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August 15, 2003

Geoffrey H. Griffis, Chairperson
DC Office of Zoning
Board of Zoning Adjustment
441 4th Street, NW
Suite 210 South
Washington, DC 20001

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

Dear Mr. Griffis:

In accordance with the Board's Order, enclosed herewith for filing in the above appeal please find the original and nineteen (19) copies of Bannum, Inc.'s Findings of Fact and Conclusions of Law.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

Kevin M. Cox

Cc: Bannum, Inc., via mail
Donald Temple, Esq., via fax & mail
Bennett Rushkoff, Esq., via fax & mail
Shawn Whittaker, Esq., via mail

BZA
Case No. 16998
Exhibit No. 85

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 85

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

BANNUM, INC.'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW, BANNUM, INC. (hereinafter "Bannum") and files Its Findings of Fact and Conclusions of Law and states as follows:

Findings of Fact

1. Bannum submitted an application for a building permit to DCRA on October 9, 2002, wherein it stated its proposed use as a "**community correction center**" (See Exhibit 19). Bannum was very explicit and forthcoming about its intended use for the property in the application.

2. The term "community corrections center" is language taken directly from the BOP's RFP, and Bannum's resultant contract with the BOP (See ANC 5B Document #3, "Statement of Work (SOW) Community Corrections Center (CCC)." This term was recently explained in very eloquent terms by the Court in Howard v. Ashcroft, 248 F.Supp.2d 518 (M.D.La.2003), which was specifically addressing Bannum's community corrections center in Orlando, Florida:

> So, the question the court faces would appear to have evolved into the question whether community confinement centers are penal or correctional institutions...**It becomes obvious, without going far, that a community corrections center is in fact a penal or correctional institution.**
> ...
> Moreover, the court finds that community confinement centers are 'places of imprisonment' as that phrase is most naturally understood.

> ...
> Placement in a CCC allows an inmate to leave the CCC for the purpose of employment, but otherwise requires the inmate to be in the CCC. As the joint report by the Sentencing Commission and the Bureau point out, '[e]xcept for employment and other require activities, offenders in the CCC component must remain in the facility at all times.'
> ...
> The inmates do not do not return to their homes. They do not set their own schedules. They are confined for all practical purposes and under the control of the Government through its agents. The *degree* of confinement is not determinative of *whether* these inmates are confined. Therefore, **the court cannot escape the conclusions that a term served in a CCC is a term of confinement and that a term of confinement is a term of imprisonment...**

Howard v. Ashcroft, 248 F.Supp.2d 518, 538-541 (M.D.La.2003).

3. In response to Bannum's building permit application, on December 12, 2002, DCRA issued a building permit to Bannum to "Change tenant warehouse space to 150 bed community corrections center."

4. On January 8, 2003, Bannum submitted an application to DCRA to revise building permit 425438 issued by DCRA on December 12, 2002 to state the proposed use as a "**3 year temporary use community corrections center**" (See Exhibit 19).

5. On January 17, 2003, DCRA issued a building permit to Bannum (Permit No. B448325) which revised Building Permit No. 425438 to read "3 yr temporary use," and authorized Bannum's use for a "[t]emporary 150 bed community corrections center on leased property for a period not to exceed (3) years" (See Exhibit 19).

6. Subsequently, on January 24, 2003 Regina James filed an appeal **of the December 12, 2002 building permit (No. 425438) only**" (See Exhibit 1 of Bannum's Motion for Affirmation).

7. Subsequent to the filing of the aforementioned appeal of the building permit, on May 2, 2003, DCRA issued a Certificate of Occupancy to Bannum for a "temporary correctional institutional (sic) on leased property for a period not to exceed three (3) years" for the community corrections center at 2210 Adams Place, NE (See Exhibit 35). The Certificate specifically states that it "**expires on May 02, 2006.**"

Conclusions of Law

1. **Appellant Has Failed to Meet Burden of Proof:**

The sole issue to be determined by this board is if the appellant complied with the Board of Zoning Adjustment Rules of Practice and Procedure Title 11, Chapter 3119.2, which states as follows:

> In all appeals and applications, the burden of proof shall rest with the appellant or applicant. If no evidence is presented in opposition to the case, the appellant or applicant shall not be relieved of this responsibility.

