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D.C. RECEIVED

2005 MAY -9 PM 4:33

May 9, 2005

VIA HAND DELIVERY

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, D.C. 20001

BZA # 16998

Re: 2210 Adams Place N.E.: Supplement to Bannum's Request for a Stay

Dear Board of Zoning Adjustment:

Bannum, Inc. ("Bannum") supplements its request for a stay based upon recent developments. On May 4, 2005, the D.C. Court of Appeals denied Bannum's motion for a stay of the DCRA's revocation for lack of jurisdiction over the Certificate of Occupancy ("CofO") proceedings. The Court noted that no petition for review had been filed and that the proceedings at this stage were appropriately before Respondent, District of Columbia. In dictum, the motions panel of the Court also cited the prior motion panel's earlier denial of Bannum's request for a stay. Ex. 1.

That same day, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued a response to Bannum's objections and request for a stay of any revocation of Bannum's use of 2210 Adams Place, N.E. for use as a federal Community Corrections Center ("CCC") until the Court of Appeals panel assigned to the case decides Bannum's appeal of the BZA's decision on zoning for Bannum's building permit on the merits.[1] Ex. 2.

On May 5, 2005, the federal U.S. District Court for the District of Columbia denied Bannum's motion for injunctive relief on jurisdictional grounds. Ex. 3. Based on the Court of Appeal motion panel's decision on the stay, the Superior Court also denied Bannum's protective motion for injunctive relief. Ex. 4. Thus, the only forum considering a stay is the BZA. As discussed below, this revocation should be stayed.

The DCRA decision to uphold its revocation action did not address the principal grounds for seeking a stay—that DCRA had no legal right to essentially void the order of the DCRA Administrative Law Judge ("ALJ") who, on August 6, 2005, ordered proceedings stayed until the Court of Appeals ruled on the merits. The DCRA decision merely cites the BZA's order on Bannum's building permit as grounds to revoke the CofO. Ex. 2.

[1] As noted in our earlier motion, all briefs were filed as of January 20, 2005 and the Court is expected to schedule oral argument in the near future.

BZA
Case No. 16998
Exhibit No. 108

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 108

However, in pleadings filed by counsel for the District of Columbia in opposition to Bannum's motion to stay to the Court of Appeals and in opposition to Bannum's motions for injunctive relief before the U.S. District Court, DCRA, through counsel, indicated its apparent rationale. As shown below, based on this rationale, DCRA's revocation is illegal and void.

In the opposition, D.C. counsel argued that D.C. Code Ann. §2-1831(b) authorized a reorganization of the Office of Administrative Hearings ("OAH") under which zoning matters, such as the revocation of a CofO, would be decided by the DCRA Administrator with a right to appeal to the BZA. Ex. 5, p 5. The opposition stated that DCRA had determined based on "a further review of the regulations" that BZA, not OAH, had "jurisdiction" over CofO contested cases. Based on this determination, the DCRA Zoning Administrator supposedly had the right to rescind the prior revocation notice and ignore the August 6, 2004 ALJ order to stay proceedings until the Court of Appeals issued a decision on the merits. Id.

The problem with this rationale is that absolutely nothing supports any unilateral right in the DCRA Administrator to rescind the prior revocation notice and ignore the prior ALJ decision, or to issue a new revocation notice without providing Bannum with an opportunity to have its case decided by an ALJ.

The revocation proposed is a "contested case" under D.C. Code Ann. §2-502(8). A contested case is defined as:

> "... a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency ...." (None of the exceptions apply).

The revocation is therefore an "adjudicated case" subject to an ALJ hearing and decision. Under D.C. Code Ann. §2-1831.01, "adjudicated case" is defined as:

> "... a contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type. The term "adjudicated case" includes, without limitation, any required administrative adjudicative proceeding arising from a charge by an agency that a person committed an offense or infraction that is civil in nature." (emphasis added).

The DCRA revocation charges that Bannum is operating a federal CCC without proper zoning, a civil offense. D.C. Code Ann. §6-641.09. Since the DCRA order will deprive Bannum of its right to operate a federal CCC for the Federal Bureau of Prisons, under that statute and D.C. Code Ann. §2-1831(b), DCRA is subject to hearings before an ALJ. No statute authorizes DCRA to avoid ALJ review.

In fact, in DCRA's April 27, 2004, Notice of Intent to Revoke, DCRA advised Bannum of its right to hear on contested cases pursuant to D.C. Official Code §1-1509(a)(2003). DCRA quoted §1-1509(a): "[i]n any **contested case**, all parties thereof shall be given reasonable notice of the afforded hearing by the Mayor or the agency as the case may be..." §1-1509 is now §2-509, and the language quoted by DCRA is the exact same as the wording of §2-509.

In its opposition, D.C. counsel conceded that adjudicated cases were transferred to OAH under D.C. Code Ann. §2-1831(b). Ex. 5, p. 5. Accordingly, DCRA is not authorized to issue a revocation without first providing Bannum with a right to a hearing before an ALJ and DCRA can take no action until that time. D.C. Code Ann. §2-1831.13 and D.C. Code Ann. 2-509.

Contrary to the implications in the D.C. opposition, the regulations cited as the basis for the DCRA "jurisdictional" determination do not supplant the statute which expressly confers jurisdiction over contested and adjudicated cases to OAH. The OAH is an executive adjudicatory reviewer of decisions of the DCRA Administrator. OAH decisions on zoning can then be appealed to the BZA under D.C. Code Ann. §6-641.07. This was the law prior to and after the implementation of the centralization of OAH. Cases cited by D.C. prior to the centralization regarding other areas are irrelevant. Nothing in the new centralization changed that. Indeed, DCRA decisions are specifically under OAH jurisdiction in D.C. Code Ann. §2-1831.03(b).

Accordingly, nothing in the statute or regulations gave DCRA a unilateral right to "rescind" a prior revocation notice in order to ignore an ALJ ruling on the revocation of the exact facility on the exact grounds previously asserted.

Moreover, even if the new statute changed the law, which it did not, nothing made it retroactive. The administrative centralization that D.C. counsel claimed was based on this provision did not take effect until October 2004, after the ALJ had issued a decision on August 6, 2004, to stay proceedings until the Court of Appeals issued its decision on the merits.

Apparently recognizing the lack of a legal or factual basis for this action, in the U.S. District Court, D.C. counsel contended that the DCRA ALJ's August 6, 2004 order was "equivocal" in staying proceedings until the Court of Appeals decided the matter. Ex. 6, p. 3. D.C. Counsel told the court orally that there was a tape recording of the ALJ's Order. However, instead of candidly quoting the transcript or providing the tape to the parties and the court, D.C. counsel chose instead to claim that no "current certified" copy existed so that counsel could then selectively paraphrase the ALJ's ruling. However, even D.C. counsel's careful paraphrasing proves that the ALJ ruling was unequivocal.

Bannum's motion for a stay to the DCRA on August 4, 2004 had expressly asked the ALJ to stay any revocation proceedings until the Court of Appeals had issued a decision on the merits of its appeal of the BZA's decision on the building permit. Ex. 7.

D.C. Counsel admitted that the ALJ had "granted Bannum's motion for continuance in light of Bannum's appeal of the BZA decision to the D.C. Court of Appeals." Ex. 6, p. 3. The supposed "equivocal" paraphrase was that Bannum's counsel had asked the ALJ regarding scheduling of "any future administrative hearing" (emphasis added) since the ALJ had explained that there was an impending reorganization of the OAH. D.C. counsel then argued that the order did not stay "all further administrative hearings."

D.C. counsel's argument is sophistry and must be rejected. While "all further hearings" were not stayed, after the ALJ granted Bannum's motion in light of the Court of Appeals proceeding which would finally decide whether the BZA's March 31, 2004 decision would be reversed or affirmed, the only "future" or "further administrative hearing" that could possibly take place consistent with that order would only occur if the Court of Appeals affirmed the BZA's decision. This is because, as D.C. counsel and DCRA have admitted, the sole reason for DCRA's intended (and now actual) revocation of the CofO was the BZA's decision on the building permit. Thus, if the Court of Appeals reversed the BZA, there will be no basis for any future or further administrative action on the revocation. Therefore, even the supposed "equivocal" statement paraphrased by D.C. counsel proves that the ALJ's valid order staying revocation proceedings until the Court of Appeals decided the case on the merits.

Conclusion and Renewed Request for a Stay

Bannum respectfully requests the BZA to stay DCRA's revocation of Bannum's CofO until the Court of Appeals merits panel decides the case on the merits for the reasons given above and the equities stated in Bannum's initial motion. Taking this step is the right thing to do as it would enforce an unequivocal DCRA ALJ order that DCRA should have given effect.

Further, it will maintain the status quo without harm to any party. Before the U.S. District Court, D.C. counsel could point to no special harm to the public or any one else from maintaining the status quo. In contrast, the harm to Bannum will be immediate through the effective loss of its appeal rights (since the appeal will be moot) and the special harm to its business and reputation, as well as damages that can never be recovered.

Finally, the BZA should carefully consider the impact on the BZA of DCRA's totally unsupported "interpretation" of D.C. Code Ann. §2-1831(b) and the "regulations". Under DCRA's interpretation, an ALJ will no longer review any DCRA zoning decisions—they will be immediately appealed to the BZA along with motions to stay any revocation orders. There is no other legal recourse for a person affected. This will radically increase the BZA's case load to cover cases which, in the past, have been correctly and satisfactorily resolved by DCRA ALJs' review without BZA involvement. For these reasons, Bannum respectfully requests that the BZA grant its request for a stay until the Court of Appeals panel assigned to the appeal decides the case on the merits.

Respectfully submitted,



Shawn C. Whittaker, Esq.
Michael A. Gordon, Esq.
Counsel for Bannum, Inc.

cc. Bennett Rushkoff, Esq., DCRA
Donald C. Temple, Esq., ANC 5-B[2]

[2] Mr. Temple, counsel for ANC 5-B in the first BZA proceeding on the building permit, failed to timely appeal the issuance of the Certificate of Occupancy to Bannum and thus, is not a party to this proceeding. A courtesy copy is being furnished to Mr. Temple solely to keep him informed. He was properly excluded from participating in the August 6, 2004 DCRA ALJ proceeding and the U.S. District Court TRO hearing. Apparently in response to his exclusion, Mr. Temple submitted false statements to the DCRA regarding alleged "fraud" by Bannum and representations of Bannum's revenues from its contract with the Bureau of Prisons, allegations which he knows have no basis in fact or law. Because of these inflammatory, unnecessary, and unbecoming actions, Bannum requests that Mr. Temple not be permitted to participate in this BZA proceeding in any manner.

