BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

APPELLANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

A. APPELLANT'S PROPOSED FINDINGS OF FACT

1 Bannum Inc. ("Bannum") is a Florida based halfway house contractor which was awarded a Federal Bureau of Prisons ("BOP") contract to operate a permanent "Community Corrections Center" ("CCC") in the District of Columbia (D.C.).

2. The term "Community Corrections Center," is a term of art used by the BOP; it is not defined in D.C.'s zoning regulations. According to BOP definitions, a CCC is defined as follows: "The location in which the Contractor's programs are operated; also called facility, center, community treatment center (CTC), or a *halfway house*. A CCC is considered a penal or correctional facility." (Emphasis added). Statement of Work at Appellant's Ex. 3. The BOP uses the terms "Community Corrections Center" and "halfway house" interchangeably. There is no explanation contained in the BOP solicitation document that defines a CCC as a "temporary" correctional facility.

3. The Bannum halfway house is located at 2210 Adams Place in Northeast, Washington, D.C. (Ward 5).

4. The area where the halfway house is located is zoned CM-2. Under D.C. zoning regulations, a CM-2 zone is a commercial-light manufacturing district zoned for medium-bulk

BZA
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Exhibit No. 84

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industrial purposes.

5. According to Title 11 of the D.C. Municipal Regulations ("DCMR") at Section 199, a halfway house is a community based residential facility ("CBRF").

6. Under DC Zoning laws, C3 and C4 districts are the only areas in which a CBRF can be located as a matter of right. In those districts, applicable DC zoning laws expressly state that a CBRF can be located as a matter of right.

7. In its bid solicitation to the BOP, Bannum was required to submit satisfactory proof in writing that it met all D.C. 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, LLP, transmitted a letter dated December 2000 to Michael Johnson ("Johnson"), then Acting Zoning Commissioner. Appellant's Ex. 1.

8. Brown's December 2000 letter failed to disclose that Bannum intended to use the letter as an official verification to the BOP of compliance with local DC zoning laws and further, for the purpose of securing a contract from the BOP for a *permanent* halfway house. The letter stated only 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 D.C. as a matter of right for a period not to exceed three (3) years. Appellant's Ex. 1.

9. At no time did Bannum request a concurrence or more specifically, a clarification of its intent to consider its 150 bed CBRF/adult rehabilitation home as a "temporary correctional institution" for purposes of compliance with D.C. zoning regulations. Thence, the then Acting Adminstrators' concurrence did not constitute a suffficient opinion on which Bannum could have justified its action.

10. Four (4) months after its December submission, Bannum, by certified mail, wrote a three (3) page letter to D.C. Councilmember Vincent Orange in which Bannum stated the following: 1) that it intended to operate a *halfway house*; 2) that it was submitting a proposal to the BOP for use of the subject space as a *halfway house*; 3) that should the property "not be zoned for its proposed use, then Bannum would make application for all necessary permits and applications"; 4) that the total term of the contract was for five (5) years; 5) that the proposed site would be able to accommodate up to 250 offenders; 6) that there are no locks, bars or physical restraints used at this facility and that Bannum's staff are not peace officers, are not permitted to carry weapons and are not permitted to restrain persons. At no point in this April, 2001 correspondence did Bannum state that its intended use was either temporary or exigent in nature. Appellant's Ex. 18.

11. In November 2001, Brown elicited a similar "concurrence" for a CCC to its December 2000 request, this time from then Acting Zoning Administrator, Olutoye Bello ("Bello"). Appellant's Ex. 2. Brown's letter to Bello also failed to state that Bannum intended to operate a 150 bed halfway house or CBRF at the Adams Place, N.E. location. In response to Brown's letter, Bello, like Johnson, gave a written concurrence on the stationary of Bannum's law firm, Holland & Knight. Appellant's Ex. 2. When Bannum sought and secured the

aforementioned "concurrences," neither Brown nor Bannum provided copies of Bannum's BOP contract, BOP's contract solicitation documents or its lease to the D.C. Department of Consumer and Regulatory Affairs ("DCRA").[1] BZA Tr. 243-244.

