GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16998 of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs, to issue building permit No. B425438, for the renovation of a warehouse for use as a community corrections center. 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: April 22, 2003, May 20, 2003, June 17, 2003, July 8, 2003, July 22, 2003

DECISION DATE: September 9, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS

On January 24, 2003, Regina James brought this appeal as Chairperson of, and on behalf of, Advisory Neighborhood Commission (ANC) 5B. In a statement accompanying the Appeal document, Ms. James alleges error in the decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") to issue building permit number B425438 and revised building permit number 448325. The permits were issued to Bannum, Inc., the party in opposition herein, to permit it to renovate a warehouse in a C-M-2 zone district in order to use the warehouse as a community corrections center ("CCC"), which DCRA concluded was a type of temporary detention or correctional institution permitted within a CM zone pursuant to § 801.7 (k) of the Zoning Regulations.

According to ANC 5B ("Appellant"), such a use is not a temporary detention or correctional institution, but rather a community-based residential facility ("CBRF"), which, it argues, is not a permitted use in a C-M-2 zone. DCRA concedes that the approved use is a CBRF, but argues that a temporary detention or correctional institution is a type of CBRF permitted in a CM zone. Bannum, for its part, eschews the CBRF label, but claims that its use fell squarely within the scope of uses allowed by § 801.7.

For the reasons stated below, the Board concludes that: the proposed facility is neither a CBRF nor a temporary detention or correctional institution. Thus, while the Board finds appellant's theory of error unpersuasive, it nevertheless concludes that the building permits are invalid.

FINDINGS OF FACT

The Subject Property and the Surrounding Area

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1. The subject property is located in Ward 5, in a C-M-2 zone district. C-M zones are intended to provide sites for heavy commercial and light manufacturing activities with many employees and some heavy machinery. 11 DCMR § 800.1

2. The subject property is located at 2210 Adams Place, N.E., and is improved with a building formerly used as a warehouse. The building is one story tall and encompasses a gross floor area of approximately 12,000 square feet. *See,* Exhibit No. 19, Attached permit documents.

3. The site is near the center of its C-M-2 zone, which is surrounded by a narrow perimeter of C-M-1 zones. There are railroad tracks in the vicinity, but also several residential zones on the other side of the narrow C-M-1 zone districts. *See,* Exhibit No. 20 (Motion to Dismiss of Bannum, Inc.), Attachments J and K; *See also,* April 22, 2003 hearing transcript at 240, lines 3-13.

The Parties

4. Appellant ANC 5B is the Advisory Neighborhood Commission within which the subject property is situated.

5. Appellee DCRA is the agency of the government of the District of Columbia that is authorized, among other things, to issue building permits and certificates of occupancy. *See,* Reorg. Plan #1 (1982), Part A, § II(e), codified at D.C. Official Code vol. 3, at 362 (2001) and Reorg. Plan #1 (1983), Part A, § III B, codified at D.C. Official Code vol. 3, at 368 (2001). At the time this appeal was filed, David Clark was the Director of DCRA. The Zoning Division is headed by the Zoning Administrator ("ZA") and is part of the Building and Land Regulation Administration ("BLRA"), which is, in turn, part of DCRA. The ZA is charged with administering and enforcing the Zoning Regulations. *Id.* As part of his duties, the Zoning Administrator provides guidance to attorneys, developers and members of the general public on the interpretation and application of the Zoning Regulations.

6. Opposition Party Bannum is a Kentucky corporation which is in the business of operating community corrections centers under contract to the Federal Bureau of Prisons of the United States Department of Justice ("BOP"). The BOP is Bannum's only client. *See,* Exhibit No. 20 (Motion to Dismiss of Bannum, Inc.),[1] Attachment Q, Affidavit of David Lowry.

Community-Based Residential Facilities

7. Community-based residential facilities are generally permitted, with varying restrictions as to size and/or operation, either as a matter-of-right use or as a special exception, in residential, commercial and waterfront zone districts. *See, e.g.,* 11 DCMR §§ 201.1(n)

[1]There appear to be two pleadings encompassed within Exhibit number "20." Therefore, when either one of these pleadings is referenced, the name of the referenced pleading will appear in parentheses.

(R-1 district), 300.3(d) & 303 (R-2 district), 330.5(i) (R-4 district), 601.2 (CR district), 711 (C-1 district), 732 (C-2 district), 901.1(f) (W district).

8. A community-based residential facility is defined at 11 DCMR § 199.1 as follows:

> A residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living. This definition includes, but is not limited to, ... facilities formerly known as convalescent or nursing home, residential halfway house or social service center, philanthropic or eleemosynary institution, and personal care home.

9. If an establishment is a community-based residential facility as defined in this section, it cannot be deemed to constitute any other use permitted by the Zoning Regulations. 11 DCMR § 199.1.

10. All CBRF's must fall into 1 of 7 subcategories: adult rehabilitation home, community residence facility, emergency shelter, health care facility, substance abusers' home, youth rehabilitation home or youth residential care home. 11 DCMR § 199.1.

