GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16998-A 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 (DCRA) for the issuance of Building Permit No. B425438, for the renovation of a warehouse for use as a community corrections center. Appellant alleges that DCRA erred by issuing the building permit as the proposed use will allegedly be operated as a community-based residential facility (halfway house) and therefore in violation of the prohibition of new residential use in a C-M District pursuant to section 801. The subject property is located in the C-M-2 District at premises 2210 Adams Place, N.E. (Square 4259, Parcel 154/81).

HEARING DATES: April 22, 2003, May 20, 2003, June 17, 2003, July 8, 2003, and July 22, 2003

DECISION DATE: September 9, 2003

DATE OF DECISION ON RECONSIDERATION: May 4, 2004

ORDER DENYING RECONSIDERATION AND STAY

In Appeal No. 16998, appellant Advisory Neighborhood Commission ("ANC") 5B ("Appellant") claimed that the Department of Consumer and Regulatory Affairs ("DCRA") had erroneously issued a building permit allowing a prohibited community-based residential facility ("CBRF") in a C-M zone. Appellee DCRA claimed that it had acted properly in issuing the permit pursuant to 11 DCMR § 801.7(k), which permits a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years." DCRA alleged that an 801.7(k) institution was a type of CBRF permitted in a C-M zone. Intervenor/property lessor Bannum, Inc. claimed that its facility was not a CBRF, but a community corrections center ("CCC"), and that therefore the use fell squarely within § 801.7(k).

The final order of the Board of Zoning Adjustment ("Board") granting Appeal No. 16998 was issued on March 31, 2004 ("Order"). The Order explained, in detailed findings of fact and conclusions of law, that although the Board found Appellant's theory of error unpersuasive, it nonetheless determined that DCRA had erred in issuing the building permit. The Board ultimately concluded that the proposed facility was neither a CBRF nor a temporary detention or correctional institution under § 801.7(k) of the Zoning Regulations.

On April 5, 2004, DCRA timely moved for reconsideration of the Order and for a stay of the Board's final decision while reconsideration was pending. On April 13, 2004, Bannum timely moved for reconsideration and for a stay of the final decision while reconsideration was

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pending.[1] *See,* 11 DCMR § 3126.2. On April 21, 2004, Appellant filed an opposition to both of these motions. *See,* 11 DCMR § 3126.5.

THE MOTIONS FOR A STAY

Both DCRA's and Bannum's Motions for Reconsideration purport to also ask for "a stay of the Order's effect while this reconsideration and any related motions or hearings are pending." The stay requests were made because neither the filing nor the granting of a motion for reconsideration automatically stays the effect of a Board order. 11 DCMR § 3126.9.

A movant needs to make four showings in order for a stay to be granted: that it is likely to succeed on the merits, that denying the stay would cause irreparable injury, that granting the stay would not harm other parties, and that the public interest favors granting a stay. *See, eg., Barry v. Washington Post,* 529 A.2d 319, 320-321 (D.C. 1987). Neither DCRA's nor Bannum's Motion set forth these factors or discussed them in any way. Neither Motion explained why a stay was requested or claimed to be necessary. In fact, neither Motion addressed the issue of a stay at all. The Board, therefore, denies the Motions for Stay.

THE MOTIONS FOR RECONSIDERATION

A motion for reconsideration must specifically state in what way the Board's decision is erroneous, the grounds for reconsideration, and the relief sought. 11 DCMR § 3126.4. To be persuasive, such a motion should present more than a re-hashing of the original arguments made. *See, e.g., Washington Gas Light Co. v. Public Service Comm'n.,* 483 A.2d 1164, 1168, n. 11 (D.C. 1984).

Bannum' s Motion for Reconsideration

Bannum makes three arguments in its Motion. First, Bannum claims that since the Board found Appellant's theory of error unpersuasive, it should have denied the appeal outright. This is incorrect. The question on appeal is whether DCRA erred, not whether the Appellant presented the alleged error properly. The Board concluded that DCRA erred in its interpretation of the zoning regulations based on the record and may reject the specific theory of error proffered by the Appellant. As the Order stated, "the Zoning Act intends for the [Board] to exercise an in-depth second level of review to ensure that a non-compliant use or structure is not inadvertently permitted." Order at 8. If the Board determines that DCRA erred, the Board must so find, regardless of whether this finding is based on the Appellant's stated grounds for appeal or on the Board's own in-depth second level of review.

