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May 25, 2005

Jerrily R. Kress, FAIA
Director, Office of Zoning
Government of the District of Columbia
Board of Zoning Adjustment
441 4th Street, N.W.
Washington, DC 20001

Re: Opposition Motion for Stay of DCRA's Revocation of Certificate of Occupancy Permit (2210 Adams Place, N.E. - Temporary Correctional Institution) Bannum, Inc.

Dear Board of Zoning Adjustment:

COMES NOW, Regina James, as an Intervenor and affected party and opposes Bannum's motion for a stay.

DCRA, which is charged with enforcing BZA decisions (and the highest departmental zoning authority), has determined to revoke Bannum's Certificate of Occupancy ("COO"). (See Exhibit 1). This decision should have been made almost immediately after the BZA order was issued. When the first notice of revocation was filed by DCRA and a hearing was scheduled, the Administrative Law Judge, based upon Bannum's Motion for *Continuance, Not Stay,* continued the case subject to reassignment under the new system. The decision by DCRA to enforce the BZA's decision is proper because the highest zoning authority in D.C. has determined that Bannum acted illegally and possibly fraudulently in its representations to the D.C. government which led to its approval of permits. The local government has every right to determine that it will not sanction illegal conduct.

Since DCRA's April 21st issuance of the revocation notice, Bannum has filed actions in the D.C. Court of Appeals, the United States District Court for the District of Columbia, the D.C. Superior Court, DCRA, and the BZA to try and stop the closure of its facility. Each court and DCRA denied its motion for injunctive relief. (See Exhibits 2-4). Meanwhile, the D.C. Court of Appeals is scheduled to hear Bannum's appeal of the BZA decision sometime in the summer or fall.

Bannum acted illegally and possibly fraudulently in its representations to the D.C. government which led to its approval of permits. As such, there is no question that the COO is also illegal since

BZA
Case No. 16998
Exhibit No. 110

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 110

it is necessarily based upon the issuance of illegal permits in the first instance. The local government should not sanction such illegal conduct.

Bannum submits that a hearing is required by DCRA prior to revocation of the permit. But there is no legal authority to support that argument. BZA has ruled on the merits of the permit issuance and the legality of the COO. If the permits are illegal then the Certificate of Occupancy is necessarily illegal since the COO is necessarily based upon the issuance of the illegal permits.

As the DCRA Director correctly noted in his April 4, 2004 letter to Bannum, the BZA rulings "invalidated the certificate of occupancy." (See Exhibit 5). Hence, the DCRA Zoning Administrator is authorized by law to revoke the COO without *further* due process. Based upon the BZA's findings and applicable law, DCRA's Zoning Administrator can revoke a Certificate of Occupancy without a hearing, particularly if a legal basis exists to do so. There is no reason, given the BZA's ruling that the DCRA Administrator should not have immediately revoked Bannum's Certificate of Occupancy more than a year ago. The burden then would be appropriately placed on the wrongdoer and violator of D.C. zoning laws to show just cause why such action should not have been taken in a further appellate process. Given the extensive due process awarded Bannum in the BZA's construction of the legality of its permits, further hearing on the issue as a condition precedent to revocation is legally redundant and serves the limited purpose of Bannum's clear and consistent intention to delay and obfuscate enforcement of D.C. zoning laws.

Bannum also complains that it will suffer special harm to its business and reputation, as well as unrecoverable damages if the stay is not granted. However, Bannum carefully placed location of this facility in bad faith. Bannum now expects it can encourage the BZA to endorse its victimization. This harm, however substantial, necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of special harm. It is important to note that Bannum has pursued an ordinary course of litigation (i.e. hearings and motions before the BZA and D.C. Court of Appeals) that has been decided unfavorably. However, despite these decisions, Bannum now claims that it will not be able to recover monetary damages. The pending appeal of the BZA's final order before the D.C. Court of Appeals presents Bannum with the adequate compensatory or other relief available at a later date. Plaintiff, with lack of patience and respect for principles of federalism and *res judicata*, invokes the BZA to render a decision contrary to, and in some respects, pending before the District of Columbia Court of Appeals.

