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September 30, 2005

BZA # 17356

RECEIVED
D.C. BOARD OF ZONING
2005 SEP 30 AM 11:53

VIA OVERNIGHT MAIL

Jerrily R. Kress, FAIA
Director, Office of Zoning
Government of the District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, D.C. 20001

Re: 2210 Adams Place N.E.: Motion to Delay Hearing or for Summary Relief

Dear Mr. Kress:

Bannum respectfully requests that the hearing before the Board on Bannum's appeal of a decision to revoke Bannum's Certificate of Occupancy ("COO"), issued by the Department of Consumer and Regulatory Affairs ("DCRA") on May 4, 2005 be delayed until the Office of Administrative Hearings ("OAH") conducts a hearing on the same decision and issues a ruling. The reason is that by statute, the DCRA revocation action being taken is not a decision that that can be heard by the BZA as an initial matter.

In the notice to revoke at issue, DCRA cited 11 DCMR §3100.2 and 12A DCMR §110.6 as giving Bannum the right "to appeal the Department's decision" on the May 3, 2005 revocation of the COO. However, the Department did not issue a decision that is subject to a direct appeal at the BZA.

The Zoning Act, DC ST §6-641.07(f), which defines the available appeals to the BZA in the Zoning Act cited in 11 DCMR §3100.2, specifies the only direct appeals to the BZA:

(f) Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of the Inspector of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17356
EXHIBIT NO. 23

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decision based in whole or in part upon any zoning regulation or map adopted under this subchapter.... (emphasis added).

The BZA statute limits direct appeals only to “aggrieved persons” or “affected” D.C. or federal agencies relating to either the granting or withholding of a COO.

“[A]ny other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter” cannot be construed to cover revocations of a COO since the statute specifically covers the direct appeals for actions involving COOs and does not include revocations. The case law confirms this as only after an ALJ decision affirming a revocation of a COO will this Board take an appeal. See Perkins v. District of Columbia Board of Zoning Adjustment, 813 A.2d 206 (D.C. 2004); Rogers Brothers Custodial Services, Inc. v. Board of Zoning Adjustment, 846 A.2d 348 (D.C. 2004); Compare District of Columbia v. L.G. Industries, 758 A.2d 950 (D.C. 2000) (BZA had jurisdiction over denial of application for a COO under predecessor of DC ST §6-641.07(f)).

This is further confirmed by the regulation cited which deals specifically with this revocation, 12A DCMR §110.6 and the statute it cites - DC ST §6-641.09. It states:

110.6 Appeal from Action. Any person aggrieved by the action of the Director granting, withholding, or revoking a Certificate of Occupancy may appeal the action to the Board of Zoning Adjustment, pursuant to D.C. Official Code Sec. 6-641.09 (2001) and the District of Columbia Zoning Regulations. (emphasis added).

...**6-641.09.** Building permits; certificates of occupancy.

... In the event that said regulations provide for the issuance of certificates of occupancy or other form of permit to use, it shall be unlawful to use any building, structure, or land until such certificate or permit be first obtained. The owner or person in charge of or maintaining any such building or land or any other person who ... uses any building ... in violation of said sections or of any regulation adopted under said sections, shall upon conviction for such violation on information filed in the Superior Court of the District of Columbia by the Corporation Counsel or any of his assistants in the name of said District and which Court is hereby authorized to hear and determine such cases be punished by a fine of not more than \$100 per day for each and every day such violation shall continue. The Corporation Counsel of the District of Columbia or any neighboring property owner or occupant who would be specially damaged by any such violation may, in addition to all other remedies provided by law, institute injunction, mandamus, or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate such violation or to prevent the occupancy of such building, structure, or land.

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Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this subchapter, or any rules or regulations issued under the authority of these sections, pursuant to Chapter 18 of Title 2. Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2.

This statute is a penalty statute for infractions based on violation of zoning regulations. See 11 DCMR §3201.

An infraction is defined in DC ST §2-1801.02(2) as:

(2) "Infraction" means any act or failure to act for which a civil sanction may be imposed under the provisions of this chapter, and with respect to which either the Corporation Counsel or the United States Attorney for the District of Columbia is authorized to commence a criminal proceeding in the Superior Court of the District of Columbia, or for which another civil sanction may be imposed under any District laws or regulations.