12. Bannum failed to disclose to Johnson or Bello in both December, 2000 and November 2001 any of the specific information that it disclosed to Councilmember Vincent Orange in the aforementioned April 21, 2001 letter. Appellant's Exs. 1, 2 AND 18.

13. On October 9, 2002, Bannum applied for a permit from the D.C. Department of Consumer and Regulatory Affairs ("DCRA") to "change tenant warehouse space to a 150 bed community corrections center." Bannum omitted from its application that it intended to operate a halfway house or adult rehabilitation home for 150 persons. Appellant's Ex. 11.

14. In December, 2002, the BOP awarded Bannum a contract to operate a permanent CCC in D.C. even though its correspondence to DCRA Zoning Administrators implied that its CCC would be temporary in nature. Appellant's Ex. 33.

15. On or about December 12, 2002, Defendant DCRA issued Building Permit No B425438 authorizing Bannum to convert the warehouse space to a 150 bed corrections center at 2210 Adams Place, N.E. Appellant's Ex. 11

16. There is no reference in Bannum's contract with the BOP which suggest that its operation of a halfway house or even a CCC is either temporary or exigent in nature. Appellant's Ex. 33.

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[1] The BZA should note that although Bannum's counsel volunteered to submit the lease, they only submitted a partial and redacted version. Further, Bannum has not submitted the proposal which it submitted in response to the BOP Request for Proposal.

17. By its own admission, Bannum's lease corresponds with its legal obligation under it contract with the BOP to accommodate probable use of the facility at issue for a maximum five (5) year period. BZA Tr. at 207.

18. On January 15, 2003, D.C. Councilmember Vincent Orange ("Orange") wrote to David Clarke ("Clark"), the Director of DCRA, and protested DCRA's issuance of a permit to Bannum. Further, Councilmember Orange urged Clarke to immediately issue a stop work order for building construction at the site to prevent the inappropriate opening of a 150 bed correctional facility in Ward 5. He noted that the facility was zoned for industrial use and not residential use and that the BOP contract was for a five (5) year period. Appellant's Ex. 6.

19. On January 17, 2003, DCRA issued a building permit No. B448325 which revised Building Permit No. B425438 as follows: "Change Tenant Warehouse to 150 Bed Community Corrections Center." Appellant's Ex. 11.

20. On January 24, 2003, ANC 5B Chairperson Regina James ("James") filed this appeal to the BZA challenging DCRA's decision to issue permit no. B425438. Appellant's Ex. 26. James' appeal of the DCRA decision includes an appeal of DCRA's revised permit No. 448325.

21. On January 31, 2003, Clark replied to Orange and indicated that Bannum's use of the facility was legal because it was "institutional" and consistent with 11 DCMR 801.7(k). Appellant's Ex. 7.

22. On February 7, 2003, Concerned Citizens for Ward 5, through Counsel, wrote to Clark and explained in detail that the site being built was a halfway house and not a detention

facility and that the location of the Bannum facility violated D.C. zoning laws. Appellant's Ex. 8.

23. In a February 21, 2003 letter, Denzil Noble, a Zoning Administrator for Defendant D.C., 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. Appellant's Ex. 10.

24. D.C., a party to this matter, has admitted that Bannum's proposed facility is an adult rehabilitation home and a community based residential facility. DCRA's Proposed Findings of Fact and Conclusions of Law at 5.

25. D.C. government officials representing DCRA have also made several admissions against D.C.'s interests. To wit, DCRA zoning official, Denzil Noble, who oversees the Building and Land Administration Operation (BZA Tr. at 264) and to whom the Zoning Adminstrators report, admitted the following when examined by Appellant's counsel:

> Q. If you knew that a property -that the intended use for the property was violative of the D.C. zoning regulation , am I correct that you wouldn't issue, for example, a permit for that property?
>
> A. That' correct.

Tr. at 240.

> Q. And it is your understanding, is it not, that a halfway house is indeed, a community based residential facility?
>
> A. Yes, it is.
>
> Q. And you also understand, am I correct, that an adult rehabilitation home under D.C. regulations is also considered a halfway house?
>
> A. It's a community based residential facility.

Tr. at 241.

