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

PREHEARING BRIEF OF DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") submits this prehearing brief in opposition to Bannum, Inc.'s ("Bannum") appeal from DCRA's decision to revoke a Certificate of Occupancy ("C of O") that had authorized Bannum to use the property at 2210 Adams Place, N.E., as a "temporary correctional" facility.

I. Factual Background

This appeal is from DCRA's April 21, 2005 "Notice of Revocation of Certificate of Occupancy Number C53679" ("2005 Notice"). (BZA Case No. 17356, Exh. 2) The C of O in question had been issued by DCRA on May 2, 2003, nearly two years before the 2005 Notice, and authorized Bannum to operate a "TEMPORARY CORRECTIONAL INSTITUTIONAL [sic] ON LEASED PROPERTY FOR A PERIOD NOT TO EXCEED THREE (3) YEARS. THIS CERTIFICATE EXPIRES ON MAY 02, 2006[.]" (BZA Case No. 16998, Exh. 35 (attachment thereto))

At the time that DCRA issued the C of O, an appeal from DCRA's decision to issue *building permits* for Bannum's correctional facility was pending before this Board

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(the "BZA"). (BZA Case No. 16998) The BZA granted the appeal by Order dated March 31, 2004. That Order describes in detail the events leading up to DCRA's issuance of the C of O that is the subject of this appeal. (BZA Case No. 16998, 3/31/04 Order at ¶¶ 21-38)

DCRA's 2005 Notice cited and relied on the BZA's March 31, 2004 Order, which concluded that "DCRA erred in granting Bannum" the building permits "for construction of a community corrections facility." (BZA Case No. 16998, 3/31/04 Order at 16) The BZA ruled that the facility was not in fact 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. In particular, the BZA rejected Bannum's argument "that the three year limitation on [building] permit [B448325] makes it temporary":

> Clearly Bannum did not intend its use to be temporary. Rather, the lease manifests Bannum's plan to remain for so long as it had the [Bureau of Prisons] contract, perhaps even longer, and to seek "extensions" of its certificate of occupancy, which DCRA could not have lawfully issued. Its claim of temporary use was thus a sham.

(BZA Case No. 16998, 3/31/04 Order at 16)

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, Exh. 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. (BZA Case No. 17356, Exh. 11, 5/2/05 letter from Holmes & Gordon to BZA)

Eight-and-a-half months later, on April 21, 2005, the Zoning Administrator issued the 2005 Notice, which rescinded the 2004 Notice and thereby dismissed the DCMR charges against Bannum. (BZA Case No. 17356, Exh. 2)

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, Exh. 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, Exh. 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 in Case No. 16998, 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. 16998, Exh. 104, copy of 4/25/05 letter to Bell attached thereto, 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.

(BZA Case No. 17356, Exh. 33, 5/4/05 letter to Bannum attached thereto as Exh. 20)

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).

(BZA Case No. 16998, Exh. 108, copy of Order attached thereto as Exh. 1) (emphasis supplied)

Since May 5, 2005, Bannum has not had a C of O for the premises at 2210 Adams Place, N.E.

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." (BZA Case No. 17356, Exh. 25, copy of Order attached thereto as Exh. A) Soon after the forty-five day period set by DCRA expired, the Attorney General for the District of Columbia filed an injunction action in D.C. Superior Court to enforce DCRA's order that

Bannum vacate the premises. (BZA Case No. 17356, Exh. 25, copy of Application and supporting Memorandum attached thereto as Exh. B) After a hearing on October 14, 2005, the Superior Court took the Attorney General's request for an injunction under advisement.

II. ARGUMENT

A. The BZA has jurisdiction to hear this appeal

Bannum first contends that the BZA does not have jurisdiction to hear this appeal. According to Bannum, "the BZA and DCRA have historically treated [C of O revocations] as immediate infractions to be first appealed to and decided by an ALJ." (BZA Case No. 17356, Exh. 33 at 8) Bannum fails to acknowledge that C of O revocations need not be based on infractions, and that C of O revocations based on zoning regulations – and not based on infractions involving the zoning regulations – may be appealed directly to the BZA.

Bannum's contention relies on the incorrect assumption that DCRA may 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 *et seq.* (2001); *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) (emphasis supplied). If the infraction "stems from [a violation] of the Height Act or the Zoning Regulations," as opposed to "a violation of the Zoning Act itself," the ALJ's ruling may be appealed to the BZA. BZA Appeal No. 03-0001 (*Choharis*) at 3 (July 23, 2004)(comparing original text

of Civil Infractions Act to codified version); *accord* BZA Appeal No. 04-0001 (*Robinson*) at 3 (Mar. 18, 2005).

By contrast, the revocation decision that is the subject of this appeal was not based on 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 matter has been appealed to and decided 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 2005 Notice, DCRA did not allege that Bannum's use failed to conform to the C of O; instead, 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 BZA 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)

Because the "administrative decision" from which Bannum appeals was not based on any infraction by Bannum, and because the decision *was* based, at least in part, on a "zoning regulation or map," the BZA has jurisdiction to hear this appeal.

B. The pendency of a revocation proceeding based on alleged violations by Bannum did not preclude DCRA from instituting a separate revocation proceeding based on an alleged error by DCRA.

