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December 19, 2005

MARYLAND REGIONAL OFFICE
110 MILL STREET
P.O. BOX 279
GREENSBORO, MARYLAND 21639

Jeffrey Griffis
Chair, Government of the District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210 South
Washington, D.C. 20001

BZA # 17456

Re: 2210 Adams Place N.E.: Bannum's Reply

Dear Mr. Griffis:

Jurisdiction is Lacking over a COO Revocation under DC ST §6-641.09

The Department of Regulatory and Consumer Affairs' ("DCRA") opposition fails to support its claim that a Certificate of Occupancy ("COO") revocation can be issued separately from the resulting "use" violation in order to obtain initial jurisdiction. However, the legislators chose in DC ST §6-641.07(f) to allow direct appeals of agency actions "granting or withholding" a COO and did not include the "revoking" of a COO. That is because a COO revocation creates a "use" violation directly addressed in DC ST §6-641.09, the statute cited in 12A DCMR §110.6 in the revocation notice at issue. DC ST §6-641.09 provides for an initial adjudication of civil use violations under "Chapter 18 of title 2" before an Administrative Law Judge ("ALJ").

DCRA does not even cite this statute or offer any explanation for how the Board has initial jurisdiction over a COO revocation under DC ST §6-641.09. That is because until April 21, 2005, DCRA interpreted the above statutes as authorizing an initial ALJ hearing of all COO revocations as infractions or "contested cases" under DC ST 2-§502(8) with an appeal to the BZA. See Rogers Brothers Custodial Services, Inc. v. Board of Zoning Adjustment, 846 A.2d 348 (D.C. 2004) ("use" infraction before an ALJ); Perkins v. District of Columbia Board of Zoning Adjustment, 813 A.2d 206 (D.C. 2004) ("contested case" before an ALJ). An ALJ hearing is provided for disputes over vested rights in a "contested case." DC ST §2-509. Hearings for such rights are legally distinguishable from a right to appeal a "nuisance" case ("granting") or an appeal of the denial of such rights ("withholding"), the direct appeals that are authorized at the BZA.

Since the passage of the Office of Administrative Hearings ("OAH") Act in October 2004, DC ST §2-1831 et seq., initial ALJ review of all DCRA administrative decisions in "adjudicated cases" (which include infractions and "contested cases") is a statutory requirement. DC ST §§2-1831.01(1), 1831.03(b)(2). Since its passage, DC ST §6-641.09 is identified in 12A DCMR §110.6 for appeals of COO revocations.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17356
EXHIBIT NO. 35

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DCRA's attempt to distinguish the above COO revocation cases because they involved a failure to conform to a COO, versus a COO "issued in error," has no basis in the regulations. All COO revocations issued under 12A DCMR 110.5 parts .1 to .4 are subject to the same appeal rights under DC ST §6-641.09. See 12A DCMR 110.6.

The related claim that "no infraction proceeding was even "available" is inaccurate, and in direct conflict with DCRA's actions. DCRA's April 27, 2004 infraction notice shows its awareness of the use violations automatically resulting from the COO revocation. Ex. 16. Further proof is DCRA's May 13, 2005 violation letter, issued shortly after DCRA's April 21, 2005 letter, which "rescinded" the prior revocation and immediately re-issued the same revocation of the same COO on the same basis. Ex. 19. In the May 13th letter, DCRA notified Bannum that based on the new COO revocation, Bannum was allegedly in "violation" of zoning regulations. Ex. 21.

Alternatively, if no infraction proceeding was available because only a statutory "use" violation in DC ST §6-641.09 exists under the Zoning Act, under Peter Choharis, Appeal No. 03-001 (April 20, 2004), this Board lacks jurisdiction over this COO revocation.

In any event, as shown by its actions, DCRA did not remove the "use" infraction from its April 21, 2005 revocation notice because it did not believe a zoning violation existed or that an infraction proceeding was unavailable. DCRA took this action to attempt to avoid an August 6, 2004 ALJ order in a pending OAH case that continued proceedings until the Court of Appeals decided the merits of the Bannum's appeal. As shown below, such action made the April 21, 2005 COO revocation illegal and void.