EXHIBIT 1

District of Columbia Court of Appeals

FILED
MAY - 4 2005
DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 04-AA-345

BANNUM, INC.,

Petitioner,

v.

DISTRICT OF COLUMBIA, BD. OF ZONING ADJUSTMENT,

Respondent,

and

REGINA JAMES,

Intervenor.

BEFORE: Terry and Glickman, Associate Judges, and Steadman, Senior Judge.

ORDER

On consideration of the petitioner's motion to stay, and respondent's opposition, it is

ORDERED that petitioner's motion to stay is denied. This court lacks jurisdiction to stay revocation of the order in question since no petition for review of that decision has been filed and the matter is currently and properly before the respondent. *See* D.C. Code § 6-641.07 (f) (2001); 11 D.C.M.R. § 3200.2 (2003). In addition, petitioner advances the same arguments for stay which this court has previously rejected; it has not shown either a likelihood of success on the merits of its claims or the existence of any irreparable harm. *See Barry v. Washington Post, Co.*, 529 A.2d 319, 321 (D.C. 1987).

PER CURIAM

Copies to:

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Donald M. Temple, Esq.
1229 15th Street, NW
Washington, DC 20005

dpt

EXHIBIT 2

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR

May 4, 2005

BANNUM, INC.
c/o Shawn C. Whittaker, Esq.
Suite 340
9055 Comprint Court
Gaithersburg, Maryland 20877-1310

Re: 2210 Adams Place N.E.: Bannum's Request for a Stay of Revocation

Dear Mr. Whittaker:

This letter acknowledges receipt of Bannum's April 25, 2005 letter requesting a stay of the revocation of the certificate of occupancy (C/O # 53679 issued 5/2/2003)[1] under which your client, Bannum, Inc., currently operates a "Temporary Correctional Institution on leased property for a period not to exceed three years, with an expiration date of May 2, 2006. The revocation is effective May 5, 2005 pursuant to an extension granted by the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) at the request of the trial court in Bannum's recently filed TRO action.

As you correctly state in your letter, the DCRA's notice of revocation is based solely on a March 2004 Board of Zoning Adjustment (BZA) decision (see BZA Appeal # 16998) that the agency erred in issuing the building permit upon which certificate of occupancy was predicated. Although DCRA considered the arguments put forth in your April 25, 2005 letter, it declines to base its decision on your request by deciding those issues. Instead, DCRA concludes that your comments and objections are not sufficient to warrant extension of the revocation date, or recission of the notice of revocation, where they do not address the fact that DCRA's revocation notice is based on a finding of error by the BZA.

The April 21, 2005 notice of revocation is unambiguous as to your right of appeal of this action to the BZA. You have taken the necessary steps to preserve your right of appeal by filing with the BZA not only a motion to stay DCRA's enforcement action, but also an appeal of the notice of revocation.

[1] In its April 21, 2005 notice of revocation, DCRA invited Bannum to submit comments and objection in opposition to the revocation. The DCRA treats Bannum's April 25, 2005 letter as the invited objections and comments.

Please be advised that, notwithstanding the appeal filed before the BZA, nothing in this letter should be construed to foreclose DCRA's right to enforce the occupancy or use of the building without a certificate of occupancy.

You may contact my office at 202-442-4576. Thank you in advance of your cooperation.

Sincerely,

Toye Bello
Zoning Administrator

EXHIBIT 3

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.

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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EXHIBIT 4

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

JOAN BLACK, et al.,	)	
Plaintiffs	)	
	)	**Case No. 03-CA-1639**
v.	)	**Calendar 7**
	)	**Judge Kravitz**
DISTRICT OF COLUMBIA, et al.,	)	
Defendants	)	

ORDER DENYING DEFENDANT BANNUM, INC.'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Bannum, Inc. ("Bannum") has asked the Court to enjoin the District of Columbia Department of Consumer and Regulatory Affairs from revoking the certificate of occupancy for the halfway house operated by Bannum at 2210 Adams Place, N.E. Bannum contends that an injunction is necessary to maintain the status quo until the District of Columbia Court of Appeals resolves Bannum's pending appeal of the Board of Zoning Adjustment's ruling regarding Bannum's building permit for the same premises.

On May 4, 2005, the District of Columbia Court of Appeals denied Bannum's motion for a stay of the District's revocation decision, in part on the ground that Bannum had failed to show "either a likelihood of success on the merits of its claims or the existence of any irreparable harm." For these same reasons, it is this 5 day of May 2005

ORDERED that Bannum's motion is **DENIED.**

Neal E. Kravitz

Neal E. Kravitz, Associate Judge
(Signed in Chambers)

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EXHIBIT 5

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BANNUM, INC., Petitioner,	:	
v.	:	No. 04 AA 345
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,	:	
Respondent,		
REGINA JAMES, ANC 5B COMMISSIONER, Intervenor	:	

THE DISTRICT OF COLUMBIA's COMBINED MOTION TO DISMISS BANNUM'S "SECOND RULE 18 MOTION FOR STAY AND INJUNCTION" AND OPPOSITION TO THE MOTION

INTRODUCTION

Petitioner Bannum, Inc. is a company that operates a 130 - bed "community corrections center ("CCC") for felony inmates under a contract with the Bureau of Prisons ("BOP") in a converted warehouse at 2210 Adams Place, N.E., in a commercial-manufacturing zone near the National Arboretum in Ward 5.

Bannum asks this Court to enjoin the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") from proceeding with a notice to revoke Bannum's certificate of occupancy to operate the CCC.[1] The DCRA's notice states

[1] Bannum has also filed emergency motions seeking injunctions barring the DCRA's action in the federal district court and in the Superior Court. *See, Bannum, Inc. v. Board of Zoning Adjustment, et al.*, No. 1:05-CV-00858 (D.D.C.) (filed April 29, 2005); *Black v. D.C.*, No. 03 CA-1369 (Sup. Ct. D.C., filed app. April 49, 2005). The District Court and Superior Court have not yet ruled on the motions in those cases.

that it intends to revoke the CO because it was issued in error in that the zoning regulations do not permit community corrections centers in the zone district in which the CCC is located.[2] The DCRA decision is based on a decision of the Board of Zoning Adjustment to invalidate Bannum's building permit for the CCC because the BZA, the final arbiter of the zoning regulations, determined that the zoning regulations do not permit CCCs in the zone district in which Bannum operates.[3]

The motion should be dismissed or denied for any one of a number of reasons. First, Bannum previously filed virtually the same emergency motion in this Court, making the same arguments, and requesting the same relief. The Court denied Bannum's motion.[4] This Court's denial is law of the case.

Second, the motion should be dismissed on exhaustion grounds because Bannum has not satisfied the requirements of D.C. Ct. App. R. 18 that it first seek a stay from the agency and show that the agency denied the request.

Third, this Court lacks jurisdiction over the motion because the motion, filed in case no. 04 AA -345, seeks injunctive relief against a non-party in that appeal, to enjoin a decision not at issue therein.

Finally, the motion should be denied on the merits because Bannum cannot satisfy any of the requirements for a stay or injunction. Bannum's motion regurgitates the

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[2] (Ex. A, April 21, 2005 notice of revocation, attached). The DCRA's notice states that it will become effective ten days from the date of issuance. That is May 1, 2005. However, DCRA Director Julie Lee advised undersigned counsel that the revocation will become effective on Thursday, May 5, 2005, unless the agency decides to stay the revocation pending review of objections filed by Bannum, or to rescind the proposed revocation based on Bannum's objections.

[3] The BZA's decision is the subject of Bannum's appeal to this Court in No. 04 AA 345.

[4] *See*, Ex. B, attached, August 5, 2004 order denying Bannum's first Rule 18 motion for a stay and injunction.

arguments it made before this Court in its prior stay motion, in proceedings before the BZA, and/or in briefs filed in this Court on the merits in appeal no. 04 AA 345 (the appeal of the BZA's decision to revoke Bannum's building permit). The irreparable harm that Bannum alleges from revocation is both speculative and purely financial-- lost profit, contractual penalties under the BOP contract, and so on. As a matter of law, that is not irreparable harm. As a private contractor for the BOP, Bannum has no standing to allege irreparable harm to the BOP from any closing of the CCC. BOP has not intervened in any of the agency or court proceedings involving revocation of Bannum's certificate of occupancy or building permit. It plainly does not consider its interests to be adversely affected by the D.C. government's actions concerning one of its private contractors.

Bannum also cannot establish that it has a likelihood of success on the merits of its as yet unfiled appeal of the DCRA's proposed revocation. Bannum claims that the DCRA's pending revocation of its CO is erroneous because it relies on the BZA's decision to invalidate Bannum's building permit, in particular, on the BZA's determination that the zoning regulations do not permit CCCs in the zone district in which Bannum's CCC is located. According to Bannum, the DCRA's revocation of its CO cannot be sustained because the BZA's interpretation of the zoning regulations is erroneous. This Court affords great deference to the BZA's decisions. The BZA's interpretation of the zoning regulations is reasonable, and Bannum's claims of error in the BZA's decision are wholly lacking in merit. Nor can Bannum, for all these reasons, satisfy the remaining requirements for a stay: that the public interest weighs in favor of a stay, and that the public will not be harmed by a stay.

BACKGROUND

In late 2002, Bannum applied to the DCRA for a building permit to make renovations to a warehouse in a CM-2 zone district that Bannum had leased in order to operate a CCC under contract with the federal Bureau of Prisons. (Ex. C, BZA March 31, 2004 dec. at 6, ¶¶ 30-32). In January 2003, the DCRA issued a building permit to Bannum. (Ex. C at 6, ¶¶ 34-36). DCRA issued the permit based on its determination that the CCC was a temporary detention or correctional institution. That use is permitted in zone district CM-2 under § 801.7 (k) of the zoning regulations. 11 D.C.M.R. § 801.7 (k) (2003). Section § 801.7 (k) permits this use in CM zone districts at a matter of right, but for a period not to exceed three years. *Id.*

Regina James, the Chair of Advisory Neighborhood Commission ("ANC") 5B, appealed to the BZA from DCRA's issuance of the building permit. (Ex. C at 1). Following five days of hearings, numerous submissions and motions, the BZA issued a decision on March 31, 2004. (Ex. C.). The BZA concluded, in a seventeen page decision containing 50 findings of fact and extensive legal analysis, that the building permits were invalid because the CCC was not a "temporary detention or correctional institution" to operate for no more than three years within the meaning of 11 D.C.M.R. § 801.7(k). (Ex. C at 1, 8, 13-16). There is no other use allowed in CM 2 zones that could apply to Bannum. After the BZA issued its decision, the DCRA issued a notice of intent to revoke Bannum's certificate of occupancy, based on the BZA's decision.

