BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal 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.	)	BZA Appeal No. 16998

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MOTION FOR RECONSIDERATION AND FOR A STAY OF THE EFFECT OF THE BOARD'S FINAL DECISION

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") moves for reconsideration of the Board's March 31, 2004 Order ("Order"), which concludes that Bannum Inc.'s community corrections center ("CCC") is neither a "community-based residential facility" ("CBRF") as defined by 11 DCMR § 199.1, nor a "temporary detention or correctional institution" as that term is used in 11 DCMR § 801.7. DCRA respectfully requests that the Order be modified and the appeal denied. DCRA also moves for a stay of the Order's effect while this motion for reconsideration and any related motions or hearings are pending.

The Order determines that Bannum's facility cannot be a CBRF because it is much larger than a 20-bed facility. This legal conclusion is supported neither by the zoning regulations applying the term "CBRF" nor by the Zoning Commission Order that adopted the current definition of that term. The Order also determines that Bannum's facility is not a temporary detention or correctional facility. This conclusion of fact and law does not "rationally flow from findings of fact supported by substantial evidence in

BZA
Case No. 16998
Exhibit No. 92

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 92

the record as a whole." *Draude v. District of Columbia Board of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990).

DCRA submits that the March 31 Order is erroneous in the following respects:

1. The Board erred in reaching the legal conclusion that a 150-bed facility "is simply too large to be considered an adult rehabilitation home."

The Board's conclusion that an adult rehabilitation home cannot have 150 beds as a matter of law is not supported by the zoning regulations or by the Zoning Commission Order cited by the Board. As the Board acknowledges in its Order, the zoning regulations do not expressly limit the size of CBRFs in the C-3, C-4, and C-5 zones. Finding of Fact No. 13. In Order No. 347 (1981), the Zoning Commission stated very plainly that "[a]dult rehabilitation homes . . . are permitted in the same zones in the same manner as youth rehabilitation homes," and that youth rehabilitation homes, though limited to 20 residents in R-5, CR, and C-2 zones, "are a matter-of-right in C-3, C-4 and C-5 Districts." Exhibit No. 20 (Bannum's Memo in Opposition), Attach. No. 9 at 6.

The Board cites the 20-person size limitation that is applicable to adult rehabilitation homes in the R-5, CR, and C-2 zones in support of a general proposition that a facility that greatly exceeds the 20-person size threshold can *never* qualify as an adult rehabilitation home. *See* Finding of Fact No. 12 & n.2. The Board's attempt to generalize, on a city-wide basis, from the specific size limitation applicable to an adult rehabilitation home in certain zones is inconsistent with the overall CBRF regulatory scheme. For example, the type of CBRF known as a "health care facility" may accommodate only up to 15 persons in an R-5 zone, 11 DCMR § 350.4(f), but as many 300 persons in an SP or CR zone, 11 DCMR §§ 513.1(b) & 616.1(b). Exhibit No. 20 (Bannum's Memo in Opposition), Attach. No. 9 at 5-6 (emphasis supplied). Similarly,

the type of CBRF known as a "youth residential care home" may accommodate, with BZA approval, only up to 25 residents in a C-2 zone. Yet, in C-3, C-4, and C-5 zones, youth residential homes "*of any size* in any location are permitted as a matter-of-right." *Id.* at 5 (emphasis supplied).

At page 14 of its Order, the Board incorrectly paraphrases the Zoning Commission as stating that "CBRF's, including adult rehabilitation homes, were and are intended to be 'smaller facilities, approximating the size and characteristics of families.' " What the Zoning Commission actually said was that "[s]maller facilities, approximating the size and characteristics of families, *should be encouraged*, to lessen impact, increase compatibility and provide for true alternatives to institutional settings." *Id.* at 4 (emphasis supplied). Had the Zoning Commission intended to limit all CBRFs to approximately "the size and characteristics of families," the CBRF regulations would never have included express authorization for CBRFs with as many as 300 beds. 11 DCMR §§ 513.1(b) & 616.1(b).