11. The only subcategory to which Bannum's facility is similar, and therefore the only subcategory relevant here, is the first, "adult rehabilitation home." The definition states:

> Adult rehabilitation home - a facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual twenty-one (21) years of age or older, under pre-trial detention or sentenced court orders. (Emphasis added.) 11 DCMR § 199.1.

12. In all zones other than C-3, C-4 and C-5 (PAD) where an adult rehabilitation home is permitted, either as a matter-of-right use or a special exception, the maximum number of residents, other than resident supervisors or staff, and their families, is twenty (20).[2]

13. CBRF's, including adult rehabilitation homes, are allowed with no size or operation restrictions only in three less restrictive zone districts, C-3, C-4 and C-5 (PAD)). *See,* §§ 741.5(c), 751.2(a) and 761.1, respectively. Beginning in the R-4 zone, CBRFs that are intended to be operated as housing for persons with disabilities are subject to those occupancy limitations that apply to the matter of right residential uses in the zone district where they are located. 11 DCMR § 330.5(i).

14. Community-based residential facilities are not listed among the uses permitted in CM zones.

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[2] *See,* § 221 (R-1, max. 8), §306.1 (R-2, max. 8), § 322.1 (R-3, max. 8), §335.1 (R-4, max. 15), § 357 (R-5, max. 20), § 513.1(d) (SP, max. 20), § 616.1(d) (CR, max. 20), § 711.1(d) (C-1, max. 15), § 732.1(d) (C-2, max. 20) and § 913.1(d) (W, max. 20).

15. Although commercial uses permitted in a C-4 zone are permitted as a matter of right in CM zones pursuant to § 801.2, a community-based residential facility is not considered a commercial use for the purposes of that subsection.

Temporary Detention or Correctional Institution

16. Subsection 801.7(k) states that a "[t]emporary detention or correctional institution on leased property not to exceed three (3) years" is a matter-of-right use in a C-M zone district.

17. The text of § 801.7(k) was adopted by the Zoning Commission in 1972. *See,* Exhibit No. 20, (Bannum's Memorandum on the Merits in Opposition to the Appeal ("Bannum's Memo in Opposition")), last page of Attachment No. 8, Zoning Commission Order No. 46, Case No. 71-33, April 11, 1972.

18. The stated purpose of § 801.7(k) was "to provide for interim or temporary locations for persons being confined by the Court until permanent facilities can be acquired and developed for such purposes." *See,* Exhibit No. 20, (Bannum's Memo in Opposition), Attachment No. 8, Zoning Commission Public Notice, December 23, 1971, giving notice of a public hearing on, *inter alia,* the text of § 801.7(k), at 3.

19. At least beginning in the mid-1960's, the District of Columbia Corrections System was seriously overcrowded. Throughout approximately the next 30 years, the District has worked to come into, and remain in, compliance with several court orders and two consent decrees trying to alleviate these overcrowded conditions. *See,* July 8, 2002 hearing transcript at 230-232 and at 294-296.

20. At the time of permit issuance, no facility was operating in the District of Columbia pursuant to § 801.7(k) and it appears that no facility has ever been opened in the District pursuant to § 801.7(k). *See,* July 22, 2003 hearing transcript at 201, lines 9-11 and at 203, lines 9-15 and at 238, lines 20-22.

Events Leading Up to the Opening of Bannum's Facility

21. Prior to applying for the building permits under review, Bannum entered into a lease agreement for the subject property, whereby it leased the property[3] for a period commencing on December 1, 2002, "or later date, to conform to and run concurrently with the performance of Bannum's Federal Contract #J200C-576 and end upon expiration, cancellation or other termination of base period, all option periods and extensions." Exhibit No.79 at 1. According to the lease, Bannum's occupancy of the

[3]Bannum's lease is actually for approximately 42% of the former warehouse building, and for purposes of this Order references to the subject property should be construed to apply only to that part of the building and/or property leased by Bannum.

premise was not to extend beyond 66 months from the commencement of performance of the contract and was to end no later than December 31, 2009. *Id.*

22. Paragraph 5.02 of the lease recognizes that "the current zoning applicable to the Premises may place a three (3) year restriction on the planned and permitted use within the Premises" and permits Bannum to cancel the lease if Bannum cannot obtain permission to extend its period of use. *Id.* at 6.

23. On December 11, 2000, then-Zoning Administrator Michael Johnson concurred with Bannum's representation that, pursuant to § 801.7(k), its "proposed use of the [subject] property as a residential community corrections center can be established as a matter of right at the Adams Street location." Mr. Johnson's concurrence signature was given at the end of a letter on the letterhead of Bannum's then-attorney, Holland & Knight, LLP. Exhibit No. 20, (Bannum's Memo in Opposition), Attachment No. 1. This concurrence letter was issued prior to Bannum's entering into a contract with the Federal Bureau of Prisons.

