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Improving Historic Preservation Enforcement in the District of Columbia

Introduction

Within the past few years, the creation of the Office of Administrative Hearings (OAH) has been an important change in the District of Columbia government. OAH is viewed by many as an innovative government agency that provides fair and impartial administrative adjudication for District agencies, with efficiency. However, since OAH began full operations in 2004, the effectiveness of historic preservation enforcement has actually decreased. The primary indicators of this are the fewer number of completed adjudications and the smaller amount of fines collected in the past year.¹

This paper is a policy paper. As such, the paper will identify problems in historic preservation enforcement that have arisen during the transition to OAH's centralized adjudicative system, as well as offer possible solutions to such problems. Prior to identifying the problems, however, it is important to summarize the enforcement process within the District so that the identified problems can be placed in their proper context.

The historic preservation enforcement system can be roughly broken down into three areas. First, there is the *permitting process*, which includes submitting an application to the Department of Consumer and Regulatory Affairs (DCRA) as well as the review of the application in accordance with Preservation Act standards and criteria by the staff of the Historic Preservation Office (HPO), which also doubles as the staff of

¹ According to documents printed from the HPO computer database, the amount in fines issued by inspectors for fiscal year 2005 was \$23,500, down from \$45,500 in 2004 and \$77,000 in 2003. Likewise, the amount in revenue collected for fiscal year 2005 was \$1,510, down from \$1,880 in 2004 and \$20,455 in 2003.

the Historic Preservation Review Board (HPRB), and possibly by the Board itself or the Mayor's Agent²; second, *the inspection process*, which includes the issuance of stop work orders, notices of violation, and notices of infraction; and finally, *the hearing process*, which includes filing, preparing, and presenting cases in the current OAH.

Two major problems have been identified in connection with the OAH hearing process. First, OAH's new filing requirements, which are stricter than those of its predecessor—the Office of Adjudication—have resulted in a decrease in the number of cases that have been filed by the Historic Preservation Office for prosecution.³ The Office of Planning (OP), the District agency to which HPO functions have been transferred, is a relatively small agency, with limited resources. There are only two inspectors who are responsible for preparing and presenting cases before OAH but they have not been adequately trained to do so.⁴ Furthermore, the time inspectors take to prepare and present cases takes away from valuable time that could be spent in the field. Other District agencies, such as DCRA, have not encountered such a problem to the same degree. One possible reason for this is that DCRA has the manpower resources that can accommodate OAH's stricter filing requirements without a decrease in enforcement efficiency. The Office of Civil Infractions (OCI) is the office within DCRA that is responsible for processing DCRA infractions that are pending before OAH. It is helpful to analyze how OCI prepares and presents such cases in order to identify potential solutions to the problem facing the HPO.

² Historic Landmark and Historic District Protection Act (Law 2-144). All references to this act include the newly adopted HP regulations, found at 10A DCMC. Also included is the pending Bill 16-195 known as the Historic Preservation Amendment Act of 2006 (HPAA 06).

³ According to documents printed from the HPO computer database, the number of infractions filed in fiscal year 2005 was 12, down from 74 in 2004 and 97 in 2003.

⁴ OP inspectors are really OP/HPO inspectors. OP has no other inspectors. Therefore, for the purpose of this paper, OP inspectors are synonymous with HPO inspectors. Since the HPO is part of the OP, both terms are used interchangeably as well in this paper.

The second major problem in connection with the OAH hearing process is that OAH has not efficiently processed historic preservation cases that are pending before it. Final orders—in some instances orders for default cases—have not been issued in a timely manner. As a result, there is a disparity between fines issued by HPO inspectors and those actually collected by ALJs. Recently, OAH has started to respond to this problem. This paper provides additional solutions that could lead to increased efficiency in processing historic preservation cases on the part of OAH.

The DC Enforcement System: The Permitting Process

To perform work on a historic property, one must obtain a permit from DCRA. A permit is required under both the Building Code and the Preservation Act. The Building Code requires a permit for demolition, alteration or construction of a building or structure. To perform such work without a permit or beyond the scope of an issued permit is a violation of the Code. The Preservation Act and the regulations issued under the Preservation Act established standards and criteria that apply to permit review for historic landmarks or contributing properties within designated historic districts. Like the Building Code, the Preservation Act⁵ requires the property owner to submit a permit application to DCRA for approval and once issued, the terms of the permit must be followed.

Under the Preservation Act, the Mayor is responsible for actually approving the permit that is submitted to DCRA.⁶ The Mayor has delegated this duty to a Mayor's Agent.⁷ Prior to approving or denying the permit application, the Mayor's Agent must

⁵ Bill 16-195 known as the Historic Preservation Amendment Act of 2006 (HPAA 06).

⁶ D.C. Code Ann. §§ 6-1104(a), 6-1105(a), 6-1107(a)(2006).

