GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 16998-B of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. B425438, for the renovation of a warehouse for use as a community corrections center. The subject property is located in the C-M-2 District at premises 2210 Adams Place, N.E. (Square 4259, Parcel 154.81).

HEARING DATES FOR APPEAL NO. 16998: April 22, 2003, May 20, 2003, June 17, 2003, July 8, 2003, and July 22, 2003

DECISION DATE FOR APPEAL NO. 16998: September 9, 2003

DATE OF DECISION ON RECONSIDERATION AND STAY OF APPEAL NO. 16998: May 4, 2004

DATE OF DECISION ON MOTION TO STAY REVOCATION OF CERTIFICATE OF OCCUPANCY, ARISING OUT OF APPEAL NO. 16998: June 7, 2005

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 16998-B
EXHIBIT NO. 114

ORDER DENYING MOTION TO STAY NOTICE OF REVOCATION

On May 2, 2005, Bannum filed a motion for a stay of any action by the Department of Consumer and Regulatory Affairs (DCRA) to revoke Bannum's Certificate of Occupancy until the District of Columbia Court of Appeals (DCCA) decided Bannum's appeal of the underlying order in this case, Appeal No. 16698, issued on March 31, 2004.[1] DCRA issued a Notice of Intent to Revoke on April 27, 2004 and a

[1] As of the date of the motion and the Board's ruling on the motion, that appeal was pending before the DCCA. The DCCA has since issued its decision upholding the Board's denial of the appeal. The DCCA decision was made on March 16, 2006. Accordingly, while this issue is now moot, it was not moot at the time of the Board's ruling.

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 114

Notice of Revocation on April 21, 2005, to effectuate the Board's decision in Appeal No. 16998, granting the Appeal of Advisory Neighborhood Commission 5B.

Background

In Appeal No. 16998, appellant Advisory Neighborhood Commission ("ANC") 5B ("Appellant") claimed that the Department of Consumer and Regulatory Affairs ("DCRA") had erroneously issued a building permit allowing a prohibited community-based residential facility ("CBRF") in a C-M zone district. Appellee DCRA claimed that it had acted properly in issuing the permit pursuant to 11 DCMR § 801.7(k), which permits, in a C-M district, a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years." DCRA alleged that an 801.7(k) institution was a type of CBRF permitted in a C-M zone. Bannum, Inc., property lessor and intervenor in Appeal No. 16998, claimed that its facility was not a CBRF, but a community corrections center ("CCC"), and that therefore the use fell squarely within § 801.7(k).

On May 2, 2003, during the pendency before the Board of the proceedings in Appeal No. 16998, DCRA issued Bannum Certificate of Occupancy No. C53679 ("C of O") for its community corrections center facility at 2210 Adams Place, N.E. Appeal No. 16998 was not amended to include the issuance of the C of O as one of the grounds for the appeal.

The final order of the Board of Zoning Adjustment ("Board" or "BZA") granting Appeal No. 16998 was issued on March 31, 2004 (referred to herein as the "underlying order"). The underlying order explained, in detailed findings of fact and conclusions of law, that although the Board found Appellant's theory of error unpersuasive, it nonetheless determined that DCRA had erred in issuing the building permit. The Board ultimately concluded that the proposed facility was neither a CBRF nor a temporary detention or correctional institution under § 801.7(k) of the Zoning Regulations.

On April 13, 2004, Bannum timely moved for reconsideration and for a stay of the final decision while reconsideration was pending. The next day Bannum filed a petition for review of the Order with the DCCA. On May 4th, 2004, the Board voted to deny the Bannum's motion for reconsideration and stay. In its written order of August 24, 2004, the Board held that Bannum failed to address any of the four factors that must be proved before a stay can be granted. On June 1, 2004, Bannum asked the Court of Appeals to stay the underlying order. By order dated August 24, 2004, the DCCA denied Bannum's request, finding that Bannum was unlikely to succeed on the merits, citing *Barry v. Washington Post,* 529 A.2d 319, 320-321 (D.C. 1987).

Meanwhile, based on the underlying order, DCRA, on April 27, 2004, issued a Notice of Intent to Revoke Bannum's C of O. Exhibit No. 112, Second Attachment. This Notice of Intent to Revoke cited Bannum with being "in violation" of two municipal regulations through its continued occupancy of the premises at 2210 Adams Place, N.E. (11 DCMR § 3023.11 and 12A DCMR §110.1.1)

Bannum then requested a hearing before the Office of Adjudication, and on August 6, 2004, an Administrative Law Judge ("ALJ") ordered that the proceeding before him be continued until the DCCA decided Bannum's appeal of the underlying order.