DCRA's Revocation is Void

DCRA admits as it must that an ALJ proceeding on this revocation was pending at the time that it purported to "rescind" its April 27, 2004 revocation on April 21, 2005. DCRA Brief, p. 9.¹ Contrary to DCRA's position, DC ST §2-1831.13(c) did preclude DCRA from revoking Bannum's COO. The statute prohibits any:

"... further decisional action with respect to the subject matter in issue except in the role of a party litigant or with the consent of all parties, for so long as the Office has jurisdiction over the proceeding." (emphasis added).

The "subject matter in issue" in that case did not exist in a vacuum. Decisional actions with respect to the revocation of Bannum's COO, the sole basis for the infractions, cannot be legitimately separated from the subject matter of the "use" infractions before the ALJ in this case. Bannum of course, did not consent to this decisional action.

¹ Contrary to DCRA's attempt to reconstruct its actions, the August 2004 ALJ proceeding was not based on 12A DCMR §113.2 and §113.2.2 which involve violations of construction regulations with which Bannum had never been charged and which have no application. See Ex. 19.

Even under DCRA's unduly narrow interpretation of "subject matter in issue" as covering only the infractions per se, DCRA concedes that the April 21, 2005 rescission and new revocation "dismissed the DCMR charges against Bannum." See DCRA Brief at 4. Thus, even under DCRA's strained reading, DCRA took a "decisional action" on that "subject matter in issue" which was admittedly pending before the OAH.

DC ST §2-1831.13(c) makes no distinction between types of agency decisional actions that are prohibited while a case is pending. The purpose of the statute was to protect the OAH's jurisdiction from agency actions that could undermine its ability to adjudicate its cases. Thus, DCRA's "rescission" and immediate re-issuance of the same revocation on the same basis, actions which were obviously designed to escape an ALJ order, and the ability of the OAH to decide the case before it at all, are exactly the type of case within the statutory prohibition.

Thus, even assuming for the sake of argument that this Board has initial jurisdiction, this statute overrides any DCRA interpretation of a "streamlined procedure" set forth in a regulation. Accordingly, the April 21, 2005 revocation on which this appeal is based, which was issued in violation of DC ST §2-1831.13(c), is void. Bannum's appeal should be granted.

Bannum Has Established the Elements for Estoppel

Under Saah v. District of Columbia Bd. of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C.1981), the test for application of estoppel is not whether Bannum would have proceeded as it did had it known the entire future of the project. The test in this case is whether (1) Bannum reasonably and justifiably relied in good faith on DCRA decisions in entering a contract with the Bureau of Prisons ("BOP") (2) which necessitated the expenditure of funds for expensive and permanent improvements, (3) without notice that this use potentially could violate a zoning regulation. Bannum meets these tests.

DCRA does not really contest that Bannum acted in good faith in obtaining the DCRA decision letter. That letter was a formal agency decision subject to appeal. Mr. Lowry has attested that Bannum relied on this DCRA letter and would not have entered the BOP contract without it. Ex. 1, p. 2. That contract fixed Bannum's obligation to perform costly improvements or face a default termination. Exs. 9, 26. The BOP already has threatened to terminate this contract for default when it appeared that Bannum would not perform for the 3-year period. Ex. 27.

Whether the improvements are permanent is not based on whether the zoning is "temporary." Converting a warehouse to living quarters obviously required permanent improvements to the building. Mr. Lowry will testify that the design and construction of new partition walls and doors, sprinkler systems and fire alarm systems and plumbing fixtures, many required by District codes, were permanent and expensive improvements to the premises.

Bannum had no notice that the use of the facility as a Community Correctional Center ("CCC") might violate zoning regulations when it made the key decision requiring the expensive and permanent improvements -- to enter the BOP contract.