⁷ D.C. Code Ann. § 6-1102(8)(2006). There is a delegation from the Mayor to the Mayor's Agent who, in this case, is the Director of OP who hears appeals from the HPRB. See 10ADCMR at Sec. 104

first consider the recommendation of the HPRB.⁸ Under the Preservation Act, the HPRB must review and make recommendations for all permit applications involving demolition, alteration, or new construction.⁹

If the HPRB denies the permit application, it must notify the applicant in writing and give its reasons for denying the application.¹⁰ In determining whether to grant a permit, the HPRB abides by the standard prescribed by the Preservation Act: both demolition and alteration must either be necessary in the public interest or necessary to prevent the property owner from suffering unreasonable economic hardship.¹¹ New construction must not be incompatible in both design and character.¹²

The HPO/HBRB has a staff that initially reviews all permit applications. The staff will approve an application if it clearly meets the standard prescribed by the Preservation Act and relevant regulations. In such instances, the permit will be approved under the authority of the Mayor's Agent. Likewise, the staff will deny an application if it clearly fails to meet the standard. If the staff determines that the application neither clearly meets nor fails to meet the standard, then it will be referred to the HPRB to decide. Once the HPRB issues its decision, the applicant can appeal the decision to the District's hearing officer, commonly referred to as the Mayor's Agent. The decision of the hearing officer is the final level of permit review within the DC administrative system. Aggrieved parties can, however, appeal the decision to the DC Court of Appeals.

The DC Enforcement System: The Inspection Process

⁸ D.C. Code Ann. §§ 6-1104(b), 6-1105(b), 6-1107(b)(2006).

⁹ Id.

¹⁰ D.C. Code Ann. §§ 6-1104(d), 6-1105(d), 6-1107(d)(2006).

¹¹ D.C. Code Ann. §§ 6-1104(e), 6-1105(f)(2006).

¹² D.C. Code Ann. § 6-1107(f)(2006).

While the HPO used to be an office within DCRA, it was transferred to the OP in 2000.¹³ In 2001, OP/HPO and DCRA entered a Memorandum of Agreement whereby DCRA enforcement authority under the Construction Code was granted to inspectors within OP/HPO.¹⁴ OP/HPO inspectors now have the authority to issue stop-work orders and notices of violation to people who perform work on protected properties without a permit or work that is outside the bounds of an issued permit.

Notices of violation are generally issued for relatively minor acts such as window or door replacements.¹⁵ Depending on the individual circumstances, inspectors may also issue a notice of violation for more egregious acts like roof or deck replacement or the construction of an areaway or a front porch.¹⁶ A person who is issued a notice of violation—a property owner or contractor—must rectify the illegal condition that gives rise to the issuance of the notice of violation.¹⁷

When an inspector issues a stop-work order, all work must stop immediately.¹⁸ Although stop-work orders are issued because the property owner is breaking the law and possibly creating an unsafe condition, OP/HPO inspectors hope to help the owner by stopping work prior to the completion of expensive construction work that has to be undone.¹⁹ Inspectors generally issue stop-work orders for more serious cases than they do for notices of violation.²⁰ However, both serve as warnings by giving the offending party

¹³ Omnibus Budget Revision Act of 2000.

¹⁴ Memorandum of Agreement Between the Department of Consumer and Regulatory Affairs and the Office of Planning.

¹⁵ Conversation with T. Cherry, Historic Preservation Office, March 22, 2006.

¹⁶ Id.

¹⁷ Conversation with T. Cherry.

¹⁸ Id.

¹⁹ Conversation with T. Cherry.

²⁰ Id.

time to correct. They both also represent an effort on behalf of the inspector to work with the parties involved.²¹

In certain instances, the DC government will take it upon itself to remedy the condition. If the property owner does not abate the condition, then the inspector will file for enforcement of abatement with DCRA. In turn, DCRA sends workers to the property to remedy the condition and the cost of such work is charged to the owner.²² Due to the invasive nature of this remedy, inspectors are required to adhere to a comprehensive checklist that has been created by DCRA attorneys to prevent the dismissal of cases by aggrieved property owners.²³

In addition to the enforcement orders that OP/HPO inspectors are authorized to issue under the Construction Code, OP/HPO inspectors may also issue notices of infraction pursuant to the Civil Infractions Act of 1985.²⁴ A notice of infraction carries a fine that is charged to the responsible party and is therefore, a more serious penalty than a notice of violation or stop-work order. OP/HPO inspectors could technically issue notices of infraction on-the-spot to those who violate the Construction Code or the Preservation Act. In practice, however, inspectors generally do not issue notices of infraction until the property owner has ignored a notice of violation or a stop-work order.²⁵

Finally, the Preservation Act provides additional penalties for those who violate its terms.²⁶ The Act authorizes OAG to criminally prosecute people who violate the

²¹ Id.

²² Id.

²³ Id.

²⁴ D.C. Code Ann. § 2-1802.01(2006). Before the Civil Infraction Act was amended in 2005 to provide for violations of the Preservation Act and regulation, inspectors could only act under the Building Code for “preservation-related” violations of the code.

²⁵ Conversation with T. Cherry.

²⁶ D.C. Code Ann. § 6-1110(2006).

Act.²⁷ However, OAG has never prosecuted a party for doing so.²⁸ In addition, the Act provides for the imposition of fines pursuant to the Civil Infraction Act of 1985.²⁹

Offending property owners are generally reported to OP/HPO by other citizens. Areas where there are large historic districts account for the most reports. Active citizen groups are also an important factor. Some areas with large historic districts have historic preservation groups that are overshadowed by a culture of individuals with other, often conflicting interests. Once offenders are reported to OP/HPO, they are entered into a computer database and tracked by the inspectors.³⁰

The DC Enforcement System: The Hearing Process at The New Office of Administrative Hearings

Once the OP/HPO inspector issues a notice of infraction, the hearing process at the Office of Administrative Hearings (OAH) begins. OAH is an independent agency and is relatively new. OAH was established in 2001,³¹ and began its first and second phases of caseload operations in March and October of 2004, respectively.³² OAH provides administrative adjudicative services and has jurisdiction over many DC agencies, including the Department of Public Works, the Department of Health, the Department of Human Services, the Department of Employment Services, the Office of Tax and Revenue, the Taxicab Commission, and the former Board of Appeals and Review.³³

Prior to the creation of OAH, administrative adjudicative services were provided by individual District agencies. For instance, within DCRA, the Office of Adjudicative Hearings provided hearings for infractions issued by DCRA inspectors. As the OAH

²⁷ D.C. Code Ann. § 6-1110(a)(2006).