Second, Bannum claims that the Board determined that the Federal Government, specifically the U.S. Attorney General and the Federal Courts, either misrepresented that a CCC is a detention or correctional institution, or, "does not know what [it] is talking about" with respect to this conclusion. The Board never stated anything to this effect. There is no finding in the Order that

[1] On April 14, 2004, Bannum filed a petition for review of the Order with the District of Columbia Court of Appeals and on June 1, 2004, Bannum filed with the same court a petition for review of the Board's May 4, 2004 oral decision to deny reconsideration and stay of the Order.

the Federal Government misrepresented anything or "did not know what it was talking about." Instead, the Conclusions of Law in the Order make it clear that a CCC is not a defined term in the zoning regulations nor in Webster's Dictionary, and that it is not what was envisioned by the Zoning Commission when it promulgated § 801.7(k). The Board did not conclude that a CCC can never be a detention or correctional facility, but merely that Bannum's facility is not the type of detention or correctional facility which is sanctioned by § 801.7(k).

Third, Bannum claims that the Board acted beyond its authority and assumed a legislative role. The Board reads Bannum's Motion to mean that when the Board looked beyond the wording of the regulation to try to determine the meaning of the word "temporary" it somehow found the word "temporary" vague and therefore, somehow treated § 801.7(k) as unconstitutional. A reading of the Order shows the fallacy of this assertion. The Board made no finding that the word "temporary" was impermissibly vague. In the Conclusions of Law, the Order merely states that "temporary" and "for a period not to exceed three years," both of which appear in § 801.7(k), must be read to have separate meanings. In this case, a "temporary" use must not exist for more than three years and the record shows that Bannum intended its use to exist for more than three years.

The Board concludes that Bannum fails to make a persuasive argument for reconsideration of the Board's decision.

DCRA's Motion for Reconsideration

DCRA makes four arguments for reconsideration. First, DCRA argues that the Board is in error in concluding that a 150-bed facility could never be an adult rehabilitation home because it is just too large. Second, DCRA asserts error in the Board's statement that there is no indication as to what DCRA thought a CCC was or why DCRA assumed a CCC was a § 801.7(k) facility. Third, DCRA contends that the Board erred in concluding that the residents of Bannum's facility are there for the purpose of being freed, not confined, and that, while they are there, they "can pretty much come and go as they please." Fourth, DCRA asserts that the Board erred in finding that Bannum's facility was not intended to be temporary.

DCRA's first assertion of error

The Board stands by its assertion that a 150-bed facility "is simply too large to be considered an adult rehabilitation home." *See,* Order at 13. The Board chose its words carefully. It did not say that no CBRF could have 150 beds, but that no adult rehabilitation facility could have 150 beds. CBRF's are permitted with no numerical size limit in C-3, C-4, and C-5 districts, but adult rehabilitation homes were never intended to be particularly large facilities. As stated in the Order at 13, up until C-3 zones, the largest adult rehabilitation home permitted could house only 20 persons. Yet, in those same zones, health care facilities for up to 300 people are permitted. The fact that the Zoning Commission permitted health care facilities with a 300-person maximum in the same zones in which it permitted adult rehabilitation homes with only a 20-person maximum shows that adult rehabilitation homes were never meant to approach a size much above 20 residents. Clearly, an adult rehabilitation home for 150 persons was not intended by the Zoning Commission in 1981.

This conclusion is echoed by the statements of Mr. Parsons, the Zoning Commission member who sat on this case with the Board, and who also sat on the Commission in 1981 when the CBRF regulations were debated and promulgated. During the September 9, 2003 decision meeting, Mr. Parsons stated:

> Our dilemma is that the Zoning Commission placed these [adult rehabilitation homes] in residential areas as a more amenable place to perform that transition, [back into society] limited them to 25. Certainly, the authority of this Board or others is not to say, well, probably the Zoning Commission also meant 300 people or 400 people, and therefore, it should be in a commercial district. It just doesn't wash.

September 9, 2003 meeting transcript at 62, lines 17-24. Later in the deliberation, Mr. Parsons, again discussing adult rehabilitation homes, stated:

> [t]hey are limited to a certain size ... we spent a great deal of time on this in the 1980s as to – I mean, we considered CBRFs (*i.e.*, adult rehabilitation homes) up to 150-200 people in size and determined, no. One, they don't belong in residential zones and, two, it isn't good for the people who are in them.
>
> That is, they are supposed to be mainstreaming with society and not clinically assembled and released on a daily basis en masse. So I can recall the Commission deliberating on this for a long period of time, on what is a size that fits the purpose of these facilities.