24. Approximately a year later, on November 28, 2001, the then-Acting Zoning Administrator signed a similar letter on the same letterhead, again concurring with Holland & Knight's and Bannum's interpretation of § 801.7(k) as permitting "Bannum's proposed use of the property as a residential Community Corrections Center ... as a matter of right in the C-M and M Districts for a period not to exceed three years." *Id.*, Attachment No. 2. This concurrence letter was issued after Bannum entered its contract with the Bureau of Prisons, but before the issuance of any building permit by DCRA.

25. The term "community corrections center" does not appear in the Zoning Regulations.

26. Neither letter describes the programs or operations of a community corrections center.

27. On November 16, 2001, the BOP awarded Bannum Contract No. J200C-576 to "[p]rovide residential Community Corrections Center services." The contract states that its effective date is March 1, 2002, however, on its second page, it states that "[p]erformance shall begin March 1, 2001, and/or upon Government's issuance of Notice to Proceed." *See,* Exhibit No. 60, Attached contract pages.

28. The contract is for one year, running from March 1st to March 1st, with four one-year extension options, listed as running from March 1, 2003 through February 29, 2004, March 1, 2004 through February 29, 2005, March 1, 2005 through February 29, 2006, and March 1, 2006 through February 29, 2007. *See, Id., See also, e.g.,* July 8, 2003 hearing transcript at 269, lines 15-16 and July 22, 2003 hearing transcript at 244, lines 23-24. The extension options may be exercised only by the BOP, not by the contractor. *See,* July 8, 2003 hearing transcript at 359, lines 12-13 and at 377, lines 15-19.

29. On April 18, 2002, Bannum held 4 meetings with members of the public, one of which was with ANC leaders, including those of ANC 5B. At this meeting, Bannum explained that it had a government contract to operate a CCC at the subject property and that it

thought it had zoning as a matter of right. The two concurrence letters were mentioned, but not distributed. *See,* April 22, 2003 hearing transcript at 298-301.

30. By application dated October 9, 2002, Bannum Center (*i.e.,* Bannum) requested a building permit to "change tenant warehouse space to community correction facility." *See,* Exhibit No. 19, attached "Application for Construction Permits on Private Property."

31. For item 16 of the building permit application, "Proposed Uses of Building or Property," Bannum wrote "Community Correction Center." *Id.*

32. For item 18, "Prop. No. of Dwelling Units," Bannum wrote "150 beds." *Id.*

33. On December 12, 2002, the Building and Land Regulation Administration issued Bannum building permit number B425438, for a "Community Corrections Center." The permit states that Bannum is to "[c]hange tenant warehouse space to 150-bed Community Corrections Center." The permit did not indicate that the use was to be temporary and limited to 3 years. Exhibit No. 59.

34. On January 17, 2003, DCRA issued Bannum a revised building permit, number B448325, which states that it is revising Building Permit No. B425438 to include the words "3 Yr. Temporary Use." The new permit goes on to state the use as "Temporary 150 Bed Community Corrections Center On Leased Property For A Period Not To Exceed (3) Years." Exhibit No. 59.

35. At the time that the original and revised permits were issued, DCRA did not have before it a copy of Bannum's lease, the federal contract, or the solicitation documents or statement of work attendant to them. *See,* Transcript of June 17, 2003 public hearing, at 243-244, lines 7-25 and 1-20.

36. Bannum did not provide specific information with respect to the expenses it incurred prior to the date on which the first building permit was issued. It apparently spent some money on activities preliminary to construction. Although it had a lease, Bannum did not present proof that it had made any payments thereunder.

37. Bannum expended approximately $450,000 on refurbishing the former warehouse building and converting it for CCC use. *See,* April 22, 2003 hearing transcript at 308, lines 21-22.

38. On January 24, 2003, within 60 days of the issuance of both the original and revised permits, Appellant filed this appeal with the Office of Zoning.

The Operation of Bannum's Facility

39. Bannum's facility has approximately 130 beds, but can accommodate up to 260 beds. *See,* Exhibit No. 16, Attachment No. 18, Bellew Letter.

40. The residents of Bannum's facility must choose to serve the end of their sentences there, as opposed to in the higher-security facility in which they served the earlier portions of their sentences. *See,* July 8, 2003 hearing transcript at 192, lines 1-21.

41. The residents fall into three categories: (1) individuals transferred from a prison to the CCC for pre-release programming, (2) individuals committed directly to the CCC to serve short sentences, and (3) individuals under the supervision of the U.S. Probation Office for whom residence at the CCC is a condition of supervision. *See,* Exhibit No. 16, Attachment No. 18, Bellew Letter.

42. An offender housed at a CCC as a condition of supervision is ordinarily deemed not to be in the custody of the Attorney General or the BOP. *See,* Exhibit No. 64, CCC SOW, at 38.

43. Those residents who are in custody serve out the remainder of their sentences in the CCC in a structured, supportive environment. The CCC staff assists them in obtaining employment, re-establishing family ties, locating suitable housing and preparing to function normally within the community to which they will return. *See* Exhibit No. 16, Attachment No. 18, Bellew Letter; July 8, 2003 hearing transcript at 181, lines 6-12.