²⁸ Conversation with T. Cherry.

²⁹ D.C. Code Ann. § 6-1110(c)(2006). It wasn't until the amendment in 2005 etc.

³⁰ Conversation with T. Cherry.

³¹ D.C. Official Code §§ 2-1831.01 *et seq.*

³² Testimony of Tyrone T. Butler: Committee on the Judiciary OAH oversight hearings.

³³ Testimony of Tyrone T. Butler.

enabling legislation noted, such a structure “suffer(ed) from the general perception, and in some cases the reality, of unqualified hearing officers who lack the qualifications to fairly and properly adjudicate the cases before them.”³⁴ The enabling legislation noted that the reason for this, in part, was that “(3) Hearing officers in agency cases heard under District of Columbia law are generally employed by the agency responsible for enforcement of the law under which a case is brought, and therefore are often perceived to lack independence and to have a bias in favor of that agency.”

OAH, on the other hand, would “function as a unified adjudication agency and shall provide access to a high-quality, fair, impartial, and efficient system of adjudicating cases at the administrative level.”³⁵ Interest in independent, centralized adjudicative bodies is increasing, as there are 28 such central panels across the country. A number of other states are considering the implementation of such a system as is the federal government³⁶ Judge Poindexter, an Administrative Law Judge (ALJ) with OAH notes, “OAH is a great experiment that is being watched by people from around the country.”³⁷

Preparing the Notice of Infraction

Under current OAH procedures, the process begins when the respondent is sent a copy of the notice of infraction to their last known address from the relevant agency with enforcement authority. The notice of infraction includes: the date of service, the location of the violation, the violation code, the fine for the violation, and the inspector’s signature.³⁸

³⁴ OAH Sec. 3.

³⁵ OAH Sec. 2. Purpose

³⁶ Conversation with Judge Poindexter, Office of Administrative Hearings, April 6, 2006.

³⁷ Id.

³⁸ Conversation with T. Tyler, Office of Civil Infractions, April 3, 2006.

On the notice of infraction, the respondent can admit, admit with an explanation, or deny.³⁹ The respondent must pay the fine if she admits to the infraction. If the respondent denies the infraction, the matter goes to OAH for hearing.⁴⁰ An extensive file is required to be submitted under the new hearing procedures put in place by OAH. A complete file contains the following: 1) Description of infraction—with relevant cite to D.C. Regulations., 2) initial inspector’s report, 3) activity log, 4) certified return receipt, 5) track and confirm printout, 6) Pictures of infraction, 7) Bill of particulars (what they need to do), 8) inspector’s certification. Over time, the file is expanded to include final orders, default orders, more entries in the activity log, and anything else that comes in such as transfer memos to OGC.⁴¹

Answering the Notice of Infraction

At OAH hearing, a respondent who denies has the opportunity to change her plea to admit with explanation, in which case the respondent may be subject to cross examination over mitigating factors that would reduce the fine.⁴² If respondent maintains the plea of deny, she may be cross examined over evidence provided by respondent in support of denial.⁴³ If respondent admits with explanation on the notice of infraction (as opposed to changing plea from deny to admit with explanation at hearing), then there is a paper hearing and the ALJ reviews submitted documents to determine mitigating factors that would reduce the fine.⁴⁴

Default Procedure

³⁹ Conversation with D. Lang and G. Owens, Office of Civil Infractions, April 3, 2006.

⁴⁰ D.C. Code Ann. § 2-1802.02(d).

⁴¹ Conversation with T. Tyler.

⁴² Conversation with D. Lang and G. Owens.

⁴³ Id.

⁴⁴ Id.

If the respondent chooses not to respond to the notice of infraction, then an ex-parte OAH hearing takes place.⁴⁵ The ALJ issues a notice of default and the fine doubles.⁴⁶ There are a large number of default cases because some respondents may make the decision that it is be cheaper to simply default and pay the double fine than to take the time to answer the notice or to contest it at OAH.⁴⁷ If the respondent fails to pay fines that are ordered by OAH a lien is attached to the property through a separate administrative procedure.⁴⁸

Problem 1: Stricter Filing Requirements and Bureaucracy of OAH/Lack of Resources Within Office of Planning—Therefore, cases not filed; some cases that are filed are thrown out due to inadequate review

As noted above, historic preservation enforcement functions were transferred from DCRA to OP in 2000 with the transfer of HPO. After the transfer of authority, OP/HPO was responsible for enforcement though administrative adjudication of HPO cases still took place at the Office of Adjudication, which was part of DCRA. Although OP/HPO is a much smaller agency than DCRA, hearing procedures were not so onerous as to put a strain on the limited resources that it did have. Filing requirements were relatively simple, as opposed to the much more extensive filing requirements of OAH.⁴⁹ Furthermore, trained DCRA staff—not its inspectors—handled the administrative processing of cases to be heard by its Office of Adjudication, which included review and presentation of the case by legally trained employees who worked for DCRA.⁵⁰

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Conversation with T. Cherry.