26. Noble also specifically admitted that under Title 11 DCMR section 801 that an operator of a halfway house/CBRF cannot locate its facility in a CM-2 district because the facility is not consistent with "commercial use" and that a CBRF cannot have an alternative use under the regulations. BZA Tr. 245-246.

27. Noble could not identify any situation where a CBRF/halfway house has been permitted to locate in D.C. as a matter of right. BZA Tr. 248

28. The halfway house is not a temporary or emergency facility.

B. INTRODUCTION TO APPELLANT'S PROPOSED CONCLUSION OF LAW

i. The Legal Issue Before This Board

To date, no correctional halfway house can be or has been located as a matter of right in D.C., except in a C-3 district and the BZA has approved all of the existing halfway houses located in D.C.

The immediate matter before the BZA involves an unprecedented question that has significant implications for D.C. citizens and communities: whether, under DC zoning laws, a BOP adult rehabilitation home operator (and therefore a CBRF operator) with a five (5) year contract and a corresponding five (5) year lease can independently characterize its facility as a "temporary correctional institution" for purposes of locating its facility as a matter of right in an area zoned CM-2?

ii. District of Columbia Law Governs

As a premise, any and all issuances of permits and certificates of occupancy by the DCRA must comply with D.C. zoning laws. It is axiomatic that the D.C. government's issuance of a permit is impermissible for a purpose that violates D.C. zoning laws.

iii. Bannum's Intention to Circumvent Applicable Law

In the case before the BZA the record demonstrates that Bannum strategically sought to circumvent the requirements and force of existing zoning laws by creating an unprecedented, expanded, yet strained, interpretation of 11 DCMR section 801.7 (k). In short, Bannum has attempted to characterize itself as a "temporary" facility on the grounds that it would voluntarily operate for a limited three (3) years. Thence, in its narrow and self serving view, it would be allowed to locate as a matter of right in a CM-2 district despite its clear objective characterization as a halfway house and adult rehabilitation home.[2]

iv. The BZA Must Enforce The Law

Notwithstanding Bannum's relentless and disingenuous attempt to avoid any reference to itself as a halfway house and adult rehabilitation home, the record is abundantly clear that its operation is just that. An old legal adage is quite appropriate: if it looks like a duck, walks like a duck and quacks like a duck, then it is a duck. Bannum's operation is indeed a halfway house

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[2] Appellant notes that although Bannum has intervened, its Executive Director, David Lowery, did not testify before the BZA. Absent his testimony and that of the BOP representative, and also absent introduction into the record of an unredacted lease and copy of Bannum's contract proposal to the BOP, Bannum fails miserably to make any meaningful or credible factual contribution to the hearing record that refutes either what D.C. or the Appellant has proven. Bannum's witnesses offered only questionable opinion testimony of a general nature, not specifically peculiar to D.C. law or zoning regulations. Additionally, none of Bannum's documentary exhibits reference in even one instance its so called "temporary" or exigent nature.

and adult rehabilitation home for purposes of any analysis under D.C. law. Thus, its intended use in this particular CM-2 zone is inherently illegal and impermissible. This Board is therefore required by the letter of the law, based on the record before it, to prohibit Bannum's intended use of this halfway house in a CM -2 zone as a matter of right.

C. APPELLANT'S PROPOSED CONCLUSION OF LAW

1. Bannum's position is that its facility is a "community corrections center" and a "temporary correctional institution," not a halfway house.

2. Bannum's general communications to the two D.C. Zoning Administrators in 2000 and 2001 did not sufficiently disclose to the DCRA pertinent information about specific circumstances surrounding its intended use. Critical information such as that contained in its April 21, 2001 missive to Councilmember Vincent Orange was omitted. Such information would have more fully described Bannum's intentions and made these concurrences more significant.

3. The Acting Zoning Administrators' general "concurrences" are not binding on the DCRA. The BZA's consideration of this issue in an adversarial context with testimony and documentary evidence constitutes the first time that this matter has been given proper zoning review.

4. D.C. courts have 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 BZA's ruling. 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 BZA's ruling on this matter will be controlling and

have much greater weight than the two "concurrences" issued by acting Zoning Administrators in 2000 and 2001.

