BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)
Re: 2210 Adams Place, NE	)

ANC5B's MEMORANDUM
ON THE MERITS OF THE APPEAL

Advisory Neighborhood Commission 5B ("ANC") has appealed the determination made by the Department of Consumer Affairs, Office of Building and Lands, to award a permit to Bannum, Inc. on January 17, 2003 to renovate certain property located at 2210 Adams Place, in Northeast Washington, D.C. from a warehouse to a "Community Correction Center." Bannum is doing so pursuant to a contract which it was awarded from the United States Department of Justice Bureau of Prisons. It is the ANC's position that the "concurrences" in this case in 2000 and 2001 by acting Zoning Administrators are neither rulings or specific enough as stated to encompass the issue of Bannum's proposed halfway house or community based residential facility, as these questions were never specifically posed.

FACTUAL BACKGROUND

Bannum Inc. ("Bannum") is a Florida based halfway house contractor which was awarded a Bureau of Prisons ("BOP") contract to operate a permanent "Community Correctional Center" ("CCC") in the District of Columbia. The CCC is to be located at 2210 Adams Place, N.E., located in Ward 5. Although this area is zoned CM-2, there are single family homes and apartments located close to this. Langdon Elementary School is located within 4-6 blocks.

The term "Community Correction Center", a term of art used by the Federal Bureau of

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Prisons (BOP) is not defined in the District of Columbia's zoning regulations. The BOP uses the terms "Community Correctional Center" and "halfway house" interchangeably. However, According to Title 11 of the DCMR at Section 199, a halfway house is a community based residential facility ("CBRF"). According to Title 11 of the DCMR at 801.7(k), only *temporary* detention centers and correctional facilities can operate as a matter of right in a CM-2 zone. All presently existing halfway houses in the District of Columbia ("DC") are permanent facilities and have been considered by the DC government as CBRFs thereby requiring zoning approval. No correctional halfway house can or has been located as a matter of right in DC. The BOP has stated that Bannum's facility at 2210 Adams Place is unequivocally a CBRF and a halfway house.

In its bid solicitation to the BOP, Bannum was required to submit satisfactory proof in writing that it met all District of Columbia zoning requirements, including documentation from necessary local officials stating that the contract may be performed at the proposed site(s) in accordance with the current zoning and other requirements of the local jurisdiction. In response, Bannum through Attorney Carolyn Brown of Holland and Knight law firm transmitted a letter dated December 2000 to Michael Johnson ("Johnson"), then Acting Zoning Commissioner. The letter failed to disclose that Bannum intended to use the letter as an official verification of compliance with local DC zoning laws and further, for the purpose of securing a contract from the BOP for a *permanent* halfway house. It stated that Bannum intended to lease the subject property for use as a residential CCC under a contract with the Department of Justice ("DOJ"), that the area is zoned as Commercial Light Manufacturing ("CM-2") and that a temporary detention or correctional institution is permitted on leased property in the District as a matter of

right for a period not to exceed three (3) years.

Brown's December 2000 letter elicited a written concurrence from the acting Zoning Administrator with her law firm's opinion that a CCC could be built as a matter of right in a CM-2 district. Mr. Johnson appears to have indicated his agreement with this opinion by signing his name on the law firm's stationary. . In November 2001 Attorney Brown elicited a similar concurrence for a CCC from then Acting Zoning Administrator Olutoye Bello ("Bello"). Bello gave a written concurrence as well on Firm Holland and Knight's law stationary. Neither of the two (2) letters submitted by Bannum's attorneys to D.C. Zoning Administrators in 2000 and 2001 stated that Bannum intended to operate a halfway house or a CBRF at the Adams Place location. Brown also did not provide documents or copies of the BOP solicitation documents to Johnson or Bello. In fact, no District of Columbia Agent or agency has reviewed Bannum's contract with the BOP. [1] Neither constitute a formal Zoning Board variation or exception that would enable Bannum to locate its halfway house in the CM-2 zone.