Under DC ST §2-1801.01, administrative law judges ("ALJ") are appointed to determine the penalty for infractions of laws. It is the ALJ's "final decision" on an "infraction" that is the final decision of an agency that may be appealed. DC ST §2-1801.02. While the BZA is not authorized to hear direct appeals of revocations of COOs, under DC ST §2-1803.01, the BZA is authorized to hear appeals of ALJ decisions on penalties for violation of zoning laws, including the allegedly illegal use of a property without a COO following an adjudication by an ALJ:

Except as provided in §2-1831.16, the District of Columbia Board of Appeals and Review shall entertain and determine appeals timely filed by persons aggrieved by orders issued by hearing examiners pursuant to this chapter or by the Mayor, except that appeals involving infractions of subchapter I of Chapter 6 of Title 6, or the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment;

Thus, the "appeal" for the revocation of a COO referred to in 12A DCMR §110.6, under DC ST §6-641.09 cited therein, is an appeal following a final decision on a penalty for an infraction by an ALJ. This is the traditional procedure as shown by the case law. See Rogers, supra; Perkins, supra.

Since October 2004, all ALJ decisions are now processed by the Office of Administrative Hearings ("OAH") under the "Office of Administrative Hearings Establishment Act of 2001" ("Act"). DC ST §2-1831, et seq. That statute includes decisions by the DCRA. DC ST §2-1831.03(b).

In this case, a notice of revocation and notice of violation were originally issued to Bannum on April 27, 2004. As noted in Bannum's appeal, the ALJ continued all

SHAWN C. WHITTAKER

proceedings on the revocation until the D.C. Court of Appeals decided the appeal of the Board's March 31, 2004 order, the sole basis for the revocation of the COO and the notice of violation.

On April 21, 2005, May 4, 2005 and May 13, 2005, DCRA purported to "rescind" the prior revocation notice and issued decisional actions revoking the COO and notifying Bannum that it was in violation of zoning laws. Under DC ST §2-1831.13(c), the decisional actions are void.

But in any event, Bannum sought a hearing of these decisional actions at the OAH. Those cases are currently pending before the OAH under Case No. CR-C-05-800000. Until a final decision is issued by the ALJ in those appeals, Bannum's appeal to the BZA is premature and should be delayed.

II. Alternatively, the Revocation is Barred by Estoppel

If the Board proceeds with the appeal of the revocation based upon 12A DCMR 110.6, which it lacks jurisdiction to do at this time, it should reverse DCRA on the grounds of estoppel. As an initial matter, the revocation of the COO was not before the Board—only the zoning for the building permit. Therefore, the validity of the COO under principles of estoppel is not controlled by the Board's March 31, 2005 Order regarding the applicability of equitable doctrines regarding Bannum's building permit. Unlike that case, there is no third party here against which estoppel would be applied. As shown below, estoppel should bar DCRA's current attempts to revoke the COO.

Before entering into the Federal Bureau of Prisons ("BOP") contract to perform Community Correctional Center ("CCC") services at 2210 Adams Place N.E., Bannum, in good faith, twice sought written DCRA confirmation that Bannum's proposed use of a structure as a federal "community corrections center" was allowed under D.C. zoning law in a C-M Zone as matter-of-right. Each time, authorized persons within DCRA confirmed in writing that proper zoning was present. Ex. 1.

On January 23, 2001, in reliance on these determinations, Bannum submitted its offer to the BOP, based on the zoning in the DCRA letters. On November 16, 2001, the BOP awarded the contract to Bannum. This obligated Bannum to perform CCC services for a period of up to 3 years. On November 2001, DCRA again reaffirmed that Bannum's zoning was proper. Ex. 2.

Bannum incurred significant costs in reliance on these DCRA actions. Ex. 3. But more importantly, Bannum had committed itself contractually to the BOP and subjected itself to BOP contractual penalties for non-performance.

Thereafter, DCRA received requests to stay performance of the construction authorized from the Ward 5 Councilman and a citizen group and ANC 5-B filed its appeal to this Board. DCRA rejected those requests and issued Bannum a COO after the BZA appeal was filed.

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Bannum's expended approximately \$450,000 by the time the COO was issued. Bannum could not take this loss, since it would still be subject to major monetary penalties for a BOP default termination and the loss of future business from its only customer.

In sum, Bannum had no choice but to continue to rely on DCRA's defense and reaffirmation of its building permit and COO and to proceed to perform the contract.

To estop DCRA from disavowing these zoning decisions, Bannum was required to show that in good faith reliance on affirmative acts of DCRA, Bannum made expensive and permanent improvements to a property; and that the equities strongly favor retention of that use. See Saah v. District of Columbia Bd. of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C.1981). Bannum has made this showing.