5. Quoting Bannum's December 11, 2000 and Novemebr 26, 2001 letters to DC Acting Zoning Administrators, DCRA admits that Bannum's proposed CCC fits "within the general definition of CBRF set forth in 11 DCMR Section 199.1: a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living. DCRA's Proposed Findings of Fact and Conclusions of Law at 4-5.

6. Quoting from Bannum's permit application, DCRA admits that Bannum's facility is residential in nature. Id.

7. DCRA also admits that Bannum's facility is an adult rehabilitation home under 11 DCMR section 199.1. Id.

8. DC zoning regulations follow a particular theme and design relative to CBRFs. For instance, D.C. zoning regulations specifically state the term "community based residential facility" when referring to prohibitions or qualifications about location of these facilities in particular zones. In most of these zoning districts, CBRFs are limited to not more than twenty (20) persons and require variances or exceptions. Appellant's Ex. 35. Regulations for C-3 and C-4 zones expressly reference the location of CBRFs as a matter of right. There are no implicit references to CBRFs in DC zoning regulations. An interpretation that would create a matter of right where none expressly exists as in all other zoning regulations that prescribe the location of CBRFs would be an anomaly and as the District notes in its papers at odds with the principle that "statutory provisions are to be construed *not in isolation, but together with other related provisions.*" Citing Carey v. Crane Service Co., 457 A.2d 1102, 1108 (D.C. 1983). quoting

United Mine Workers of America v. Andus, 581 F.2d 888, 892 (D.C. Cir. 1978). Accordingly, the BZA read of applicable regulations should be consistent and this isolated provision should be interpreted consistent with all zoning regulations governing CBRF use.

9. DCRA now argues that Bannum's facility is both a CBRF and a "temporary correctional institution" under 11 DCMR section 801.7(k) and that even though it is a CBRF it can be located in this CM-2 district as a matter of right.

10. As demonstrated by the comparative chart introduced by Appellant, Bannum's facility is not a jail-like facility; it is a halfway house, adult rehabilitation home and CBRF. Its residents enjoy the use of cellular phones and beepers, work forty (40) hour per week jobs, enjoy recreational activities, furloughs and minimum supervision. There are no bars at Bannum's facility, no restraints, no peace officers, no right to touch inmates, etc. Bannum's facility is therefore exactly like all other halfway houses in D.C.

11. DC zoning laws, however, provide that CBRFs be deemed to constitute any other use permitted under the authority of these regulations in D.C.: "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. (See 11 DCMR 199.1).

12. DCRA suggests that the term "other use" in this section refers to a non-CBRF use. In so doing, DCRA contends that a temporary correctional institution, i.e. section 801.7(k) use is a CBRF use even though it is decribed in another part of the regulations. DCRA's Findings of Fact and Conclusions of Law at 4-5. This may appear to be logical, however strained, but the

theory is unsupported by applicable law. In this regard, the law is clear and cogent: According to the definition of a community based residential facility under 11 DCMR section 199.1:

> "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. *All community-based residential facilities shall be included in one or more of the following subcategories*: (a) adult rehabilitation home; (b) community residence facility; (c) emergency shelter; (d) health care facility; (e) substance abuse home and (f) youth rehabilitation home."

13. A plain reading of 11 DCMR 199.1 suggests that a "temporary correctional institution" was not intended to be included within the ambit of a CBRF. Assuming, *arguendo,* that it could, the BZA would have to find that Bannum's halfway house is indeed a "temporary correctional institution."

14. There is no evidence in this record that Bannum's facility is "temporary," other than Bannum's subjective and quite frankly, rather convenient insistence that its site is a "temporary correctional institution." No reference can be found in any of its correspondence describing the facility, in any BOP document, or in the Bannum-BOP contract. Bannum only makes such reference to the temporary nature of its facility in a subjective and unsupported characterization of its purported use, e.g. the amended permit application. Just because Bannum and its attorney argue that it is a "temporary correctional institution" doesn't necessarily make it so.

