UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNUM, INC., **Plaintiff,** **v.** **DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, et al.,** **Defendants.**	**Civil Action No. 05-858 (JDB)**

ORDER

Plaintiff Bannum, Inc., is a corporation that provides Community Correction Center (or halfway house) services to the United States Bureau of Prisons ("BOP"). In late 2002 and early 2003, defendant District of Columbia Department of Consumer & Regulatory Affairs ("DCRA") issued a building permit and a certificate of occupancy to plaintiff to convert a warehouse in the District of Columbia into a Community Correction Center, and on May 1, 2003, Bannum commenced operation of such a facility at the site. A community group took an appeal of the issuance of the building permit to the Board of Zoning Adjustments ("BZA"), however, and on September 9, 2003, the BZA decided that the permit had been improperly issued.[1]

A tangle of litigation in the agencies and courts of the District of Columbia ensued.

[1] The community group also commenced an action against the District of Columbia and Bannum in the Superior Court of the District of Columbia challenging the anticipated (at that time) issuance of the certificate of occupancy. See Pl. Mem., Ex. 1.

BZA
Case No. 16998
Exhibit No. 107

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 107

Bannum and the DCRA moved for reconsideration of the BZA decision, and on May 4, 2004, the BZA denied those motions. Bannum then appealed the BZA decision to the District of Columbia Court of Appeals. That appeal has been briefed and is awaiting oral argument. Meanwhile, on April 12, 2004, the DCRA had filed notice of its intent to withdraw the certificate of occupancy in light of the BZA decision on the building permit. Bannum filed a motion in the District of Columbia Court of Appeals to stay the revocation of its building permit and certificate of occupancy pending appeal, which was denied on August 5, 2004. Bannum also asked an Administrative Law Judge ("ALJ") of the DCRA to continue action on the certificate of occupancy pending the appeal of the BZA decision on the building permit before the District of Columbia Court of Appeals. The ALJ granted that motion in an oral ruling in August 2004.[2]

On April 21, 2005, the DCRA rescinded its earlier April 2004 notice of intent to revoke the certificate of occupancy, and issued a new notice to revoke the certificate of occupancy that would be effective in ten (10) days. Bannum then commenced this action against the BZA and the DCRA on April 29, 2005,[3] arguing that the challenged zoning decisions are preempted by federal law, and violate the Supremacy Clause of the United States Constitution as well as the Equal Protection and Due Process Clauses. Bannum also filed a motion for a temporary restraining order (TRO) to prevent the DCRA from revoking the certificate of occupancy. Bannum has made

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[2] No transcript was made available to the Court of the ALJ's oral ruling, and the parties disagree on the gist of the ruling. Plaintiff claims that the ALJ stayed the action pending appeal, while defendants maintain that the ALJ continued the action pending appeal, but also recognized that future motions would proceed before a different agency in light of the then-approaching restructuring of the District of Columbia agency system.

[3] In an order issued this day, this Court grants plaintiff's motion to file an amended Complaint that adds the District of Columbia as a defendant.

a similar request for a stay or TRO in each of the DCRA, the BZA, the Superior Court of the District of Columbia, and the District of Columbia Court of Appeals. Over the last few days, each of those entities has now denied the request. The DCRA agreed to postpone the date that its revocation would take effect until May 5, 2005. The parties each submitted papers on the motion for a TRO, and this Court held a hearing on the motion for a TRO on May 4, 2005.