Id., at 72, line 3 and lines 11-21.

It is clear from Mr. Parsons' statements that the Zoning Commission had in mind smaller, "home-like" facilities when it created adult rehabilitation homes. The Board has no independent authority to promulgate or change the Zoning Regulations. D.C. Official Code § 6-641.07(e) (2001). Only the Zoning Commission can do this and the Board is bound to follow the language and intent of the Commission. If the Board were to permit adult rehabilitation homes of 150 beds, it would be exceeding its authority by ignoring the intent of the Commission and re-writing the Zoning Regulations.

DCRA also states that the Board misparaphrases Zoning Commission Order No. 347 by stating that CBRF's were "intended" to be, rather than "encouraged" to be, "smaller facilities, approximating the size and characteristics of families." The Board concludes that this mischaracterization is not dispositive, or even particularly important. As explained above, the Zoning Commission did not contemplate adult rehabilitation homes of the size Bannum proposes here. Instead, the Zoning Commission favored "smaller facilities, approximating the size and characteristics of families."

Even if DCRA is correct that this facility was an Adult Rehabilitation Home, the Board would still grant the appeal, since the order also concluded that a CBRF is not a matter of right use in a CM zone.

DCRA's second assertion of error

DCRA takes issue with the statement in the Order, at 14, that "[t]here 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." The statement, however, is correct. DCRA never adequately determined whether Bannum's proposed use, a CCC, is just another way of describing the use contemplated by § 801.7(k). Section 801.7(k) had never been implemented before. The use it represents was undefined, and therefore, uncertain. Bannum was proposing a "CCC," also an undefined use in the Zoning Regulations. DCRA issued the building permit(s) appealed here based on the two concurrence letters, drafted by Bannum's then-attorney, and concurred in by the Zoning Administrator. These letters are cited by DCRA in its Motion for Reconsideration as sufficient to put DCRA on notice as to what sort of facility Bannum intended to operate. In fact, DCRA appears to argue that anyone who saw the concurrence letters would naturally assume that the facility they describe falls within § 801.7(k). In 1972, however, when § 801.7(k) was enacted, the term CCC did not yet exist. Therefore, it would have been impossible for the Zoning Commission in 1972 to have meant to include a CCC within the ambit of § 801.7(k).

More importantly, however, DCRA is misconstruing the standard applicable in this appeal to DCRA's actions. The question is not whether the record before DCRA was adequate to make a determination, but whether such a determination was correct. The Board concluded that DCRA's determination that Bannum's proposed CCC facility falls within § 801.7(k) is incorrect. Even if DCRA had reached this determination after going to great lengths to establish what a CCC is, it would still be incorrect.

DCRA's third assertion of error

DCRA next contends that the Board placed undue emphasis on the freedom of movement of the residents of Bannum's facility. DCRA's motion states that the Board's findings as to the degree to which the residents are free to come and go are not supported by substantial evidence. The Board must again disagree. There is evidence in the record of the constraints on the absolute freedom of movement of the residents, but there is also evidence that they are permitted quite a bit of unrestricted movement. They are certainly not under constant surveillance. Bannum's facility has no locks, bars, physical restraints, guards, or even a secure perimeter. Finding of Fact No. 45. With permission, the residents of the facility may leave for any number of reasons, such as to go to work, to visit family members, or to attend classes. Finding of Fact No. 47. Residents can also get weekend passes and furloughs for more than two consecutive nights or for trips of more than 100 miles. Finding of Facts No's. 48 and 49. Moreover, the ultimate goal of Bannum's facility is to free its residents, not to keep them confined.

Even with all this freedom of movement, it may be possible to consider a facility a detention or correctional institution, but the Board concludes, as it did in its Order, that such a facility is not

the type of detention or correctional institution intended by § 801.7(k). A § 801.7(k) facility was intended to relieve the prison overcrowding which existed at the time of the enactment of the section. At that time, the D.C. Jail had a population cap imposed on it and the § 801.7(k) facility was to temporarily house inmates who would otherwise have been housed in the jail. Such a facility was not meant to be a stepping-stone between confinement in a jail and freedom in society.

