BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	BZA Appeal No. 16998
	)	
Re: 2210 Adams Pl., N.E.	)	
	)	

DISTRICT OF COLUMBIA
2003 MAR 14 P 4:26

ANC 5B'S OPPOSITION TO BANNUM INC.'S
MOTION TO DISMISS ON NEW GROUNDS

COMES NOW, ANC 5B and respectfully opposes Bannum Inc.'s Motion to Dismiss On New Grounds.

1. Bannum is estopped to challenge this court's jurisdiction.

> ....Bannum opposes the issuance of a TRO for several reasons. First, Bannum's construction of the community correction facility is the subject of a case now pending before the Board of Zoning Adjustment ("BZA") and therefore ***primary jurisdiction rests with the BZA.***
>
> Bannum's Opposition to Plaintiff's Motion for Temporary Restraining Order in DC Superior Court. March 11, 2003. (Emphasis added)

Bannum is judicially estopped from raising any argument regarding dismissal of the immediate case for lack of jurisdiction. Its Motion to Dismiss on New Grounds is simply a rehashed motion with a different argument. This motion, which was predictable given its recent shenanigans to further postpone this case, is contemptuous and disingenuous and would render this Board powerless and unnecessary, especially given the timely filing of citizens challenge to Bannum's illegal actions. ANC 5B submits that based upon the record before you Bannum should be precluded from raising any challenge to this forum's exercise of jurisdiction.

BZA
Case No. 16998
Exhibit No. 52

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 52

The principle of judicial estoppel prohibits Bannum from seeking one form of relief in one court and then going to another forum and seeking the opposite relief. The case of Porter Novelli., Inc. v. Bender, 817 A.2d 185 (D.C. 2003) is instructive. In that case the subtenant was judicially estopped from relying on terms of lease requiring payment of double rent for holdover period, as provided in lease, rather than triple rent, as provided in holdover agreement, where tenant rejected rent in lease in prior appeal in exchange for stay of eviction. Because subtenant switched legal position in two related judicial proceedings, taking one side of an issue at trial and saying the opposite on appeal, the technical doctrine we apply is judicial estoppel. *"The independent doctrine of judicial estoppel precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self-interest."* Id. at 188. "A party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects." Id.

Relative to this case, several residents who live in close geographical proximity to the site filed a civil action in the District of Columbia Superior Court seeking a declaratory judgment and injunctive relief *pendente lite* (pending outcome of the BZA consideration of Regina James' appeal). In the DC Superior Court action, Bannum persuasively argued that the DC Superior did not have primary jurisdiction over the case and that the Board of Zoning Adjustment should be allowed first to rule on the pending ANC 5 B appeal before the Superior Court exercised

jurisdiction, or take any action. Based on this argument, on April 17, 2003 the court denied Plaintiffs' Motion for a Temporary Restraing Order, ruling among other things, that the BZA should first consider the matter and that its decision would be instructive to the court.

On April 21, 2003, Bannum sued Darryl Carter, Concerned Citizens of Ward 5, Regina James and ANC 5B in the United States District Court for the District of Columbia. Contrary to its arguments in the DC Superior Court, Bannum sought in its federal law suit to enjoin the BZA from considering ANC 5B's appeal of DCRA's decision to issue Bannum a permit. Bannum's requested relief demonstrated its disingenuousness and revealed that its actual intentions were to obfuscate and delay the zoning review process, subvert neighboring citizens' rights and the public interest in this case and intimidate and retaliate against those private citizens leading public opposition to Bannum's halfway house. The court denied Bannum's motion.

At the first BZA hearing on April 22, 2003, Bannum caused the BZA not to consider the substantive issues on appeal by filing and arguing at great length several preliminary motions. As a result of Bannum's time consuming arguments, the BZA delayed their hearing until May 22, 2003. On May 22, 2003, Bannum requested and was granted a continuance because Holland & Knight, LLP, its counsel of record, withdrew.

Now, after urging the DC Superior Court to stay its consideration and exercise of jurisdiction, Bannum comes before this forum and once again moves to dismiss the immediate action even though Bannum has completely influenced the present status of this case, while at the same time knowing that it would pursue and likely receive a Certificate of Occupancy from the Department of Consumer and Regulatory Affairs. In all, Bannum's actions are part of a very carefully mapped out plan to ususrp the BZA and circumvent exiting zoning laws. This Board should take extrajudicious efforts to ensure that Bannum is not allowed to use this forum as a pawn to further circumvent DC law.