⁴⁹ Id.

⁵⁰ Id.

However, since the creation of OAH in 2004, OP/HPO has been responsible for the administrative preparation of its own cases. Since OP/HPO does not have a comparable administrative staff to that of DCRA, the two OP/HPO inspectors are responsible for completing this work, thus consuming valuable time that could be spent in the field.⁵¹ Indeed, one OP/HPO inspector refers to OAH as the “mini superior court.”⁵² Under current conditions, the OP/HPO inspector estimates that it takes an average of three days just for her to arrange the file that needs to be submitted to OAH.⁵³

Although an attorney from OAG has been assigned to assist in reviewing OP/HPO cases that will be heard by OAH, she has to divide her time with a great deal of other duties.⁵⁴ In regards to presenting the case at OAH, OP inspectors are uncomfortable with serving in a quasi-legal capacity, as they frequently have to deal with technical legal terms with which they are unfamiliar.⁵⁵

Other independent agencies such as DCRA, on the other hand, have the benefit of a large staff that helps process infractions and present the agency’s case to OAH. Such employees are part of the Office of Civil Infractions (OCI), which falls under the penumbra of DCRA.⁵⁶ OCI was created subsequent to the creation of OAH, though it existed in substance prior to the creation of OAH.”⁵⁷

Administrators within OCI assist with the processing of notices of infraction to various degrees. In the case of Land Regulation cases, there is an administrative assistant whose sole job is to write the notice of infraction based upon a report that the inspector

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Conversation with R. Fletcher, Office of Civil Infractions, April 3, 2006.

⁵⁷ Conversation with B. Newsome, Office of Civil Infractions, April 3, 2006.

writes. All that the inspector has to do is sign the infraction! This is a rare example however, as most agency inspectors in other division of DCRA write their own notices of infraction and then send them to OCI for processing and review.⁵⁸

In addition, OCI has a staff of three attorneys who participate in the review of infractions and who present the cases to ALJ's in place of the inspectors.⁵⁹ The attorneys are actually referred to as advocates since only attorneys from the Office of the Attorney General for the District of Columbia and attorneys from the General Counsels' offices of District agencies are allowed to represent the District government in a legal capacity before OAH.⁶⁰ If an attorney for the respondent files a notice of appearance, then an attorney from the General Counsel's office of DCRA (or OAG in the case of OP) will represent the government.⁶¹

Once the file is assembled by the administrative staff, the advocate will review the file to make sure that it is not deficient in any way. Advocates will commonly check with the recorder of deeds to confirm that the person cited is the owner of the property. There have been instances where a house changes hands and the prior owner who is cited on the infraction no longer owns the property and therefore, the case has to be dropped.⁶² OCI advocates also review the file to ensure that evidentiary burdens are likely to be met.⁶³

Finally, advocates will check to make sure that the notice of infraction is properly written.⁶⁴ This serves as an additional level of due process review such that valid cases are not thrown out for failure to adequately give the respondent notice of the charge or for

⁵⁸ Conversation with T. Tyler.

⁵⁹ Conversation with R. Fletcher.

⁶⁰ Conversation with D. Lang and G. Owens.

⁶¹ Conversation with R. Fletcher.

⁶² Conversation with D. Lang and G. Owens.

⁶³ Id.

⁶⁴ Id.

other procedural issues. If there is a problem with the file or there is an error on the notice of infraction, the advocates will send a memo to the inspector explaining the problem and what should be done to correct it.⁶⁵ Since the hearing process has not yet been started, it is relatively easy to correct any mistakes at this point.

No such services are available to OP/HPO inspectors, putting an almost insurmountable burden on them. OP/HPO inspectors are inefficient at filing cases and the cases that they do file are more likely to be dismissed by OAH on legal grounds. This is precisely what happened after a new schedule of fines was developed in May 2005.⁶⁶ In the case of District of Columbia Office of Planning v. Suresh Kumar, the OP inspector issued a notice of infraction for failing to obtain a building permit before engaging in building construction. However, the OP inspector failed to reference the newly enacted schedule of fines on the notice of infraction and the case was dismissed by the ALJ.⁶⁷

The central issue in the Kumar case was not whether the citation was technically correct but rather, whether the procedure was fair. That is, was it fair for the inspector to cite to the DC Code and omit the specific fine from the fine schedule? The ALJ held that fairness and due process require that the cited party have actual notice and a fair opportunity to litigate the charges. The inspector needed to cite to the fine schedule itself. Since she didn't, the ALJ could not hold that the respondent had adequate notice or an opportunity to litigate the charge. The significance of this case is that if the inspector had received adequate training regarding the schedule of fines, or a legal advocate assigned to the case had caught the error, the case would likely not have been dismissed.

⁶⁵ Id.

⁶⁶ 10A DCMC. This amendment increased the fines and made them applicable to work under the Historic Preservation Act and regulations.

⁶⁷ District of Columbia Office of Planning v. Suresh Kumar.