In October 2002, Bannum applied for a permit from the D.C. Department of Consumer and Regulatory Affairs ("DCRA") stating only its intentions to convert a warehouse to a 150 bed CCC. Bannum intentionally omitted from its application that it intended to operate a halfway house. On about December 12, 2002 Defendant D.C. government approved Bannum's permit. In December 2002 the BOP awarded a contract to Bannum to operate a *permanent* CCC in D.C., not a temporary detention center or a temporary correctional institution. On January 17, 2003

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[1]/ ANC urges this Board to request a copy (in confidence) of Bannum's BOP contract and proposal so that it will conduct appropriate due diligence.

Bannum submitted a revised permit for said use, again based upon use as a CCC. Once again, no reference was made to it using the facility as a halfway house or CBRF.

Invariably, Bannum advised the BOP that it could build a permanent halfway house as a matter of right at the Adams Place site, even though its correspondence to the Zoning Administrators implied that its CCC would be temporary in nature. Bannum then leased the subject warehouse located at 2210 Adams Place in Northeast Washington, D.C. in order to open a permanent CCC .

In January 2003, Ward 5 residents began to notify the Ward 5 community at large of Bannum's intentions to open a halfway house as a matter of right in the nearby CM-2 zone and that such use was illegal under DC zoning laws. Community leaders and residents immediately began to express their opposition through their elected officials and to host several community meetings. One of their chief concerns was that Bannum's location of the CBRF near an elementary school created public safety risks to its students, that the site also threatened their property values and unjustly nullified their opportunity to participate in a public review process – in violation of clearly established law. They were especially concerned that the government was so silent when a private contractor advised it that it intended to locate a 150 bed correctional facility for recently released felons so close to an elementary school and that no other D.C. CBRF in any other ward has been allowed so close to public school. On January 13, 2003 Ward 5 City Councilmember Vincent Orange expressed his strong opposition to Bannum's halfway house and asked David Clark ("Clark"), Director of DCRA, to issue a stop work order. Clark, for reasons unbeknownst to the ANC, denied Mr. Orange's request, stating that Bannum's

facility was "institutional" and could be used in that location as a matter of right. Clark's decision is the very first time that the D.C. government has stated that a building used as a permanent CBRF/halfway house could be operated in a CM-2 zone as a as a matter of right.

In a February 21, 2003 letter Denzil Noble, a Zoning Administrator for Defendant DC, reiterated Mr. Clark's view that Bannum's CCC was "institutional"and could be built in a CM-2 district as a matter of right. Neither Mr. Clark nor Mr. Noble's letters preceded the contract or Bannum's renovation work on its facility. Both of their letters peculiarly adopted the language stated in Brown's November 2000 and December 2001 letters. To date, Defendant DC has refused to acknowledge that Bannum's facility is a CBRF despite that it has received the BOP's solicitation documents which verify that the facility is a halfway house and what is being procured is permanent in nature. After learning about the DC's issuance of a permit to Bannum, ANC5B filed an appeal with the Board of Zoning Adjustment challenging DCRA's issuance of a permit to Bannum to convert a warehouse to a 150 bed "CCC."

At least four (4) D.C. City Councilmembers have expressed concerns about this facility being operated as a halfway house as a matter of right. At least two (2) City Councilmembers and one School Board member oppose it. Despite an overwhelming record of opposition, and repeated requests for government officials to take steps to ensure the enforcement of the law, each effort has so far been futile. It thus appears that the government is sanctioning Bannum's illegal action and also violating its own laws thereby leaving its citizens voiceless and victimized.

ARGUMENT

The background of this case is instructive. The term "Community Correction Center" is a term of art peculiar to the Federal Bureau of Prisons. The term, however, is not defined or used for purpose of zoning in DC. On the other hand, BOP uses the terms halfway house and Community Corrections Center interchangeably. The BOP has readily admitted in public forums held by the community after the contract award and after DC's issuance of a permit that the 150 bed facility which Bannum is renovating is a halfway house. See Exhibit 4, Video tape. All other halfway houses in DC are designated CBRFs and required zoning approval. Bannum's facility is a halfway house and should be treated accordingly. To date, Bannum still publicly refuses to acknowledge the obvious, that its facility is a CBRF. This is despite that DC has received the BOP's solicitation documents which verify that the facility is a halfway house and that the BOP contract awarded to Bannum calls for a permanent, rather than temporary facility. DC government officials recently testified beforethe DC Superior Court in unqualified agreement with the ANC position before this Board. Thence, it is clear that Bannum is boldly violating existing D.C. law and zoning practices regarding location of this permanent halfway house in a CM-2 district as a matter of right.