Bannum moved for reconsideration and a stay of the BZA's decision. (Ex. D, Aug. 26, 2004 order denying motion). The BZA denied the motion. (Ex. D). Bannum then petitioned this Court for review of the BZA's decision. The appeal was assigned

case no. No. 04 AA 345. On July 30, Bannum filed an emergency motion for a stay and injunction in this Court. Bannum sought to stay, not only the BZA's decision, but also any DCRA proceedings to revoke Bannum's certificate of occupancy. On August 5, 2004, this Court denied the motion for a stay. (Ex. B, attached). On August 6, 2004, a DCRA administrative law judge granted Bannum's request to postpone the hearing on the CO revocation. The ALJ then referred the case to the Office of Administrative Hearings ("OAH"). (Bannum mtn. at 1). The OAH is the new centralized administrative hearing agency that assumed the administrative hearing functions of DCRA and many other District agencies, effective October 1, 2004. *See,* D.C. Code § 2-1831 generally, and § 2-1831.03(b)(2) (transferring adjudicated cases under DCRA jurisdiction to OAH effective October 1, 2004) (2004 supp.).

Upon further review of applicable regulations, the DCRA determined that BZA and not OAH, had jurisdiction over any appeals of zoning related decisions to revoke certificates of occupancy. *See,* 12A D.C.M.R. § 110.5.6(2004); 11 D.C.M.R. § 3200.2 2004).[5] Accordingly, on April 21, 2005, DCRA rescinded the prior notice of revocation and issued a new, corrected one. (Ex. A, notice of revocation). The corrected notice

[5] DCRA regulation 12A D.C.M.R. § 110.5.6(2004) provides that: "any person aggrieved by a decision to ...revoke[ ] a Certificate of Occupancy may appeal the action to the Board of Zoning Adjustment, pursuant to D.C. Official Code Sec. 6-641.09 (2001) and the District of Columbia Zoning Regulations." The zoning regulations, at 11 D.C.M.R. § 3200.2 (2004), authorize appeal to the BZA of any zoning related decision to grant or deny certificates of occupancy or building permits. *See, also Walsh v. BAR*, 826 A.2d 375, 377 (DC 2003) (holding that the Board of Appeals and Review lacked jurisdiction over an appeal of a DCRA decision to fine a landlord for operating without a certificate of occupancy because only BZA had jurisdiction over matters involving the zoning regulations and the fines involved violations of the zoning regulations); *Felicity's v. BAR*, 817 A.2d 825 (D.C. 2003) (holding that BAR lacked jurisdiction to hear appeal of DCRA decision to fine cultural center for operating in violation of zoning regulations; appeal should have been to BZA).

stated that Bannum could file objections to the proposed revocation, and could appeal the decision to the BZA. (Ex. A at 1-2). We have been advised by DCRA and Bannum's counsel that Bannum filed objections and a request for a stay with the DCRA, as well as an appeal to BZA and a request that BZA stay the decision pending appeal to it. We understand that those stay requests are still pending, and we will advise the Court immediately if either of those agencies acts on the stay motions.

ARGUMENT

I. The Motion for a Stay and Injunction Should Be Dismissed On Law of the Case, Jurisdictional and Exhaustion Grounds

This Court previously denied a prior emergency motion by Bannum that sought the same relief and made the same arguments. Bannum's first "Rule 18 Motion for a Stay and Injunction" in case no. 04 CV 345 sought to enjoin the DCRA from revoking its certificate of occupancy. It also sought to stay the BZA's decision to revoke Bannum's building permit. In denying the earlier stay motion, the Court rejected the same arguments that Bannum makes in this motion. The Court's denial of Bannum's prior motion is law of the case.

"The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another [judge] of coordinate jurisdiction.'" *Pannell v. District of Columbia*, 829 A.2d 474, 477-78 (D.C. 2003), *quoting Tompkins v. Washington Hospital Center*, 433 A.2d 1093, 1098 (D.C. 1981). "'The analysis focuses on whether the question initially decided is substantially the same as the issue being presented and whether the court's first ruling was deemed to be final. " *Pannell, supra, quoting Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10, 12 (D.C. 1983). "The doctrine applies 'when (1) the motion under consideration is

substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law." *Pannell, supra, quoting P.P.P. Productions, Inc. v. W & L, Inc.*, 418 A.2d 151, 152 (D.C. 1980). The doctrine discourages "judge shopping and multiple attempts to prevail on a single question." *Tompkins v. Washington Hospital Center*, 433 A.2d 1093, 1098 (D.C. 1981)

All three law of the case criteria are met here. Bannum's first Rule 18 motion sought the same relief and made the same arguments. This Court's *per curiam* decision to deny the motion is final, particularly because the Court stated in its order that it denied the motion "on the merits." (Ex. B, order). Bannum does not suggest, much less argue, that this Court's denial of its first Rule 18 motion is "clearly erroneous in light of newly presented facts or a change in substantive law." *Pannell*, 829 A.2d at 477-78.

This Court should also dismiss Bannum's motion on exhaustion grounds because Bannum has not satisfied the requirements of D.C. Ct. App. R. 18 that it first seek a stay from the agency and show that the agency denied the request. Rule 18 requires that the party seeking a stay show that it sought a stay from the agency, and that the agency denied it, or that it would be impracticable to move first before the agency for a stay, before the party seeks a stay in this Court. D.C. Ct. App. R. 18(a). As stated above, we have been advised that Bannum has requested that the DCRA stay its decision pending appeal, and also asked the BZA to stay the DCRA's notice pending appeal to the BZA. Neither the DCRA nor the BZA have as of yet denied the stay motions, but we will advise the Court once either agency acts on the stay motions. Agency denial of a stay motion is a prerequisite to a Rule 18 stay motion in this Court.

Bannum cursorily claims that it "will likely be futile" to await a stay from the BZA because the BZA previously denied its motion for a stay in a different case. (Bannum mtn at 2-3). Bannum is referring to the BZA's denial of Bannum's motion for a stay of the BZA's March 31, 2004 decision invalidating Bannum's building permit. [6] Bannum sought the stay there after the BZA had already issued a decision on the merits in that case. Bannum's request to the BZA is in the same posture as its request to this Court. This Court previously denied a stay. It is no more "futile" to go to the BZA than to come to this Court.

Finally, the motion should be dismissed because it seeks injunctive relief against a non-party to this appeal, concerning a proceeding that is not at issue in this appeal. The appeal before the Court in No. 04-AA 345 is from the BZA's March 2004 decision to invalidate Bannum's building permit on the grounds that Bannum's CCC is not permitted in the zone district in which it is located. Bannum now seeks a stay and injunction enjoining a *different* agency, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") from taking different action--- revoking Bannum's certificate of occupancy. The BZA and DCRA are separate and independent agencies, and the BZA has no control over the actions of the DCRA. Bannum is not only attempting to bring a new party into *this* case, it is attempting to bring a new dispute to it. It is not permitted to expand the scope of this proceeding in this manner.

[6] *See*, Ex. D, BZA's August 26, 2004 decision denying Bannum's motion for reconsideration and stay of the BZA decision to invalidate Bannum's building permit.

II. Alternatively, The Motion Should be Denied Because Bannum Cannot Satisfy Any of the Requirements for Injunctive Relief

To prevail on a motion for a stay or injunction, the movant must show that s/he is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987); *In re Antioch University*, 418 A.2d 105. 109 (D.C. 1980); *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 104 U.S. App. D.C. 106, 110, 259 F.2d 9212, 925 (1958). Bannum cannot satisfy any of these requirements.

A. Bannum Will Not Suffer Irreparable Harm

In determining whether to grant an injunction, "the most important inquiry is that concerning irreparable injury....because the primary justification for the issuance of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 22 (D.C. 1993) (internal citations omitted). Bannum cannot satisfy this requirement.

Bannum alleges that if the stay is not granted, and DCRA brings an enforcement action to close it for operating without a certificate of occupancy, it will lose revenues, monies invested, employees, possible future contracts with BOP, and incur penalties for breach of its existing contract with BOP for operation of the D.C. CCC. (Bannum mtn. at 22). Bannum also alleges that BOP will be irreparably harmed by the action.

There are several defects in this argument. First, Bannum does not allege imminent and irreparable harm directly from the DCRA decision to revoke its certificate

of occupancy. Rather, the purported harm is from closure of the facility, based on a future enforcement action by DCRA. Second, the harms Bannum alleges are only monetary. They are lost profitS, contractual penalties, loss of business and loss of employees. Bannum does not allege that the decision would threaten the very existence of its business, and it appears from the record in no. 04 AA 345 that the DC CCC contract is one of many that Bannum has with BOP all over the country. It is beyond cavil that monetary damages do not, as a matter of law, constitute irreparable harm. *See, e.g., Group Ins. Admin.*, 633 A.2d at 22-23. This applies to loss of income, lost profits, and other economic loss, unless the loss threatens the very existence of the movant's business. *Group Ins. Admin.*, 633 A. 2d at 23 (internal citations omitted; also collecting cases); *Sampson v. Murray*, 415 U.S. 61, 90-91 (1974) (applied to job loss).

Third, any assertion as to harm caused to BOP must be dismissed out of hand. (Bannum mtn. at 4, 22-23). BOP is not a party. As a private contractor for the BOP, Bannum has no standing to allege irreparable harm to the BOP from the DCRA's action. BOP has not intervened in any of the agency or court proceedings involving revocation of Bannum's certificate of occupancy or building permit and there is no competent evidence of any harm to BOP. BOP plainly does not consider its interests to be adversely affected by the D.C. government's actions concerning one of its private contractors. The assertions that BOP's ability to operate the District's prisons will be compromised by the decision are pure speculation. The BOP certainly has space elsewhere for these inmates.

B. Bannum Is Not Likely to Succeed on the Merits

i. The BZA's Decision Reasonably Interprets The Zoning Regulations And Is Supported By Substantial Evidence

Bannum's sole claim of error in the DCRA decision is that it relies on an ostensibly erroneous interpretation of the zoning regulations by the BZA in the BZA's decision to revoke Bannum's building permit. As mentioned previously, the BZA's decision is currently pending before this Court in No. 04 AA-345 and has been fully briefed by the parties. [7] Bannum has a heavy burden to establish that it is likely to succeed on the merits.