Conclusion

Bannum filed this appeal because it had been erroneously advised by DCRA that the BZA was its only recourse. Bannum previously sought a stay, noting that the BZA did not entertain appeals of "contested cases" in the first instance and that 12A DCMR §110.6 was void. However, the case law and statutes show that 12A DCMR §110.6 and DC ST §6-641.09, which set out the only possible appeal right to the BZA, involve only appeals after an ALJ has issued a decision. The BZA does not issue penalties in the first instance for violations of zoning laws.

Bannum has had such a case before an ALJ, now the OAH since August 2004. Thus, under DC ST 2-1831(c), the decisional actions at issue are void and in any event, are also in a case pending before the ALJ. Accordingly, Bannum's BZA appeal on the current revocation action is premature and should be delayed.

Alternatively, for the reasons set forth above, DCRA should be estopped from revoking Bannum's COO.

Respectfully submitted,



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

cc. Bennett Rushkoff, Esq.
Donald C. Temple, Esq.

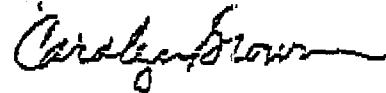
01/19/2003 12:39 *****

Michael Johnson
November 26, 2001
Page 2

If you concur with our interpretation of this section of the zoning regulations, kindly indicate so by signing on the line provided below.

Thank you for your assistance with this matter.

Very truly yours,



Carolyn Brown

I concur.

 11/29/01

Olutayo Bello Date
Acting Zoning Administrator

WAS1-1035551 v1

EX. 2

Lee Green

HOLLAND & KNIGHT LLP

2100 Pennsylvania Avenue, N.W.
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Washington, D.C. 20037-3222

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Herman	Neuman, D.C.
Hughes, Cg	Neil Finnegan
Katz	Reynolds, D.C.
Lee, Ted	Law

December 11, 2000

PLAZA CANTONMENT REENTRY
1025 16th St., S.W.
Commerce Building
Washington, D.C.

VIA HAND DELIVERY

Mr. Michael Johnson
Zoning Administrator
Building and Land Regulation
Administration
D.C. Department of Consumer and
Regulatory Affairs
941 North Capitol Street, N.W.
Washington, D.C. 20002

Re: 2210 Adams Place, N.E., Square 4259, Parcel 15481.

Dear Mr. Johnson:

This office represents Bannum, Inc. ("Bannum"), a company that provides residential rehabilitation services to individuals referred by appropriate community authorities. Bannum proposes to lease the property at 2210 Adams Place, N.E. (Parcel 15481 in Square 4259) for use as a residential Community Corrections Center under a contract with the U.S. Department of Justice. Individuals are referred to the facility either directly by the court system, under a conditional release from the parole commission or through a transfer from a federal institution in order to make the transition back into society.

The property at 2210 Adams Place, N.E. is located in the C-M-2 District Under section 801.7(f) of the zoning regulations, a "temporary" detention or correctional institution on leased property for period not to exceed three (3) years" is permitted as a matter of right in the C-M District. Accordingly, Bannum's proposed use of the property as a residential Community Corrections Center can be established as a matter of right at the Adams Street location.

01/12/2006 12:37

Michael Johnson
December 11, 2000
Page 2

If you concur with our interpretation of this section of the zoning regulations, kindly indicate so by signing on the line provided below.

Thank you for your assistance with this matter.

Very truly yours,



Carolyn Brown

I concur:


Michael Johnson Date
Zoning Administrator

WASH 0035143 v1

EX-3

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AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF PINELLAS) ss:

I, DAVID LOWRY, being over the age of majority and otherwise competent to make this affidavit state as follows:

1. I am over the age of eighteen (18) and am a resident of Pinellas County, Florida.
2. I am employed as the Executive Director of Bannum, Incorporated ("Bannum") headquartered in Clearwater, Florida.
3. Bannum is in the business of operating Community Corrections Centers ("CCC"s) pursuant to contracts awarded through competitive bidding by the United States Department of Justice, Federal Bureau of Prisons ("BOP") located in Washington, D.C. Bannum has CCCs currently operating in Florida, Alabama, North Carolina, South Carolina, West Virginia, Mississippi, Georgia, Nevada, and Texas.
4. Over the past nearly twenty (20) years, Bannum has successfully performed and completed dozens of CCC contracts for the BOP. More importantly, Bannum has spent countless business resources, and indeed the essence of its business operations and policy-making activities on the development of its business reputation and goodwill. This has been accomplished through Bannum's history of performance in operating current BOP programs and in preparing proposals for current and outstanding BOP solicitations for CCCs that are in the process of being awarded by the BOP.
5. Bannum is solely in the business of operating CCCs and the BOP is its only customer. Over the past almost twenty years, the BOP has awarded Bannum its

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CCC program contracts through competitive negotiated procurements after the issuance of requests for proposals ("RFP"s). In each of Bannum's CCC programs, it as the contractor is solely responsible for all operational aspects of the program, including but not limited to the following: personnel hiring and management; real estate acquisition/leasing, renovations and build-out; the provision of food service for the residents; and the provision of all equipment and services necessary for the operation of the CCC.