The Board's stated rationale for limiting the permissible size of an adult rehabilitation home is "not just to control the number of residents within a given zone, but to relate the number of residents allowed to the intended purpose of this type of facility." Order at 13. However, it is the federal Bureau of Prisons – and not this Board – that is responsible for determining the facility size that would most effectively and efficiently serve the facility's intended purpose. As the Zoning Commission has stated, "program[m]atic elements" are "more properly . . . addressed by licensing regulations than zoning." Exhibit No. 20 (Bannum's Memo in Opposition), Attach. No. 9 at 6. Thus, the purpose behind placing zone-specific limitations on the sizes of CBRFs is not

to impose District-wide caps on the sizes of CBRFs, but to "provide for adequate land use impact review in all areas." *Id.* The guiding principle is that "[t]he size and density of such facilities should be generally consistent with the size and density permitted in the various zone districts contained in the Regulations." *Id.* at 4.

2. The Board erred in finding that "[t]here is no indication [in the record] 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."

The record before DCRA adequately supported the agency's conclusion that Bannum's proposed CCC would be a temporary detention or correctional institution.

The December 11, 2000 and November 28, 2001 letters from Bannum to DCRA (Exhibit No. 20, Attach. 1&2), which the Board itself cites in its Findings of Fact Nos. 23 and 24, disclosed quite clearly to DCRA that Bannum's proposed CCC would serve both as a detention institution and as a correctional institution. Each of the letters described Bannum as "a company that provides residential rehabilitation services to individuals referred by appropriate committing authorities." In addition, the second letter stated that individuals would be referred to the CCC "directly by the court system either to serve their entire sentence in confinement at the CCC or to complete their confinement at a CCC after a portion has been served as [sic] a federal institution." Finally, both letters stated that the CCC would be operated "under a contract with the U.S. Department of Justice."

The references to "residential rehabilitation services," "committing authorities," "court system" referrals, "sentence," "confinement," "federal institution," and the "U.S. Department of Justice" would have left little doubt in anyone's mind that the proposed residential facility was to be used both for detention and correctional purposes.

Furthermore, the temporary nature of the facility was evident from the subject line of the second letter – "Temporary Correctional Facilities" -- and from Bannum's representation in that letter that the use "can be established as a matter of right . . . for a period not to exceed three years."

3. The Board erred in finding that Bannum's facility serves persons who "can pretty much come and go as they please" and whose "purpose for being there is not to remain confined, but to be freed."

In concluding that Bannum's facility is not a "correctional or detention institution," the Board focuses on the fact that residents are allowed for various reasons to leave the facility's premises.[1] But the Board's findings as to the degree to which Bannum's residents are free to "come and go" are not supported by substantial evidence in the record as a whole. Moreover, it would be sufficient for DCRA to show that Bannum's facility is *either* a detention institution *or* a correctional institution. 11 DCMR § 801.7(k) ("Temporary detention or correctional institution"). Given that Bannum's residents are *confined* in a *correctional* institution, the record shows quite clearly that Bannum has met both prongs of § 801.7(k).

The Introduction to the federal Bureau of Prison's Statement of Work explains unambiguously that a CCC is a correctional institution whose residents are being confined:

> The contractor shall ensure that the CCC operates in a manner consistent with the mission of the BOP. The mission is to protect society by *confining offenders in the controlled environments of prisons and community-based facilities* that are safe, humane, cost efficient and

[1] The Board also states that "it is doubtful that the Commission intended to keep [§ 801.7(k)] in place for over thirty years" and that "the Board will not lightly assume that the Zoning Commission intended to permit residential programs in a [CM] zone district." Order at 15-16. But the Board appears to treat these considerations more as tipping factors than as independent grounds for its determination.

> appropriately secure, that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.

Exhibit No. 64, CCC SOW, at 1 (emphasis supplied). This general statement of purpose simply cannot be reconciled with the Board's conclusion at page 15 that the "purpose for being [in a CCC] is not to remain confined, but to be freed."

Moreover, there is not support in the record for the Board's finding (at page 15) that some CCC residents have not been "confined by the courts" because they are "on probation." Probation is imposed pursuant to sentencing by a court. To the extent that a person's "residence at [Bannum's] CCC is a condition of [probation] supervision" (Finding of Fact No. 41), the person is being confined pursuant to a court order.