15. The term "temporary correctional institution" must be defined by reference to its legislative history. Case No. 71.33 relative to a text amendment clarifying the BZA's intention of subparagraph (k) of 801.7 is of note. Specifically, the BZA 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 established institutions or as a temporary facility while they proceed with the process of budget, acquistion, and development of permanent facilities." This provision constitutes essential guidance for this Board in its assessment as to whether Bannum's facility is a "temporary correctional institution." This backdrop is critical to this Board's determination.

16. It is abundantly clear that Bannum's contract is no different than all other BOP halfway house contracts. Bannum's assessment, nor any other applicant's subjective assessment, especially of such a major 150 bed halfway house, should not dictate the government's determination and application of the law. Such an end would inevitably result in abuse of process and a lawless state relative to the intended various protections of neighborhoods and citizens in D.C. To this extent, simply because its contract is for a period of years and its lease is for minimally three (3) years, including multiple year options, does not make it temporary. That is not what the term "temporary" means in this context. Appellant underscores that there is not one third reliable third party reference in the record, by way of testimony or documentation, which states that the halfway house at issue is temporary as the term is intended by the legislative history of 801.7(k). Bannum's halfway house is not intended to "accommodate overflow" or exist temporarily during the pendency of a budget process, acquisition of development of permanent facilities as allowed under 801.7(k).

17. Bannum's contract is for a five (5) year period. More important, the BOP has the exclusive option to exercise the four (4) one (1) year options, and there is no mention of any temporary context. Further, Bannum has arranged a flexible lease to accommodate the BOP's exercise of its option. In short, Bannum has disclosed to this Board that it does not have a straight forward three (3) year lease. It is readily transparent that Bannum intends to use 801.7(k) to secure the BOP contract and circumvent DC law and then exercise its flexibility on the back end of the three (3) year period and fight whatever necessary legal challenges while satisfying its five (5) year commitment to the BOP, at the expense of D.C. citizens and the appropriate enforcement of D.C. law. However, the law is the law for all persons and businesses in D.C.

18. There is no emergency in the District of Columbia regarding prison or jail overcrowding. D.C. Code Section 24-201.42 governs the declaration of state of emergencies. It requires the Department of Corrections to request that the Mayor declare a state of emergency.

19. There is no evidence in this record that any official in either the District or federal government has declared a state of emergency relative to the need to house overflow offenders.

20. Both Bannum's and DCRA's arguments are without merit. Bannum's halfway house is not temporary in nature.

D. CONCLUSION

Based on the foregoing, Appellant urges BZA to properly apply D.C. zoning laws to the facts before it. In so doing, this Board should determine the following: 1) Bannum's halfway house is a CBRF and adult rehabilitation home; 2) Bannum's facility is not a temporary correctional institution as described under 801.7(k); 3) Under D.C. zoning laws, Bannum cannot operate its CBRF in a CM–2 zone as a matter of right.

Therefore, a decision to operate a CBRF/adult rehabilitation home must be reviewed by the BZA and the D.C. public.

Respectfully submitted,

Donald M. Temple, Esq.
Temple Law ~~Offices~~
1200 G Street, N.W., Suite 370
Washington, D.C. 20005

Counsel for Appellant
(202) 628-1101

For the reasons stated above, it is hereby **ORDERED** that DCRA's decision to issue Building Permit No. B425438 is hereby **REVOKED** as being inconsistent with the zoning in Ward 5. To wit, Bannum's facility it is not permitted in a CM-2 zone.

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.

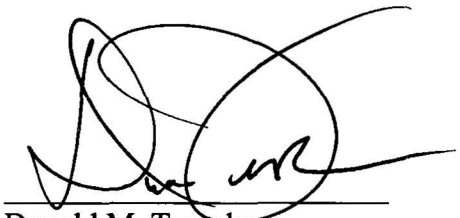
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's Findings of Fact and Conclusions of Law was served this 15 day of August, 2003 via U.S. first-class mail, postage-prepaid to:

Mr. Bennet Rushkoff, Esq.
Civil Division
Office of Corporation Counsel
441 4th Street, N.W., Suite 540N
Washington, D.C. 20001

Joseph A. Camardo, Jr.
127 Genesee Street
Auburn, New York 13021

Shawn C. Whittaker
9055 Comprint Court, Suite 340
Gaithersburg, Maryland 20877



Donald M. Temple