GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17356 of Bannum, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA) for the revocation of Certificate of Occupancy Permit No. C053679, dated May 2, 2003, for a temporary correctional institution. The subject property is located in the C-M-2 District at premise 2210 Adams Place, N.E. (Square 4259, Parcel 154/81)

HEARING DATES: October 4, 2005, November 15, 2005, November 22, 2005, and December 20, 2005
DECISION DATE: February 7, 2006

ORDER

PRELIMINARY MATTERS

On April 28, 2005, Bannum, Inc. ("Appellant") filed this appeal with the Board, alleging that the Department of Consumer and Regulatory Affairs ("DCRA") had had no authority to revoke Bannum's Certificate of Occupancy ("C of O"), No. CO53679 and that, even if it did, DCRA should be estopped from doing so.

The Board heard the appeal at a hearing originally scheduled for October 4, 2005, but continued until November 15, November 22, and December 20, 2005. A decision meeting was set for February 7, 2006, at which the Board, after deliberation, and for the reasons stated below, decided to dismiss the appeal, by a vote of 5-0-0, for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 2210 Adams Place, N.E ("Subject Property"), which is located in the C-M-2 Zone District.
2. DCRA issued C of O No. CO53679 to Appellant on May 2, 2003, authorizing the use of the Subject Property as a temporary correctional institution.
3. At the time the C of O was issued, the Board was hearing Appeal No. 16998 of Advisory Neighborhood Commission 5B, challenging DCRA's earlier decision to issue a building permit that authorized the conversion of the building at the Subject Property from a warehouse to a "community corrections facility."

4. DCRA's defense to that appeal was that the proposed use was a type of temporary correction facility, a use classification allowed as a matter of right in a CM zone. 11 DCMR § 801.7(k).

5. The Board disagreed and found that that Appellant's building permit had been issued in error. BZA Order No. 16698 (March 31, 2004).

6. As of the date of that order, Appellant was operating pursuant to the almost-one-year-old C of O No. CO53679.

7. On April 27, 2004, DCRA issued a "Notice of Intent to Revoke Certificate of Occupancy No. CO53679" ("first notice") based on two charges of violations, one a violation of Title 11, the Zoning Regulations, and one, a violation of Title 12, the Building Code. Exhibit No. 8.

8. Appellant appealed the first notice to the Office of Administrative Hearings, as instructed by the notice.

9. The appeal to the OAH was heard by ALJ Henry McCoy, who, on August 6, 2004, orally granted the Appellant's motion to stay any action on the revocation of the C of O until after the DCCA issued a decision on the merits of Order No. 16998.

10. On April 21, 2005, while the OAH proceeding was stayed, DCRA sent the Appellant its second notice that the C of O was to be revoked. ("second notice"). Exhibit No. 2.

11. The second notice was not based on allegations of regulatory infractions, but on 12A DCMR § 110.5.3, which states that the Director of DCRA may revoke a C of O "if it is found to have been issued in error." The "error" DCRA alleged was the same error it had denied committing in Appeal No. 16998, i.e., that the Appellant's building permit, and, by extension, its C of O, had been issued for a non-permitted use in a CM zone.

12. Appellant appealed the issuance of the second notice to both the Board and OAH.

13. Appellant alleges that the second notice was issued in error because it violated Section 16 (c) of the Office of Administrative Trials and Hearings Establishment Act of 2001, effective Mar. 6, 2002, (D.C. Law 14-76; D.C. Official Code § 2-1831.13 (c) (2001) ("OAH Act"). That provision reads as follows:

> When a case is brought before the [OAH], any agency that is a party shall take no 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.

D.C. Official Code § 2-1831.13(c) (2001).

14. In its appeal before this Board, Bannum claims that the second notice was a "further decisional action with respect to the subject matter at issue" in the stayed OAH proceeding, and therefore an action prohibited under the OAH Act.
15. Appellant also challenges the second notice on grounds of the equitable theory of collateral estoppel.
16. Bannum does not contend that DCRA made any error based in whole or in part on the Zoning Regulations.

CONCLUSIONS OF LAW

Section 8 of the Zoning Act, presently codified at D.C. Official Code § 6-641.07 (g)(1), authorizes the Board to "hear and decide appeals where it is alleged by the appellant that there is error in any decision, determination, or refusal made by [DCRA] in the carrying out or enforcement of any regulation adopted pursuant to this Act."[1] The decision must be based "in whole or in part" on the Zoning Regulations. D.C. Official Code § 6-641.07 (f).

As indicated in the findings of fact, the error complained of was not based upon the Zoning Regulations at all, but upon § 16 (c) of the OAH Act. No misinterpretation of the Zoning Regulations is asserted. Because the alleged error is not based upon the Zoning Regulations, the Board does not have the subject mater jurisdiction to hear or decide the error claimed.

Appellant also contends that, even if the basis for the revocation is correct, the equitable doctrine of estoppel requires that the revocation should not occur. The Board, however, declined to decide estoppel because a similar theory of estoppel was before the DCCA in the Appellant's appeal of Order No. 16998. The Court of Appeals ultimately concluded that the estoppel claim was "untenable and must be rejected". *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 432 (D.C. 2006).

In any event, a claim of estoppel does not itself involve an allegation of zoning error. The Board has, nevertheless, considered claims of estoppel as part of appeals that do claim such error. This is no different from the ability of federal district courts to hear claims under state laws, so long as a federal claim is also alleged. But just as a federal court may not hear state claims when no federal case or controversy also exists, this Board may not hear estoppel contentions that are not part of an appeal also alleging an error made in the interpretation of the Zoning Regulations.

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[1] The current D.C. Code text actually says, "adopted under this subchapter and subchapter V of this chapter".

For the reasons stated above, the Board concludes that it cannot hear this appeal because it lacks the subject matter jurisdiction to do so. Therefore, it is hereby **ORDERED** that this appeal be **DISMISSED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, Curtis L. Etherly, Jr. and Michael G. Turnbull to dismiss)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

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.

LM

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17356

As Director of the Office of Zoning, I hereby certify and attest that on **MARCH 30, 2007**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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