44. Residents are assigned to one of three components that make up the CCC. These are, in descending order of strictness of supervision, the community corrections component, the pre-release component, and the home confinement component. *Id.* at 366, lines 8-25; Exhibit No. 64, CCC SOW, at 44-45.

45. There are no locks, bars or other physical restraints used at the Bannum facility. *See,* Exhibit No. 16, Attachment No. 18, Bellew Letter. The facility does not employ any guards and does not have a secure perimeter. *See,* July 8, 2003 hearing transcript at 185, line 5 and at 283, lines 15-22.

46. Bannum's staff of approximately 10 individuals includes social workers and "counselor aides" who are present around-the-clock. They conduct frequent bed checks, but they "are not peace officers, are not permitted to carry weapons of any kind, and are not authorized to physically restrain any person. [They] do no (sic) wear uniforms or possess any other form of identification or powers than any other citizen." *Id.* at 185, lines 5-8 and 284, lines 7-8; Exhibit No. 16, Attachment No. 18, Bellew Letter.

47. Residents go to work daily and return to the facility after work. In time, and with appropriate behavior, a resident may receive a pass to leave the facility for other reasons, including to attend classes, engage in recreational opportunities, or visit family and friends on weekday evenings, or for a few hours on a weekend, returning to the facility by a set curfew time. *See,* Exhibit No. 16, Attachment No. 18, Bellew Letter; Exhibit No. 64, CCC Statement of Work ("SOW"), Chapter 10.

48. Residents may also be permitted to check out overnight or to leave on Friday and not return to the facility until Sunday night curfew. *Id.; See also,* July 8, 2003 hearing transcript at 185, lines 8-12 and at 307, lines 16-25 and at 308, lines 7-14 and at 345, lines 5-8. All of these permitted absences may be approved by the facility manager, *i.e.,* Bannum, unless they involve a resident in the community corrections component of the facility. In the latter situation, such absences require the approval of the Bureau of Prisons, except for absences for approved program activities. *See,* Exhibit No. 64, CCC SOW, Chapter 10.

49. Residents can also receive a furlough for an absence of more than two consecutive nights or for a visit to a destination of more than 100 miles from the facility. Furloughs cannot be issued without the approval of the BOP and are not ordinarily issued to residents in the community corrections component. *See,* Exhibit No. 64, CCC SOW at 47-49; July 8, 2003 hearing transcript at 308, lines 2-6.

50. If "a resident violates his agreement to remain in the program by missing curfew, by unexcused absence from work, etc., or if the resident fails to return to the facility or decides to leave the facility without ... permission [Bannum] cannot and will not stop them." Exhibit No. 16, Attachment No. 18, Bellew Letter.

CONCLUSIONS OF LAW AND OPINION

An appeal to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07 (2001). The Board's review of such decisions is not limited to the documents presented to the administrative decision-maker. Rather, the Board conducts a full evidentiary hearing. Parties are permitted to present and cross examine witnesses and introduce evidence. The Board deliberates upon this record and issues a written decision that must be supported by substantial evidence in the record. In essence, the Zoning Act intends for the BZA to exercise an in-depth second level of review to ensure that a non-compliant use or structure is not inadvertently permitted.

With respect to this particular proceeding, Bannum, without objection from any party, presented evidence of the actual operation of the facility, which obviously could not have been known at the time of permit issuance. Although the Board's decision remains primarily based upon the facts available to DCRA, these post-permit events have proven useful in "confirming our view as to the proper disposition of this case," *George Washington University v. D.C. Board of Zoning Adjustment,* 831 A.2d 921, 945 n22 (2003).

However, before turning to the merits of the appeal, the Board must first dispose of several procedural arguments raised by Bannum, all of which the Board concludes are without merit.[4]

Timeliness

[4] Although Commissioner Miller disagreed with the Board's decision on the merits of the appeal, she agrees with the procedural rulings stated below.

Section 3112.2 of the Zoning Regulations states:

> [a]n appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

The Board has no jurisdiction to hear an untimely appeal. *Waste Management of Maryland, Inc. v. BZA*, 775 A.2d 1117 (D.C. 2001)

This is an appeal of a decision to issue a building permit and a revision to that permit. The building permit was issued December 12, 2002. The appeal was filed on January 24, 2003, well within 60 days of the decision being appealed from. This appeal is therefore timely.

Intervenor however argues that the two concurrence letters are administrative decisions within the meaning of section 3112.2 and that therefore ANC 5B had 60 days from April 18, 2002 (the date on which ANC 5B first had notice of the decision) to appeal. It is argued that since the Appellant did not do so, it may not now challenge the building permit with respect to the use issue addressed in the letter. The Board disagrees.

Section 8 (f) of the Zoning Act of 1938 (D.C. Official Code 6-641.07 (f) provides that appeals may be taken from "any decision ... granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map... ." Thus, the Zoning Act recognizes three types of appealable zoning related decisions: (1) those granting or refusing building permits; (2) those granting or withholding certificates of occupancy; and (3) "other administrative decisions."