Bannum contends that the pendency of an Office of Administrative Hearings ("OAH") proceeding regarding the 2004 Notice to revoke Bannum's C of O precludes DCRA from seeking to revoke the very same C of O pursuant to the 2005 Notice. However, the OAH proceeding cited by Bannum pertains to the adjudication of alleged violations *by Bannum*. The pendency of that proceeding does not preclude DCRA from seeking to revoke Bannum's C of O in order to correct an error made *by DCRA*.

The proceeding before the ALJ arose from a Notice of Intent to Revoke – the 2004 Notice -- that was, in effect, a notice of *violation* because it 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").

Unlike the proceeding before the ALJ, the instant proceeding involves a notice of *revocation* – the 2005 Notice – that was based on a C of O having been "found to have been issued in error." 12A DCMR §§110.5.3 and 110.5.6. The streamlined procedure for a notice of revocation, as set forth in 12A DCMR § 110.5.6, was especially appropriate here, given that DCRA was not yet 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's revocation is no longer based on any violation by Bannum. 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 D

C. Bannum has not made a prima facie showing of equitable estoppel as a matter of law.

Bannum contends that DCRA is estopped from revoking Bannum's C of O because Bannum relied on DCRA's earlier position that the facility in question was permitted in a C-M zone as a matter of right. However, Bannum's submissions do not make out a prima facie showing of equitable estoppel.

"The doctrine of equitable estoppel is judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations." *Interdonato v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d

1000, 1003 (D.C. 1981). In its March 31, 2004 Order, the BZA 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." (BZA Case No. 16998, 3/31/04 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 nearly 32 of the 36 months allowed by the temporary C of O that DCRA issued.

As a threshold matter, Bannum has not offered evidence clearly demonstrating that it would not have proceeded as it did had it known that, sometime in or after December 2005, it would have to cease operations at the property subject to the C of O. If operating the facility for the full 36 months contemplated by the C of O would likely have been profitable for Bannum, then operating the facility for about 32 months or more could also be profitable. The test of detrimental reliance is not whether Bannum will receive all the benefits it anticipated receiving when it decided to proceed with its plans in reliance on DCRA's approval. Rather, the test is whether Bannum would have decided not to proceed with its plans if it had known all along that it would have to cease operations in December 2005, or soon thereafter.

In a Declaration submitted in support of Bannum's estoppel argument, Bannum's Executive Director, David A. Lowry, states that Bannum made a "total estimated investment" in the facility of $1.2 million, and that revocation of the C of O would cause Bannum to "lose profits of at least $12,000 per day." (BZA Case No. 17356, Exh. 33, Declaration attached thereto as Exh. 2, ¶¶ 4 and 6) If Mr. Lowry's figures are accurate,

Bannum should have been able to recover its "total estimated investment" with only 100 days of operation at the current level of profitability. That suggests that the correctional facility would have been a highly profitable undertaking for Bannum even if the facility had been shut down a long time ago.

Mr. Lowery also states in his Declaration that revocation of the C of O "could" result in Bannum being "terminated for default" on its contract with the Bureau of Prisons and "[p]otentially" even "suspended or debarred from Government contracting." (BZA Case No. 17356, Exh. 33, Declaration attached thereto as Exh. 2, ¶ 5) But the Declaration does not refer to any contract provisions or prior dealings that would allow the BZA to assess the likelihood of Bannum actually being terminated, suspended, or debarred as a result of its having to shut down the facility before the expiration of the three-year C of O term. For example, with all the notice it has had regarding the possible closure of the facility, Bannum might have approached the Bureau of Prisons with a proposal to transfer the facility's residents to several of Bannum's other facilities.

According to the District of Columbia Court of Appeals, to prevail on its estoppel claim in this zoning case, Bannum would have to demonstrate *each* of the following elements:

> (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon; (4) affirmative acts of the District Government, (5) without notice that the improvements might violate the zoning regulations; and (6) equities that strongly favor [Bannum].

Interdonato, 429 A.2d at 1003.

As to the first element, Bannum can hardly argue that it made "permanent improvements" to the facility, given its position all along that the facility was "temporary." Bannum can perhaps argue that the improvements were "expensive," but,

as explained above, they were not "expensive" when compared to the stream of profits that, according to Mr. Lowry, the facility has been generating daily. *Cf. Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114, 1116 (D.C. 1981) ("major reconstruction of the building" held "sufficient to satisfy the requirement of expensive repairs of a permanent nature").

As to the fifth element, Bannum cannot contend that it was "without notice that the improvements might violate the zoning regulations," given the fact that, at the time the C of O was issued, the issue had yet to be resolved by the BZA in Case No. 16998. The District of Columbia Court of Appeals has held: "It is the [BZA], not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations." *Murray v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990). Bannum's decision to proceed "on receiving the Zoning Administrator's ruling, despite knowledge of the neighborhood opposition to [Bannum's] plans, invites application of the 'self-created hardship rule' . . . and certainly precludes application of estoppel given the likelihood that the Administrator's ruling would be appealed." *Id.* (citation omitted); *cf. Interdonato*, 429 A.2d at 1004 ("ample notice that the [BZA's] order was not final because judicial review was being sought").

Conclusion

For the reasons stated above, DCRA respectfully requests that the Board deny Bannum's appeal.

Respectfully submitted,

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