OCI advocates will also present DCRA’s case, in person, to OAH. They present witnesses, cross examine respondent’s witnesses, file motions for reconsideration, motions to dismiss without prejudice and request that fines be reduced in light of mitigating factors.⁶⁸ The advocates have an enforcement coordinator—also an attorney—who writes motions and responds to orders written by ALJ’s, replies to orders to show cause, and keeps track of the case and disseminates the updated information to advocates.⁶⁹ Since there is currently no central database that monitors the progress of cases, the enforcement coordinator is crucial in tracking OAH litigation.⁷⁰

OCI also has a lien coordinator, an administrator who is dedicated entirely to filing liens on property.⁷¹ If judgment is entered against respondent and respondent fails to pay, a lien is attached to the property.⁷² The OCI lien coordinator processes hundreds of such cases.⁷³ If an order from OAH is 20 days delinquent, the lien administrator will send a letter request to respondent and then file a lien with the Recorder of Deeds for the District of Columbia.⁷⁴ If the respondent pays (cash is no longer accepted), checks made out to the DC Treasury are sent to a lock box account just for OCI liens at the Bank of America.⁷⁵ In stark contrast to DCRA, OP has no such administrative position and as a result, no liens have been filed since OAH has been enacted.⁷⁶

Solutions to Problem 1

HPO Advocates should present OP/HPO cases

⁶⁸ Conversation with D. Lang and G. Owens.

⁶⁹ Conversation with B. Newsome.

⁷⁰ Id.

⁷¹ Conversation with K. Bryant, Office of Civil Infractions, April 3, 2006.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Conversation with T. Cherry.

One obvious suggestion is that advocates should present OP cases. As the description of OCI above indicates, there clearly are benefits to having advocates present cases. Both OCI advocates and inspectors claim that this increases efficiency and provides for a more orderly presentation of cases. Advocates have legal training and will therefore do a better job of presenting evidence, in what is largely an evidentiary hearing.⁷⁷ Further, inspectors will have more time to work in the field—especially those inspectors who work in far away parts of the city.⁷⁸

The benefits of having advocates have been recognized in other cities as an effective way to present cases. KPMG, an outside consulting firm, conducted a Best Practices study for the DC government. The study determined that Chicago and New York, cities that both utilize advocates, have the best practices.⁷⁹

The legal expertise of advocates can also be helpful when going up against highly competent respondents such as developers, who hire lawyers or paralegals and train them to present the cases like advocates.⁸⁰ In this instance, it would probably be better to have an advocate representing the city, than an inspector who is barely trained.

In the District of Columbia there is a large population that is highly educated. For instance, at one historic preservation administrative hearing that this author attended—a window replacement case—both the respondent and her husband were lawyers who had work experience with large Washington firms and it was apparent that they were highly competent in maneuvering through the administrative system.⁸¹

Arguments against having advocates

⁷⁷ Conversation with D. Lang and G. Owen.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Please ask for case name from OAG, as case may still be pending.

Although there are many compelling reasons to suggest that advocates should present OP cases, there are also justifications for maintaining the status quo by having OP inspectors continue to present cases at OAH. According to Judge Poindexter, in the vast majority of OAH cases, it may actually favor the agency to have the inspector attend the hearing in person in order to present the evidence against the respondent.⁸² Although hearsay evidence is allowed in administrative hearings, there still is a burden of proof that must be met. The testimony of a credible respondent who testifies at the hearing should outweigh the hearsay testimony of an inspector whose findings are presented by advocates. In Board of Psychology v. Compton, the DC Court of Appeals found that there was reversible error when an ALJ based findings of fact in a Department of Health case upon prior statements of an inspector over those of a credible witness who testified in-person at the hearing.⁸³

Judge Poindexter suggests that the decision to have advocates present the case instead of inspectors is a business decision that is a function of case volume.⁸⁴ If an agency has a very large caseload, it may be unfeasible to have inspectors present the case, as it would take away all or the majority of the time spent in the field. Indeed the only two agencies in DC government that employ advocates—DCRA and the Department of Human Services—have the two largest caseloads.⁸⁵

DCRA alone handles cases involving construction code and zoning violations, condemnation, noise violations, elevator violations, vending, professional licensing,

⁸² Conversation with Judge Poindexter.

⁸³ Board of Psychology v. Compton.

⁸⁴ Conversation with Judge Poindexter.

⁸⁵ *Id.*

housing regulations, and inspections weights and measures.⁸⁶ The number of DCRA cases heard annually by OAH is in the thousands. On the other hand, the number of historic preservation cases heard by OAH in 2005 was under 20.⁸⁷ Even if the OP inspector's time is significantly consumed by attending OAH hearings, it is clear that the two agencies do not operate on the same levels of volume.

Furthermore, Judge Poindexter points out that ALJ's recognize that inspectors and respondents are likely to not have significant legal knowledge and take this into account. More likely than not, the respondent is less sophisticated and does not know very much about the system and how it works. OAH receives many oral hearing requests to aid uneducated and underrepresented people by the legal aid society.⁸⁸

If a party is highly sophisticated or poor and uneducated, Judge Poindexter maintains that OAH takes this into account.⁸⁹ In describing OAH's flexibility in accommodating the diverse cross sections of the DC population, Judge Poindexter further notes that "OAH is here so that people have the opportunity to be heard."⁹⁰

The case for outside advocates

Assuming that having advocates present cases before OAH would be desirable, one would have to decide whether advocates should be hired to work within OP or whether OCI advocates should present the case. Simply put, hiring advocates to work within OP may not be feasible due to the budget constraints of OP. Having OCI advocates present the case, however, may also be currently unfeasible. The enforcement coordinator for OCI, who currently tracks the motions and orders from OAH, thinks that

⁸⁶ Conversation with D. Lang and G. Owens.

⁸⁷ E-mail from L. Coleman, Office of Administrative Hearings.