The first question is whether these letters are even appealable. There is no doubt that the two concurrence letters are decisions, but not decisions to grant a building permit. Thus, the letters do not come under the first category of appealable decisions. The question then becomes whether interpretative letters, which relate to the decision to grant a building permit can stand alone under the "other administrative decisions" category, and thus be appealed, or whether they are subsumed within the building permit decision category, in which case no appeal is authorized.

The Board believes there are persuasive reasons to find that separate appeals are permitted under Section 8. First, the Board assumes that DCRA will likely adhere to the conclusions reached in these letters. Therefore an appeal of the issue would be ripe.[5] This being the case, these letters represent the type of significant event in the zoning process that Section 8 intended to be appealed. Such appeals could resolve zoning-related design issues that may be relevant to other types of review processes, such as historic preservation and Commission of Fine Arts. Early disposition of such issues would avoid delays and repeated modification to applications. Such

[5]However, in order to ensure that the Board will not hear hypothetical questions, future interpretative letters must indicate that the decision is the final determination by DCRA and that the interpretation relates to a project for which a building permit or certificate of occupancy will be applied for.

appeals can also permit the early vindication of community positions or, if adverse to those positions, allow petitions to be made to the Zoning Commission for a text or map change before any zoning rights vest.

Although the Board thus finds that these concurrence letters are appealable under Section 8 as "other administrative decisions," the Board nevertheless concludes that the failure to do so, even after notice, does not bar a subsequent appeal of the related building permit. The express authority granted by Section 8 to appeal a decision granting a building permit cannot be negated by the failure to appeal a related, but earlier decision. A contrary interpretation would skew the entire zoning process.

Building permits are subject to public notice requirements and building permit applications must be accompanied by plans and "other documentation necessary to determine compliance with" the Zoning Regulations. 11 DCMR § 3202.2. Because no similar requirements apply to the concurrence letters at issue, compelling appeals of such decisions would allow property owners to force appeals at the point when the public has the least information available. Moreover, since there is no guarantee that a project, for which an interpretation is sought, will ever be built, compulsory appeals of such interpretations are likely to generate needless appeals that will waste the time and resources of all involved. Finally, Bannum's interpretation would result in two classes of potential building permit appellants: those with and those without notice of an earlier administrative decision. So that, with respect to the same building permit, one segment of the public will be able to bring an appeal and another group barred. This is an arbitrary and unworkable result that will encourage needless protective appeals by persons unsure which group an appellant falls into.

For these reasons, the Board interprets Section 8 of the Zoning Act as permitting the appeal of zoning-based decisions that precede the issuance of a building permit. However, the Board further concludes that Section 8 did not intend to bar timely appeals of building permits because of a prior failure to appeal a zoning-based decision that preceded permit issuance. It is important to note, however, that if a timely appeal of a ZA decision is made and decided, any subsequent appeal of the building permit based upon the same theory of error would likely be precluded.

Authorization to bring the appeal

Bannum has argued that Ms. Regina James did not have authority to bring the appeal on behalf of ANC 5B. Pursuant to § 3112.4 of the Zoning Regulations, the Board of Zoning Adjustment, may "at any time require additional evidence demonstrating the authority of the agent to act for the appellant." The question of Ms. James' authority was therefore answered to the Board's satisfaction during the hearing on the appeal through the introduction into the record of three pieces of evidence. The first of these was the minutes of ANC 5B's February 6, 2003 meeting during which the filing of the appeal was ratified. Also entered into the record were two letters from the ANC, one dated May 4, 2003, and signed by the Vice Chairperson of ANC 5B, Ms. Joan Black, which stated that the ANC properly voted on February 6, 2003, to ratify the filing of the appeal. The second letter, dated April 10, 2003, and signed by Ms. James in her capacity as chairperson of the ANC, stated that the ANC properly voted to have Donald Temple, Esq.,

represent it in the appeal before the Board. *See also,* Exhibit No. 52, Attached Declaration of Joan Black.

Whether an ANC must prove that it is "aggrieved"

Bannum claims that the Appellant ANC did not demonstrate that it was aggrieved and therefore did not meet the standard to bring an appeal. Section 8 (f) of the Zoning Act states that "appeals may be taken by any person aggrieved ... *or* any officer or department of the District of Columbia government ... *affected* by the decision complained of." D.C. Official Code § 641.07 (2001) (emphasis added).

Since Advisory Neighborhood Commissions are departments of the District of Columbia government, they need only show they are *affected* by the decision being appealed. Moreover, the Board's rules of procedure make ANCs automatic parties in any appeal involving property located within their area. 11 DCMR § 3199. The Board does not believe that this automatic party status for ANCs is limited to intervention, but includes the absolute right to bring appeals, if the subject property is located within their jurisdiction. Because ANC 5B's area includes the subject property, it had the right to bring this appeal without having to demonstrate that it was aggrieved or affected by the decision.