As such, Appellant had an obligation to prove to this Board that the DCRA had no basis to issue a building permit to Bannum. However, Appellant has failed to establish that the DCRA did not have a basis to issue Bannum a building permit based upon Title 11, Chapter 8, Section 801.7(k), which allows for zoning as a matter-of-right for facilities:

> Temporary detention or correctional institution on leased property for a period not to exceed three (3) years.

Appellant was required to prove that Bannum did not meet the three (3) elements of this section of the zoning code which permit it to locate its community corrections center at 2210 Adams Place, N.E. as a matter of right. As stated above, however, Appellant has failed to come forth with any evidence whatsoever which would tend to prove that Bannum does not meet any of the three elements.

Furthermore, assuming for the sake of argument only that a violation were shown, Bannum relied upon D.C.'s issuance of a building permit to begin with in good faith, and has incurred over one million dollars ($1,000,000) to date in getting the facility up and running. Bannum is under contract with the Department of Justice ("DOJ"), Federal Bureau of Prisons ("BOP") to operate the community corrections center at its present location, and is currently housing inmates at this facility. Any interference with Bannum's zoning and operation of the facility at this point in time would have a massive adverse impact on Bannum's ability to operate community correction centers nationwide. More specifically, not only would Bannum have lost and unable to recoup all of its renovation, setup, and administrative costs, but the BOP would terminate for default Bannum's contract and because of this default not award Bannum any more government contracts. During the hearing, the board indicated that there could be no further alliance on the building permit once it was issued. However, the record shows that the appellant, on several occasions, sought a stop-work order which the District refused to issue. To the contrary, Bannum relied also upon the District's refusal to issue a stop-work order. Thus the proposition that any detrimental reliance on a building permit is somehow cut-off just because an allegedly agreed party files a appeal is misplaced. The reliance centers more appropriately on the District's refusal to issue a stop-work order.

As discussed above, the three (3) elements are as follows:

1. A temporary detention or correctional institution;
2. On leases property;
3. For a period not to exceed three (3) years.

Appellant has offered absolutely no evidence to show that Bannum is not a correctional institution. Appellant only made unfounded accusations that Bannum was a "halfway house," a

term which it never defined for the Board. Appellant did not, and could not, offer any evidence to show that Bannum's facility is not located on leased property, since Bannum is not the owner of the property and signed a lease with the landlord to use the property.

There is a presumption that DCRA acted properly in granting the building permit to Bannum, and Appellant has failed to rebut that presumption. There is nothing in the record to permit this Board to grant the appeal. In fact, Appellant went so far as to present evidence and testimony that actually supports DCRA's granting of a building permit to Bannum. In his opening statements, Mr. Temple, attorney for Appellant, argued that the Bannum facility is a "halfway house" as allegedly supported by the Statement of Work ("SOW") for a community corrections center, which is located at BZA Exhibit 16, Sub-Exhibit No. 3 (see page 198 of the June 17, 2003 Transcript). Mr. Temple even invited the Board to go and review the SOW in this regard. Perhaps Mr. Temple has never actually read the SOW, for if he had he would have seen that it actually states that **"[a] CCC is considered a penal or correctional facility"** (see Attachment G, page 1 of 5 of SOW).

Appellant then called several witnesses to allegedly testify in support of its position that DCRA had improperly issued a building permit to Bannum. However, Mr. Temple's witnesses offered no testimony whatsoever to support this argument. Specifically, none of Appellant's witnesses testified that Bannum's CCC is not a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years." In fact, Appellant's witnesses actually made admissions which support DCRA's decision to issue the building permit to Bannum. Specifically, Appellant's witnesses testified as follows:

(i) Council Member Phil Mendelson: Mr. Mendelson admitted that he does not know what Bannum does (see June 17, 2003 Transcript, pg. 214), and also admitted that

Bannum's proposed use of the property is only for three years, and that the certificate of occupancy is only for three years (see June 17, 2003 Transcript, pgs. 218-19).