Plaintiff's request for an order preventing the DCRA from revoking Bannum's certificate of occupancy runs up against well-established principles of abstention. In a line of cases beginning with Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court has "held that, except in extraordinary circumstances, a federal court should not enjoin a pending state proceeding (including an administrative proceeding) that is judicial in nature and involves important state interests." JMM Corp. v. District of Columbia, 378 F.3d 1117, 1120 (D.C. Cir. 2004). This Circuit has held in JMM Corp. that Younger abstention is applicable to the District of Columbia, and specifically to zoning decisions within the local administrative and judicial system. Applying these principles, this Court concludes that it has no authority to enjoin the ongoing zoning proceedings before the District of Columbia agencies and courts in this case. See id. at 1119 (holding that a preliminary injunction blocking the revocation of a certificate of occupancy by the DCRA cannot issue on Younger abstention grounds).[4]

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[4] See also Brawner Bldg., Inc. v. Shehyn, 442 F.2d 847, 856 (D.C. Cir. 1971) (vacating preliminary injunction regarding the zoning of a community correctional center; holding that the district court "should not have proceeded to a final determination of the merits but should have stayed the action pending an appeal to the [BZA]"). Plaintiff argues that Younger abstention is inappropriate in this case because plaintiff is bringing a preemption claim. However, the Supreme Court rejected this broad proposition in New Orleans Pub. Serv. Inc. v. Council of City of New Orleans, 491 U.S. 350, 363 (1989), and the weight of persuasive authority in the wake of that decision has held that Younger abstention is inappropriate only if a claim of preemption is not merely "substantial" but "facially conclusive." Local Union No. 12004, United Steelworkers of

Plaintiff argues that the District of Columbia proceedings in this case do not afford an adequate opportunity in which to raise the federal claims under the Younger line of cases because plaintiff is seeking relief on an emergency basis. However, plaintiff could not cite a case to the Court suggesting that Younger abstention is inapplicable to claims seeking a temporary restraining order or other expedited relief. Nor could plaintiff explain why this Court is any better situated to provide the emergency relief sought in this case than are the state courts and agencies already involved. This Circuit has already observed in JMM Corp. that a full range of constitutional and other challenges to zoning decisions can be fairly raised and advanced before the District of Columbia agencies and courts. See JMM Corp., 378 F.3d at 1121, 1126.

Moreover, plaintiff's suggestion that there does not exist an adequate opportunity to seek relief before the DCRA, the BZA, the District of Columbia Superior Court and the District of Columbia Court of Appeals is belied considerably by the fact that each of these entities has now considered and rejected precisely the same request for emergency relief that plaintiff now seeks from this Court. To issue a TRO in these circumstances, this Court would be required to disregard not only settled principles of Younger abstention, but also issue preclusion law and the

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Am. v. Massachusetts, 377 F.3d 64, 78 (1st Cir. 2004); Midwestern Gas Transmission Co. v. McCarty, 270 F.3d 536, 539 (7th Cir. 2001); Comms. Telesystems Int'l v. Cal. Pub. Util. Comm'n, 196 F.3d 1011, 1017 (9th Cir. 1999). The preemption claim in this case simply is not "facially conclusive" -- plaintiff relies principally on the federal statutes giving the federal government control over the incarceration of District of Columbia felons and requiring the placement of suitable felons in a halfway house to the extent practicable for the final ten percent of their sentences for its preemption argument, 18 U.S.C. §§ 3621, 3624, but neither of these provisions can be said to clearly conflict *on their face* with an order revoking the license for a halfway house in the District of Columbia (even if, as plaintiff argues, the legal basis for the order could be read to extend to most other halfway houses in the District as well). Indeed, the record reflects that the Bureau of Prisons agreement with plaintiff contemplates full application of and compliance with all District of Columbia zoning requirements. See Pl Mem., Ex. 3 at 1146.

Rooker-Feldman doctrine. See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S. Ct. 1517 (2005). This Court cannot and will not cast aside these important rules of comity and federalism, and therefore declines plaintiff's invitation to insert itself into ongoing District of Columbia proceedings on issues of paradigmatically local concern. See Warth v. Seldin, 422 U.S. 490, 508 (1975) (zoning laws and their application are "peculiarly within the province of state and local legislative authorities.").

CONCLUSION

For the foregoing reasons, plaintiff's motion for a temporary restraining order is denied.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: May 6, 2005

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