"It is well established that this court 'must uphold decisions made by the BZA if they rationally flow from findings of fact supported by substantial evidence in the record as a whole.'" *Watergate West, Inc. v. District of Columbia Board of Zoning Adjustment*, 815 A.2d 762, 765 (D. C. 2003); quoting *Draude v. District of Columbia Board of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990). "In other words, this Court may not substitute [its] own judgment [for that of the BZA] so long as there is a rational basis for the BZA's decision." *Watergate West, supra.*

This Court gives "particular deference" to BZA's interpretations of its governing statute and regulations. *Watergate West, supra; see, also Georgetown Residents Alliance*

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[7] Bannum also suggests that the DCRA is barred from revoking its CO because, in August 2004, a DCRA ALJ in DCRA's since abolished Office of Adjudication postponed any hearing on a *prior* notice of revocation issued to Bannum in light of the pending appeal of the BZA decision in No. 04 AA 345. (Bannum mtn. at 1-2). This "law of the case" argument is specious. The ALJ's decision to grant Bannum's request to postpone the prior hearing is not law of the case because it is a non-final ruling on a procedural request. *Compare, Pannell,* 829 A.2d at 477-78 and *supra* at 6-7, discussing the requirements for law of the case.

v. District of Columbia Board of Zoning Adjustment, 816 A.2d 41, 45 (D.C. 2003). "'When the BZA's decision turns on its interpretation of a regulation that agency is charged with implementing, that interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation.'" *Watergate West, supra at 765; quoting Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment,* 749 A.2d 1258, 1262 (D.C. 2000); *see also Sisson v. District of Columbia Board of Zoning Adjustment,* 805 A.2d 964, 968-69 (D.C. 2002) (BZA interpretation must be affirmed, even if another is equally reasonable, unless plainly erroneous or inconsistent with language or purposes of provision). Bannum cannot show that it is likely to succeed on the merits under this deferential standard of review.

The BZA's interpretation of § 801.7(k) is entirely consistent with its language and intent. The regulation permits a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years" in a CM-2 zone. The zoning regulations do not refer to a "community corrections center," which is what Bannum calls its facility. The zoning regulations do not define the terms in § 801.7(k). 11 D.C.M.R. § 199.2, the general definitions section of the zoning regulations, provides that "[w]ords not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary.*" However, as the BZA observed, resort to the dictionary to consider the definitions of the words "temporary," "detention," "correctional" and "facility" provides little help in determining the meaning of the entire term and it appears that the words were intended to be read together to describe a very specific type of use. (Ex. C, BZA dec., at 14-15). The BZA could not turn to past interpretations of the provision, because no institution has ever operated in the District under § 801.7k. (Ex. C, BZA dec. at 4).

Particularly given the ambiguity of § 801.7(k), the BZA properly considered its legislative history. The Zoning Commission notice of public hearing for the proposed regulation, the Zoning Advisory Council Final Report to the Zoning Commission, the Zoning Commission's order approving the regulation, and the hearing testimony before the BZA established that the regulation was promulgated in response to overcrowding at the D.C. Jail, and was intended to give the Department of Corrections flexibility to reduce the overcrowding by permitting it to construct temporary correctional facilities in CM zones for overflow from the D.C. Jail while it constructed permanent facilities. (Ex. C; BZA dec. at 4, 15-16). However, the DOC never took advantage of the regulation, and no entity has ever operated in the District under this regulation. (Ex. C at 4). The BZA reasonably determined that the regulation was not intended to encompass a facility like Bannum's CCC, which, as Bannum's own evidence before the BZA proved and the BZA found, is a rehabilitative transitional facility that is not secure, employs no guards, houses residents nearing the end of their sentences, permits them to come and go with few restrictions, and does not temporarily house overflow inmates while other facilities are built to house them. Ex. C at 6-8, 15; Rathkopf, *The Law of Zoning and Planning*, §§ 5:11 and 5:12 at 5-27 to 5-28 (2001) (where meaning of term is ambiguous, deference should be given to contemporaneous expressions of legislative intent and purpose).

The BZA also reasonably found that the CCC was not "temporary" or for a "period not to exceed three years," as required under the regulation. As the BZA found, the contract awarded to Bannum is for a one or two year base period, with three or four one year option periods, to be exercised by the BOP at its discretion. (Ex. C at 5, 16). Bannum's lease runs concurrently with the contract and thus was for up to a five year

period. (Ex. C at 4-5, 16). BOP clearly considered the contract to be for a five year total period. In an April 4, 2001 letter that it drafted for Bannum's use in making required notifications to government officials informing them that it was seeking the contract, the BOP stated that: "[t]he total term of the proposed contract is 5 years." (No. 04 AA 345, administrative record at 1367). Bannum used this language, verbatim, in sending notification letters to District officials one week later. (No. 04 AA 345, JA at 95-106). Bannum also referred elsewhere in its letters to "the five year contract term" of the BOP proposed contract. (*Id.* at JA 95, 98, 101).

Bannum claims that the BZA erred because the Bureau of Prisons considers its CCC to be a "correctional institution" and "place of confinement. (Bannum mtn. at 7-8 and exs. cited thereto). That the BOP may consider a CCC to be a correctional institution has no relevance to the determination as to what the Zoning Commission intended when it enacted the regulation.

Bannum also maintains that the legislative history supports its use and not the BZA's determination. It points out that the Zoning Advisory Council stated that "'the Department of Corrections needs the *flexibility* provided by this amendment.'" (mot. at 8-9). Bannum asserts that the BOP needs the flexibility that the Zoning Commission had the foresight to allow at the time the regulation was promulgated. (*Id.*). It also argues that the fact that the regulation remains in effect after 33 years, and that former Lorton prisoners are now lodged in federal correctional institutions around the country, further suggests that the CCC is a permitted use under the regulation. (*Id.*). The only reasonable interpretation, according to Bannum, is that the regulation provides flexibility to address evolving correctional needs through temporary correctional facilities, such as

the CCC. (*Id.*). All Bannum demonstrates is that it reads the regulation and legislative history more expansively than did the BZA. It does not establish that the BZA's interpretation is erroneous. *See, e.g., Providence Hospital v. DOES*, 2004 D.C. App. LEXIS 406 at *7 (D.C. July 29, 2004) (court must affirm agency interpretation of its governing statute if reasonable even if there is an alternative reasonable construction).

Bannum differs with the BZA's determination that its use of the CCC was not temporary or for a period not to exceed three years is "untenable." (mot. at 9-10). According to Bannum, its five year renewable contract with BOP and similar year lease merely show that it was complying with the regulation's three year requirement, but wanted to preserve its option to seek a variance thereafter to continue to operate the facility. (mot. at 9-10). We do not believe that Bannum made this argument before the BZA. Further it is wholly unclear whether Bannum could seek a variance to continue a use that the regulation expressly limits to three years. Such a result would seem to permit an end run around § 801.7(k)'s unqualified requirements that the use be limited to three years and be temporary. It also undermines Bannum's argument that CCC was to operate for no more than three years. The BZA reasonably determined, based on the lease, BOP contract, and record as a whole, that Bannum's use of the CCC was not intended to be limited to three years as required by § 801.7(k). Bannum cannot show otherwise. [8]

[8] Bannum agrees with the BZA's determination that it is not a community based residential facility. (Bannum mot. at 11-14). The zoning regulations do not permit CBRFs of any size in CM zones. 11 D.C.M.R. § 801.2.

Bannum's remaining assertions of error in the BZA's decision may be quickly dispatched.

ii. . The BZA's Decision Does not Violate the Constitution

Bannum claims that the BZA's decision violates the Supremacy Clause of the Constitution and "due process." the Equal Protection Clause of the Fifth Amendment. (Bannum mtn. at 18-20). Neither claim was made before the agency. They cannot be raised now. *Glenbrook Road v. District of Columbia Board of Zoning Adjustment,* 605 A.2d 22, 33 (D.C. 1990). In any case, the claims are without basis.

According to Bannum, the National Capitol Revitalization Act, 111 Stat. 251; codified in relevant part at D.C. Code § 24-101 (2001), under which the federal government assumed responsibility for handling District prisoners, preempts the BZA's interpretation of its zoning regulation because the regulations restrict Bannum's ability, as a private contractor for BOP, to locate wherever it wants to in order to operate a community corrections center under contract with the BOP. (*Mot.* at 18-19).

State law may be preempted by federal law under the Supremacy Clause where Congress expressly so states in the federal law, where Congress evinces a clear intent to occupy an entire field and the state law is within that field, or where, as Bannum asserts here, the state law conflicts with the federal law, making it impossible to comply with both. *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581 (1987). The zoning laws have traditionally been considered a local government function over which local governments have broad power. *Schad v. Mount Ephraim,* 452 U.S. 61, 68 (1981).

The restriction at issue in the District's zoning regulations on the locations of CCCs simply does not conflict with the NCRA's transfer of District prisoners to BOP

control. The BOP does not consider there to be a conflict. The BOP RFP and contract award to Bannum for the D.C. CCC make plain that they are subject to the District's zoning regulations, and that those regulations control. The RFP states that the contractor is required to be in compliance with all local zoning laws. No. 04 AA 345, AR 1146. It required bidders to submit proof of all necessary zoning approvals. *Id.* at AR 1146-47. Bannum's preemption argument is a repudiation of the contractual obligations it undertook with BOP.

Bannum's argument is essentially one for immunity from District zoning law. Courts have rejected similar attempts by private contractors for the federal government in various contexts. *See, e.g. International Bank for Reconstruction and Development v. District of Columbia,* 171 F.3d 687, 690-94 (D.C. Cir. 1999) (private cafeteria contractor for World Bank cannot invoke tax immunity of Bank to avoid paying District taxes).

Bannum also claims that the BZA's decision violates "Equal Protection under the Due Process component of the Fifth Amendment." (Mot. at 21). This is because, according to Bannum, the BZA decision treats Bannum differently than other similarly situated CCCs that have been permitted to operate. (Id.) Bannum points to Hope Village, which it claims is a large adult rehabilitation home and CBRF, and Community Corrections Center 4. (Mot. at 20-21).

This claim fails on the most elemental level because there was no evidence before the BZA as to how either of these facilities is similar to, or different from, Bannum's CCC. The DCRA's submission at the BZA hearing responding to the BZA's request for information as to whether any entities operated in the District under 801.7k. indicates that Hope Village is located in an R 5A zone district. It could not be an 801.7k facility

because, unlike Bannum, it is not located in a CM zone. (No. 04 AA 345, joint appendix at 975. The DCRA's submission stated that the "CCC-4," which was a DOC facility, was located in a CM zone. (*Id.* at JA 976). However, DCRA stated that it could not have been operating under 801.7k because its use was not temporary. It appeared to have been in operation as early as 1974, and to have remained in operation for at least twenty years thereafter. (*Id.* at JA 976-77). No further information was known about the nature of its operations or the zoning regulation under which it operated. (*Id.* at JA 976-77).

ii. The Agency Decisions and the ANC Appeal to BZA are not Barred by Estoppel or Laches

Bannum claims that the agencies are barred by estoppel from revoking Bannum's building permits and certificates of occupancy. (Bannum mtn. at 14-17). Bannum relies on letters it sent to various District officials and community members notifying them that it was seeking the BOP contract, the DCRA zoning administrators' informal concurrences in Bannum's letters, and the DCRA's issuance of a building permit and certificate of occupancy. (mot. at 15-17). The BZA rejected both arguments. (Ex. A at 11-12).

