BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Bannum, Inc.'s Request for a Stay of Department of Consumer and Regulatory Affairs' Revocation of Certificate of Occupancy No. C53679 authorizing Bannum, Inc., to use the property located at 2210 Adams Place, N.E., as a temporary correctional institution	)	BZA Appeal No. 17356/16998

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' OPPOSITION TO BANNUM, INC.'S REQUEST FOR A STAY

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") opposes Bannum, Inc.'s ("Bannum") request for a stay of DCRA's revocation of the certificate of occupancy ("C of O") for use of Bannum's facility at 2210 Adams Place, N.E. In an April 21, 2005 Notice of Revocation of Certificate of Occupancy Number C53679 ("2005 Notice"), the Zoning Administrator informed Bannum that DCRA was revoking the C of O pursuant to a regulation that "authorizes the Director to revoke a Certificate of Occupancy that has been issued in error." [BZA Case No. 17356, Exhibit 2]

Though Bannum contends otherwise, the 2005 Notice did not "void" any Administrative Law Judge ("ALJ") order in the administrative proceedings arising from DCRA's earlier April 27, 2004 Notice of Intent to Revoke ("2004 Notice"). [BZA Case No. 17356, Exhibit 8] The 2004 Notice had charged Bannum with being "in violation" of two municipal regulations through its continued occupancy of the premises at 2210 Adams Place, N.E. By rescinding the 2004 Notice, the 2005 Notice effectively dismissed these charges and informed Bannum that DCRA would be revoking the C of O, not as a sanction for any alleged law violations by Bannum, but to correct DCRA's own error in

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issuing the C of O. Nothing in the administrative proceedings pertaining to the 2004 Notice prevented DCRA from revoking the C of O in order to correct its own error.

I. Factual Background

On March 31, 2004, in BZA Appeal No. 16998, the Board of Zoning Adjustment ("BZA") issued a written Order concluding that DCRA "erred" when it granted Bannum building permits for a "Community Corrections Center" at 2210 Adams Place, N.E. (BZA Case No. 16998, 3/31/04 Order at 16) The BZA ruled that the facility was not a "[t]emporary detention or correctional institution" within the meaning of 11 DCMR § 801.7(k) and, therefore, was not a matter-of-right use in the C-M zone district in which the facility was located. Therefore, DCRA should not have issued Bannum either the facility's original building permit on December 12, 2002, or the facility's revised building permit on January 17, 2003.

Both DCRA and Bannum sought reconsideration and a stay of the BZA's March 31, 2004 Order. On August 26, 2004, the BZA issued an Order denying reconsideration and denying a stay. Bannum also sought a stay from the D.C. Court of Appeals, which denied the requested stay on August 5, 2004. Bannum's petition to the Court of Appeals for review of the BZA's decision is still pending.

As the BZA itself recognized in its March 31, 2004 Order, the conclusion that DCRA erred in issuing the building permits necessarily compels the conclusion that DCRA also erred when, on May 2, 2003, it issued a C of O for Bannum's use of the facility:

> The issue underlying the appeal of the building permit is whether or not the use of the facility is allowed in the CM-2 zone. The Board has concluded that the facility is not permitted. If a building permit is found to be invalid because it authorized a non-permitted use, the legal

> underpinning of a subsequently issued certificate of occupancy for that same use also fails.

(BZA Case No. 16998, 3/31/04 Order at 12)

On April 27, 2004, less than a month after the BZA's original Order invalidating the building permits for Bannum's facility, the Zoning Administrator issued to Bannum a Notice of Intent to Revoke Certificate of Occupancy ("2004 Notice"). (BZA Case No. 17356, Exhibit 8) The proposed revocation was supported by two charges. The first charge was that Bannum was in violation of 11 DCMR § 3203.11, which governs the issuance of a certificate of occupancy when "the establishment of the use is dependent upon the erection, construction, conversion, or alteration of the structure, or part thereof." The second charge was that Bannum was in violation of 12A DCMR § 110.1.1, which prohibits use of a "building or structure . . . until the certificate of occupancy has been issued by the code official, in accordance with this Section and Title 11 DCMR."

DCRA's 2004 Notice informed Bannum that it could challenge the proposed C of O revocation by requesting a hearing from DCRA's Office of Adjudication. (2004 Notice at 3) An administrative proceeding was, in fact, commenced before the Office of Adjudication. On August 6, 2004, an Administrative Law Judge ("ALJ") from the Office of Adjudication ordered that the administrative proceeding be continued until the D.C. Court of Appeals decided Bannum's appeal. (5/2/05 letter from Holmes & Gordon to BZA)

Eight-and-a-half months later, on April 21, 2005, the Zoning Administrator issued a new Notice of Revocation ("2005 Notice") rescinding the 2004 Notice and thereby dismissing the charges against Bannum. (BZA Case No. 17356, Exhibit 2) Currently, Bannum is not being charged with any DCMR violations.