Again, in our view, Bannum has operated illegally for over two (2) years in violation of D.C. zoning laws. Such action in no way serves the public interest. The BZA's opinion and the District of Columbia courts' subsequent denials of Bannum's injunctions are on point in this case. These decisions appropriately reflect this jurisdiction's views against Bannum's deliberate and strategic manipulation of D.C. zoning regulations, knowing all along that its actual intention in employing section 801(k) of the zoning laws was to remain for a period longer than the regulation allowed. You should note the Court of Appeals' finding that there was no likelihood of success by Bannum on the merits of its claim. The BZA by a 4-1 decision, we underscore, concluded that Bannum's action constituted a "sham" and that Bannum intentionally deceived the D.C. government. In so doing, it was able to secure illegal authorization to build a 150 bed halfway house in a prohibited zone and

then to place the affected community in an untenable defensive legal position.

In sum, I request what we have continuously urged upon the BZA and our courts, "the law is the law!" This applies to all and should be applied equally and forcefully. The abundant record in this case shows that Bannum violated the law and as of this writing continues to violate the law given its operation in the face of a revoked COO. It is absolutely critical that the government give meaning and life to our laws and not allow further contemptuous and defiant circumvention of them.

On behalf of ANC Commissioner Jones, I therefore urge the Board of Zoning Adjustment to deny its request.

Respectfully submitted,

Donald M. Temple, Esq.

cc: Shawn C. Whittaker
Andrew J. Saindon

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Zoning Administrator

David A. Lowry, Executive Director
BANNUM, INC.
2210 Adams Place, N E
Washington, D.C 20001

NOTICE OF REVOCATION OF CERTIFICATE OF OCCUPANCY NUMBER C53679.

This is official notice that the District of Columbia Department of Consumer and Regulatory Affairs (Department) revokes Certificate of Occupancy Number C53679 effective ten (10) days from the date of service of this notice. This action is taken pursuant to 12A DCMR § 110.5.3 (2004), which authorizes the Director to revoke a Certificate of Occupancy that has been issued in error.

On May 2, 2003, the Department issued to Bannum, Inc. Certificate of Occupancy Number C53679 ("C of O") The C of O authorized Bannum, Inc. to use the property located at 2210 Adams Place, N.E., Washington, D.C. as a "temporary correctional institution." The Department's grant of the C of O was based upon the issuance of a building permit to Bannum, Inc. for construction of a community corrections center. On January 24, 2003, community members appealed to the Board of Zoning Adjustment (BZA) challenging the Department's issuance of the building permits issued December 12, 2002 and January 17, 2003 (revised) to Bannum, Inc. for construction of a community corrections center. On March 31, 2004, the BZA, in the matter of *Advisory Neighborhood Commission 5B*, (BZA Appeal Number 16998), found that the building permits were issued in error in that, *"a community corrections center was not a permit use in a C-M-2 District" and "the facility did not meet the requirements of Section 801.7(k)."*

Upon receipt of the above-referenced BZA order, the Department, on April 27, 2004, issued to you a Notice of Intent to Revoke Certificate of Occupancy Number C053679. The April 27, 2004 Notice of Intent to Revoke is hereby **Rescinded.**

You are invited to deliver comments and/or objections to the subject Notice of Revocation at **least two (2) business days** prior to the effective date of the revocation. Your response shall be submitted to the Zoning Administrator at the Department of Consumer and Regulatory Affairs, Office of the Zoning Administrator, 941 North Capitol St., N.E., Suite 2000, Washington, D.C. 20002. Notwithstanding the delivery of comments and/or objections, your Certificate of Occupancy is revoked ten (10) days from the date of service of this notice unless you are notified by the Zoning Administrator that the revocation is rescinded.

RIGHT TO APPEAL

You have the right, pursuant to 11 DCMR § 3200.2 (2003) and 12A DCMR § 110.6 (2004), to appeal this decision to the BZA. Should you decide to appeal the Department's decision, your appeal must be made pursuant to the requirements set forth in the District of Columbia's Zoning Regulations, D.C. Mun. Reg. tit.11 (2004), and must be filed at the Office of Zoning, Board of Zoning Adjustment, 441 Fourth Street, N.W., Suite 210S, Washington, D.C. 20001.