Estoppel is "judicially disfavored in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations." *Interdonato v. BZA*, 429 A.2d 1000, 1003 (D.C. 1981) (internal citations omitted). In order to establish estoppel, a party must satisfy each of these elements: (1) expensive and permanent improvements; 2) made in good faith; 3) in justifiable and reasonable reliance upon; 4) affirmative acts of the District government; 5) without notice that the improvements might violate the zoning regulations; and 6) equities that strongly favor the petitioner. *Interdonato*, 429 A.2d at 1003.

The failure of Mayor Williams, Chief of Police Ramsey, and Councilmember Orange to respond to Bannum's letters informing them that it was seeking the BOP contract are not affirmative acts. Bannum could not reasonably rely on the informal concurrences of the DCRA zoning administrators because: "[i]t is the Board [of Zoning Adjustment], not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations." *Murray v. BZA*, 572 A.2d 1055, 1058 (D.C. 1990) (rejecting similar estoppel argument based on zoning administrator's ruling). Nor could Bannum reasonably rely on the DCRA's issuance of the building permit in January 2003 and its May 2003 issuance of a certificate of occupancy. The ANC immediately appealed the issuance of the build permits on January 24, 2003, and Bannum was fully aware that it did so. There was adamant community opposition to the CCC. In fact, community members filed a lawsuit and unsuccessfully sought an injunction enjoining Bannum from operating the CCC. *See, Black v. D.C.*, No. 03 CA-1369 (Sup. Ct. D.C.). The DCRA commenced proceedings to revoke Bannum's CO in April 2004, and again in April of this year. Under these circumstances, Bannum could not reasonably rely on the issuance of the building permit or certificate of occupancy. *Interdonato*, 429 A.2d at 1004 (rejecting estoppel argument where petitioner knew of challenges to its application for special exception, including community opposition); *Murray*, 572 A.2d at 1058 (same). Further, any expenses incurred by Bannum by virtue of its decision to proceed full throttle with renovations in the face of the pending appeal and community opposition are a "self-created hardship" from which Bannum should not benefit. *Murray*, 572 A.2d at 1058 (determining, under "self-created hardship rule," that petitioner could not have

reasonably relied upon a Board order that they knew was on appeal and therefore not final).

Bannum also fails to satisfy the remaining elements of estoppel. There is evidence that it did not act in good faith in requesting the informal approvals from the zoning administrators or in requesting the permits. It did not provide the administrators with the BOP contract, its lease, or other information that would have showed that its use was not temporary under section 801.7k. DCRA stated that it might not have issued the permit had it known the duration of the contract and lease. It also stated that the information could be a basis for revoking the permit. Bannum failed to specify which improvements were taken in reliance on which government decision. *Wohdley Park Community Assoc. v. BZA,* 490 A.2d 628, 639 (D.C. 1985) (petitioner failed to establish with specificity that improvements were made in reliance on government action). Finally, the equities weigh overwhelmingly against estoppel. This case involves a 130 bed community corrections center that could have a significant and potentially adverse impact on the community. Further, under Bannum's logic, no party could ever appeal an agency action taken in error.

Bannum's argument that the ANC's appeal of the building permit to BZA is barred by laches also fails. Like estoppel, the application of laches in the zoning context is disfavored "because of the public interest in enforcement of the zoning laws. *Beins v. BZA,* 572 A.2d 122, 126 (D.C. 1990). "For this reason, laches 'is rarely applied [in this context] except in the clearest and most compelling circumstances.'" *Beins,* 572 A.2d at 126 (internal citations omitted). The party asserting laches must prove that it has been

prejudiced by the delay and that the petitioner's delay in objecting is unreasonable. *Beins,* 572 A.2d at 126; *Woodley Park,* 490 A.2d at 639.

The ANC did not unreasonably delay. ANC 5B was not informed of or provided with the zoning administrator's concurrences until many months after they were issued In any case, it was reasonable for the ANC to await official DCRA action in the issuance of the building permits. It appealed the issuance of the permits within one month after the first permit was issued and in less than two weeks after the second permit was issued, well within the 60 day time limit for appeal. *See, Beins,* 572 A.2d at 123, 127-28 (32 day delay in appealing issuance of permit to BZA no unreasonable delay). Bannum cannot show that it was prejudiced by the ANC's failure to take action earlier. As the BZA found, most of Bannum's expenses were incurred after it obtained the building permit. The issuance was subject to a 60 day window for appeal and the ANC promptly appealed. Bannum's expenditures were therefore taken at its own risk. Finally, Bannum never adequately explained what expenses were the result of delay by the ANC. (Ex. A at 7-8).

iii) The ANC Was an Aggrieved Party with Standing

Bannum fails to show error in the BZA's determination that Commissioner James, on behalf of ANC 5B was an aggrieved party with standing to appeal the issuance of the building permit. (Bannum mtn. at 17-18; Ex. A hereto, BZA dec. at 10-11). The BZA relied on D.C. Code § 6-641.07 and the zoning regulations. D.C. Code § 6-641.07 provides that "any person aggrieved, or organization authorized to represent such person, or [ ] any officer or department of the District of Columbia" may appeal to the BZA. The zoning regulations, at 11 D.C.M. R. § 3199.1 provide that the ANC for the area within which the property at issue is located is by definition a party to the appeal.

Relying on these provisions, the BZA reasonably held that ANC 5B was an aggrieved party entitled to appeal the issuance of the permit in its area. (JA 22).

There was also specific testimony before the BZA from Ms. James and other ANC 5B Commissioners and residents concerning how they were aggrieved by the DCRA's issuance of the permit. Regina James, ANC 5B Commission and former Chair and Joan Black, the acting chair of ANC 5B, both testified as to the adverse effects of the proposed CCC in their ANC and on the community in which they have long lived. (No. 04 AA 345, administrative record at 935-941 [Black]; 956-75 [James]). There was no error in the BZA determination.

C. Bannum Fails to Satisfy the Remaining Requirements for a Stay

Bannum cannot satisfy the remaining requirements for a stay: that the opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay. In interpreting the zoning regulations, the BZA is the arbiter of the public interest. It is not in the public interest to stay a DCRA decision to revoke Bannum's certificate of occupancy when the DCRA is doing so because the CO was erroneously issued in the first place; as the BZA's interpretation of the zoning regulations makes plain. In interpreting the zoning regulations, the BZA is the arbiter of the zoning regulations. It is not in the public interest to stay an agency action taken to effectuate the BZA's determination that the zoning regulations do not permit 130 felons to reside essentially unsupervised in a zone district across the road from the National Arboretum . The public interest requires that the stay be denied.

CONCLUSION

The motion for a stay and injunction should be dismissed. Alternatively, the motion should be denied.

Dated: May 3, 2005

Respectfully submitted,

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EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNUM, INC., Plaintiff, v. D.C. BOARD OF ZONING ADJUSTMENT, *et al.*, Defendants.	Civil Action No. 05-0858 (JDB)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

The defendants herein (collectively, "the District"), by and through undersigned counsel pursuant to LCvR 65.1(c), hereby submit this Memorandum of Points and Authorities in Opposition to Plaintiff's Application for a Temporary Restraining Order.

II. Factual and Procedural Background

On or about April 30, 2001, plaintiff Bannum applied to the Department of Consumer and Regulatory Affairs ("DCRA") for a certificate of occupancy for a "community corrections center – 100 residents, 23 staff" for 2210 Adams Place, N.E. ("the property").[1]

[1] The District does not admit the allegations of the Complaint or plaintiff's' motions except for the purposes of this opposition.

On or about October 9, 2002, Bannum applied for a building permit to convert an existing warehouse on the property into a "community corrections center" with 150 beds. DCRA granted the building permit (No. B425438) on December 12, 2002.

On January 17, 2003, DCRA issued a revised building permit to Bannum to amend the previous permit to state "3 year temporary use." *See* 11 DCMR § 801.7(k).

On or about January 24, 2003, Regina James, chair of Advisory Neighborhood Commission ("ANC") 5B appealed to the Board of Zoning Adjustment ("BZA") the December 12, 2002, grant of the building permit to Bannum. (BZA Case No. 16998).

On or about May 2, 2003, DCRA granted Bannum a certificate of occupancy for 2210 Adams Place, N.E., for a "Temporary Correctional Institutional [Use] on Leased Property For a Period Not to Exceed Three (3) Years."

The BZA held hearings on the ANC's January 24, 2003 appeal of the DCRA's issuance of the building permit on April 22, 2003; May 20, 2003; June 17, 2003; July 8, 2002; and July 22, 2003 (copy of BZA decision attached as Plaintiff's Exhibit number ("PEx.") 1, at 1). Testimony was heard from a number of witnesses, and extensive documentary evidence was entered into the record. *Id.*

The BZA deliberated on September 9, 2003 and decided at that time to grant the ANC's appeal and invalidate the building permit. It issued its written decision on March 31, 2004. *Id.* at 17. The BZA concluded, in a seventeen-page decision containing 50 findings of fact and extensive legal analysis, that the building permits were invalid. *Id.*

Bannum appealed the BZA decision to the D.C. Court of Appeals ("DCCA"). *See Bannum, Inc. v. Board of Zoning Adjustment*, No. 04-AA-345.

DCRA moved promptly to enforce the BZA decision. By letter dated April 12, 2004, DCRA informed Bannum of imminent enforcement action against the facility, in light of the BZA Order. DCRA, on or about April 30, 2004, served Bannum with a Notice of Intent to Revoke Certificate of Occupancy No. CO53679. DCRA served Bannum with a Notice of Scheduled Hearing to revoke certificate of occupancy No. CO53679, on or about July 15, 2004; the referenced hearing occurred on August 6, 2004, at 10 a.m. at the Office of Adjudication within DCRA.

At that hearing, Bannum asked for a "continuance" in light of the DCCA appeal.[2]

On July 20, 2004, Bannum filed its "Rule 18 Motion for Stay and Injunction" at the DCCA, requesting a stay of any revocation of its certificate of occupancy, asserting, *inter alia*, the "irreparable harm" of "lost profits," "significant contractual penalties for non-performance, loss of investment, loss of future contracts from its only customer, and loss of key personnel." Defendants' Exhibit number ("DEx.") 1 at 2. By order dated August 5, 2004, the DCCA denied Bannum's motion "on the merits." DEx. 2.