Citing the Bureau of Prison's Statement of Work, the Board correctly observes that persons "under the supervision of the U.S. Probation Office" are "ordinarily deemed not to be in the custody of the Attorney General or the [Bureau of Prisons]." Finding of Fact No. 42. But as the Statement of Work itself makes clear, the fact that an offender is under the supervision of the U.S. Probation Office does not mean that the individual is not being confined:

> The federal escape statute applies only to those who escape from the custody of the Attorney General or BOP. 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. *These offenders may be considered to have absconded rather than escaped.*

Id. at 38 (emphasis supplied). The Statement of Work provides that whenever absconders "are deemed missing or escaped, the contractor shall immediately report to the supervising authority, i.e., [U.S. Probation Office]. The contractor shall notify the [Community Corrections Manager] of [U.S. Probation Office] absconders no later than the next calendar day." *Id.* at 88.

Moreover, the definition of "escape" in the Statement of Work, which applies both to federal escapees and to absconders, establishes that *every* offender who is housed at a CCC is in a state of confinement:

> An escape means an offender who fails to report to the facility for admission at the scheduled time; fails to remain at the approved place of employment or training during the hours specified by the terms of the employment or training/treatment program; fails to return to the facility at the time prescribed; fails to return from an authorized furlough or pass at the time and place stipulated; fails to abide by the residence, employment or curfew conditions of home confinement; is arrested; or otherwise leaves without permission of the staff.

Id. These restrictions on offenders' movements in no way describe "a facility whose residents can pretty much come and go as they please." Order at 15.

4. The Board erred in finding that "there was nothing temporary about Bannum's plans or commitments" with respect to its proposed facility.

The Board concludes from its review of the Bureau of Prison's contract and Bannum's lease that "there was nothing temporary about Bannum's plans or commitments." Order at 16. This conclusion does not take into account Bannum's January 23, 2001 letter to the federal Bureau of Prisons, which expressly disclosed that the "property discussed herein above is properly zoned for a three year period." Exhibit 80 at 2. Thus, Bannum properly placed the Bureau of Prisons on notice as to the three-year zoning limitation on Bannum's ability to operate the CCC at the proposed location. The Order cites nothing in the record that would support a finding that the Bureau of Prison's right to exercise up to four one-year extension options (after the original one-year term) would prevail over this express limitation on Bannum's ability to perform.[2]

[2] With respect to extension options, Finding of Fact 28 purports to cite to pages 359 and 377 of the July 8, 2003 hearing transcript; however, the transcript is only 294 pages long.

The Board describes as "[p]articularly troubling" the lease provision that "allows for cancellation should Bannum fail to obtain extensions of the certificate of occupancy." Order at 16. The Board concludes from this provision that Bannum's "plan" was seek certificate of occupancy extensions that "DCRA could not have lawfully issued," and that Bannum's "claim of temporary use was thus a sham." *Id.*

While the Board is correct that DCRA could not lawfully have issued extensions of the certificate of occupancy pursuant to 11 DCMR §801.7(k), the lease provision in question refers not to DCRA approval specifically, but rather to "governmental approval" generally:

> Tenant acknowledges that the current zoning applicable to the Premises may place a three (3) year restriction on the planned and permitted use within the Premises. Tenant agrees that it shall bear the responsibility, at its sole risk and expense, to obtain any necessary *governmental approvals* to extend the period of permitted use of the Premises for its intended purpose. . . . In the event that Bannum cannot obtain *governmental approval* to extend the period of permitted use of the premises, Bannum can cancel the lease and will have no further liability under this lease.

Exhibit 79 at 6 (¶5.02) (emphasis supplied). Following DCRA's approval of Bannum's request to open a temporary, three-year institution, Bannum was perfectly free to petition this Board for the kind of variance that would be needed to establish a permanent institution. What Bannum could *not* do was obtain from DCRA an extension of the three-year period in which it could operate a "temporary" facility. Bannum's reservation of a right to cancel the lease in the event that it failed to obtain the "necessary governmental approvals" to operate on a permanent basis is evidence not of a "sham" but of prudent business planning.

Conclusion

For the reasons stated above, DCRA respectfully requests that the Board reconsider its March 31, 2004 Order, stay the Order's effect, and, following reconsideration, deny this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2004, copies of the foregoing District of Columbia Department of Consumer and Regulatory Affairs' Motion for Reconsideration and for a Stay of the Effect of the Board's Final Decision, are being *faxed and mailed, first-class postage prepaid, to*:

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