Prior to applying for and being issued this permit, Bannum secured two advisory "concurrences" from District of Columbia Zoning Administrators dated respectively December 11, 2000 and November 26, 2001. By design, we submit that Bannum's correspondence specifically implied that its intended use of the property at issue would be for a "temporary detention or correctional institution" as that term is referenced in District of Columbia Municipal Regulations 801.7(k). Invariably, in these document and in its discussions with the Zoning Administrator, Bannum omitted any reference to the fact that its actual intended use was

for a federal halfway house or a community based residential facility ("CBRF"). Indeed, its attorneys, who are well versed in zoning laws fully understood the implications of their actions. Bannum intended under DCMR 801.7(k) to circumvent Zoning Board scrutiny and operate a halfway house without public restriction.

In this respect the ANC draws the Board's attention to Exhibit Number 9, Case No. 02-21, a proposed text amendment. That amendment was offered by the same law firm that presently represents Bannum and which drafted the two previously referenced letters that induced Zoning Administrator concurrences, and upon which Bannum substantially relies in making its case before you today. That proposed amendment indicates the law firm's extensive knowledge of this Agency's sensitivity to CBRFs and its restrictive treatment of them in CM zones. Albeit the amendment was subsequently withdrawn. Still, it is powerfully instructive. It shows that Bannum through its counsel knew how DC law treated CBRFs in CM2 districts. Moreover, this record also shows that Bannum is hereby making an attempt to effectively and deliberately circumvent DC zoning law and in so doing, attempting to effectively amend the law and create a dangerous precedent.

In its dealings and communications with the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Bannum not once disclosed that it was building a halfway house or a CBRF. This is confirmed by the record. Hence, it strategically mislead the District of Columbia government and we would add, at its own peril. This point is accentuated by the fact that it has absolutely no political or community support. In fact, in January of this year Councilmember Vincent Orange of Ward V, urged Mr. David Clark, Director of DCRA, to issue a stop work order. Further, ANC 5A resolved to oppose Bannum's project and not one

ANC or Civic Association has endorsed it. ANC, as does others in the community, insists that Bannum's actions are knowingly illegal and intentionally designed to circumvent applicable Zoning laws.

The ANC's appeal challenges the issuance of the permit specifically on the ground that Bannum has failed to disclose its intended use to the District of Columbia government and that its Community Correction Center is a Halfway House and *is* a CBRF, and therefore under DCMR, it *cannot* operate a halfway house or community based residential facility as a matter of right. The ANC underscores that the issue in this case is very clear: Can a Bureau of Prison contractor locate a halfway house or community based residential facility as a matter of right in a CM-2 District? Under applicable zoning law the answer is no, and we submit that no defacto exception to the law should be allowed. that would undermine this Board's authority or the law.

Among the ANC's chief concerns are that Bannum's location of the CBRF near Langdon Elementary school creates public safety risks to its students, that the site also threatens property values and most important that Bannum and any other proposed CBRF in this city must enjoy public zoning review as established by existing law. Moreover, the force of law should not be taken lightly despite poliics or any other consideration. Bannum suggests that it had numerous meetings with members of the community to discuss its plans. However, those meetings are of no moment absent compliance with applicable law and do not justify their inetntional abrigartion of Zoning requirments.

As part of its strategy to deliberately circumvent applicable zoning law, Bannum now selfishly seeks to cloak itself in the defensive rubric of lost investment. Moreover, despite its intentional nondisclosures, it places blame on the District of Columbia government. for issuing it

a permit to renovate its leased warehouse and repeatedly stating, albeit after the BOP contract award, that a CCC can be located as a matter of right in a CM-2 district. At least four (4) D.C. City Councilmembers have expressed concerns about this facility being operated as a halfway house as a matter of right. At least two (2) City Councilmembers and one School Board member have expressly opposed it.