If you decide to appeal, you should also send a copy of your appeal, pleading or written communication to the Department of Consumer and Regulatory Affairs, Office of the General Counsel, 941 North Capitol St., N.E., Suite 9400, Washington, D.C. 20002.

If you have any questions, you may contact my office at (202) 442-4576.

Date: APRIL 21, 2005

Toye Bello
Zoning Administrator

cc: Shawn C. Whitaker, Esquire.
9055 Comprint Street, Suite 340
Washington, D.C. 20877

bcc: Dr. Patrick Ca ıavan, Acting Director
Theresa Lewis, Chief of Staff
Julie Lee, Gen ɜral Counsel, OGC
J. Carl Wilson, Deputy General Counsel, OGC
Lisa A. Bell, Esq., OGC

District of Columbia
Court of Appeals

FILED
MAY 24 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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Gaithersburg, MD 20877

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Washington, DC 20005

Edward E. Schwab, Esq.
Deputy Attorney General for D.C.

dpt

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)

DOCKETED MAY 6

MAILED MAY 6

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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OFFICE OF THE CORPORATION COUNSEL
JUDICIARY SQUARE
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WASHINGTON, D. C. 20001



IN REPLY REFER TO:

BY HAND-DELIVERY

August 8, 2003

Jerrily R. Kress, FAIA
Director
D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 210-S
Washington, DC 20001

Re: BZA Appeal No. 16998

Dear Ms. Kress:

On behalf of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), I am submitting the attached proposed Findings of Fact and Conclusion of Law for the Board's consideration in the above-referenced appeal. The attachment is in the form of a proposed Order affirming DCRA's decision to issue Building Permit No. B425438. DCRA's analyses of the issues raised by this appeal are also reflected in the legal memoranda it has submitted in this appeal, including Exhibits 18, 34, 58, and 74.

Enclosed are 20 additional copies of this letter and the proposed Order.

Very truly yours,

ROBERT J. SPAGNOLETTI
Corporation Counsel

By: Bennett Rushkoff
Bennett Rushkoff
Senior Counsel

Attachment and enclosures

cc. Donald M. Temple, Esq. (by fax to 202-628-1149 and first-class mail)
Joseph A. Camardo, Jr., Esq. (by fax to 315-252-3508 and first-class mail)
Regina James, Chair, ANC 5 B (by first-class mail only)
Lori Monroe (by hand-delivery)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16998 of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs (DCRA) for the issuance of Building Permit No. B425438, for renovation of a warehouse for use by a community corrections center.

HEARING DATES: April 22, May 20, June 17, July 8, and July 22, 2003
DECISION DATE: September 9, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On January 24, 2003, Advisory Neighborhood Commission 5B ("ANC 5B" or "the ANC") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA"). The appeal challenges a December 12, 2002 decision of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. B425438 allowing Bannum, Inc. ("Bannum") to convert warehouse space at 2210 Adams Place, N.E. into a 150-bed community corrections center. The property is located in the C-M-2 District and within the boundaries of ANC 5B.

In its appeal, the ANC contends that DCRA's decision to issue the building permit was in error because: (1) Bannum's community corrections center qualifies as a community-based residential facility ("CBRF") and, therefore, is not permitted in a C-M District as a matter of right; (2) Bannum does not intend to operate the community corrections center temporarily, and therefore, DCRA cannot treat the facility as a "[t]emporary detention or correctional institution on leased property for a period not to exceed three . . . years" to be located as a matter of right in a C-M District. 11 DCMR § 801.7(k).

[Procedural issues raised and Board's resolutions of those issues.]

