraction with which the appellant in this case was
13 cited.

14 There are two statutes that we were faced
15 with that seem to be contradictory. One is 2.1803.01
16 which governs jurisdiction to hear appeals of civil
17 infraction cases. In that statute appellant relied on
18 the provision that said that all civil infraction
19 appeals are heard by the Board of Appeals and Reviews
20 except that appeals involving infractions of Chapter 6
21 of Title 6 or the District of Columbia zoning
22 regulations shall be entertained and determined by the
23 District of Columbia Board of Zoning Adjustment.

24 This appeal involves an infraction based
25 on D.C. Code 6-641.09 which by definition is within

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1 Chapter 6 of Title 6. Then we looked at D.C. Code 6-
2 641.07 which is the jurisdiction of the Board of
3 Zoning Adjustment which says that this Board hears
4 appeals based in whole or in part upon any zoning
5 regulation or MAP adopted under this subchapter and
6 subchapter 5 of the chapter. That does not include
7 the type of infraction that is being appealed.

8 We have two inconsistent statutes and in
9 the week intervening from last week we looked into how
10 to reconcile the two inconsistent statutes. What we
11 found was that actually 2-1803.01 was inaccurately
12 mistakenly codified into the D.C. code and that is not
13 the law that was passed by the city council. The law
14 that was passed by the city counsel is set forth in
15 the D.C. Register at 32 DCR 4454 and 4455 originally
16 in 1985.

17 There it says that all appeals go to Board
18 of Appeals and Review except that appeals involving
19 infractions of the act to regulate the height of
20 buildings in the District of Columbia or the District
21 of Columbia zoning regulation shall be entertained and
22 decided by the D.C. Board of Zoning Adjustment.

23 So infractions of the zoning regulations
24 are included in the height act but not the type of
25 infraction that is before this Board. When there is a

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1 conflict between the D.C. statutes at large and what
2 is printed in the D.C. Register and the D.C. code,
3 it's the original law printed in the D.C. Register
4 that prevails.

5 This mistake has actually been brought to
6 the attention of the codification council for the
7 District of Columbia and a corrected version of the
8 law will be appearing this summer in the pocket parts
9 of the D.C. code as well as on the web site.

10 Therefore, I would conclude that this Board does
11 not have jurisdiction over this infraction or this
12 appeal and, therefore, we need to -- I would propose
13 that we dismiss it for lack of subject jurisdiction.
14 We don't have discretion to take an appeal of a case
15 that we do not have subject matter jurisdiction over.

16 It's a question of law. This appeal should be heard
17 before the BAR.

18 I also would like to say, though, if there
19 is a question of timeliness here for the appellant
20 with respect to whether or not he can bring his appeal
21 before the BAR, I would suggest that there are
22 extremely exceptional circumstances in this case that
23 it would be difficult for anybody to be on notice that
24 there was a mistake of this kind and it was reasonable
25 for him to rely on this. I would hope that DCRA would

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1 support the appellant, at least on the timeliness
2 issue with bringing it before the BAR.

3 CHAIRPERSON GRIFFIS: Well, said. The
4 last point I would agree. Of course, we can't set the
5 availability of whether it's timely or not but I think
6 that is good instruction in our own viewing of the
7 processing of this appeal.

8 In addition to that, I want to reiterate
9 some of the comments from our last deliberation when
10 we heard the motion. I think it is strongly evidenced
11 in the legal analysis that you've just undertaken for
12 the Board and I absolutely agree with it, but there
13 was also a matter of, one might say, common sense in
14 looking at this as it went through.

15 I think if you start with the fact of we
16 are the Board of Zoning Adjustment, we would obviously
17 hear appeals that were based in zoning and issues that
18 impacted and affected the zoning regulations. I was
19 hard pressed to find what the issue was in this civil
20 infraction.

21 Ms. Mitten said, which I thought was a
22 well articulated common sense view, and that being if
23 we do have the jurisdiction, why haven't we seen so
24 many. Now, of course, you can go back and look at the
25 fact that we can make mistakes and continue those

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1 mistakes for years and years but there seems to be
2 some logic to that, not to mention the history and the
3 process that has been put in place.

4 With that, the actual instructions direct
5 someone bringing an appeal to the certain
6 jurisdictions that are appropriate. I was stunned
7 when the attorney, shortly after describing himself as
8 an excellent attorney, said he didn't read the
9 instructions. I think possibly no matter what being a
10 person or attorney or not, you might want to start
11 there and then do your legal investigation of the
12 statutes, although that does fascinate me. That being
13 said, anybody else? Others? Final words?

14 Ms. Miller.

15 VICE CHAIR MILLER: That being said, I do
16 think it was reasonable, though, for him to rely on
17 the jurisdictional provisions in the statute.

18 CHAIRPERSON GRIFFIS: Right.

19 VICE CHAIR MILLER: I think that we
20 haven't seen too many of these kind of cases because
21 most people probably just follow the instructions.

22 CHAIRPERSON GRIFFIS: That's true.

23 VICE CHAIR MILLER: I think what's
24 important --

25 CHAIRPERSON GRIFFIS: We can ponder that

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1 for the morning. Okay. Anything else?

2 VICE CHAIR MILLER: I think what's in
3 order is a motion, I guess, by us to dismiss Appeal
4 No. 03-001, Civil Infraction Case No. 03-OAD-1234-E of
5 Peter Choharis versus Department of Consumer and
6 Regulatory Affairs for lack of subject matter
7 jurisdiction.

8 CHAIRPERSON GRIFFIS: Second. Further
9 deliberation? Verification. We have a motion before
10 us to dismiss the appeal for lack of jurisdiction. It
11 has been seconded. I ask for all those in favor
12 signify by saying aye.

13 ALL: Aye.

14 CHAIRPERSON GRIFFIS: Opposed? Why don't
15 we record the vote.

16 MR. BASTIDA: Mr. Chairman, the staff will
17 record the vote five to zero to zero. We have
18 received -- excuse me. Ms. Miller moved it, Mr.
19 Griffis seconded it, Mr. Thomas in the affirmative and
20 the staff has two proxies, one from Ms. Mitten and one
21 from Mr. Etherly voting in the affirmative also.

22 This case has been dismissed because of
23 lack of matter jurisdiction over this case. It will
24 be directed in such a manner to encourage DCRA to
25 determine that the filing was mistakenly placed here

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1 and that they should consider timeliness in favor of
2 the applicant when he files with the Board.

3 CHAIRPERSON GRIFFIS: Well said. Thank
4 you very much.

5 MR. BASTIDA: Thank you.

6 CHAIRPERSON GRIFFIS: Just for my
7 clarification, we have two absentee votes. Is that
8 what you stated?

9 MR. BASTIDA: Yes. We have two proxy
10 votes. I'm sorry. I said proxy votes. I thank you
11 for the correction.

12 CHAIRPERSON GRIFFIS: Thank you. Any
13 other business for the Board then at this special
14 public meeting?

15 MR. BASTIDA: Regarding civil infractions,
16 no, Mr. Chairman.

17 CHAIRPERSON GRIFFIS: Okay. Ms. Bailey,
18 are you aware of anything we need to conduct in this
19 special public meeting this morning?

20 MS. BAILEY: No, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Excellent.

22 (Whereupon, at 9:29 a.m. the special
23 public meeting was adjourned.)

24

25