BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal of Bannum, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to revoke Certificate of Occupancy Permit No. C53679, dated May 2, 2003, for a temporary correctional institution in the C-M-2 District at premises 2210 Adams Place, N.E. (Square 4259, Parcel 154/81).	)	BZA Appeal No. 17356

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' OPPOSITION TO BANNUM, INC.'S REQUEST TO DELAY HEARING OR FOR SUMMARY RELIEF

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") opposes Bannum, Inc.'s ("Bannum") request that the Board either delay the hearing in this appeal or grant Bannum summary relief. Bannum's primary contention is that a decision to revoke Bannum's certificate of occupancy ("C of O") could be appealed to this Board only if the decision were made by an ALJ. This contention overlooks DCRA's express authority to revoke a C of O pursuant to 12A DCMR § 110.5.3, which plainly states that a C of O "shall be revoked by the Director, after notice, if it is found to have been issued in error." Moreover, Bannum's appeal from DCRA's decision is properly before this Board pursuant to 12A DCMR § 110.6, which provides: "Any person aggrieved by the action of the Director [in] revoking a Certificate of Occupancy may appeal the action to the Board of Zoning Adjustment . . . ."

I. Factual Background

This appeal is from DCRA's April 21, 2005 "Notice of Revocation of Certificate of Occupancy Number C53679" ("Notice of Revocation"), pertaining to Bannum's facility at 2210 Adams Place, N.E. [BZA Case No. 17356, Exh. 2] Relevant facts are set

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forth in the "Factual Background" section of DCRA's May 31, 2005 Opposition to Bannum, Inc.'s Request for a Stay; that section is incorporated fully herein by reference. [BZA Appeal No. 16998, Exh. 111, at 2-5]

On June 30, 2005, DCRA issued an Order Governing Unlawful Possession of Premises, which directed Bannum to "vacate the premises at 2210 Adams Street, N.W., [sic] Washington, D.C. within forty-five (45) calendar days of receipt of this Order." [copy of Order attached as **Exhibit A hereto**] Soon after the forty-five day period set by DCRA expired, the Attorney General for the District of Columbia filed an injunction action against Bannum in D.C. Superior Court. [copy of Application and supporting Memorandum attached as **Exhibit B hereto**] After a hearing on October 14, 2005, the Court took the Attorney General's request for an injunction under advisement.

II. Argument

Bannum contends that a decision to revoke a C of O may be appealed to this Board "only after an ALJ decision affirming [the] revocation." [Bannum's Sept. 30, 2005 request, p.2] This contention is based largely on the incorrect assumption that DCRA can revoke a C of O only through 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"). Those procedures normally require a hearing before an ALJ because they involve an adjudication as to whether to impose "alternative civil sanctions for infractions of laws and regulations." D.C. Code § 2-1801.01 (purpose of chapter).

By contrast, the revocation decision that is the subject of this appeal does not involve any alleged infraction, or even any alleged wrongdoing, by Bannum. Rather,

DCRA issued its Notice of Revocation based on Bannum's C of O having been "found to have been issued in error." 12A DCMR §§ 110.5.3. Unlike the charging of an infraction, the noticing of a revocation invokes a summary procedure: "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 resulting revocation may be appealed directly to the BZA: "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." 12A DCMR § 110.6.

Bannum cites two D.C. Court of Appeals cases – *Perkins v. District of Columbia Bd. of Zoning Adjustment*, 813 A.2d 206 (D.C. 2002), and *Rodgers Bros. Custodial Services, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 846 A.2d 308 (D.C. 2004) – in support of its contention that this Board hears an appeal from a revocation decision only after the decision has been affirmed by an ALJ. One of these cases concerned a proposed revocation based on an alleged use that "was not in conformity with the certificate [of occupancy] issued," *Perkins*, 813 A.2d at 208, while in the other case DCRA had issued a notice of infraction based on an allegedly non-conforming use, *Rodgers*, 846 A.2d at 310. Neither case involved a revocation based on the C of O itself having been issued by DCRA in error. Moreover, in neither case did the Court of Appeals have an opportunity to consider whether DCRA might properly have revoked the C of O pursuant to 12A DCMR § 110.5.1 ("Different Occupancy"), which authorizes

revocation without a formal adjudication when actual occupancy does not conform to a C of O: "Any certificate of occupancy previously issued . . . shall be revoked by the Director, after notice, if the actual occupancy does not conform with that permitted."