FINDINGS OF FACT:

1. By letter dated December 11, 2000, counsel for Bannum informed the Zoning Administrator that Bannum was a company that "provide[d] residential rehabilitation services to individuals referred by appropriate committing authorities." Counsel requested that the Zoning Administration countersign the letter to indicate his concurrence with her opinion that the following proposed use could be "established as a matter of right" at a proposed site in the C-M-2 District, pursuant to 11 DCMR § 801.7(k):

> Bannum proposes to lease the property at 2210 Adams Place, N.E. (Parcel 154/81 in Square 4259) for use as a residential Community Corrections Center under a contract with the U.S. Department of Justice. Individuals are referred to the facility either directly by the court system, under a conditional release from a parole commission or through a transfer from a federal institution in order to make the transition back into society.

On the same date, the letter was countersigned by Zoning Administrator Michael Johnson. Exh. 20 (Exh. 1 thereto).

2. On November 26, 2001, counsel for Bannum wrote to the Acting Zoning Administrator to request that he indicate his concurrence with her "interpretation" that the following proposed use could be established "as a matter of right in the C-M District, and by extension, in the M District," pursuant to 11 DCMR § 801.7(k):

> Bannum proposes to lease property in the C-M or M District for use as 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 a[t] a federal institution.

In this letter, too, counsel described Bannum as "a company that provides residential rehabilitation services to individuals referred by appropriate committing authorities." On November 28, 2001, the letter was countersigned by Acting Zoning Administrator Olutoye Bello. Exh. 20 (Exh. 2 thereto).

3. On October 9, 2002, Bannum applied for a building permit to "change tenant warehouse space [at 2210 Adams Place, N.E.] to [a] 150 bed community corrections center." Exh. 19 (attachment to Permit No. B425438).

4. On December 12, 2002, the Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. B425438 allowing Bannum to "CHANGE TENANT WAREHOUSE SPACE TO 150 BED COMMUNITY CORRECTIONS CENTER" at 2210 Adams Place, N.E. Exh. 59 (attachment).

5. On January 15, 2003, D.C. Councilmember Vincent B. Orange, Sr. wrote to the Director of DCRA stating:

> I am requesting that you immediately place a stop work order for building construction taking place on 2210 Adams Place, NE to prevent the inappropriate opening of a 150 bed corrections facility for the purpose of housing 150 inmates by Bannum, Inc. The area is zoned industrial and consequently does not allow for residential use. The contract issued to Bannum by The Federal Bureau of Prisons is for 5 years. The building construction permit issued by your department is a temporary permit for

> three years. Additionally, Bannum has never presented its proposal to the affected Advisory Neighborhood Commission (ANC) for a vote by the entire body. . . .

Exh. 19 (1/15/03 letter).

6. On January 17, 2003, DCRA issued Building Permit No. B448325, which stated that Building Permit No. B425438 was revised "TO READ '3 YR TEMPORARY USE'." Building Permit No. B448325 described the proposed facility at 2210 Adams Place, N.E. as a "TEMPORARY 150 BED COMMUNITY CORRECTIONS CENTER ON LEASED PROPERTY FOR A PERIOD NOT TO EXCEED (3) YEARS." In the lower right-hand corner of the document, separated from other print, was the phrase "**3 YEAR TEMPORARY USE**". Exh. 59 (attachment).

7. On January 24, 2003, ANC 5B, by its Chairperson Regina James, filed this appeal to the Board from DCRA's decision to issue Building Permit No. B425438. Exh. 1&2.

8. By letter dated January 31, 2003, the Director of DCRA replied to the letter he had received from Councilmember Orange. The reply included the following clarification regarding the three-year limitation on the proposed use of the property:

> The building permit that was issued for this property (#B425438) does not have a three-year expiration date. However, pursuant to DCMR 11, 801.7 (k), a...["]temporary detention or correctional institution on leased property" is limited to a period of use not to exceed three years in a C-M zone, unless a special exception has been approved by the Board of Zoning Adjustment. DCRA will ensure that the certificate of occupancy for this property, when issued, specifically limits the use of this property as a correctional institution to three years, as stated in the zoning regulations.

Exh. 19 (1/31/03 letter).

