Government of the District of Columbia

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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)

BZA
Case No. 16998
Exhibit No. 83

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 83

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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> * * *
>
> **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.