BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	**BZA Appeal No. 16998**
Re: 2210 Adams Place, NE	)	

OPPOSITION TO DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' MOTION FOR AFFIRMANCE OF DECISION AT CONCLUSION OF APPELLANT'S CASE

COMES NOW Appellant, ANC 5B, and respectfully opposes the District of Columbia Department of Consumer and Regulatory Affairs' ("DCRA") Motion for Affirmance of Decision at Conclusion of Appellant's Case.

Appellant completed presentation of its case-in-chief at the June 17, 2003 hearing in the above-captioned appeal and maintains that it has established a solid factual and legal basis to overturn DCRA's issuance of a permit, and possibly its certificate of occupancy ("COO"). Appellant has met its burden of proof relative to this appeal. Accordingly, ANC 5B respectfully urges this Board to complete its hearing on this case and expeditiously enforce applicable District of Columbia ("DC") zoning laws.[1] In support thereof, Appellant sets forth below a chronology of critical facts proven by Appellant and a corresponding legal argument.

CRITICAL FACTS PROVEN

1. In October, 2001, Bannum, Inc. ("Bannum") and the Federal Bureau of Prisons ("BOP") entered into a contract for two distinct services in response to Request for Proposal ("RFP") 200-0593-MA and RFP 200-0604-MA. Each agreement provided for a four (4) year

[1] Appellant has filed a motion to modify its claim to include a challenge to DCRA's issuance of a COO to Bannum relative to its facility at 2210 Adams Place, N.E.

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contract, essentially a one year deal with three option years, the total contract not to exceed five (5) years. See, Ex. 3 at section 52-217-9, Option to Extend the Term of the Contract.

2. In November, 2001, Bannum's legal Counsel sought a general advisory opinion as to the application of Title 11, DCMR Section 801.7(k). Bannum, in its inquiry, never specifically mentioned that it intended to operate a halfway house or a community-based residential facility ("CBRF"), and it never discussed its present view that a temporary correctional institution is a CBRF. Also, Bannum never discussed its contract terms with the BOP or its present lease. See, Ex. 1.

3. On February 7, 2003, Counsel for the Ward 5 Community sent a letter to David Clark, Director of DCRA, directly advising him that Bannum's proposed facility was a "CBRF" and a "halfway house." In this three (3) page letter, Counsel explained in great detail Bannum's violation of the zoning laws and the legal issues at hand. Both David Clark and Denzil Noble, head of the DC Office of Building and Land Regulations, were made aware of this letter and should have assessed the validity therein. See, Exs. 8 and 10.

4. In a letter to Councilmember Vincent Orange, dated April 10, 2001, Bannum admitted that its "Community Corrections Center" ("CCC") was a "halfway house," that the total term of the contract was for "five years" and that their proposed site "will be able to accommodate up to two hundred and sixty offenders..." See, Ex. 18.

5. Several terms are defined by the BOP, including the term "Community Corrections Center," which is defined as a "halfway house." See, Ex. 3.

6. Both the BOP and Bannum have openly admitted that Bannum's facility at 2210 Adams Place, N.E. is unequivocally a halfway house. See, Ex. 4; see also, Exs. 18 and 3.

7. Title 11 of District of Columbia Municipal Regulations ("DCMR"), Section 199 defines a CBRF 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."

8. DC zoning laws were carefully designed to regulate CBRFs. For instance, CBRFs are generally prohibited in a CM-2 zone. Bannum's facility at 2210 Adams Place is in a CM-2 zoned district.

9. Applicable zoning regulations explicitly state that a CBRF shall not be considered a matter of right use in a CM zone. See, 11 DCMR 801.2.

10. All presently existing halfway houses in DC other than Bannum's facility at 2210 Adams Place, N.E. have been deemed by DC government as CBRFs thereby requiring zoning approval.

11. According to Title 11 of the DCMR at 801.7(k), only temporary detention centers centers and correctional facilities can operate as a matter of right in a CM-2 zone.[2]

12. In October 2002, Bannum applied for a permit from DCRA and stated that it was converting a warehouse into a 150 bed CCC. Bannum omitted from its application that it intended to open a halfway house or a CBRF. In fact, Bannum never once stated in its application that it intended to open a 150 bed "temporary corrections center." See, Ex. 11.

13. In December 2002, the BOP awarded Bannum a contract to operate a "Community Corrections Center," not a temporary detention center or a temporary correctional institution. See, Exs. 3 and 33.