9. By letter dated February 7, 2003, Donald M. Temple, Esq., on behalf of his client the Concerned Citizens for Ward 5, Inc., wrote to the Director of DCRA in opposition to Bannum's "efforts to locate a Community Based Residential Facility at 2210 Adams Street, NE without seeking proper zoning approval and appropriate input from its citizens and elected leaders, thereby strategically attempting to circumvent the law." Mr. Temple argued that Bannum's proposed facility "did not enjoy 'matter of right' zoning" because it was "actually" a Community Based Residential Facility and "*not* a 'temporary detention or residential facility.'" (emphasis in original) He also commented: "One can't help but wonder why [Bureau of Prison]'s contract review staff accepted DC Zoning Administrators' 'concurrences' on non-government stationery . . . as satisfactory documentation of compliance with DC zoning laws." Exh. 19 (2/7/03 letter).

10. In a response dated February 21, 2003, Acting Zoning Administrator Denzil Noble reiterated what the Director of DCRA had said to Councilmember Orange about the three-year limitation on the proposed use of the property. Mr. Noble also noted: "Your concerns involving previous Zoning Administrators' concurrences on non-governmental stationary have been addressed. This practice is no longer used by this office." Exh. 19 (2/21/03 letter from Acting Administrator Noble to Mr. Temple).

11. On May 2, 2003, DCRA issued Bannum a Certificate of Occupancy authorizing use of the premises at 2210 Adams Place, N.E. for a "TEMPORARY CORRECTIONAL INSTITUTION ON LEASED PROPERTY FOR A PERIOD NOT TO EXCEED THREE (3) YEARS. THIS CERTIFICATE EXPIRES ON MAY 02, 2006." Exh. 35 (attachment).

12. The federal Bureau of Prisons' Statement of Work ("SOW") applicable to Bannum's facility states that a "Community Corrections Center (CCC)" is "also called a community treatment center (CTC), or a halfway house." The SOW further states that a "CCC is considered a penal or correctional facility." Exh. 16 (Exh. 3 thereto).

CONCLUSIONS OF LAW AND OPINION:

ANC 5B has appealed from DCRA's decision to issue Building Permit No. B425438. This building permit authorized Bannum to renovate the warehouse at 2210 Adams Place, N.E. so that it would be *capable* of being used as a 150-bed "community corrections center" or "CCC." Bannum was required to obtain a certificate of occupancy before actually using the premises as a CCC.

Prior to applying for the building permit, Bannum informed DCRA of its intention to operate the CCC as a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years" pursuant to 11 DCMR § 801.7(k). A use qualifying under section 801.7(k) may be located in a C-M District as a matter of right. The premises at 2210 Adams Place, N.E. are in a C-M District.

DCRA's decision to issue the building permit was in error if the record before DCRA showed that the proposed facility could not qualify for "matter of right use" pursuant to section 801.7(k) *or* that the proposed facility would not be operated consistently with section 801.7(k).

The ANC's primary contention is that the CCC proposed by Bannum was a CBRF, and a CBRF cannot qualify for "as a matter of right" treatment under section 801.7(k).

Based on the descriptions that Bannum provided to DCRA, the proposed CCC did appear to fit within the general definition of CBRF set forth at 11 DCMR § 199.1: "a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." In her December 11, 2000 and November 26, 2001 letters to the Zoning Administrator, Bannum's counsel stated that Bannum "provide[d] residential rehabilitation services." Counsel's second letter stated that individuals would

be "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 the CCC." The residential nature of the CCC was also clear from Bannum's application, which referred to a "150 bed" facility. A residential facility that provides rehabilitative services for sentenced individuals referred by the court system qualifies under at least one of two CBRF subcategories: "adult rehabilitation home" and/or "youth rehabilitation home."

However, assuming that the ANC is correct that Bannum's proposal was to convert the subject premises into a CBRF, it does not follow that the premises could not qualify for "as a matter of right" treatment under section 801.7(k).

It follows from the fact that use pursuant to section 801.7(k) is *always* a CBRF use that use as a CBRF *may* be able to qualify as a section 801.7(k) use. The definition of CBRF provides: "If an establishment is a community-based residential facility [CBRF] as defined in this section, it shall not be deemed to constitute any *other* use permitted under the authority of these regulations." (emphasis added) Because the only use to which the sentence refers is use as a CBRF, the term "other use" must refer to "non-CBRF use," *i.e.* use other than as a CBRF. Therefore, the plain meaning of the provision is that a CBRF shall not be deemed to constitute any *non*-CBRF use. The provision does not mean that a CBRF cannot be deemed to constitute a particular CBRF use – *i.e.* section 801.7(k) use – solely because that particular CBRF use is described in another part of the regulations.