Estoppel

Bannum claims that this appeal is barred by estoppel. However, the affirmative acts upon which Bannum claims reliance were all taken by DCRA, not the appellant. The Board has previously taken the position that estoppel should not bar a neighboring property owner (as distinct from the District) from asserting rights under the Zoning Regulations. See, e.g. *Beins v. D.C. Board of Zoning Adjustment,* 572 A.2d 122, 125 (D.C. 1990). The Court of Appeals, while never deciding the question on its merits, has, on two occasions, indicated that "arguably, [estoppel] may be asserted only against the municipality which rendered the decision on which a party relied." *Sisson v. DC Board of Zoning Adjustment,* 805 A.2d 964, 972, n.15 (D.C. 2002), *quoting*, *Goto v. D.C. Board of Zoning Adjustment,* 423 A.2d 917, 925, n.15 (D.C. 1980).

Estoppel should not be used to preclude an innocent non-government appellant from seeking to eliminate a zoning violation. The Board therefore will not dismiss this appeal on those grounds.[6] This is not to say that equity is not an available defense in a BZA appeal. Thus, the Board now turns to Bannum's claim of *laches.*

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[6] Even if estoppel could be used in this instance, Bannum did not prove the traditional estoppel elements, as stated in *Saah v. District of Columbia Board of Zoning Adjustment,* 433 A.2d 1114, 1116 (D.C. 1981). Bannum claims to have relied in good faith on the two concurrence letters, the building permits, and DCRA's failure to issue a stop work order. The mere issuance of interpretative letters or a building permit cannot estop an appeal, since the whole purpose of a BZA appeal is to determine whether the decisions to issue the letters or permit were erroneous. DCRA's failure to issue a stop work order was not an affirmative act at all. Moreover, the equities strongly favor the public's interest in stopping an unlawful use, particularly one that could easily destabilize adjacent residential neighborhoods.

Laches

Laches is a species of estoppel, often characterized as "sleeping on one's rights." Laches arises when an individual waits an unreasonable amount of time before bringing an action, thereby prejudicing the party against whom the action is brought. *Goto, supra.,* at 925. Unlike estoppel, with its 4 discrete elements, laches requires that the entire course of events be examined. *Id.* Thus, an appeal may be timely filed for the purpose of jurisdiction, but barred as a result of delay in bringing the timely appeal *Id.* However, like estoppel, its application to zoning is disfavored.

Bannum claims that the ANC knew of Bannum's intended use possibly as early as February, 2002, but at least by April, 2002, and that it should have appealed the concurrence letters within 60 days thereafter, and not waited until after the building permit was issued to file the instant appeal. *See,* April 22, 2003 hearing transcript at 297 to 301. *See also, Id.* at 262, lines 8-10. Bannum further claims that because the ANC waited to file this appeal, Bannum was prejudiced in that it obligated itself to perform under its BOP contract and continued to expend significant amounts of money converting the warehouse into a CCC. Exhibit No. 20 (Motion to Dismiss of Bannum, Inc.) at 12.

The Board is constrained to disagree with Bannum's analysis. First of all, Bannum was awarded the BOP contract on November 16, 2001. Even according to Bannum, this is before the ANC first knew of its intent to open the CCC. Therefore, Bannum's obligation to perform under the contract is certainly not an element of prejudice in a laches claim. Further, Bannum made no real attempt to explain what its expenses were, when they were incurred, or why those expenses would not have been compensated under its contract. Moreover, it appears that most of its expenses related to construction activities that could not commence until after permit issuance. Since Bannum could not assume that its permit was valid until after the 60-day jurisdictional window for appeals had expired, any expenditures before that date were made at its own risk. Second, the Board has already found that the Appellant was under no obligation to file an appeal of the concurrence letters. Its decision to wait until a building permit was actually issued is understandable, and thus the period between its notice of the concurrence letters and its appeal of the first building permit was reasonable. Since there was neither delay by Appellants nor prejudice to Bannum, the Board finds that the equitable doctrine of laches does not apply.

Mootness

Bannum also claims that the instant appeal has been mooted by DCRA's issuance of a Certificate of Occupancy for Bannum's facility on May 2, 2003. "A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *See, Murphy v. Hunt*, 455 U.S. 478, 481, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982) (citations omitted), *Cropp v. Williams, 841 A.2d 328* (D.C. 2004). 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. Thus, the legal issue presented here is very much alive.

DISCUSSION OF MERITS OF APPEAL

As noted at the outset, the question presented to the Board is whether the proposed community correction facility is a community-based residential facility (CBRF), which is not permitted in a CM zone district, a temporary detention or correctional institution, which is, or a combination of the two.