In the 2005 Notice, the Zoning Administrator announced that Bannum's C of O was being revoked, not because of any alleged violations by Bannum, but because DCRA had issued the C of O "in error": "This action is taken pursuant to 12A DCMR § 110.5.3 (2004), which authorizes the Director to revoke a Certificate of Occupancy that has been issued in error." (BZA Case No. 17356, Exhibit 2) By contrast, the 2004 Notice, while acknowledging that the C of O had been "issued in error," relied on Bannum's alleged violations to justify the proposed revocation. (BZA Case No. 17356, Exhibit 8)

The Zoning Administrator's 2005 Notice invited Bannum to "deliver comments and/or objections," and Bannum did so by letter dated April 25, 2005. In addition to renewing arguments that it had previously presented to the BZA, Bannum argued that there was "no legal or factual basis for [DCRA's] rescinding" of the 2004 Notice, and that "nothing has occurred which provides a valid basis to circumvent" the ALJ's ruling "that no action should be taken until the District of Columbia Court of Appeals decides the validity of the BZA decision." (BZA Case No. 17356, Exhibit 17 (5/3/05 letter to Kress), attached letter (4/25/05 letter to Bell) at 1)

In his May 4, 2005 response to Bannum's letter, the Zoning Administrator stated that, in accordance with a brief extension that DCRA had already granted, the revocation of the C of O would become effective on May 5, 2005. The Zoning Administrator concluded that Bannum's arguments did not justify any further extension:

> As you correctly state in your letter, the DCRA's notice of revocation is based solely on [the BZA's decision] that the agency erred in issuing the building permit upon which [the] certificate of occupancy was predicated. Although DCRA considered the arguments put forth in your April 25, 2005 letter, it declines to base its decision on your request by deciding those issues. Instead, DCRA concludes that your comments and objections are not sufficient to warrant extension of the revocation date, or

> rescission of the notice of revocation, where they do not address the fact that DCRA's revocation notice is based on a finding of error by the BZA.

(5/9/05 Whittaker letter to BZA, Exhibit 2 thereto)

On the same day that the Zoning Administrator responded to Bannum's letter, the D.C. Court of Appeals denied a motion by Bannum to stay the revocation of the C of O. The denial was based in part on Bannum's failure to demonstrate that it was likely to succeed in its appeal and that, without a stay, it would suffer irreparable harm:

> This court lacks jurisdiction to stay revocation of the order in question since no petition for review of [the C of O revocation] decision has been filed and the matter is currently and properly before the respondent [BZA] . . . . *In addition, [Bannum] advances the same arguments for stay which this court has previously rejected; it has not shown either a likelihood of success on the merits of its claims or the existence of any irreparable harm.* See Barry v. Washington Post, Co., 529 A.2d 319, 321 (D.C. 1987).

(5/9/05 Whittaker letter to BZA, Exhibit 1 thereto) (emphasis supplied)

Since May 5, 2005, Bannum has not had a C of O for the premises at 2210 Adams Place, N.E. As of May 31, 2005, the District had not filed an enforcement action against Bannum's use of the premises.

II. Argument

Bannum's primary argument in support of its requested stay is that denying a stay would "effectively nullify the existing ALJ order to continue the matter until the Court of Appeals decided the case on the merits." (BZA Case No. 17356, Exhibit 5 at 1) However, the ALJ order to which Bannum refers pertained to DCRA's adjudication of an alleged violation by Bannum. That order does not prevent DCRA from revoking Bannum's C of O in order to correct an error made by DCRA.

The proceeding before the ALJ arose from what was, in effect, a *notice of violation* that accused Bannum of violating District law. *Cf.* 12A DCMR §§ 113.2 and 113.2.2 (notice of violation seeking "the discontinuance of the illegal action or condition and/or abatement of the violation"). DCRA proceeded to adjudicate this alleged violation pursuant to the administrative procedures of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985. D.C. Official Code § 2-1801.01 (2001), *et seq.* *Cf.* 12A DCMR § 113.3 ("Prosecution or Adjudication of Violation"). These procedures normally include a hearing before an ALJ. D.C. Official Code § 2-1802.03(a) (2001).

By contrast, the instant proceeding involves a *notice of revocation* of a C of O based on its having been "found to have been issued in error." 12A DCMR §§110.5.3 and 110.5.6. Compared to the procedure for a notice of violation, the procedure for a notice of revocation is quite simple: "Notice of the proposed revocation of the Certificate of Occupancy shall be given in writing, setting forth specifically the grounds for the action. The notice shall be sent by certified mail, at least ten (10) days prior to the date of the proposed action." 12A DCMR § 110.5.6. The revocation may then be appealed directly to the BZA. 12A DCMR § 110.6. The streamlined procedure is especially appropriate in this case, given that DCRA is not accusing Bannum of having done anything wrong.

The fact that the relief sought by the notice of revocation is the same as the relief sought by the notice of violation does not mean that the two notices pertain to the same matter. It is not as if DCRA has rescinded one notice of violation only to issue a new notice of violation. Indeed, DCRA is no longer asserting that there was any violation at all. Rather, DCRA is simply complying with the requirement that "[a]ny certificate of

occupancy previously issued . . . *shall be revoked* by the Director, after notice, if it is found to have been issued in error." 12A DCMR § 110.5.3 (emphasis supplied).

Citing *Washington Metropolitan Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977), Bannum also argues that it meets the four-part test for a stay pending D.C. Court of Appeals review of the BZA decision upon which the proposed revocation is based. (BZA Case No. 17356, Exhibit 5 at 2) However, on May 4, 2005, the Court of Appeals issued an Order denying Bannum's motion for a stay from the Court. The Order stated that Bannum "has not shown either a likelihood of success on the merits of its claims or the existence of any irreparable harm. *See Barry v. Washington Post, Co.*, 529 A.2d 319, 321 (D.C. 1987)." (5/9/05 Whittaker letter to BZA, Exhibit 1 thereto) This ruling was not dictum; it was one of two grounds for the Court's decision to deny Bannum's motion to stay. The Court of Appeals' conclusion – that Bannum has not satisfied the legal standard for a stay – is binding on Bannum and should be adopted by the BZA.

Conclusion

For the reasons stated above, DCRA respectfully requests that the Board deny Bannum, Inc.'s request for a stay of DCRA's revocation of Certificate of Occupancy No. C53679.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2005, copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Opposition to Bannum, Inc.'s Request for a Stay are being mailed, first-class postage prepaid, to:

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