Moreover, if a facility's status as a CBRF meant that it could not possibly qualify for "as a matter of right" treatment under section 801.7(k) treatment, then *no* facility would *ever* be able to qualify under section 801.7(k). Nothing in the definition of CBRF suggests that a CBRF cannot be "temporary" or "on leased property." Consequently, *any* "temporary *detention or correctional* institution on leased property for a period not to exceed three (3) years" would qualify as a CBRF, either under the definition of "adult rehabilitation home" or under the definition of "youth rehabilitation home" (or both):

> **Adult rehabilitation home** - a facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual twenty-one (21) years of age or older, *under pre-trial detention or sentenced [by] court orders*;
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> * * *
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> **Youth rehabilitation home** – a facility providing residential care for one (1) or more individuals less than twenty-one (21) years of age who have been *detained or committed by a court* pursuant to their involvement in the commission of an act designated as an offense under the law of the District of Columbia, or of a state if the act occurred in a state, or under federal law. The facility shall not house persons sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense;

11 DCMR § 199.1. Were the Board to accept the ANC's contention that CBRF status precludes the possibility of qualifying as a section 801.7(k) use, the Board would effectively write section 801.7(k) out of the regulations. Such an interpretation would be at odds with the principle that "[s]tatutory provisions are to be construed not in isolation, but together with other related provisions." *Carey v. Crane Service Co.*, 457 A.2d 1102, 1108 (D.C. 1983) (*quoting United Mine Workers of America v. Andrus*, 581 F.2d 888, 892 (D.C. Cir. 1978).

Because it is possible for a CBRF to be deemed a section 801.7(k) use that qualifies for "as a matter of right" treatment, the record before DCRA did not show that Bannum's proposed facility could not qualify for "matter of right" use pursuant to section 801.7(k)

The ANC also contends that "if the Zoning Administrator had examined [Bannum's] lease or [Bannum's] contract with the Bureau of Prisons (both in excess of three years) or the extent of the renovation being undertaken, he could have determined that there is no intent to comply with the 'temporary' provision of the Section 801.7(k)." Exh. 2 at 3. Had DCRA had reason to believe that Bannum's facility would not in fact be used as a "temporary" institution, DCRA would have had a reason to deny the building permit. But information as to the duration of the lease or as to the duration of the contract was not available to DCRA when it made the decision to issue Building Permit No. B425438. Thus, DCRA did not err in proceeding to issue a building permit that authorized Bannum to renovate the building for use, upon issuance of a certificate of occupancy, as a "temporary detention or correctional center."

The fact that the ANC appears unable to challenge DCRA's issuance of the building permit does not mean that the ANC is without a remedy. By showing that Bannum made a "false statement or misrepresentation of fact" in its building permit application, or that Bannum's "construction does not comply [with] the permit" that was issued, the ANC could provide DCRA with a basis for revoking the permit. 12A DCMR § 108.9 (1999). Or by showing that Bannum's "actual occupancy does not conform with that permitted" by the certificate of occupancy, the ANC could provide DCRA with a basis for revoking the certificate of occupany. 12A DCMR § 118.4.1 (1999). A "refusal" by DCRA to revoke a building permit or a certificate of occupancy could then be appealed to this Board. 11 DCMR § 3112.2 (2003).

Although not necessary to the resolution of this appeal, the Board does wish to address the ANC's expressed concern that Bannum may have been "under the impression that they can simply reapply as a matter of right" in order "to extend beyond the three years" their use of subject property pursuant to section 801.7(k). Exh. 2 at 3. Whatever Bannum's impression or belief may have been, the Board agrees with the ANC that Bannum, having obtained one certificate of occupancy pursuant to section 801.7(k), could not "reapply as a matter of right" for a second certificate of occupancy in order to extend the period of "temporary" use beyond three years.