2. The issue on appeal is not moot.

The issuance of a COO does not render moot a challenge to the validity of a building permit. Compare, Community Housing Trust v. Department of Consumer and Regulatory Affairs, 2003 WL 1887958 (D.C. 2003) (Zoning Administrator's determination concerning COO does not render moot facial challenge to zoning regulations). The mootness doctrine has emerged to assure that the courts decide "actual, ongoing controversies." Pharmachemie B.V. v. Barr Labs., Inc., 276 F.3d 627, 631 (D.C.Cir. 2002), quoting Clarke v. United States, 915 F.2d 699, 700-01 (D.C. Cir. 1990)). In this instance, the actual, ongoing controversy is whether Bannum should have been issued a building permit to operate a halfway house in a CM district as a matter of right, where such use is prohibited by D.C. Zoning laws. Simply stated, DCRA building permits must be issued consistent with zoning laws. No building permit or COO would

be or should be issued in violation of zoning laws. Thus, Bannum's permit is not the issue. The zoning law violation is the issue.

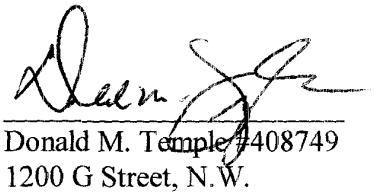
Bannum sites a series of New York state court cases that are inapplicable here. However, even their cases support the ANC's position. See, e.g., G.Z.T. Industries, Inc. v. Planning Board of the Town of Fallsburg, 245 A.D.2d 741, 665 N.Y.S.2d 736 (1997). In G.Z.T. Industries, Inc., the court held that if the work encompassed by a building permit has been completed and a COO has been obtained, the appeal has been rendered moot *where the appellants have failed to seek injunctive relief during the pendency of their appeal.* Id. Here, injunctive relief was sought in the D.C. Superior Court, unsuccessfully, to stop any and all building of a halfway house at 2210 Adams Place N.E. by Bannum Inc.

Furthermore, case law is very clear that an appeal should be rendered moot only where "events have so transpired that the decision will neither presently affect the parties' rights not have a more-than-speculative chance of affecting them in the future." Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C.Cir. 1990). In this case, the issue of zoning continues to be ripe as the decisions here could affect your decision on any other challenge to Bannum's use of the land at issue. Additionally, your decision will determine wether Ward 5 citizens will be able to secure their right to be heard concerning the operation of a halfway house in their neighborhood and its threat to the community's safety and property value.

3. ANC 5B authorized Regina James to file an appeal.

Attached is an affidavit of acting ANC 5B chair, Joan Black, which confirms even further that ANC 5B ratified James' report.

Respectfully submitted,



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Counsel for Plaintiffs

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B

Re: 2210 Adams Place, N.E.

DECLARATION OF JOAN BLACK

I, Joan Black, do state and solemnly swear, under penalty of perjury, that the following is true to the best of my recollection:

1. That I presently reside at 2401 Rand Pl., NE in Washington, DC,.

2. That I am presently a member and Acting Chair of ANC 5B. On February 6, 2003 I served in the position of Vice-Chair of ANC5B.

3. On February 6, 2003 I attended an ANC meeting at which a Quorum was present. At that meeting, there was a vote to ratify an appeal filed by Regina James to the Board of Zoning Adjustment on or around January 23, 2003 regarding DCRA's issuance of a permit to Bannum Inc. to renovate a building located at 2210 Adams Pl., N.E. to be used as a halfway house or community residential facility. Ms. James was at that time the newly elected Chairperson for ANC5B.

4. At all times in that meeting, it was our understanding that the appeal would challenge the Department of Consumer and Regulatory Affairs issuance of a permit and that the zoning for a halfway house was improper, specifically that Bannum could not operate the halfway house as a matter of right.

5. This was the subject of a favorable majority vote of the ANC which ratified Regina James Appeal.

Sworn and affirmed under penalty of perjury, this 16th day of June 16, 2003.

Joan Black
JOAN BLACK

CERTIFICATE OF SERVICE

I hereby certify that copies of ***ANC 5B's Opposition to Bannum, Inc.'s Motion to Dismiss on New Grounds*** were mailed, by first-class delivery, postage prepaid, this 16th day of June 2003 to the following:

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