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May 2, 2005

VIA HAND DELIVERY
Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, D.C. 20001

Re: 2210 Adams Place N.E.: Bannum's Request for a Stay

Dear BZA:

Bannum, Inc. respectfully requests that the Board of Zoning Appeals ("BZA") stay any action by the District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA") to revoke Bannum's Certificate of Occupancy ("CofO") for 2210 Adams Place, N.E. for use as a federal Community Corrections Center ("CCC") until the District of Columbia Court of Appeals decides Bannum's appeal of the BZA's decision underlying the revocation. An appeal to the BZA was filed today. The DCRA revocation action may be issued as early as May 5, 2005 (the revocation was stayed until that date by the U.S. District Court for the District of Columbia on April 30, 2005). Thus, immediate action by the BZA to stay the revocation is requested.

The sole basis for DCRA's revocation is the BZA's Decision, dated March 31, 2004 regarding zoning for the building permit issued by DCRA for the above CCC facility. In that Decision, the BZA reversed the DCRA, which had twice issued Bannum written administrative determinations that Bannum's CCC was properly zoned as a matter of right in a Commercial-Manufacturing ("C-M") zone under 11 DCMR §801.7(k). Although the BZA denied in writing both the DCRA and Bannum motions for reconsideration and a stay of its March 2004 decision on the building permit on August 26, 2004, Bannum requests that under the current circumstances, the BZA now grant a stay until the Court of Appeals issues its decision on the appeal.

As grounds for this request, Bannum states the BZA should adopt the August 6, 2004 ruling of the DCRA Administrative Law Judge ("ALJ") who continued any action on the revocation until the Court of Appeals decides Bannum's appeal of the March 25, 2004 BZA decision. The ALJ's ruling on August 6, 2004 should be binding on the DCRA since the ALJ decision was on exactly the same subject matter and the ALJ had full authority to do so. Nothing in the District of Columbia's administrative reorganization purported to retroactively void existing ALJ orders and nothing has changed that would affect his ruling. Indeed, there was no factual or legal basis to "rescind" the original notice of revocation and effectively nullify the existing ALJ order to continue the matter until the Court of Appeals decided the case on the merits.

BZA
Case No. 16998
Exhibit No. 103

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 103

In any event, granting a stay now is a reasonable exercise of the BZA's discretion. There is no reason to allow the DCRA to effectively moot the Court's review. The delay involved in obtaining a decision by the Court of Appeals at this point is minimal. The last briefs in the Court of Appeals case was filed on January 20, 2005 and the parties are awaiting the Court's notice of oral argument. A decision on the merits is expected to follow shortly thereafter.

Bannum recognizes that the BZA believes that the March 31, 2004 decision, which is the sole basis for the revocation, was correct and believes that it will be affirmed by the Court of Appeals. However, when the forum that issued the decision that is on appeal is determining whether to issue a stay, like the BZA here, that forum must take a different perspective. In Washington Metropolitan Transit Commission v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977) the court set out the factors for granting a stay: (a) the likelihood of success on the merits, (b) irreparable harm to the petitioner, (c) comparative harm to the other parties, and (d) the public interest.

With respect to the likelihood of success, it cannot be denied that many of the issues before the BZA were serious ones of first impression involving the meaning of 11 DCMR §801.7(k), and the jurisdiction of the BZA. As the Court stated:

> "Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." Id. (emphasis added).

Little or no harm will befall the other interested parties. Bannum's facility is located in an isolated commercial manufacturing area, not a densely populated neighborhood. Notwithstanding the BZA's concern about a possible impact on the community, in the two years since the CofO was issued, the CCC has operated safely and efficiently. Indeed, rather than harming any community, the CCC has provided a valuable service. This CCC has enabled hundreds of selected D.C. felons who are returning to D.C. from prisons around the country to obtain employment during the last portion of their sentences (usually between 30 to 60 days) while residing in a controlled setting. Bannum is currently housing 77 persons. A revocation now followed by a transfer of those persons by the Bop would disrupt their transition into society without a gain to anyone.

In the hearing before the BZA, Bannum and the D.C. residents who filed the BZA appeal of the DCRA building permit that led to the BZA's March 31, 2004 decision all agreed that a facility like Bannum's is beneficial to the District of Columbia. Thus, the DCRA's action will harm the public's interest.

In contrast, Bannum will lose its profits that cannot be recovered and will be in breach of contract, subjecting it to monetary damages, loss of key personnel and significant harm to its reputation with its only customer, the Federal Bureau of Prisons that could negatively affect Bannum's future ability to stay in business.

Finally, ANC 5B, the plaintiff in the BZA March 31, 2004 decision, never alleged any financial or other special harm —the issue was solely a matter of law that the Court of Appeals is poised to decide with a minimal delay.

Conclusion

Given the harm to the public and immediate financial and other harm to Bannum from a revocation of the CofO, and lack of special harm to ANC 5B, Bannum respectfully requests that BZA stay the revocation, as did the DCRA ALJ, until the Court of Appeals decides Bannum's appeal on matters of first impression.

Respectfully submitted,

Michael A. Gordon
Shawn Whittaker
Counsel for Bannum, Inc.

cc. Bennett Rushkoff, Esq., DCRA
Donald C. Temple, Esq., ANC 5-B[1]

[1] ANC 5-B did not timely appeal the issuance of the Certificate of Occupancy and thus, is not a party to this proceeding. A courtesy copy is being furnished to Mr. Temple solely to keep him informed.