On October 1, 2004, the administrative hearing bodies of a number of District agencies (including DCRA) were subsumed into a new umbrella agency, the District's Office of Administrative Hearings ("OAH"). *See* D.C. Law 14-76, the "Office of Administrative Trials

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[2] The referenced ALJ decision, P.Memo at 3, did *not* unequivocally stay matters at DCRA. There is no current, certified copy of the transcript of that oral decision. On information and belief, that decision granted Bannum's motion for continuance, in light of Bannum's appeal of the BZA decision to the D.C. Court of Appeals. However, in response to a subsequent query from Bannum's counsel regarding the scheduling of any future administrative hearing, the ALJ noted the impending transfer of administrative appeals to another entity, and stated that all future motions should be directed there. Consequently, it is incorrect for Bannum to assert here that the ALJ's oral order stayed all further administrative proceedings. That order did not so hold, as the ALJ's contemporaneous comments make clear. Moreover, the DCCA has already denied Bannum's motion to stay administrative proceedings "on the merits." *See* DEx. 2 (denying DEx. 1).

and Hearings Establishment Act of 2001," effective Mar. 6, 2002, *codified at* D.C. Official Code § 2-1831.01 *et seq.* (2001 ed.); D.C. Official Code § 2-1831.03(b)(2) (as of Oct. 1, 2004, law applies to DCRA).

On or about April 21, 2005, defendant DCRA served on plaintiff a Notice of Revocation of Certificate of Occupancy Number C53679. P.Mem. at 26; DEx. 3. The notice invited Bannum to submit comments and/or objections to DCRA prior to the effective date of revocation, and notified Bannum of its appeal rights to the BZA. *Id.*

III. Argument

The Court should deny the requested relief because plaintiff's claims are substantively meritless and entirely local in character. Plaintiff's allegations each fail as a matter of law; plaintiff is not entitled to emergency injunctive relief.

Plaintiff's allegations are, to the extent even creditable, simple zoning and land-use disputes, quintessentially local issues masquerading as constitutional claims. Indeed, the local nature of plaintiff's claims is readily apparent on viewing the page after page of discussion that plaintiff offers on its arguments regarding local zoning. Plaintiff has apparently simply copied large portions of its zoning briefs in the local proceedings. Plaintiff's claims here should meet the same success as other District landowners who have tried to conflate run-of-the-mill land-use disputes into federal lawsuits. *See, e.g., JMM Corp. v. District of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 206 (D.C. Cir. 2003); *3883 Connecticut LLP v. District of Columbia*, 191 F. Supp. 2d 90, 95 (D.D.C. 2002), *aff'd*, 336 F.3d 1068 (D.C. Cir. 2003); *American Tower v. Williams*, 146 F. Supp. 2d 27, (D.D.C. 2001), *aff'd without opinion*, 50 Fed. Appx. 448 (D.C. Cir. 2002).

Defendant DCRA is Non-Sui Juris.

Public bodies have only such powers as are conferred on them by statute. Accordingly, subordinate agencies within the District of Columbia government are not subject to suit. *Blackmar v. Guerre*, 342 U.S. 512 (1952); *Community Housing Trust v. Dept. of Consumer and Regulatory Affairs*, 257 F.Supp.2d 208 (D.D.C. 2003):

> The law is clear that "agencies and departments within the District of Columbia government are not suable as separate entities." *Does I through III v. District of Columbia*, 238 F. Supp. 2d 212, 222 (D.D.C. 2002) (*quoting Gales v. District of Columbia*, 47 F. Supp. 2d 43, 48 (D.D.C. 1999) (*in turn citing Fields v. District of Columbia Dep't of Corr.*, 789 F. Supp. 20, 22 (D.D.C. 1992)); *see also Arnold v. Moore*, 980 F. Supp. 28, 33 (D.D.C. 1997) ("governmental agencies of the District of Columbia are not suable entities") (*citing Roberson v. District of Columbia Bd. of Higher Educ.*, 359 A.2d 28, 31 n.4 (D.C. 1976); *Miller v. Spencer*, 330 A.2d 250, 251 n.1 (D.C. 1974)); *Jenkins v. District of Columbia*, 1996 U.S. App. LEXIS 34431, 1996 WL 440551, *1 n.2 (D.D.C. 1996). Accordingly, plaintiff's charges against the Department of Consumer and Regulatory Affairs, the Office of the Chief Financial Officer, and the Office of Tax and Revenue shall be dismissed.

Id. at 217 (footnote omitted). *See also Kundrat v. District of Columbia*, 106 F. Supp. 2d 1 (D.D.C. 2000) ("overwhelming weight of precedent" in this Circuit holds that, absent explicit statutory authority, agencies within the District government are not suable as separate entities); *Hinton v. Metropolitan Police Department*, 726 F. Supp. 875 (D.D.C. 1989).

Thus, because defendant DCRA does not possess the legal authority to sue and be sued in its own name, plaintiff's claims against it must be dismissed.[3]

[3] To the extent plaintiff challenges the actions of defendant Board of Zoning Adjustment, those challenges belong in the D.C. Court of Appeals, which can hear all of plaintiff's purported constitutional claims. *See* D.C. Official Code §§ 11-722, 2-510(a)(1) (DCCA has jurisdiction over appeals from BZA, and is empowered to interpret the Constitution).

Plaintiff Fails to Qualify for Emergency Injunctive Relief.

In order to obtain a preliminary injunction, plaintiff must satisfy *each* prong of the following four-part test: (1) there is a substantial likelihood of success on the merits; (2) plaintiff will suffer irreparable harm should the relief be denied; (3) an injunction would not substantially injure other interested parties; and (4) the public interest will be furthered by the issuance of the requested order. *Mova Pharmaceuticals Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (*quoting CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (1958).

Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly. *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (emergency injunctive relief "is an extraordinary remedy that should be granted only when the party seeking relief, by a clear showing, carries the burden of persuasion.") (*citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (interim injunctive relief is "an extraordinary and drastic remedy")).

While a strong showing on one of the four factors may make up for a weaker showing on another, *Serono Labs. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998), a particularly weak showing on one factor may be more than the other factors can "compensate" for. *Taylor v. RTC*, 56 F.3d 1497, 1506 (D.C. Cir. 1995), *amended on other grounds on reh'g.*, 66 F.3d 1226 (D.C. Cir. 1995).

Plaintiff fails to make a satisfactory showing on *any* of the four factors, hence its application for a TRO should be denied.

The U.S. Court of Appeals for the District of Columbia Circuit decided a case on almost identical facts over 30 years ago.[4] In *Brawner Bldg.*, neighboring property owners sued to prevent the use of a residential property as a "community correctional center" or halfway house, alleging that District officials had erred in their zoning classification of the proposed facility. *Brawner Bldg.*, 442 F.2d at 848–49. The District Court awarded emergency, and eventually, permanent injunctive relief. *Id.* at 849. The Circuit *vacated* the permanent injunction and remanded, noting that, even assuming that the trial court had jurisdiction to grant injunctive relief,

> nevertheless under the doctrine of primary jurisdiction it should not have proceeded to a final determination of the merits but should have stayed the action pending an appeal to the [BZA]. This doctrine bids a court wait while the agency that has "primary jurisdiction" makes the initial determination—"until the administrative agency that has special competence in the field has ruled on [the issues]." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963). [E]ven assuming that an action is clearly within the jurisdiction assigned to a court, its sound discretion may require that the judicial tribunal wait until there is initial consideration by an agency. The reason for the doctrine is "that a court confronted with problems within an agency's area of specialization should have the advantage of whatever contributions the agency can make to the solutions." 3 K. Davis, *Administrative Law Treatise* § 19.09 at 53 (1958).

Id. at 855–56 (parallel citations and footnote omitted).

Similarly here, this Court should not exercise its jurisdiction—even assuming it exists—and grant the extraordinary relief requested by plaintiffs until the highest local court has ruled on the underlying zoning dispute.

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[4] *Brawner Bldg., Inc. v. Shehyn*, 442 F.2d 847 (D.C. Cir. 1971), was heard while the U.S. Court of Appeals for the District of Columbia Circuit was the highest court in this jurisdiction, but was decided only three weeks after February 1, 1971, which date marked the formal investiture of the D.C. Court of Appeals as the highest local court, and the end of review of local cases at the Circuit. *See M.A.P. v. Ryan*, 285 A.2d 310, 311–12 (D.C. 1971).

A. Plaintiff Fails to Establish A Substantial Likelihood of Success On the Merits.

All of the allegations in the Complaint fail as a matter of law. What plaintiff claims is a breach of its constitutional rights is nothing more than an ordinary land-use dispute.

Plaintiff's claims are essentially "state law claim[s] in federal garb." *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294 (D.C. Cir. 2000). "Purged of its spurious constitutional overtones," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985), this case is merely a dispute over local land-use law.

> [Land-use] laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

Warth v. Seldin, 422 U.S. 490, 508 (1975).

Here, plaintiff in effect challenges the District's enforcement of its zoning and building-code laws. "Such a question is not one of constitutional import; it is a question of state law and its resolution is best left to the local courts." *American Tower*, 146 F.Supp.2d at 31.

A judge of this Circuit, in a similar land-use case, recently reiterated the need for federal courts to tread carefully in matters of local concern. *See George Washington Univ.*, 318 F.3 at 213 (Henderson, J., concurring) (the majority's analysis "properly balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior.") (*quoting Gardner*, 969 F.2d at 69)). Judge Henderson also noted that federal courts should "hesitate before intervening in local land disputes[.]" *George Washington Univ.*, 381 F.3d at 213 n.2 (*quoting Gardner*, 969 F.2d at 67–68: "Federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.") (additional citations omitted).

Whatever the perceived flaws of the District's actions, they are not of a constitutional dimension. Nor are the policy matters involved in this case appropriate for resolution by a federal court, as discussed in greater detail *infra*.

1. Plaintiff's Claims are Really a Local Zoning Dispute.

Plaintiff purports to challenge an administrative decision of DCRA without exhausting its administrative remedies, but, in reality, plaintiff attempts to collaterally attack a *zoning* decision of the District. *See Brawner Building*, 442 F.2d at 856 ("A litigant entitled to permanent relief under the zoning regulations may be compelled to pursue his administrative remedies rather than be able either to resort to self-help or to seek an initial judicial determination.").