Title 11 DC Municipal Regulations Section 199 defined a community based residential facility as a halfway house, to wit a "residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." Under these regulations, a CBRF cannot be located in a Commercial Use District. According to §801.2 of applicable zoning regulations, CBRFs are specifically excluded from classification as a commercial use.

Title 11 DCMR at §801.7(k) states that only *temporary* detention centers and correctional facilities can operate as a matter of right in a CM-2 zone. It is noteworthy that the BOP solicitation document which resulted in Bannum's actions calls for location of a *permanent* community correction center. See Exhibit 4. Since a halfway house is not a temporary correctional facility its use is absolutely not permitted in CM districts and cannot occur without a use variance.

Bannum also relies on the legislative history of 801.7(k). Reference is made to Case No. 71.33 relative to a text amendment clarifying the Zoning Board's intention of subparagraph (k). Specifically, the Board determined that any proposed use anticipated by this provision would be "temporary" in nature. In its final report the Zoning Advisory Council noted: the effect of this amendment would be to permit detention or correctional institutions on leased 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 accomodate oveflow population from the esatblished institutions or as a temporary facility while they proceed with the process of budget, acquistion, and development of permanent facilities. Thence, Bannum's argument as to the intended purpose of this section for a halfway house or a CBRF is misplaced and even disingenuous. 801.7(k) was intended only for prison and jail overflow. Bannum knew or should have known that it could not use the property at issue in this case as a CBRF as a mtter of right, and did so at its own peril.

Zoning regulations also preclude multiple use once a use is determined to be for CBRF purose: Specifically, the regulations state: "If an establishment is a community based residential facility as defined in this section, it shall not be deemed to constitute any other use permitted under the authority of these regulations." Therefore, contrary to Bannum's argument, any CBRF cannot be deemed to constitute both a CBRF and some other category of use, such as a "temporary correctional institution." This case actually turns significantly on this point. Bannum's cannot be half pregnant. It is either a halfway house or a CCC.

Bannum has knowingly and intentionally circumvented the local zoning requirement that it publicize its intentions to build a correctional CBRF and procure approval from the DC Zoning Board in order to secure a federal BOP contract. In so doing, Bannum substantially risked, to its peril, prioritizing its financial goals over the affected community's rights and pubic safety interests and the need to comply with existing zoning laws. Its blatant circumvention of the law appears to be both strategic and collaborative on its part and certain D.C. government officials. In this respect, this Board should not reward Bannum and punish the community and the general

public for whom these laws were designed to protect. Disingenuously, Bannum would have this Board believe that the District has taken some official action approving its action on several occasions. However, the District has taken only two actions to date approving Bannum's proposed use of this facility which is the issuance of renovation permits in December, 2002 and January 2003. The two letters signed in December, 2000 and November, 2001, were merely "concurrences" with an opinion regarding use of temporary correctional facilities as a matter of right. These letters simply did not state that Bannum specifically intended to operate a halfway house and that Bannum required the concurrence in order to comply with specific requirements in a BOP contract. Moreover, our court has ruled that low level administrative opinions are not entitled to the same judicial deference as rulings that represent the last administrative word, which in this case would be the Board of Zoning Adjustment. Brawner Building v. Shehyn, 442 F. 2d 847 at 857 (1971), citing L'enfant Plaza North Inv. v. DC Redevelopment Land Agency, 141 U.S. App. D.C. 265, 437 F.2d 698 (December 1970). Hence, the letters relied upon by Defendant Bannum cannot supercede or dictate your determination.

CONCLUSION

The issue before you is clear. Bannum is violating DC zoning law, and no government representative or Agency is requiring its enforcement. The ANC urges this Board to follow itsmandate and require Bannum and the DC government, to follow its laws.

Respectfully submitted,

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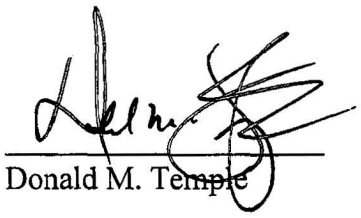
COUNSEL FOR ANC 5B

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Bannum's Memorandum on the merits in Opposition to the Appeal was served this 22th day of April, 2003 by hand delivery to:

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