6. In formulating its proposal for the RFP for CCC services in Washington, D.C., Bannum had to locate a property sufficient to house the program pursuant to BOP standards. Proof of the ability to use at least one proposed property for the program must be submitted to the BOP as part of Bannum's final proposal. In general, once the BOP awards a contract to Bannum, its proposal becomes the contract between Bannum and the BOP. Accordingly, the proof of Bannum's legal right to use the property Bannum submits as part of its bid, including proof of appropriate zoning, then becomes part of Bannum's contractual obligations to the BOP. In other words, the BOP and Bannum, Inc. rely upon the City's representation of zoning and use for a particular property.

7. On or about March 24, 2000 and April 3, 2000, respectively, Bannum received RFP Number 200-0593-MA and RFP Number 200-06-04-MA, from the BOP for CCC services in the Washington, D.C. area. Ultimately, Bannum found a suitable property for lease at 2210 Adams Place, NE, Washington, D.C. ("2210 Adams Place"), and on November 16, 2000 obtained an option to lease the property subject to zoning verification, Bannum's ability to use the property as a CCC, and Bannum's award of the CCC contract.

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8. In addition, Bannum began to meet with local officials in an effort to obtain zoning approval from the District of Columbia for the operation of a CCC. Specifically, Bannum representatives made several contacts, or attempts to contact, various D.C. officials and community leaders in the process of attempting to obtain the needed zoning approval. The following is a list of some of Bannum's efforts in this regard:

- November 30, 2000: Bannum notified Mayor Williams, Chief of Staff Omer and Police Chief Ramsey of its intention to locate a CCC at the subject property;
- December 11, 2000: Bannum obtained zoning approval from Michael Johnson, Zoning Administrator, District of Columbia;
- March 12, 2001: Bannum notified Councilman Orange of its plans to locate a CCC at the subject property;
- April 10, 2001: Bannum notified Mayor Williams, Councilman Orange, and Police Chief Ramsey of its intention to locate a CCC at the subject property;
- October 31, 2002: Bannum met with Wholistic Services, the business leasing the space next to Bannum at the subject property, and advised of its intention to locate the CCC at the subject property;
- November 26, 2001: Bannum obtained zoning approval from Olutoya Bello, Zoning Administrator for the District of Columbia;
- In or about February, 2002, Bannum, Inc. engaged the services of a community organizer for the purpose of providing information to the public and the immediate community about Bannum, Inc.'s proposed federal BOP program. One activity our community organizer undertook was to physically walk the neighborhoods and communities surrounding 2210 Adams Place, NE, talking to the public.
- April 18, 2002: Bannum met with area senior citizens at Model Cities Wellness Center after issuance of a public announcement;
- April 18, 2002: Bannum met with ANC three leaders and Mr. Jenkins representing the Mayor at Washington Center for Aging Services (BOP representatives were also in attendance);

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- April 18, 2002: Bannum met with PTA and parents at Langdon Elementary School after issuance of a public announcement (BOP representatives were also in attendance);
- April 18, 2002: Bannum met with the general community at Harbor Light Center after issuance of a public announcement (BOP representatives were also in attendance as well as some ANC leaders);
- April 19, 2002: Bannum met with area business owners at Washington Center for Aging Services to discuss the opening of the CCC;
- June 11, 2002: Bannum transported ANC leaders Chappelle and Bowser to Orlando, Florida to review Bannum's program operations at its CCC there;
- October 5-6, 2002: Bannum advertised in the Washington Post for all positions at the CCC;
- January 2, 2003: Bannum attempted to meet with Councilman Orange;
- January 2, 2003: Bannum met with Councilman Orange's Legislative Assistant;
- January 2, 2003: Bannum attempted to meet with Councilmember Patterson, Chairperson, Committee on the Judiciary;
- January 3, 2003: Bannum met with three persons representing what I was lead to believe was the Bryant Street Homeowners Association;
- January 21, 2003: Bannum met with "Citizens For A Safe Ward 5" after issuance of a public announcement (BOP representatives were also in attendance);
- February 11, 2003: BOP representatives met with "Citizens For A Safe Ward 5";
- Date Unknown: Bannum met with Councilman Orange's Chief of Staff;
- Date Unknown: Bannum met with Rhonda Chappelle, ANC leader of Ward 5 on two separate occasions; and
- Date Unknown: A Community Organizer with the D.C. Prisoners' Legal Services Project, Inc. was assigned in February, 2001 to assist Bannum in obtaining community support.