1. The proposed use is not a community based residential facility.

Community-based residential facilities are not listed among the uses permitted in CM zone districts. Moreover, § 801.2 of the Zoning Regulations provides that all commercial uses in a C-4 zone, except community-based residential facilities are permitted in a CM zone district. The definition of CBRF provides that "if an establishment is a community-based residential facility as defined in this Section, it shall not be deemed to constitute any other use permitted under the authority of these regulations." 11 DCMR § 199.1 The Appellant therefore argues that if the Bannum facility is a CBRF, it cannot also be a Temporary Detention or Correctional Institution. DCRA counters that a Temporary Detention or Correctional Institution is a type of CBRF.

The definition of CBRF breaks down the use into 7 subcategories, each one a different type of CBRF. The definition further states that: "[a]ll community-based residential facilities shall be included in one (1) or more of the following subcategories."

Neither "community corrections facility" nor "temporary detention or correctional institution" is listed among the seven categories. Thus, contrary to DCRA's argument, a temporary detention or correctional institution cannot be a CBRF. And since a CBRF use cannot be deemed to be another use, DCRA was required to consider whether any of the categories applied.

The most apparent match is "adult rehabilitation home," which is defined as:

> A facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual twenty-one (21) years of age or older, under pre-trial detention or sentenced court orders.

11 DCMR § 199.1.

The application for the first building permit informed DCRA that Bannum intended to convert a warehouse into a 150 bed community corrections facility. A facility of that size is simply too large to be considered an adult rehabilitation home. Up until the elimination of numeric limits beginning in the C-3 zone, the largest permitted adult rehabilitation home could house twenty persons. 11 DCMR § 732 (d). The reason for this limit is not just to control the number of residents within a given zone, but to relate the numbers of residents allowed to the intended purpose of this type of facility.

In 1981, the Zoning Commission adopted the current definition of CBRF, as well as comprehensive amendments to the text of the Zoning Regulations, to include and incorporate the new CBRF uses throughout the regulations. *See,* Exhibit No. 20, (Bannum's Memo in Opposition), Attachment No. 9, Zoning Commission Order No 347, (referred to *infra.* as "1981 ZC Order") and also at *Id.*, Attachment No. 9, Notice of Final Rulemaking, Zoning Commission Case No. 78-12. In the 1981 ZC Order, the Commission noted that the District of Columbia was constrained by court order and federal statute to provide "community-based alternatives to juvenile [and adult] detention and correctional facilities," which would provide care "outside of the traditional institutional setting." *Id.* at 3. CBRF's, including adult rehabilitation homes, were and are intended to be "smaller facilities, approximating the size and characteristics of families." *Id.* at 4. While a facility housing somewhat more than 20 persons might fall within the outermost population range of an adult rehabilitation home, the Board disagrees with the Appellant's contention that this or any other 150 bed facility could.

2. The proposed facility is not a temporary detention or correctional institution.

Section 3203.8 of the Zoning Regulations provides that a use designated in a certificate of occupancy must be "in terms of a use classification that is established by this title." This requirement is no less important when a use is identified on a building permit. In the present appeal, Bannum sought a building permit to construct a "community corrections center," a use appearing nowhere in the Zoning Regulations. DCRA issued a building permit for the same use, apparently based upon the theory that a CCC was similar enough to a temporary detention or correctional facility as to be allowed in a CM zone district pursuant to § 801.7(k).

Clearly, the first permit was invalid because it failed to note that the proposed use was to be temporary. Neither Bannum nor DCRA have argued that a permanent community corrections facility is permitted. Turning to the revised permit, we must determine whether the proposed CCC was within the scope of the use contemplated by § 801.7(k), both in terms of the nature and the length of its operation.[7]

The nature of the use.

There is no indication as to what DCRA thought a CCC was, or why it thought a CCC was just another name for a temporary detention or correctional institution. Certainly DCRA had no prior experience to draw upon, since no § 801.7(k) institution ever operated in the District since the provision was adopted. Although 11 DCMR § 199.2(g) provides that "[w]ords not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary,"* the separate

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[7] The Board notes that after the date of its public vote, the Court of Appeals issued its unpublished decision in *Chagnon v. D.C. Board of Zoning Adjustment*, No. 02-AA-1279 (D.C. March 11, 2004). In that decision the Court of Appeals held that the Zoning Administrator may not "interpret *defined uses* in the Zoning Regulations to encompass other uses that are functionally equivalent ... if they are outside the scope of the definition." *Id.* at 6 (emphasis added). In contrast, this appeal involves a use that is not defined in the Zoning Regulations. It is unnecessary for the purposes of this proceeding for the Board to determine whether this is a meaningful distinction. The Board has reviewed this order in light of the principles stated in *Chagnon* and finds it consistent with the principles stated therein.

definitions for "temporary," "detention," "correctional–," and "facility" would have provided little help. Moreover, it appears that these words were intended to be read together to describe a very specific type of use.