One can scarcely think of a power exercised by government that is more quintessentially local in nature than zoning. *See, e.g., Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 768 & n. 30 (1982) ("Regulation of land use is perhaps the quintessential state activity"); *Warth v. Seldin*, 442 U.S. 490, 508 & n. 18 ("[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities."); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("I am in full agreement with the majority that zoning . . . may indeed by the most essential function performed by local government"). Zoning regulations are justified by the police power of a local government to protect the public welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

And while plaintiff has appealed the BZA's decision to the DCCA, that process has not been completed, hence plaintiff's request for relief here is, at best, premature, even assuming plaintiff has proven its constitutional claims.[5]

This Circuit has recently held that trial courts should *abstain* in circumstances that are nearly identical to those present here, until the local administrative and judicial process is complete. *See JMM Corp.*, 378 F.3d at 1120.

In *JMM*, the District was attempting to revoke the certificate of occupancy of a business that was operating as a "sexually-oriented business establishment" in a zone that did not allow for such uses. *Id.* at 1119. On the very day of the previously scheduled administrative hearing at DCRA, JMM filed suit in federal court, asserting a number of constitutional violations and requesting an injunction against all pending administrative enforcement actions. *Id.* at 1119–20. The district court denied the preliminary injunction, and dismissed JMM's claims for declaratory and injunctive relief based on *Younger v. Harris*, 401 U.S. 37 (1971). The Circuit upheld the trial court's ruling, in part, because "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.*, 378 F.3d at 1120. *See also Bridges v. Kelly*, 84 F.3d 470, 476 (D.C. Cir. 1996) (federal district court may *dismiss* federal claim under *Younger* where (1) there are ongoing local proceedings that are judicial in nature; (2) the local proceedings implicate important local interests; and (3) the proceedings afford an adequate opportunity in which to raise the federal claims).

[5] As noted, the DCCA, almost nine months ago, denied Bannum's identical request for emergency injunctive relief (which asserted the same harms it now alleges).

The Circuit in *JMM* explicitly noted that the property owner there could raise its constitutional issues in the local litigation, whether that litigation begins in the Superior Court or administratively. *JMM Corp.*, 378 F.3d at 1121.[6] The Circuit also noted that the enforcement of zoning regulations, like those at issue here, constitutes an important state interest. *Id.* at 1126.

In light of *JMM*, this Court should deny plaintiff's requested extraordinary relief and stay the instant matter pending the outcome of the local proceedings.

2. *The BZA Decision is Not Preempted.*

Bannum claims that the National Capitol Revitalization Act, 111 Stat. 251; *codified in relevant part at* D.C. Official Code § 24-101 (2001 ed.), under which the federal government assumed responsibility for handling District prisoners, preempts the BZA's interpretation of its zoning regulation because the regulations restrict Bannum's ability, as a private contractor for the federal Bureau of Prisons ("BOP"), to locate wherever it wants to in order to operate a community corrections center under contract with the BOP. P.Mem. at 20–22. Plaintiff is incorrect as a matter of law.

State law may be preempted by federal law under the Supremacy Clause where Congress expressly so states in the federal law, where Congress evinces an intent to occupy an entire field

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[6] Although there is a limited exception to *Younger* abstention, the burden on plaintiff is considerable. *Id.* at 1127 (plaintiff must show "extraordinary circumstances," such as that "the pending state action was brought in bad faith or for the purpose of harassing" the plaintiff, or "where a state statute is flagrantly and patently" unconstitutional.) (*quoting Trainor v. Hernandez*, 431 U.S. 434, 446–47); *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). A plaintiff asserting a bad faith exception to *Younger* must allege *specific facts* to support an inference of bad faith. *Collins v. County of Kendall, Illinois*, 807 F.2d 95, 98 (7th Cir. 1986) (*Younger* analysis requires more than a mere allegation and more than a "conclusory" finding to bring a case within the exception). The District avers that plaintiff here has not alleged—and cannot prove—such circumstances here.

and the state law is within that field, or where, as Bannum asserts here, the state law conflicts with the federal law, making it impossible to comply with both. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). The zoning laws have traditionally been considered a local government function over which local governments have broad power. *Schad v. Mount Ephraim*, 452 U.S. 61, 68 (1981).

The BZA decision simply does not conflict with the NCRA's transfer of District prisoners to BOP control. Bannum has failed to cite *any* specific provision of federal law with which the BZA decision conflicts. Preemption is not so easily claimed.

The BOP does not consider there to be a conflict, as plaintiff's own evidence demonstrates. The BOP solicitation and contract award to Bannum for its facility make plain that they are subject to the District's zoning regulations, and that those regulations control: The solicitation states that the contractor is required to be in compliance with all local zoning laws. PEx. at 1146. It required bidders to submit proof of all necessary zoning approvals. *Id.* Bannum's preemption argument is a repudiation of the contractual obligations it undertook with BOP.[7]

Bannum's argument is essentially one for immunity from District zoning law. This Circuit has rejected similar attempts by private contractors for the federal government in other contexts. *See, e.g. International Bank for Reconstruction and Development v. District of Columbia,* 171 F.3d 687, 690–94 (D.C. Cir. 1999) (private cafeteria contractor for World Bank cannot invoke Bank's tax immunity to avoid paying District taxes).

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[7] In addition, in related litigation, Bannum has admitted that compliance with local zoning law was a *requirement* of its contract with BOP. *See Bannum, Inc. v. Citizens for a Safe Ward Five, Inc.*, No. 03-848 (PLF) (D.D.C.) (First Amended Complaint, filed Apr. 17, 2004, at ¶ 10); *Bar v. District of Columbia*, No. 03-1639 (D.C. Super. Ct.) (Memorandum in Opposition to Temporary Restraining Order, Affidavit of David Lowry, dated Mar. 11, 2003, at ¶ 7).

Courts must start with the presumption that Congress does not intend to supplant state law in fields of traditional state regulation under police power. *DeBuono v. NYSA-ILA Medical & Clinical Svcs. Fund*, 520 U.S. 806, 814 (1997). There is a strong presumption *against* preemption, which "start[s] with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted); *Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1237 (D.C. Cir. 1999) (historic police powers, entitled to presumption against preemption, include the protection of citizens' health and safety), *affirmed*, 529 U.S. 861 (2000).

Again, plaintiff has cited no language from which the Court can determine the "clear and manifest purpose of Congress" to preempt here.

Federal preemption can be express or implied. *Armstrong v. Accrediting Council for Continuing Education and Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (*citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516–17 (1992) (express preemption if federal statute contains explicit preemption language)).

"Conflict preemption" occurs to the extent a non-federal law actually conflicts with federal law, or where non-federal law is an "obstacle" to the execution of federal law. *Armstrong*, 178 F.3d at 1369; *see also, e.g., Geier*, 529 U.S. at 873–74. Conflict preemption requires "identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Id.* at 884 (citations omitted).

Here, plaintiff has cited no specific provision of federal law that "conflicts" with the BZA's decision. Plaintiff only makes repeated, vague references to the need for "flexibility" that the BOP reportedly requires. P.Mem. at 13. To be entitled to preemption here, Bannum must

show that it *cannot* comply with both the BZA decision and federal law. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (no conflict preemption if it is possible to comply with local law "without triggering federal enforcement action.").

Plaintiff has not identified a single federal requirement it would violate by complying with the BZA order. Consequently, the BZA decision is not preempted.

3. Plaintiff Has Not Been Deprived of Equal Protection.

To survive an equal protection challenge, official government action need only bear a rational relationship to a legitimate government interest, so long as no fundamental rights or suspect classifications are implicated. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439–40 (1985).

Plaintiff alleges that there are at least two similar facilities that the District "will have approved [sic]" as a result of the BZA decision. P.Mem. at 23. This claim fails on the most elemental level because there is no evidence as to how either of these facilities is similar to, or different from, Bannum's. There is no evidence which demonstrates the zoning classification of either facility, or that either facility received differential treatment. Such a sparse showing is insufficient, as a matter of law, to support a request for emergency injunctive relief.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Plaintiff has clearly failed the initial hurdle in any equal protection claim—showing how the other facilities are similarly situated.[8]

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[8] To the extent plaintiffs claim they were "singled out" for enforcement among other, similarly situated facilities the allegation cannot stand. Preliminarily, plaintiff has not shown and cannot show that any other facility has applied to DCRA for a building permit or

Plaintiff has not even begun to meet its "heavy burden of proof." *United States v. Grace*, 778 F.2d 818, 822 & n.7 (D.C. Cir. 1985). Plaintiff's request for a temporary restraining order must be denied.

4. Plaintiff Has Not Been Denied Procedural Due Process.

Plaintiffs have not been deprived of *any* constitutionally protected rights. Plaintiffs can point to no "entitlement" of which they have been denied without due process. *See Tri County*, 104 F.3d 455, 460 (D.C. Cir. 1997) (in procedural due process analysis, "the central issue is the adequacy not of [the agency director's] facts but of the *process* that he purported to follow."), *vacated in part on other grounds*, 208 F.3d 1066 (D.C. Cir. 2000).

> It is clear that state law which generates a legitimate claim of entitlement can create an interest the deprivation of which triggers application of the Due Process Clause. It is equally clear, however, that state-created *procedures* do not create such an entitlement where none would otherwise exist. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."

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certificate of occupancy in similar circumstances. Plaintiff's claim is thus akin to one for "selective prosecution," and it is well-established that plaintiffs bringing a selective prosecution claim carry a heavy burden. A party seeking to prove selective prosecution must make a *prima facie* showing both that others similarly situated were not prosecuted, *and* that the selective prosecution being complained of was improperly motivated, *i.e.*, it was based on an impermissible consideration such as race or on a desire to prevent the exercise of constitutional rights. *Id.* (*citing, inter alia, Wayte v. United States*, 470 U.S. 598 (1985)). *See also Branch Ministries, Inc. v. Rossotti*, 40 F.Supp.2d 15, 21 (D.D.C. 1999) (same).

"Government enforcement actions are entitled to the presumption that they are carried out with regularity and in good faith." *Branch Ministries, Inc. v. Richardson*, 970 F.Supp. 11, 15 (D.D.C. 1997). The executive branch has broad discretion with respect to decisions whether or not to enforce a law against a particular entity. *Id.* Selectivity, alone, does not render uneven enforcement unconstitutional; to so demonstrate, plaintiff must show that the selectivity was "improperly motivated." *Id. See also Brandon v. District of Columbia Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987) ("Not every divergence in the application [of] a law gives rise to an equal protection claim.") (citation omitted).

Plaintiffs have not, and cannot, demonstrate such improperly motivated selectivity on the part of the District.