⁸⁸ Conversation with Judge Poindexter.

⁸⁹ Id.

⁹⁰ Id.

it would be difficult to do so for agencies outside of DCRA—it would get too complex since there is no central database that tracks OAH documents.⁹¹ Further, it does not appear that there are funds to hire additional advocates since as it is, all employees in OCI are contactors except for the administrator and the program specialist.⁹²

Although the OCI enforcement coordinator raises valid points, it still may be possible for OCI to aide OP with the processing of its caseload in other ways. While there may not be sufficient funds to hire an additional, full-time legal advocate, it may be possible to hire a part-time contractor to assist in the processing (ie. preparation) of cases and infractions. If that is not possible, it may then, be possible for the existing OCI staff to process cases and infractions for OP. After all, this is a staff that processes thousands of DCRA infraction cases each year. Certainly it would be possible to accommodate 20 more. OP used to be a part of DCRA and the subject matter therefore, is not so far removed that training current OCI administrators would be exceedingly difficult.

Moreover, the concerns that the enforcement coordinator raises in regard to OAH case tracking may be somewhat alleviated in the near future, as OAH is currently working on developing a central database and tracking system.⁹³ During OAH oversight hearings Chief ALJ of OAH, Tyrone Butler testified:

Within past year OAH coordinated real time demonstrations with vendors to implement a new web-based case management system with a portal, and received two proposals with pricing and implementation information. This new system will better enable OAH and the agencies within its jurisdiction to be, literally, “on the same page” with regard to case filing and disposition information.⁹⁴

⁹¹ Conversation with B. Newsome.

⁹² Id.

⁹³ Conversation with Judge Poindexter.

⁹⁴ Testimony of Tyrone T. Butler.

In addition the progress that was made in developing a case management system, OAH has also helped DCRA develop an electronic notice of infraction. Chief Judge Butler further testified that, “In the past year OAH Assisted DCRA in designing a streamlined electronic Notice of Infraction form and we are assisting in coordinating cross-agency implementation of this form; and provided input for DCRA’s project of programming software to generate NOI forms.⁹⁵” If both aforementioned projects are followed through to completion, it would be very plausible for a single enforcement coordinator from DCRA to track notices of infractions and cases pending at OAH with relative ease.

Training

Training of OP inspectors and OP staff is an alternative or could be done in conjunction with the delegation of certain aspects of case processing and presentation to OCI staff. So far, neither of the OP inspectors have received proper training regarding case filing or OAH procedure. Indeed, the administrative assistant, whose job it is to help the inspector prepare cases, knows very little about historic preservation.⁹⁶

Additional training would likely require the least resources of the solutions listed thus far. It may simply be a matter of having an attorney from OAG spend time with the inspectors by giving them a “crash course” in file preparation and writing infractions. OAH has conducted training sessions in the past for other DC agencies. Most recently, OAH has provided training sessions on case presentation and preparation for DPW—so there is a precedent for this.⁹⁷ The only concern that OAH has with such training sessions

⁹⁵ Id.

⁹⁶ Conversation with T. Cherry.

⁹⁷ Conversation with Judge Poindexter.

is that it doesn't want it to appear as if it is giving legal advice. To prevent even the appearance of misconduct, OAH clerks generally provide training for District agencies.⁹⁸

The case for Law students:

Additional training, of course, does not make up for the time that inspectors lose in the field as a result of case preparation and presentation. One cost effective solution to this problem would be to have local law students handle the file preparation and possibly the presentation of cases at OAH. Law student interns at OAG could be assigned such responsibilities or law students in one of Georgetown's many clinics could lend their assistance. (The best candidates would be students in the Law Students in Court Clinic, where students already represent DC residents in landlord/tenant court).

Refine default proceedings

Finally, it may be possible to limit the circumstances in which inspectors present their case at OAH hearings. Currently, OP inspectors and DCRA advocates alike have to present their testimony in ex-parte default proceedings when the respondent fails to respond to the notice of infraction.⁹⁹ The advocates at OCI claim that this is an inefficient process since one could take the position that no hearing is necessary if the respondent defaults.¹⁰⁰ At the very least, one could argue that advocates or inspectors should not have to appear and that affidavits should be used to obtain inspector testimony. Indeed, within the past year, OAH has developed such procedures for inspectors from the Department of Health. At OAH oversight hearings, Chief Judge Butler testified that "OAH has streamlined the DOH default process to reduce the need for a DOH Inspector to appear for an in-person hearing in cases where the Respondent has chosen not to

⁹⁸ Id.

⁹⁹ Conversation with D. Lang and G. Owens.

¹⁰⁰ Id.

respond to a Notice of Infraction.”¹⁰¹ Inspectors at OP would greatly benefit if a similar process was made applicable to historic preservation cases.

Problem 2: The Transition to OAH—Pending Cases were Thrown Out

As a result of the creation of OAH, all cases that were pending before DCMR’s Office of Adjudication were thrown out.¹⁰² All prior fines that had accumulated over the years were thrown out. Inspectors had to reissue notices of infraction but could not issue fines for total amount in arrears (ie. if a property owner had grossly neglected the law and infractions had accumulated over a period of years, owner could not be fined this full amount.¹⁰³ The respondent could only be fined the amount of a single infraction; See 942 Westminster¹⁰⁴). Had to re-file the cases for hearing at OAH in accordance with new filing procedures. Toni Cherry estimates that only 15 out of 100 cases have been re-filed at the discretion of the HPO director.¹⁰⁵

The solutions to this problem are identical to those of Problem #1, as this is a filing issue. If it is easier to file and present the case, then more cases that were thrown out could be re-filed. Maybe OCI could conduct a pilot program by having OCI administrators process old Office of Adjudication cases that were thrown out during the transition to OAH. If OCI administrators are successful at processing such cases, then they could be assigned to process current OP cases pending at OAH.