The legislative history bears this out. In 1972, the Zoning Commission adopted the text of § 801.7(k) in Case No. 71-33. *See,* Exhibit No. 20, (Bannum's Memo in Opposition), last page of Attachment No. 8, Zoning Commission Order No. 46, April 11, 1972. The stated purpose of § 801.7(k) was to "provide for interim or temporary locations for persons being confined by the Court until permanent facilities can be acquired and developed for such purposes." *See, Id.,* Attachment No. 8, Zoning Commission Public Notice, at 3, December 23, 1971. The Final Report of the Zoning Advisory Council on Case No 71-33 stated that the effect of the § 801.7(k) use would be to "accommodate overflow population from the established institutions" or to provide temporary facilities while new facilities were being developed. *See,* Exhibit No. 20, (Bannum's Memo in Opposition), Attachment No. 8. To emphasize the temporary nature of the § 801.7(k) detention or correctional institution, the Council added the word "temporary" at the beginning of the regulation and the term "for a period not to exceed three (3) years" at the end. What can be gleaned from this legislative history is that the Zoning Commission envisioned a temporary use to accommodate an overflow population of inmates, for whom there did not exist sufficient room at then-existing penal institutions.

There was also testimony to this effect during the hearing. Mr. Hulon Willis, an expert in the management and operations of corrections facilities, with many years of experience with the D.C. corrections system, testified that §801.7(k) was "in essence ... developed as a response to pressures of overcrowding." *See,* July 8, 2003 public hearing transcript at 290, lines 21-23. Mr. Willis testified that certain judicial consent decrees in the late 1960's and early 1970's relating to overcrowding at the D.C. jail required a population cap at that institution and created other methods to relieve overcrowding. *Id.* at 294-295, lines 21-25 & 1-17. It appears that § 801.7(k) was enacted as part of this effort to relieve the prison overcrowding existing at the time of its enactment.

The Board therefore concludes that § 801.7(k) facilities were meant to relieve, on a one time basis, overcrowding by temporarily housing prisoners at whatever point in their sentence they happened to be at the time of their transfer to such a facility. Clearly the Zoning Commission was addressing a short term crisis. Although it is doubtful that the Commission intended to keep the regulation in place for over thirty years, it certainly did not intend to sanction the type of facility proposed by Bannum. First, the Bannum population includes persons who are on probation and thus are not "being confined by the courts." Second, as to those persons in custody, they are at the facility, not because there is nowhere else to put them, but because they chose to be there. Their purpose for being there is not to remain confined, but to be freed. Third, the Board considers it implausible that the Commission, when promulgating 801.7(k), envisioned a facility whose residents can pretty much come and go as they please, and who, if they choose to leave without permission, cannot be stopped by the personnel on site. Indeed, the very term CCC did not exist as a term of art when the rule came into being.

The Zoning Advisory Council noted in 1971 that by placing § 801.7(k) "installations in industrial areas, the impact on residential sections of the city will be minimized." *See,* Exhibit No. 20,

(Bannum's Memo in Opposition), Attachment No. 8. The Board finds that the "installations" being referred to bear no similarity to Bannum's residential program.

Moreover, the Board will not lightly assume that the Zoning Commission intended to permit residential programs in a zone district "intended to provide sites for heavy commercial and light manufacturing activities." 11 DCMR 800.1. It is because of the nature of these allowed activities that residential uses are severely restricted within the zone. While the Board does not consider the Bannum facility to be a CBRF, the uses are sufficiently similar for the Board to surmise that the Commission's rationale for banning a small residential facility in a CM zone would apply with equal, if not greater force, to a larger type of residential program.

The length of the use.

Bannum argues that the three year limitation on the permit makes it temporary. But § 801.7(k)'s use of the term "temporary" cannot be viewed as redundant of the separately stated three year limitation. Each of the two elements, "temporary" and "for a period not to exceed three (3) years," must be met for a use to fall within the purview of the subsection.

The BOP contract and Bannum's lease, both of which would have been available to DCRA had it asked, would have shown that there was nothing temporary about Bannum's plans or commitments. While the contract's initial term was one year, it could be unilaterally extended by BOP through four one-year options, the last of which would end February 29, 2007. The lease was to run concurrently with the contract performance period, but to end no later than December 31, 2009. Particularly troubling is Paragraph 5.02 of the lease, which allows for cancellation should Bannum fail to obtain extensions of the certificate of occupancy.

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 BOP 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. The original permit actually had it right. This was to be a permanent facility established in contravention of the Zoning Regulations.

Thus the Board concludes that Bannum's facility is not the type of institution envisioned by the Zoning Commission in 1971 when it enacted § 801.7(k), both because of the intended nature and length of the proposed use. As a result, the Board finds that DCRA erred in granting Bannum permit number B425438 and revised permit number B448325 for construction of a community corrections facility pursuant to § 801.7(k) at 2210 Adams Place, N.E.

It is hereby **ORDERED** that this appeal is **GRANTED.**

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain, John G. Parsons, to grant, Ruthanne G. Miller, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring 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 3 1 2004

PURSUANT TO 11 DCMR § 3125.6, THIS 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/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16998

As Director of the Office of Zoning, I hereby certify and attest that on MAR 3 1 2004 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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ATTESTED BY: Jerrily Kress

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