Notably, in the Notice of Revocation that is the subject of this appeal, DCRA did not allege that Bannum's use failed to conform to the C of O; DCRA alleged only that the C of O itself was issued in error. So DCRA did not even have the option of pursuing its allegation through an infraction proceeding. The only procedure available to DCRA for revoking the C of O based on its having been issued in error was the notice of revocation procedure set forth at 12A DCMR § 110.5.6. That procedure provides for ten days' written notice of the proposed revocation and, presumably, an opportunity to respond; it does not require administrative proceedings before an ALJ. DCRA's Notice of Revocation to Bannum did, in fact, invite Bannum "to deliver comments and/or objections to the subject Notice of Revocation **at least two (2) business days** prior to the effective date of the revocation." [BZA Case No. 17356, Exh. 2 (emphasis in original)]

Bannum would have the Board infer from the fact that the applicable statute expressly authorizes appeals from a decision "granting or withholding" a C of O that the statute does not authorize an appeal from DCRA's decision to *revoke* Bannum's C of O. But in authorizing an appeal from "any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter," the statute's plain language extends the right of appeal to a C of O revocation decision, as long as the revocation was based upon a "zoning regulation or map." D.C. Code § 6-641.07(f). Here, DCRA's administrative decision to revoke Bannum's C of O was based on the

Board's determination that, under the District's zoning regulations, Bannum's facility did not belong in a C-M-2 District. [BZA Case No. 17356, Exh. 2]

Bannum also argues that DCRA is estopped from revoking Bannum's C of O because Bannum relied on DCRA's earlier position that Bannum's facility was permitted in a C-M zone as a matter of right. But in its March 31, 2004 Order in BZA Appeal No. 16998, this Board emphasized that to "prove the traditional estoppel elements" against DCRA, Bannum would have to establish equities in its favor that outweigh "the public's interest in stopping an unlawful use, particularly one that could easily destabilize adjacent residential neighborhoods." Order at 11, n.6. In this case, the equities in Bannum's favor are necessarily limited by the fact that Bannum has already used its facility for more than two years of the three-year period allowed by the temporary C of O that DCRA issued. Moreover, even if the evidence that Bannum incurred expenses in reliance on the C of O were sufficient to raise a *bona fide* issue as to estoppel, such evidence would not provide a basis for granting Bannum summary relief. Indeed, any finding of estoppel would have to be based on an extensive evidentiary record that permitted the Board to identify, evaluate, and weigh the various competing equities.

Conclusion

For the reasons stated above, the Board should deny Bannum, Inc.'s request that the Board either delay the hearing in this appeal or grant Bannum summary relief.

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General for the District of Columbia

DAVID M. RUBENSTEIN
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Public Safety Division

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(202) 727-5173

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2005, copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Opposition to Bannum, Inc.'s Request to Delay Hearing or for Summary Relief are being mailed, first class postage prepaid, to:

Shawn C. Whittaker, Esq.
9055 Comprint Court
Suite 340
Gaithersburg, MD 20877-1310

Donald M. Temple, Esq.
Temple Law Offices
1200 G Street, N.W.
Suite 370
Washington, DC 20005

Chairperson
Advisory Neighborhood Commission 5B
1355 New York Avenue, N.E.
Washington, DC 20002

and hand-delivered to:

Alan H. Bergstein/Lori Monroe
Office of the Attorney General
441 4th Street, N.W., 6th Floor - North
Washington, DC 20001

Bennett Rushkoff

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

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OFFICE OF THE ZONING ADMINISTRATOR

June 30, 2005

BY PERSONAL SERVICE AND CERTIFIED MAIL
BANNUM, INC
c/o Shawn C. Whittaker, Esquire
2210 Adams Pl, N.E.
Washington, D.C. 20001