DCRA also addresses the Board's statement that CCC residents on probation are not "being confined by the courts." DCRA states that residents on probation are confined pursuant to court order. Probation, however, is not the same as "detention" or "confinement." Probation is actually a suspension of a sentence. It is chosen or imposed as an alternative to a sentence of incarceration, *i.e.*, "detention" or "confinement." That is why if an individual violates his probation, he does not get credit for time served, as would someone who had been incarcerated. *See, e.g., Thomas v. U.S.*, 327 F.2d 795 (10th Cir. 1964), *cert.* denied 377 U.S. 1000 (1964). Probation can have conditions associated with it, such as where the individual is to reside. *See,* 18 USCS § 3563(b). But if one's probation requires that he live within a specified judicial district or that he live with his mother, that does not make the judicial district or his mother's home a place of "detention" or "confinement."

The fact that Bannum's facility houses individuals on probation militates against its being a § 801.7(k) facility, which is meant to house the overflow of incarcerated inmates from other institutions. Individuals on probation are not "incarcerated." The same fact also militates against Bannum's facility being an adult rehabilitation home, as the definition for that use limits it to individuals who are either over 16 and charged with a felony, or over 21 and under pre-trial detention or sentenced court orders. An individual on probation is not "under pre-trial detention" and is not serving a "sentence," but is fulfilling a suspension of a sentence. Therefore, he would not fall within any of these categories.

DCRA's fourth assertion of error[2]

DCRA last asserts that the Board erred in concluding that Bannum did not intend a temporary facility. There was evidence on both sides of the question as to whether Bannum intended its facility to be both temporary and to exist for a maximum of three years. Taking the record as a whole, the Board concluded that Bannum intended its use to be permanent, or at least, for more than three years. DCRA makes the argument that, after three years, Bannum could have applied for a use variance to permit the continuation of the use. This only serves to bring home more forcefully that Bannum was hoping/intending to establish this use at this location for more than the permitted three year maximum. The Board sees no reason to change the conclusion reached in its Order.

APPELLANT'S OPPOSITION TO THE MOTIONS FOR RECONSIDERATION AND STAY

[2]DCRA asserts in its Motion, at 7, n. 2, that the July 8, 2003 hearing transcript is only 294 pages long, but that Finding of Fact No. 28 refers to pages 359 and 377. The page references in the Finding of Fact are to the page numbers in the transcript for the Board's entire public hearing held on July 8, 2003, which is 418 pages long. The page references are not to those pages of the transcript which contain only the proceedings in Appeal No. 16998. Therefore, the page references in the Finding of Fact are correct.

On April 21, 2004, Appellant filed an Opposition to both the Motions for Reconsideration. The Opposition was timely as to Bannum's Motion, but not as to DCRA's Motion. *See,* 11 DCMR §§ 3126.5 and 3110. The Board will therefore consider the Opposition timely in order to discuss it briefly.

The Opposition is actually an opposition and a de facto motion for reconsideration. After agreeing with the Order that Bannum's facility is not a § 801.7(k) facility, the Opposition urges the Board to "revisit" its decision that the facility is not a CBRF. The Opposition's discussion of why the facility is not a § 801.7(k) facility asserts no error on the Board's part, nor does it present new information or arguments and so requires no comment here. As for the Opposition's proposition that the Board should revisit its decision that the facility is not a CBRF, so far as that is a motion for reconsideration, it is untimely, and the Board need not address it. *See,* 11 DCMR § 3126.2.

CONCLUSION

The Board has carefully considered all the claimed errors and the arguments put forth by both Bannum and DCRA in their respective Motions for Reconsideration and Stay. Although there was merit to some of DCRA's contentions, the Board is not persuaded to reconsider its decision and Order in this case. Accordingly, the Motions for Reconsideration of both Bannum and DCRA are hereby **ORDERED DENIED.** So far as the Opposition filed by Appellant purports to put forth arguments for reconsideration, it is hereby **ORDERED DENIED** as untimely.

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

The Motions for Stay of the Board's decision of both Bannum and DCRA are hereby **ORDERED DENIED** as moot.

VOTE: (on both Motions for Stay): 5-0-0 (Geoffrey H. Griffis, David A Zaidain, Curtis L. Etherly, Jr., John G. Parsons, and Ruthanne G. Miller, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: AUG 26 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