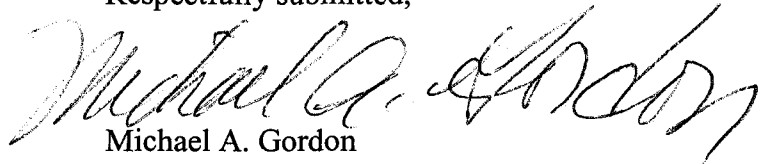
DCRA's claim that this is a case of self-created hardship has no merit, even after the BZA appeal was filed. Once DCRA rejected the Ward 5 Councilman's request for a stop work order, told Bannum it was taking this action, and thereafter issued the COO, Bannum had no choice but to continue to perform the contract or face default termination by the BOP. Ex. 1, ¶15-16.

The equities strongly favor estoppel. Bannum has acted in good faith reliance on DCRA's decisions and actions. The Court of Appeals has heard oral argument and should soon decide the merits of this Board's decision on the meaning of the zoning regulation at issue, which is a matter of first impression. There are only 5 months remaining before Bannum's 3-year zoning will expire² and there has been absolutely no harm to the community. Indeed, the District of Columbia has received an admitted benefit -- the reintegration into society of hundreds of returning D.C. felons who, as a result of Bannum's CCC services, were released from custody having had a job for approximately 30-60 days, instead of entering society jobless on a street corner from a prison bus.

Conclusion

For the foregoing reasons, Bannum respectfully requests that this Board dismiss the appeal for lack of jurisdiction as premature or alternatively, grant the appeal because the revocation is void or barred under the equitable doctrine of estoppel.

Respectfully submitted,



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

cc. Bennett Rushkoff, Esq. (facsimile)
Donald Temple, Esq. (facsimile)

² DCRA's views of Bannum's profits based on Bannum's view prior to the contract on what it could have earned, which was based on full occupancy of the CCC, did not materialize. Further, DCRA knows that Bannum had to expend significant legal fees and management time to continue its performance in the face of the adversity of DCRA and Intervenor's administrative and court actions during this period, all of which significantly reduced its profits during the performance period. The harm to Bannum is obvious.

Exhibit 26

FROM :

05/20/2005 07:50 FAX 202 307 2780

FAX NO. :

DOJ-FBP CCC

20 2005 08:39AM P2

002/002



U.S. Department of Justice

Federal Bureau of Prisons

Attn: CCC Contracting
320 First Street, NW - Room 5006

Washington, DC 20534

May 20, 2005

"By Personal Service and Certified Mail"

Mr. David A. Lowry
Executive Director
Bannum, Inc.
8726 Old County Road 54, Suite E
New Port Richey, Florida 34653

Re: Cure Notice - Contract DJB200576 (Washington, D.C.)

Dear Mr. Lowry:

The Bureau of Prisons received a copy of a letter from the Department of Consumer and Regulatory Affairs (DCRA) dated May 13, 2005, concerning the Certificate of Occupancy (COC) at Bannum, Incorporated's (Bannum) facility located at 2210 Adams Street, NE, Washington, DC. The letter states that Bannum's COC was revoked effective May 5, and "DCRA is referring this matter to the Office of the Attorney General for enforcement action, and intends to seek sanctions, fines, penalties, and other relief provided for by the law." We understand that "other relief" could include action to close the facility.

Bannum was awarded Contract DJB200576 for Community Corrections Center (CCC) services in Washington, DC, on November 16, 2001. By signing the Standard Form (SF) 26 Award Document on October 25, 2001, Bannum agreed to perform the contract in accordance with the Statement of Work (SOW) and comply with all terms and conditions of the contract which began on May 2, 2003. Retaining a COC is a condition of the contract terms (see SOW, pages 21-22).

You are hereby notified that the BOP considers Bannum's revoked COC at the facility located at 2210 Adams Street, NE, Washington, DC, a condition that is endangering performance of Contract DJB200576. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default under the terms and conditions of Federal Acquisition Regulation (FAR) 52.249-8, Default (Fixed Price Supply and Service) clause of this contract.

If you have further questions, please contact me at (202) 307-3070.

Sincerely,


Jacqueline Ponders
Contracting Officer

Exhibit 27

DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)

(a)(1) The Government may, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to —

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) of this clause); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) of this clause).

(2) The Government's right to terminate this contract under subdivisions (a)(1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred

to as “manufacturing materials” in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)