(ii) Denzil Noble: Mr. Noble admitted that Bannum is a temporary correctional facility that can be zoned as a matter of right in a CM-2 district if is on leased property for a period not to exceed three years (see June 17, 2003 Transcript, pgs. 265-66). Upon further questioning from Mr. Temple, Mr. Noble admitted that Bannum's CCC at 2210 Adams Place, NE will only operate for a period of three years (see June 17, 2003 Transcript, pgs. 269-70).

(iii) Joan Black: Next, Mr. Temple called Ms. Black to testify, the acting Chair of ANC Ward 5B, who offered nothing to support Appellant's argument that DCRA improperly issued a building permit to Bannum. Ms. Black admitted that Appellant is not in opposition to "halfway houses," but that her only complaint is that Appellant was not allegedly not notified of Bannum's intention to open a CCC at 2210 Adams Place, NE (see June 17, 2003 Transcript, pg. 274).

(iv) Martha Pippano: Mr. Temple called Ms. Pippano, who testified that she is primarily concerned about "environmental hazards" associated with halfway houses, not whether Bannum's permit was properly issued by DCRA (see June 17, 2003 Transcript, pgs. 281-84). In her opinion, Ms. Pippano felt "gigantic coverup was perpetuated," but that she does not even know what Bannum does because she has not been to Bannum's facility since it opened (see June 17, 2003 Transcript, pgs. 282 and 288, respectively).

(v) Regina James: Perhaps the most startling compelling testimony was offered by Regina James. Ms. James testified that she filed the appeal (see June 17, 2003 Transcript, pg. 295), and that she tried unsuccessfully to obtain copies of Bannum's lease and

BOP contract to see what the intent of Bannum was (see June 17, 2003 Transcript, pg. 296). Under questioning from Board member Etherly, Regina James admitted that if the Bannum facility closes down after three years, that would be satisfactory (see June 17, 2003 Transcript, pgs. 296-97) (Member Etherly: "If you saw a C of O that said three years and then this place closes down, would that be satisfactory in your opinion?" Ms. James: "Under the current definition, sir, yes. That would be satisfactory.") Ms. James further testified that she looked up in the dictionary the definition of "temporary detention or correctional institute," and allegedly it is defined there as a "lock-up" (see June 17, 2003 Transcript, pg. 297). Ms. James then goes on to testify that Webster's dictionary defines this term as "incarceration," and that the prisoners "can't go anywhere" (see June 17, 2003 Transcript, pgs. 297-98). However, when pressed by DCRA counsel Mr. Rushkoff on cross-examination, Ms. James could not answer whether Webster's defined "temporary detention or correctional institute" as "incarcerated" or "detained," but that the definition came directly out of "Standard Webster's Dictionary" (see June 17, 2003 Transcript, pg. 303). However, the Board should take judicial notice that there is no definition for "temporary detention or correctional institute" contained in Webster's Dictionary. For a definition of "community corrections center," Bannum refers the Board back to the definition stated in the BOP's Statement of Work, submitted into evidence by Appellant, which states that **"[a] CCC is considered a penal or correctional facility."**

2. Bannum Has Shown That the DCRA Has Complied With 801.7(k):

If, for the sake of argument, it were determined that Appellant somehow actually met its burden of proof in this case, then the burden would then shift to Bannum, or the DCRA, to show compliance with 801.7(k). Bannum surely has met its burden, and the appeal should be dismissed.

As stated herein above, 801.7(k) requires the following in order to establish matter-of-right zoning in a CM-2 District: (i) a temporary detention or correctional institution; (ii)on leased property; (iii) for a period not to exceed three (3) years. These three requirements, as discussed herein below, have all been met by Bannum:

(i) Bannum is a Temporary Correctional Institution:

Bannum, through the submission of the following detailed documentary evidence and testimony, has established, clearly an convincingly, that it is a "temporary detention of correctional institution":

A. The BOP's "Statement of Work," which defines a "community corrections center" as a "correctional or penal institution."