ORDER GOVERNING UNLAWFUL POSSESSION OF PREMISES

On May 2, 2003, the Department of Consumer and Regulatory Affairs (DCRA) issued Certificate of Occupancy, Number C53679 ("C of O"), to Bannum, Inc. The C of O authorized Bannum, Inc. to use the property located at 2210 Adams Street, N.E., Washington, D.C. for "temporary correctional institutional on leased property for a period not to exceed three (3) years." The C of O was based upon the issuance of a building permit to Bannum, Inc. that authorized the construction of a community corrections center. The Board of Zoning Adjustment (BZA) reviewed an appeal of the building permit by community residents and issued a decision on March 31, 2004, that invalidated the building permit. The BZA, in the matter of *Advisory Neighborhood Commission 5B*, (BZA Appeal Number 16998), found that the building permits were issued in error in that, *"a community corrections center was not a permit use in a C-M-2 District"* and *"the facility did not meet the requirements of Section 801.7(k)."*

An inspection of the premises conducted May 12, 2005 by the DCRA revealed that Bannum, Inc. is still occupying and operating a facility as a correctional community center at 2210 Adams Street, N.E., Washington, D.C. Further, DCRA is aware that Bannum, Inc. is currently occupying the premises and using the facility as a correctional community center. Bannum is advised that the continued use of the subject premises is in violation of Titles 11 and 12A of the District of Columbia Municipal Regulations, and is contrary to the BZA decision.

DCRA directs Bannum to vacate the premises at 2210 Adams Street, N.W., Washington, D.C. within forty-five (45) calendar days of receipt of this Order. By that date, Bannum should close and secure the building by doing the following:

Exhibit A

1) Removing staff and residents from the facility;

2) Removing trash, debris and personal property from the interior of the building and broom cleaning the interior;

3) Capping the main waste-line (sewer line) below all fixtures in the commonly accepted manner to comply with the District of Columbia Plumbing Code, 12F DCMR; and,

4) Barricading, as needed, all doors, all windows and bther openings with ½" exterior grade plywood.

Bannum is required to notify the Zoning Administrator of its departure within forty-eight hours of closing and securing the building. DCRA will inspect the building within five days of Bannum's departure.

Bannum's failure to properly close and secure the building may result in fines, penalties or sanctions from the DCRA as provided by law under Title 16 DCMR.

Municipal Ag

Sincerely,

Corey Buffo
Acting Zoning Administrator

By Facsimile
Shawn Whittaker, Esquire
9055 Comprint Court
Gaithersburg, Maryland 20877-1310

PERSONALLY SERVED THIS 1st DAY OF July 2005
AT 2310 Adams Pl NE BY ME Yvonne Rockett Zoning Inspector
Asst. Director Hester
At 915 AM
CONSUMER & REGULATORY AFFAIRS
ZONING REGULATION DIVISION

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

05-0006726

DISTRICT OF COLUMBIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case. No.**
	)	
BANNUM, INC.,	)	
2210 Adams Place, N.E.,	)	
Washington, D. C.	)	
	)	
Defendant.	)	

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APPLICATION OF THE DISTRICT OF COLUMBIA FOR ENTRY OF JUDGMENT OF THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' FINAL ORDER

Pursuant to Super Ct. Civ. R. 12-I (b) (i), Plaintiff District of Columbia ("Plaintiff") respectfully moves for entry of a judgment for injunctive relief pursuant to the District of Columbia Department of Consumer and Regulatory Affiars' Final Order titled, "Order Governing Unlawful Possession of Property," dated June 30, 2005. In support of this Application, the Court is referred to the attached Memorandum of Points and Authorities, the Affidavit, and Exhibits in support thereof.