The rationale for a regulation permitting "detention or correctional institutions on leased property" in industrial areas was set forth in the Zoning Advisory Council's Final Report in Case No. 71-33:

> The effect of this [proposed] amendment would be to permit detention or correctional institutions on leased private property in the industrial zones of the city. This would permit the Department of Corrections to lease private industrial property for the purpose of establishing correction facilities to accommodate overflow population from the established institutions or as a temporary facility while they proceed with the process of budget, acquisition, and development of permanent facilities.

Exh. 18 (Attach. A). In order to "make it clearer that such installations would be temporary in nature," the Council suggested that the proposed language be modified from "Detention or correctional institution on leased property" to "Temporary detention or correctional institution on leased property for a period not to exceed three (3) years." *Id.* The Council's suggested language is the language now found in section 801.7(k).

Allowing "renewals" of the three-year period "as a matter of right" would be contrary to the Council's intent that section 801.7(k) uses "be temporary in nature." Therefore, when applying for a building permit or certificate of occupancy pursuant to section 801.7(k), an applicant should assume that the certificate of occupancy will not be renewed when the three-year period ends.

For the reasons stated above, it is hereby **ORDERED** that DCRA's decision to issue Building Permit No. B425438 is hereby **AFFIRMED.**

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

Form 140
(Revised 03/15/02)

Case No.

PARTY STATUS APPLICATION

Notice: Click Here for Application Form Instructions

Name:*	**Regina James, ANC5B Commissioner**				
Address:*	**c/o Temple Law Offices 1229 15th St., NW**	**City:***	**Washington**	**State:***	**DC** **Zip:*** **20005**
Phone:*	**(202)628-1101**	**Fax:**	**(202)628-1149**	**Email:**	**templepc@aol.com**

I, hereby request to appear and participate as a party. **Signature:** **Date:*** 05/25/05

Will you appear as a(n) ☐	**Proponent**	☑	**Opponent**	**Will you appear through legal counsel**	☑	**Yes**	☐	**No**

If yes, please enter the name and address of such legal counsel.

Name:	**Donald M. Temple, Esq.**				
Address:	**1229 15th Street, N.W.**	**City:**	**Washington**	**State:**	**DC** **Zip:** **20005**
Phone:	**(202)628-1101**	**Fax:**	**(202)628-1149**	**Email:**	**templepc@aol.com**

Please answer all of the following questions referencing why the above person should be granted party status.
(If you require additional space, please attach an additional sheet.)

1). How will the property owned or occupied by such person, or in which the person has an interest be affected by the action requested of the Board?*

Bannum, Inc. is attempting to illegally place a community based residential facility in a CM-2 zone. By doing so, Bannum is manipulating D.C. zoning regulations and creating security issues in the Ward 5 community.

2). What legal interest does the person have in the property? (i.e. owner, tenant, trustee, or mortgagee)*

Regina James is the ANC5B Commissioner for Ward 5. ANCs are a component of local government and are responsible for local government activities. They are generally accorded party status before the BZA. As ANC Commissioner, Ms. James helps to protect the interests of citizen within her district.

3). What is the distance between the person's property and the property that is the subject of the appeal or application before the Board? (Preferably no farther than 200ft.)*

The property in dispute, 2210 Adams Place, N.E., is located directly within Ward 5, the district represented by Regina James.

4). What are the environmental, economic or social impacts that are likely to affect the person and/or the person's property if the action requested of the Board is approved or denied?*

Bannum, Inc. circumvented the local zoning requirements in order to secure a Federal Bureau of Prisons contract. In so doing, the community's legal rights and public safety interests are detrimentally impacted, including housing convicted felons near an elementary school.

5). Describe any other relevant matters that demonstrate how the person will likely be affected or aggrieved if the action requested of the Board is approved or denied.*

Bannum, Inc. is in direct violation of D.C. zoning laws. Again, such a violation has a detrimental impact on the Ward 5 community as a whole. See attached decision.

6). Explain how the person's interest will be more significantly, distinctively, or uniquely affected in character or kind by the proposed zoning action than that of other person's in the general public.*

Please see attached decision.