Problem 3: ALJ’s are unresponsive possibly due to low priority for HP cases/Lack of expertise

OAH delay in issuing final orders

¹⁰¹ Testimony of Tyrone T. Butler.

¹⁰² Interview with T. Cherry.

¹⁰³ Id.

¹⁰⁴ 942 Westminster

¹⁰⁵ Interview with T. Cherry.

Since OAH has come on-line, the processing of cases have been less than prompt. ALJ's are supposed to issue final orders between 90-120 days after the close of record.¹⁰⁶ However, ALJ's are not issuing final orders within this time period.¹⁰⁷ In some instances ALJ's have not even issued default judgments within this time frame.¹⁰⁸ For instance, in the default case of 942 Westminster, no Final Order has yet been issued (as of April 14, 2006) and the case was heard in October 2005.¹⁰⁹ Under the old Office of Adjudication, default judgments were generally handed down in a timely manner by the ALJ's.¹¹⁰

One reason for the slow-down in issuing final orders is the increase in number and diversity of cases that are now filed before the adjudicative body. OAH assumed its full caseload on October 1, 2004.¹¹¹ OAH's caseload filings since its inception have totaled 22,399.¹¹² OAH heard more than 16,000 cases in 2005 alone.¹¹³ To put things in proper perspective, approximately 15-20 of those were Historic Preservation cases.¹¹⁴ Prior to the creation of OAH, ALJ's at the Office of Adjudication only heard cases involving zoning and construction code violations.¹¹⁵

OAH now also hears other types of cases including Medicaid cases, and cases dealing with health and safety issues, which may have a higher priority. Some types of cases are expedited by statutes that require expedited hearing. Such examples are public entitlement cases, nursing home cases, cases involving summary suspensions, and those that provide a threat to health, safety and public welfare, some of which require a hearing

¹⁰⁶ Conversation with Judge Poindexter.

¹⁰⁷ Conversation with T. Cherry.

¹⁰⁸ Id.

¹⁰⁹ 942 Westminster.

¹¹⁰ Conversation with T. Cherry.

¹¹¹ Testimony of Tyrone T. Butler.

¹¹² Id.

¹¹³ E-mail from L. Coleman.

¹¹⁴ Id.

¹¹⁵ Conversation with Mr. Brennan.

to be conducted within 72 hours.¹¹⁶ Cases where parties file a motion to expedite will also get priority.¹¹⁷ A party can file a motion to expedite with OAH for cases involving life or property—this is common in unemployment cases though hardly the case in historic preservation cases.¹¹⁸

OAH was understaffed

Accentuating the problems that were created by OAH's expanded jurisdiction was the fact that OAH was not operating with a full staff of ALJ's. Without a full line of ALJs to deal with the high volume of cases, a great backlog of cases developed.¹¹⁹ In the words of Judge Poindexter it was like "emergency-room triage"¹²⁰ Chief Judge Poindexter testified to this problem at the OAH oversight hearings:

OAH entered operational phase on March 22, 2004 with 5 judges. Now OAH has 27 judges. 11 of these judges joined OAH within the last quarter of FY 2005 (August alone) for well over a year, OAH operated with half the judges it needed, and our case disposition rate was about half of the cases filed, even in the wake of a 150% increase in filings from FY04 to FY05.¹²¹ The reason it took so long to reach maximum capacity was that the commission that is in charge of appointing ALJ's had a difficult time in finding an adequate pool of people from which to draw. Salaries of ALJ's are very low compared to those of those most junior attorneys in large law firms. Salaries were just recently raised to attract a higher caliber of judge.¹²²

Case backlog

OAH has also developed new default procedures (unfortunately not for OP cases though) and has increased the availability of hearings to up to 72 per week (as necessary)

¹¹⁶ Conversation with Judge Poindexter.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Testimony of Tyrone T. Butler.

¹²² Conversation with Judge Poindexter.

to help with the disposition of backlogged cases.¹²³ So far, OAH has made great headway. At OAH oversight hearings Chief Judge Butler testified:

With our new complement of judges now trained and hearing cases, we have already made significant inroads in disposing of the older cases. For example, in DCRA alone, we have reduced the case backlog by 60%, and only about 350 cases—or 7% of the 5,200 cases filed with us since October, 2004—remain ripe for decision.¹²⁴

OAH has a goal of getting rid of all backlogged Rental Housing cases by next October and shortly after that, all remaining cases.¹²⁵ Chief Judge Butler further testified that, “These impressive results support our prior projection that, barring unforeseen circumstances, there will be minimal, if any, backlog of cases in OAH within a year’s time.”¹²⁶

Lack of ALJ specialization

Another contributing factor to the slow issuing of final orders may be that current OAH judges do not specialize in historic preservation cases.¹²⁷ The benefit of having a fair and independent cadre of ALJ’s, who hear cases from the entire spectrum of District agencies can also be negative in that ALJ’s are not given an opportunity to develop expertise.¹²⁸ There currently is limited expertise in some areas among ALJ’s; for instance, some ALJ’s have mental health expertise, while others have expertise in areas of human services and transportation.¹²⁹ However, these particular areas of expertise are more a function of the prior experience and knowledge of ALJ’s. Being a generalist is of

¹²³ Testimony of Tyrone T. Butler.