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[2]This theory was advanced by Bannum's law firm, Holland & Knight, specifically to create an exception to existing law.

14. On January 17, 2003, Bannum amended its permit to read "3 year temporary use." See, Ex. 27. Again, Bannum never once stated that the facility was for a temporary correctional institution.

15. At no time did DCRA seek copies from Bannum of its lease or its contract with the BOP.

16. Under the BOP contract, the BOP (***not*** Bannum) determines whether to elect an option. Therefore, Bannum has no control over whether its contract is extended for three (3), four (4) or five (5) years. See, Exs. 3 and 33.

17. When DCRA issued a permit to Bannum in January, 2003, DCRA knew or should have known that a halfway house was also a CBRF and that a CBRF was not permitted as a matter of right in a CM-2 district.

ARGUMENT

The District, in its Motion for Affirmance, essentially argues that based on Bannum's permit application and because it was "possible for Bannum's proposed "Community Corrections Center" to be used as a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years," DCRA had no basis for denying Bannum's application. See, DCRA Mot. for Affirmance at 2. It then goes on to state that "a halfway house qualifies as a 'detention or correctional institution'." Id and at footnote 2. It concludes that a halfway house can also be a "temporary...institution on leased property for a period not to exceed three (3) years," and thus is allowed as a matter of right in a CM-2 zone. Id at 2-3. In its analysis, DCRA

all too easily absolves itself of its primary duty to enforce DC laws and particularly DC zoning laws.[3]

Appellant will attempt to address DCRA's argument in sequence.

1. DC zoning laws were designed to restrict CBRFs in certain communities.

DC zoning laws are very specific in their qualification and restriction of CBRFs in certain DC communities. Review of these laws reveal that in each district the treatment of CBRFs, in general, and adult or youth rehabilitation homes, in particular, are carefully spelled out. As a rule, the laws state precisely when a CBRF can be located in a particular community, either by variance, as an exception or as a matter of right. In this respect, a CBRF can be located as a matter of right only in a C3 district. See, 11 DCMR 741.5(c). No other section of the DCMR allows a matter of right location of a CBRF. Other provisions generally allow CBRFs with a maximum restricted population of 20. DCMR, Section 801 specifically omits CBRFs in its listing of those entities that are permitted in a CM-2 district as a matter of right. However, it does list "temporary correctional institutions on leased property for a period not to exceed three (3) years" as an entity that is permitted in a CM-2 district as a matter of right.

Bannum, therefore, with the help of learned Counsel, has sought to redefine its facility to fit within the ambit of this exception. Notwithstanding Bannum's deliberate attempts, its facility at 2210 Adams Place, N.E. does not fit within this exception. The law simply did not intend that an entity could locate a 150-260 bed halfway house in a CM-2 district. If it did, DCMR, Section

[3] DCRA, in the last several paragraphs of its Motion for Affirmance, peculiarly suggests numerous steps that the ANC can take, not the government, to challenge Bannum's actions.

801 would have expressly and specifically included a CBRF for CM-2 zones as the regulations did for C3 zones.

2. CBRFs cannot be deemed to constitute any other use, including a "temporary correctional institution."

According to Title 11, DCMR Section 199, if an establishment is a 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. The principles of statutory construction require that this section be the predicate for any legal analysis of the issue before this Board. To allow for multiple definitions of a CBRF, as DCRA proffers, would completely nullify this provision. As Appellants have proven, Bannum's facility at 2210 Adams Place, N.E. is a CBRF. Even DCRA does not negate this fact. See, DCRA Mot. for Affirmance at 2. Therefore, the facility is statutorily restricted from constituting any other use. Moreover, DCRA can cite no legal authority for its view that this Board should deem a CBRF to constitute any other use permitted under the regulations.

The real point is that DCRA's analysis is woefully simplistic and inadequate. It completely ignores zoning law when it hypothesizes that "***if*** the halfway house is ***also*** a temporary institution on leased property for a period not to exceed three (3) years," then it is allowed as a matter of right. Emphasis added. Id. If this Board follows DCRA's reasoning it will effectively allow CBRFs and adult and youth rehabilitation homes of any size (150-1,000 residents) to be included in 11 DCMR 801.7(k) where they are expressly omitted. This type of strained reasoning is the only way to justify DCRA's sanctioning of Bannum's illegal permit and COO. However, the law is the law. According to Section 801.7(k), a CBRF cannot constitute a

temporary correctional institution because a CBRF is not temporary in nature as intended by this section. The legislative history maintains that correction facilities as defined in Section 801.7(k) were designed to "accommodate overflow population" from the Department of Corrections or are temporary facilities that operate while the Department of Corrections "proceed with the process of budget, acquisition, and development of permanent facilities." Neither Bannum nor DCRA proffer that Bannum's facility operates as a transient facility for the Department of Corrections.