9. Ultimately, based in large part upon the representation from the District of Columbia of valid zoning for Bannum's proposed use of 2210 Adams Place as a CCC,

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the BOP awarded Bannum the CCC contract on November 16, 2001. Bannum's contract with the BOP calls for Bannum to operate a CCC for one hundred fifty (150) male offenders per day at 2210 Adams Place. The rate to which Bannum is entitled under the contract from the BOP is \$30.00 per-man, per-day. Bannum is set to commence performance of the CCC contract on or about, but no later than May 1, 2003. Both the BOP and Bannum heavily and detrimentally relied upon the District of Columbia's representations confirming zoning approval for Bannum's operation of a CCC at 2210 Adams Place. In fact, not only did the BOP award the contract to Bannum on the basis of the District of Columbia's zoning approval, but, upon information and belief, all other bidders were excluded from contract award for failure to provide verification of zoning.

10. In fact, once the District of Columbia provided verification of proper "by-right" zoning Bannum, Inc., specifically relying upon that representation, took the following actions:

- a. Signed a lease with the land owner of 2210 Adams Place, N.E. that runs concurrently with Bannum, Inc.'s BOP contract. Bannum, Inc. is currently obligated to pay rent, common area and maintenance fees to the landlord;
- b. Entered into a contract with the U.S. Department of Justice, Bureau of Prisons;
- c. Entered into a contract for, and paid for, architectural and engineering plans for the renovation of 2210 Adams Place, N.E. for use in the Federal BOP contract;
- d. Entered into a contract for construction and renovations at the property.

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e. Entered into agreements and contractual obligations with local utilities for the appropriate upgrades of water, sewer, and electricity at the property.

f. Purchased equipment necessary for the operation of a federal BOP CCC at the property. Such property includes, among other things, beds, mattresses, desks, chairs, telephone equipment, office equipment, and fire alarm systems.

To date, Bannum, Inc. has expended in excess of four hundred fifty thousand dollars (\$450,000.00) for such items. From this date through May 1, 2003, Bannum, Inc. must obligate another approximately one hundred sixty-four thousand dollars (\$164,000.00) in order to be ready to operate its federal BOP contract and in reliance upon the District of Columbia's representations that 2210 Adams Place, N.E. is properly zoned for the said use.

11. In addition, Bannum, Inc. projects cost overruns on the construction contract of as much as seventy thousand dollars (\$70,000.00).

12. Currently, without any incoming revenue whatsoever from the federal BOP contract, Bannum, Inc.'s minimum daily fixed operational costs is four thousand one hundred fifty dollars (\$4,150.00).

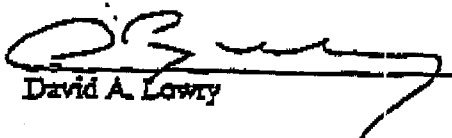
13. The BOP conducted a "pre-site inspection" of Bannum's proposed property at 2210 Adams Place on or about December 12, 2000. The purpose of this BOP "pre-site inspection" was to evaluate the proposed property in accordance with BOP standards for the CCC services contract. In furtherance of the lease agreement with 2210 Adams Place, a representative from Bannum attended said "pre-site inspection," as did

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2210 Adams Place agents and three (3) representatives from the BOP. Based in part on this inspection and the representations of the District of Columbia that is it properly zoned therefor, the BOP found that the site acceptable and ultimately awarded Bannum, Inc. a contract on that basis.

14. It is my belief from twenty-four years of experience in contracting with the BOP for CCC services that this program will be an asset to the community in which it is located. It is my further belief that the program will not adversely affect, but rather will promote, public safety in the community.

15. However, it is my further belief from my years of experience contracting with the federal BOP that if Bannum, Inc. cannot begin performance of its contract for CCC services, then the BOP will terminate the contract for default. A termination for default has a very strong adverse effect upon the ability of any contractor to obtain future contracts with the BOP and may well cause Bannum, Inc. to be debarred or in the very least put Bannum, Inc. at a significant competitive disadvantage, which may well lead to the demise of Bannum, Inc.'s business with its only customer, the federal Bureau of Prisons.


David A. Lowry

Sworn to before me this
17 day of April, 2003.


Notary Public