¹²⁴ Id.

¹²⁵ Conversation with Judge Poindexter.

¹²⁶ Testimony of Tyrone T. Butler.

¹²⁷ Conversation with Judge Poindexter.

¹²⁸ Id.

¹²⁹ Id.

utmost importance under the current system, since judges need to have the flexibility to hear an influx of emergency cases in any given area on short notice.¹³⁰

That being said, particular ALJ's may be able to develop expertise once OAH offices are consolidated. Currently, the offices of OAH ALJ's are located in different buildings due to space constraints. ALJ's rotate through particular hearing rooms that are located in different locations, depending on the particular case to which they are assigned.¹³¹ The consolidation of offices will greatly contribute to the cultivation of expertise in particular areas, as ALJ's will be able to communicate with and rely on their colleagues to a greater degree. As takes place in a large law firm, an ALJ who is faced with a perplexing question could simply walk down the hall to a colleague's office and get answers quickly and informally as opposed to relying solely on personal knowledge and research. Office consolidation is likely to be a reality in the near future as OAH is currently in talks with the Office of Property Management.¹³²

Finally, Judge Poindexter believes that efficiency within OAH will be improved if OAH gets out of the money collection business entirely. If OAH does so, it would be able to hear more cases, as a great deal of the administrative staff's time is currently spent on collection and distribution matters.¹³³ For all of the time the staff spends on such matters, OAH does not keep any of the money that is collected.¹³⁴ Previously, when OAH was a pilot program in DOH, there was a memorandum of understanding that OAH could retain funds collected from classes of cases where respondent admitted to the infraction, but

¹³⁰ Id.

¹³¹ Conversation with T. Cherry.

¹³² Conversation with Judge Poindexter.

¹³³ Id.

¹³⁴ Id.

could not retain funds for admit with explanation and deny classes of cases.¹³⁵ Under the current system, payments are sent directly from OAH to the DC Treasurer.¹³⁶ Some agencies want a tally of money—so they know how much to expect when determining budget expenses—but this also consumes the time of OAH administrators.¹³⁷

In the past year there have been improvements made in the way that fines are collected. Chief Judge Butler testified that two docket clerks were assigned “as ‘money handlers’ for incoming payments to improve financial controls regarding collections; and implemented OCFO procedures that authorize only the senior budget analyst to deposit checks¹³⁸ To maximize efficiency, Judge Poindexter would like to see a lock box system similar to that of DCRA’s adopted, where the administration never has to touch the money. He would also like to see payment be handled by a computer system; this would make the system more efficient and people would be more likely to pay.¹³⁹

Conclusion

The creation of OAH has detrimentally affected historic preservation enforcement within the District of Columbia. As an independent agency with limited resources, OP—the agency responsible for historic preservation enforcement—has had difficulty filing and presenting cases before OAH due to strict procedural requirements. Untrained inspectors are currently responsible for preparing case files, notices of infraction, and presenting evidence at hearing.

This increased responsibility has had four negative results: 1) inspectors have lost time in the field, 2) inspectors have made errors when preparing valid notices of

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Testimony of Tyrone T. Butler.

¹³⁹ Conversation with Judge Poindexter.

infraction and the cases have been dropped on due process grounds, 3) inspectors have not filed as many cases for recent infractions as they could have, and 4) inspectors have not re-filed as many old case that were thrown out during the transition to OAH as they could have.

One solution to this problem would be to employ an advocate, such as those used in OCI within DCRA to handle the presentation of cases. However, advocates may actually be less effective than inspectors at presenting cases and since OP does not have a heavy caseload compared to other agencies, it may make more sense to maintain the status quo. Even if it would be more desirable to have advocates present the case, it is not clear if either OP or OCI could afford to hire an additional advocate. Hiring a part-time administrative contractor—either within OCI or OP may be more feasible.

Current OCI administrators may also be able to process these few extra cases, as they already process thousands of cases for DCRA each year. The current development of a centralized OAH would make it feasible for the OCI enforcement coordinator to track cases pending at OAH for agencies outside of DCRA.

Law student interns at OAG or those taking clinics at local law schools could also assist in both preparation and presentation of cases. Finally, if OAH would enact streamlined default procedures—as it has for other District agencies—OP inspectors would not have to attend hearings in every circumstance.

The transition from the Office of Adjudication to OAH has resulted in a backlog of cases, and therefore, final decisions—even those for default cases—have not been issued in a timely manner. A number of ALJ's have joined OAH in the past year such

that the agency is finally operating at full capacity. Much of the backlog in case has been cleared and OAH anticipates that it will be completely cleared within the next year.

Despite the improvements that OAH has made in the past year, there is still room for more improvement. Although all ALJ's need to have an understanding of all of the agencies that fall within OAH's jurisdiction, OP could stand to benefit if at least one judge developed an expertise in historic preservation cases. As OAH hears thousands of cases each year, it is not hard to see how the 20 or so OP cases could fall between the cracks. The consolidation of OAH offices should encourage greater specialization but more proactive steps may be necessary to ensure that OP cases are prioritized such that final orders are consistently issued in a timely manner. Finally, if the administrative staff within OAH could devote less time to such tasks as fine collection and distribution, they could devote more time to case processing and therefore, more cases could be heard.