Additionally, this facility is not like the DC jail. Most, if not all, of its residents are released on a daily and regular basis to seek work, to work, or to visit. Bannum's facility is not designed to accommodate overflow populations, but to house offenders who are soon to be released from prisons. See, Ex. 2. Hence, this definition is inapplicable here as well.

3. DCRA knew or should have know that Bannum's halfway house was illegal in a CM-2 zone.

DCRA suggests that it did not err in issuing a building permit that authorized Bannum to renovate the facility at 2210 Adams Place, N.E. for its intended use because it did not know in effect the terms of Bannum's contract with the BOP. This is indeed a peculiar twist and an inaccurate one. If this Board were to follow DCRA's logic, any halfway house contractor could follow Bannum's lead by insisting on a particular interpretation of the law, not disclosing certain information to zoning officials such as its contract and its lease, then locating a 150 bed halfway house in a CM-2 zone and crying foul when they are told they are violating zoning laws. That DC would suggest that it did not know that Bannum intended to operate a halfway house is disturbing and disingenuous.

The Advisory Neighborhood Committee ("ANC") makes several contentions in this regard. Firstly, Councilmember Vincent Orange, in his January 13, 2003 letter, urged DCRA Director to stop the permit. See, Ex. 5. Secondly, Counsel for the Ward 5 Community sent a very detailed letter to Mr. Clark, which specifically reviewed Title 11 DCMR, Section 199 and outlined the legal problems with Bannum's proposed facility. This letter was forwarded to Denzil Noble. See, Exs. 8 and 9.

DCRA had every reason to believe or to know that the zoning for the Bannum halfway house was illegal when it issued the permit and the COO. Given Councilmember Orange's January 13, 2003 letter and Counsel's February 7, 2003 letter, DCRA should have minimally conducted an inquiry of Bannum and sought copies of Bannum's lease and its contract with the BOP. DCRA did not. Rather, it continued to allow Bannum to operate in a zone which prohibited its use. Given this record, DCRA did know that Bannum was operating a halfway house/CBRF and should have withdrawn its permit and not have issued a COO.

4. Bannum misrepresented its intentions to DCRA.

Bannum comes to this Board with unclean hands. Its application to DCRA neither disclosed that it was a halfway house nor a CBRF. Bannum did this intentionally. DCRA argues in its Motion for Affirmance, footnote number 2 that a halfway house may enjoy multiple definitions. In this regard, Bannum intended to circumvent DCRA scrutiny and DCRA subscribed to their actions. See, Exs. 7 and 10. Bannum should not be allowed to benefit from its misrepresentations.

CONCLUSION

DCRA, in its conclusion to its Motion for Affirmance, admits that a basis for revoking Bannum's building permit and its subsequent COO is if "Bannum is not operating its 'community correctional center' as a bona fide 'temporary detention or correctional facility'." We have clearly shown that Bannum's so-called CCC is not a bona fide "temporary detention or correctional facility and that Bannum is not acting in good faith. In fact, the reason that Bannum did not state its intentions or disclose pertinent documents to DCRA is ever more apparent now. This was part of a well-constructed plan to circumvent DC zoning laws.

The point is that Bannum's facility is in violation of DC zoning laws. Therefore, this Board should deny DCRA's Motion for Affirmance, allow a complete record to be made, and then issue an expeditious decision.

Respectfully submitted,

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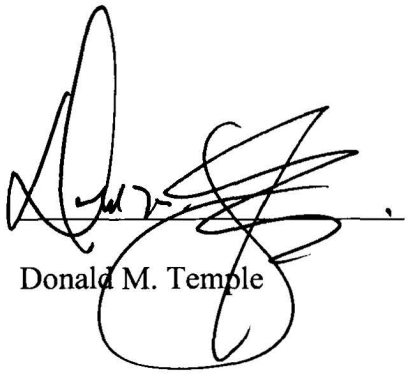
COUNSEL FOR ANC 5B

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to District of Columbia Department of Consumer and Regulatory Affairs' Motion for Affirmance of Decision at Conclusion of Appellant's Case was served this 3 day of July, 2003 via U.S. first-class mail, postage-prepaid to:

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