Approximately one year after the Notice of Intent to Revoke was issued, DCRA rescinded it and issued in its place, on April 21, 2005, a second Notice of Revocation of Bannum's C of O. Exhibit No. 110, First Attachment. The second Notice of Revocation was not predicated on any violation of municipal regulations, but on the fact that the C of O had been issued erroneously. This second Notice of Revocation acted to automatically revoke the C of O in 10 days from the date of service of the Notice.

In late April and early May, 2005, Bannum requested a stay or a temporary restraining order ("TRO"), preventing DCRA from revoking its C of O, from DCRA, the DCCA, the Superior Court of the District of Columbia, and the United States District Court for the District of Columbia. DCRA agreed to withhold its revocation until May 5, 2005, and the other three forums denied Bannum's stay/TRO requests on May 4, 5, and 6, respectively.

On May 2, 2005, Bannum filed an appeal of the second Notice of Revocation with the Board (Appeal No. 17356) together with this request that the Board stay "any action" by DCRA to revoke Bannum's C of O until the DCCA decides Bannum's appeal of the underlying order. Exhibit No. 103. Although filed concurrently with the appeal of the C of O revocation, the Board treats the motion as arising from the building permit appeal proceeding. Accordingly, the Board heard and decided the appeal and the motion separately. [2]

Conclusions of Law

Bannum, in its request for a stay from this Board, states that 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." *See,* Exhibit No. 103, at 1. DCRA's Zoning Administrator ("ZA") agrees with Bannum's assertion that the Notice of Revocation is

[2] See BZA Order No. 17356, deciding Bannum's appeal of the second Notice of Revocation, issued concurrently with this order.

based solely on the BZA decision in the underlying order that the building permit on which the C of O is predicated was issued in error.

Bannum asserts two grounds for its May 2, 2005 request for a stay. First, Bannum asserts that the Board should "adopt," or at least, look to, the August 6, 2004, ALJ decision continuing the revocation action until the DCCA decides the appeal of the underlying order. Second, Bannum sets forth the four-prong test for the granting of a stay, and claims that it meets each prong of the test.

As to Bannum's first request, the Board is not required to adopt or give deference to an order issued by an Administrative Law Judge. If that were the case, the Board would be compelled to deny any appeal of an ALJ decision that comes before it. The BZA, however, is bound to adhere to DCCA holdings. The DCCA has twice found that Bannum has not made the requisite showing for a stay. Such a showing requires a demonstration: (1) of likelihood of success on the merits, (2) that an irreparable injury will result if a stay is denied, (3) that no harm to opposing parties will result if a stay is granted, and (4) that the public interest favors the granting of a stay. A party must demonstrate all four requisites to prevail. *Barry v. Washington Post Co.*, 529 A.2d 319, 320-321 (D.C. 1987). In its most recent order, dated May 4, 2005, and attached to Exhibit No. 106, the DCCA wrote:

> [P]etitioner 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).

As was the case with the Court of Appeals, this is the second time that Bannum is requesting that this Board grant a stay based upon alleged deficiencies in the underlying order. Bannum essentially is asking this Board to reconsider its denial of the previous motion to stay. Even if such repetitive motions were permitted under the Board's rules, and not barred by the doctrines of issue and claim preclusion, Bannum has not presented any persuasive new evidence or arguments to warrant a change in the Board's ruling. Indeed, the only new evidence before the Board is that the Court of Appeals has now twice indicated that Bannum is unlikely to succeed on the merits of its appeal of the underlying order.

Nor has the Board seen any persuasive evidence that denying the stay will cause irreparable injury. Bannum has known since at least March 31, 2004 – the date of the underlying order – that its operations at 2210 Adams Place, N.E. could be shut down. Bannum has taken no steps to mitigate the damage it claims will result from revocation. In fact, ever since the original appeal of its building permit was filed, Bannum has been

operating at its own risk. Bannum has presented no new evidence since the Board's previous consideration of this issue to cause the Board to change its previous finding.

Finally, granting Bannum's request for a stay would not be in the public interest. The ANC's appeal was granted and yet, the granting of the appeal has resulted in no real change as Bannum is still operating at 2210 Adams Place, N.E. Further delay in closing Bannum's operations only makes a mockery of both the underlying order and the proper implementation and enforcement of the zoning regulations. Such a situation is clearly not in the public interest.

For the reasons stated above, the Board concludes that Bannum has not met its burden of demonstrating that it is entitled to a stay of DCRA's revocation of its C of O. Accordingly, Bannum's May 2, 2005 request for a stay of such revocation is **ORDERED DENIED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., David Zaidain and John G. Parsons to deny)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 30 2007

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.

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