BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

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DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MEMORANDUM OF POINTS AND AUTHORITIES

The building permit that is the subject of this appeal was issued pursuant to 11 DCMR § 801.7(k) (2003). Under this provision, a "[t]emporary detention or correctional institution on leased property for a period not to exceed three (3) years" may be located "as a matter of right in a C-M District," as long as it is "operated so as to comply with the standards of external effects" set forth in 11 DCMR § 804. These "standards of external effects" include, among others, a requirement that "[o]bjectionable sounds of an intermittent nature . . . be controlled so as not to become a nuisance to adjacent uses." 11 DCMR § 804.4. The building permit application for such a facility is to be accompanied by a site plan as well as a "description of any operations that would be subject to the standards of external effects in [11 DCMR] § 804." 11 DCMR § 805.1.

The rationale for permitting "detention or correctional institutions on leased property" in industrial areas is set forth in the Zoning Advisory Council's ("Council") Final Report in Case No. 71-33 (**Attachment A** hereto):

> The effect of this 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

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> 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.

The Council recommended that the amendment be approved because "the Department of Corrections needs the flexibility provided by this amendment. By providing the installations in industrial areas, the impact on residential sections of the city will be minimized." However, 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." The Council's suggested language is the precise language now found in 11 DCMR § 801.7(k).

A temporary detention or correctional institution fits within the definition of "adult rehabilitation home" set forth in 11 DCMR § 199.1 (under "Community-based residential facility"):

> **Adult rehabilitation home** - a facility providing residential care for one (1) or more individuals sixteen (16) years of age of 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 court orders*;

(emphasis supplied) An adult rehabilitation home is a subcategory of "community-based residential facility" ("CBRF"). Therefore, a temporary detention or correctional institution is a CBRF.

Unlike most of the other commercial uses permitted in the C-4 District, a CBRF is not permitted in a C-M District as a matter of right. 11 DCMR § 801. In addition, an establishment that comes within the definition of a CBRF "shall not be deemed to constitute any other use permitted under the authority of these regulations." 11 DCMR

§ 199.1. So an establishment with both a CBRF use *and* one or more non-CBRF uses would be treated as a CBRF; such an establishment would not be allowed as a matter of right in a C-M District.

Because use as a "detention or correctional institution" is a CBRF use, an establishment can be *both* a CBRF and a detention or correctional institution. If such an establishment qualifies as a "[t]emporary detention or correctional institution on leased property for a period not to exceed three (3) years," and complies with the "standards of external effects" set forth in 11 DCMR § 804, then it is allowed as a matter of right in a C-M District. 11 DCMR § 801.7(k).

The fact that an institution has a work release program does not mean that it cannot be deemed a "detention or correctional institution" under 11 DCMR § 801.7(k). The D.C. Jail can offer work release, as evidenced by the 1971 decision of the D.C. Circuit Court of Appeals applying "the so called federal escape law" to an individual who "was released from the D.C. Jail for a few hours each day for the purpose of working for a private employer," but who "fail[ed] to return to jail one day." *United States v. Vaughn*, 446 F.2d 1317, 1318 (D.C. Cir. 1971). In addition, the District's Resocialization Furlough Program allows furloughs of up to 72 hours for residents of institutions "operated by the Department of Corrections," which include the D.C. Jail. D.C. Official Code §§ 24-251.01(5) and 24-251.03(b) and (c) (2001).

Notably, under District law, escape from confinement in a halfway house may be prosecuted as an escape from confinement in prison. The District of Columbia Court of Appeals has held that the District's prison break statute applies to "misdemeanants serving sentences in halfway houses" who "escape from their work release programs":

> Prisoners incarcerated in regular correctional facilities, including misdemeanants sentenced for the same offenses as those for which appellants were initially convicted, are subject to strict prison security which provides strong disincentives to escape, as well as protection to the community. By contrast, misdemeanants serving sentences in halfway houses lack such physical deterrence, so that the deterrence provided by the increased penalties under the felony prison break statute is particularly important.

Gonzalez v. United States, 498 A.2d 1172, 1176-77 (D.C. 1985). The prison break statute makes it a felony for a person to "escape or attempt to escape from . . . [a]ny penal institution or facility in which that person is *confined* pursuant to an order issued by a court, judge, or commissioner of the District of Columbia." D.C. Official Code § 22-2601(a)(1) (2001) (emphasis supplied). Therefore, the Court of Appeals' ruling that the prison break statute applies to an individual who escapes from a halfway house means that the Court considers a halfway house resident to be "confined" in a "penal institution or facility."

In conclusion, under 11 DCMR § 801.7(k), a "temporary detention or correctional institution on leased property for a period not to exceed (3) years" is "permitted as a matter of right in a C-M District," notwithstanding the fact that its residents may participate in work release and/or furlough programs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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ZONING ADVISORY COUNCIL
Final Report

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Case No. 71-33

Application: Text Amendment
Amend Subsection 6101.34 to add Paragraph (k) in the list of permitted uses as follows:
"(k) Detention or correctional institution on leased property."

This is a proposal to amend the Zoning Regulations in Paragraph 6101.34 to add a new subparagraph "k" permitting the establishment of "detention or correctional institutions on leased property."

The effect of this 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.

RECOMMENDATION:

In our opinion, the Department of Corrections needs the flexibility provided by this amendment. By providing the installations in industrial areas, the impact on residential sections of the city will be minimized. Therefore, we recommend approval of the amendment.

It was suggested at the public hearing that the wording be modified to make it clearer that such installations would be temporary in nature. Such a clarification would be, in our opinion, within the context of the amendment as advertised and the Commission could make such an adjustment without further public hearing. In this regard, we would suggest that the new paragraph might read as follows:

Attachment A

"k. Temporary detention or correctional institution on leased property for a period not to exceed three (3) years."

(s) William F. McIntosh

(s) James Banks

(s) Arthur B. Hatton