Respectfully submitted,

ROBERT J. SPAGNOLETTI
Attorney General
for the District of Columbia

DAVID RUBENSTEIN
Deputy Attorney General
Public Safety Division

Exhibit B

Brenda Walls

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Chief, Civil Enforcement Section
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BY: MICHAEL A. STERN, Bar #354696
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(202) 727-3881

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application of the District of Columbia for Entry of Judgment of the Department of Consumer and Regulatory Affairs' Final Order, the Memorandum of Points and Authorities, Affidavit, Exhibits, and Order, was mailed, postage prepaid, on this 23rd day of August, 2005 to Bannum, Inc. 2210 Adams Place, NE,, Washington, D.C. 20019, and Michael Gordon, Esq., 9055 Comprint Court, Suite 340, Gaithersburg, MD 20877-1310.

Michael A. Stern

Michael A. Stern
Senior Assistant Attorney General

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case. No.**
	)	
BANNUM, INC.,	)	
2210 Adams Place, N.E.,	)	
Washington, D. C.	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES OF THE DISTRICT OF COLUMBIA IN SUPPORT OF APPLICATION FOR ENTRY OF JUDGMENT OF THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' FINAL ORDER

Plaintiff seeks entry of a judgment for injunctive relief ordering the defendant to vacate the premises known as 2210 Adams Place, NE, Washington, DC, pursuant to a finding by the Department of Consumer and Regulatory Affairs (hereafter 'DCRA') that the Defendant was in unlawful possession of the premises located at 2210 Adams Place, NE, by Order issued June 30, 2005 and effective August 15, 2005.

ARGUMENT

The Plaintiff Is Entitled To A Judgment Against The Defendant.

The Court is authorized, pursuant to SCR-Civil Rule 12-I (b) (i), to enter administrative agencies' final orders as judgments. There is a long and tortuous history to the proceedings involving this defendant and this location. However, that history is only relevant in the following context. On May 2, 2003, DCRA issued to Bannum, Inc. Certificate of Occupancy Number C53679 (Exhibit A) (hereafter 'the C of O'). The C of

O authorized Bannum, Inc. to use the property located at 2210 Adams Place, NE, Washington, DC as a "temporary correctional institution." On January 24, 2003, community members appealed to the Board of Zoning Adjustment (hereafter 'BZA') challenging the DCRA's issuance of building permits to Bannum, Inc. for construction of a community corrections center. On March 31, 2004, the BZA, in the matter of *Advisory Neighborhood Commission 5B*, (BAZ Appeal Number 16998) (Exhibit B), found that the building permits were issued in error in that, "a community corrections center was not a permit use in a C-M-2 District" and, "the facility did not meet the requirements of Section 801.7(k)." Bannum, Inc. has appealed that decision to the District of Columbia Court of Appeals (04AA345). Bannum, Inc. has requested and been denied a stay of the BZA's decision pending the outcome of the appeal.

Upon receipt of the above referenced BZA order, the DCRA on April 27, 2004 issued a Notice of Intent to Revoke Certificate of Occupancy Number C053679 (Exhibit C). After some proceedings on that notice, but prior to a final determination, the April 27, 2004 Notice was revoked by the DCRA on April 21, 2005. Also on April 21, 2005 the DCRA issued another Notice of Revocation of Certificate of Occupancy Number C53679 (Exhibit D). The C of O was revoked 10 days thereafter on May 2, 2005. Bannum, Inc. filed a notice of appeal and request for a stay of that order. That appeal is pending and the request for a stay was denied pursuant to Order dated May 4, 2005 (Exhibit E). On June 30, 2005, the DCRA issued an Order Governing Unlawful Possession of Premises which required Bannum, Inc. to vacate the premises at 2210 Adams Place, NE, Washington, DC within 45 days (Exhibit F). That time period expired on August 15, 2005. Bannum, Inc. is now in violation of that Order.

The finality of an order of an administrative agency does not depend on the label which the agency gives to it. Administrative orders are final when they impose an obligation, deny a right or fix some legal relationship as the consummation of the administrative process. (*Trans-Pacific Freight v. Federal Maritime Board*, 302 F. 2d 875 (DC Cir. 1962). Accordingly, under SCR Civ. 12-I (b) (i), this Court has authority to enter a judgment in this matter.

Wherefore, based upon the foregoing, the Plaintiff requests that this Court enter a judgment for injunctive relief enforcing the Order Governing Unlawful Possession of Premises.

Respectfully submitted,

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