Doe by Fein v. District of Columbia, 93 F.3d 861, 868 (D.C. Cir. 1996) (*per curiam*) (emphasis in original) (*quoting Olim v. Wakinekona*, 461 U.S. 238, 250–51 (1983) (further citations omitted)).

Assertion of a procedural due process claim requires a plaintiff to identify the process that is due. *Doe by Fein*, 93 F.3d at 869–70. Plaintiff has failed to identify the process it claims is now due.

Plaintiff had a full and fair evidentiary hearing on the merits of its zoning arguments at the BZA. Plaintiff has cited no provision of District law that requires yet another hearing on the imminent revocation of its certificate of occupancy, nor does the Constitution require one. As noted previously, DCRA's notice of revocation invited Bannum to submit comments and/or objections to DCRA prior to the effective date of revocation, and notified Bannum of its appeal rights to the BZA. *See* PEx. 3.

> Although the procedure provided was not extensive as plaintiff would have liked, and while plaintiff disagrees with the facts and law upon which the District relied . . . the District gave [plaintiff] sufficient notice and opportunity to be heard at a meaningful time and in a meaningful manner, which is all that due process requires.

American Towers, 146 F.Supp.2d at 33 (*citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (additional citations omitted). *See also Fusco v. Connecticut*, 815 F.2d 201, 205–06 (2nd Cir. 1987) ("The opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the Fourteenth Amendment.").

Even if plaintiff had shown that the District did not comply with its own procedures by failing to give it another hearing, such a "violation" is not constitutionally cognizable. *See Brandon v. District of Columbia*, 823 F.2d 644, 649 (D.C. Cir. 1987) (state does not violate individual's due process rights by deviating from its own procedures).

If local government "makes ordinary judicial process available to respondent for resolving its . . . dispute, that process is due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001) (unanimous decision). Any procedural violation here does not in itself violate the Constitution or create any interest for plaintiffs under the Due Process Clause.

The District has given, and continues to give, plaintiff all the process it is due. Plaintiff's request for emergency injunctive relief on that basis must be denied.

B. Plaintiff Has Suffered No Irreparable Harm.

An essential prerequisite to injunctive relief is a sufficient showing by the plaintiff that it will suffer irreparable harm if the injunctive relief is not granted. *See, e.g., Davenport v. Int'l Brotherhood of Teamsters,* 166 F.3d 356, 360 (1999). *See also Sampson v. Murray*, 415 U.S. 61, 88–90 (1974). Plaintiff fails to make any showing of imminent, irreparable harm and therefore its motion must fail.

At a minimum, a plaintiff seeking emergency injunctive relief must make a threshold showing of irreparable injury. *CityFed*, 58 F.3d at 747 (*citing Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989) (preliminary injunction properly denied "where moving party may have been 'likely to succeed' but did not carry burden of showing irreparable harm, since 'the basis of injunctive relief in the federal courts has always been irreparable harm.'") (*quoting Sampson v. Murray*, 415 U.S. 61, 88 (1974) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959))).

Plaintiff only alleges financial injuries. *See* P.Mem. at 27–28. Plaintiff, perhaps sensing the weight of case law, notes that "[l]oss of an entire business is not a pre-requisite for irreparable harm." *Id.* at 29. Plaintiff is incorrect as a matter of law. Contrary to plaintiff's implication, "no

citizen has a 'right' . . . to do business with the government." *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (*citing Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940)).

Overwhelming case law is clear that economic loss is *insufficient* to constitute irreparable harm unless the movant's very existence is threatened. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, plaintiff has failed to show irreparable harm because it has offered no credible proof that the very existence of its business will be threatened. *See Eastern Trans-Waste of Md., Inc. v. District of Columbia*, 758 A.2d 1, (D.C. 2000) (The "record evidence is sufficient to show the threat to ETW's continued existence without an injunction.") (*citing, inter alia, Wisconsin Gas Co.*).

Additionally, the DCCA has already denied "on the merits" Bannum's identical request for emergency injunctive relief, asserting identical feared injuries. DEx. 2.

The District should not be penalized because Bannum has structured its business so that the BOP is its only source of income, even assuming plaintiff could eventually prove the attenuated chain of causation it asserts between the BZA decision and the feared eventual loss of *all* of its federal contracts. *See* P.Mem. at 27–28.

The law is clear that economic loss is *insufficient* to constitute irreparable harm unless the movant's very existence is threatened. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, plaintiff has failed to show irreparable harm because it has not alleged nor offered proof that the very existence of its business will be threatened.

Moreover, plaintiff has known since at least September of 2003, when the BZA invalidated its building permit, that the basis of DCRA's zoning decision was legally suspect. DCRA has moved repeatedly since then to attempt to revoke plaintiff's certificate of occupancy.

Plaintiff cannot now reasonably claim "imminent" harm when it has been operating unimpeded for over 20 months.

Finally, the Circuit has cautioned against awarding emergency injunctive relief in these circumstances. *See JMM*, 378 F.3d at 1122 ("[T]he defendant in a District proceeding will not suffer irreparable injury by being foreclosed from obtaining an injunction in federal court. [T]he burden of defending an enforcement action is 'not sufficient to warrant interference by the federal courts with legitimate state efforts to enforce state laws . . . .'") (*quoting Trainor v. Hernandez*, 431 U.S. 434, 442 n.11 (1977)).

Plaintiff has failed to establish imminent, irreparable harm.

C. The Balance of Equities Favors Denying Injunctive Relief.

Plaintiff asks this Court to take the extraordinary act of enjoining the local administrative and judicial process. The balance of equities tips decidedly in favor of the defendants where plaintiff essentially is asking this Court to issue a mandatory injunction at the onset of the case. In other words, plaintiff seeks the ultimate relief at the beginning of the litigation. An injunction would substantially injure the District, its citizens, and, potentially, the administrative and local judicial process. "[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *District of Columbia v. Greene*, 806 A.2d 216, 233 (D.C. 2002) (*per curiam*) (*quoting New Motor Vehicle*).

In these circumstances, the balance of the equities favors the District of Columbia.

D. The Public Interest Favors the District.

It should go without saying that the public interest is served by allowing the District to attempt to enforce its zoning laws. It is plaintiff's financial self-interest, not the public interest, which is at the root of this complaint. The public interest here therefore favors the denial of injunctive relief.

III. Conclusion

Plaintiff has failed to satisfy the requisite elements of the four-part test for emergency injunctive relief. Accordingly, its application for a temporary restraining order should be denied.

DATE: May 2, 2005

Respectfully submitted,

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EXHIBIT 7

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August 4, 2004

VIA HAND DELIVERY
E. Savanah Little, Esquire
Chief Administrative Law Judge
Department of Consumer and Regulatory Affairs
Office of Adjudication
941 North Capitol Street N.E., Suite 9100
Washington, D.C. 20002

Re: 2210 Adams Place N.E.; Bannum's Position and Request for Postponement

Dear Ms. Little:

Bannum, Inc. presents the following letter in support of its position that Government should not revoke its Certificate of Occupancy ("CofO") for 2210 Adams Place, N.E. for use as a federal Community Corrections Center ("CCC"), a "temporary correctional institution" for a period not to exceed three years. See 11 DCMR §801.7(k) ("Section 801.7(k)"). Bannum believes, as did the District of Columbia Consumer and Regulatory Agency ("DCRA"), before and during the proceeding before the Board of Zoning Adjustments ("BZA"), that DCRA's zoning for this CCC was completely legal.

DCRA's current notice of intent to revoke the CofO[1] was based solely on the BZA order finding Bannum's building permit was improperly issued for lack of matter of right zoning. Attachment ("Att.") 1. Bannum appealed the BZA's order to the District of Columbia Court of Appeals. The Court's briefing schedule, issued after denying ANC 5-B's motion for summary affirmance, shows that briefing will be completed by October 2004 which likely will result in a decision this year. Att. 2. Bannum requests postponement of these proceedings until the Court decides the appeal.

Bannum also filed a motion for a stay of the BZA order and to enjoin the revocation of the CofO, an outcome of these proceedings[2], which is pending. Since the revocation of the CofO is based solely upon the BZA's order, if as expected, the Court reverses that order, nothing will support revocation of the CofO. Indeed, in its opposition to Bannum's motion, DCRA's position is that the BZA's order is not final because a written decision on Bannum's and DCRA's motions for reconsideration has not been issued. This raises questions as to whether DCRA has a basis to revoke Bannum's CofO.

[1] The Advisory Neighborhood Commission ("ANC") 5-B, which appealed the issuance of Bannum's building permit because of allegedly illegal zoning did not appeal the CofO to the BZA.

[2] While Bannum has other legal arguments not addressed in the BZA order, see pp. 9-10 infra, Bannum sought injunctive relief because DCRA took no position on these arguments at the BZA and issued the notice of intent to revoke the CofO.

Given the harm to Bannum and to the public from a revocation of the CofO, and the Court's likely reversal of the BZA's order, we respectfully request DCRA postpone its hearing and/or its ruling until the Court of Appeals decides the appeal, or at least, until the Court decides Bannum's motion to stay. The grounds supporting Bannum's request for postponement or reversal of DCRA's notice of intent to revoke the CofO follows.

1. DCRA was Correct in Issuing the Building Permit and Certificate of Occupancy

The BZA's interpretation of the zoning regulations distorts their plain meaning, rules of statutory construction, and case law, and is in direct conflict with the DCRA's positions taken before and after the BZA decision was issued.

In 2000, and again in 2001, DCRA gave Bannum written confirmations that the federal Community Corrections Center at issue here was properly zoned and issued a building permit in a Commercial-Manufacturing ("C-M") under 11 DCMR §801.7(k) ("Section 801.7(k)") for 3 years as a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years".

DCRA was on more than sufficient notice of the nature of the facility—a temporary correctional institution. By letters dated December 11, 2000 and November 26, 2001, Bannum, through counsel, advised DCRA:

> This office represents Bannum, Inc. ("Bannum"), a company that provides residential rehabilitation services to individuals referred by appropriate committing authorities. Bannum proposes to lease property in the C-M or M District for use a Community Corrections Center ("CCC") under a contract with the U.S. Department of Justice. Individuals are referred to the facility 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.
>
> The property at 2210 Adams Place, N.E. is located in the C-M-2 District. Under Section 801.7(k) of the zoning regulations, a "[t]emporary detention or correctional institution on leased property for a period not to exceed three (3) years" is permitted as a matter of right in the C-M District. Accordingly, Bannum's proposed use of the property as a residential Community Corrections Center can be established as a matter of right at the Adams Street location.
>
> If you concur with our interpretation of this section of the zoning regulations, kindly indicate so by signing on the line provided below." Atts. 3-4.