B. The recent decision of Howard v. Ashcroft, 248 F.Supp.2d 518 (M.D.La.2003), wherein the federal courts have determined that a "community corrections center" is a place of confinement where inmates serve a portion of their sentence.

C. The "Utilization and Transfer" portion of the BOP's CCC "Program Statement" (see Bannum "Exhibit 1" of William Willingham Testimony (July 8, 2003 Transcript, pg. 232)). This portion of the Program Statement offers a rationale on how the BOP select and transfers inmates to a community corrections center, and explains which inmates are eligible for such a transfer. The Utilization and Transfer Program Statement cites to 18 U.S.C. §3621(b) as the statutory authority for the BOP to sentence inmates to serve part of their sentence at a community corrections center. 18 U.S.C. §3621(b) provides, in pertinent part, that "[t]he Bureau of Prisons shall designate the place of a prisoner's imprisonment. The Bureau may designate any available penal or correctional facility the Bureau determines to be appropriate and suitable. **A CCC meets the definition of a penal or correctional facility"** (emphasis added).

D. The testimony of Hulon Willis at the July 8, 2003 hearing as both a fact and expert witness. Mr. Willis testified as an expert witness in the field of corrections and correctional facilities (see July 8, 2003 transcript, pgs. 154-56), and testified that he has been employed in the field of corrections for approximately twenty (20) years, including the District of Columbia Department of Corrections, and is presently a part-time professor at Howard University responsible for the criminal justice track for graduate students in social work (see July 8, 2003 transcript, pgs. 152-53).

Among other things, Mr. Willis testified that Bannum Place of D.C. at 2210 Adams Place, N.E. is a temporary correctional center or facility in accordance with its building permit and certificate of occupancy:

> Q Mr. Willis, could you briefly explain to the Board what it is that Bannum operates at 2210 Adams Place?
>
> A Bannum operates a community correctional center. The center is operated under contract with the Bureau of Prisons. Inmates who are in the service of the last 10 percent of their sentence are given the opportunity to serve that portion out in a community correctional center as opposed to an institution, and while at that community correctional center or while at Bannum Place of Washington, D.C., they have to become gainfully employed, follow any programmatic needs, be it drug treatment or otherwise specified under the U.S. Parole Commission if need be or the Bureau of Prisons, and live by the rules and regulations.
>
> ...
>
> Q Now, you've heard the testimony about the Zoning Code. In your opinion, is Bannum a correctional or detention institute?
>
> A Yes, it is.

(See July 8, 2003 transcript, pgs. 156-58.)

As shown above, Mr. Willis testified that in his expert opinion Bannum is a "community correctional center" which houses "[i]nmates who are in the service of...their sentence..."

Mr. Willis further testified that Bannum's use of the property at 2210 Adams Place, N.E. is thoroughly consistent with the legislative history of Section 801.7(k) of the zoning regulations with respect to its requirement that the facility be a "temporary" location for inmates that the D.C. Department of Corrections could not accommodate. Specifically, Mr. Willis testified as follows in this regard:

> A The need for the CCC in Washington, D.C. derived out of the congressionally mandated closure of Lorton prison system, and under that, under the congressionally mandated closure, the Bureau of Prisons absorbed the D.C. Code offenders that were housed at Lorton.
>
> Consequently, as those offenders are due to be released, then they are typically released back to the sentencing district where they were sentenced.
>
> ...
>
> Q Is it fair to say that the need for the CCC that Bannum runs was created because D.C. was no longer equipped to handle the prisoners that were at that facility?
>
> A Yes.
>
> ...
>
> A Well, there were two consent decrees that affected the old D.C. Jail during that time. That was Campbell v. Magruder and D.C. Inmates v. Delbert Jackson. One was filed by pretrial inmates and one was filed by post-trial inmates, and both cases were combined in Federal District Court.
>
> From 1995 to 1999, I was the compliance officer that monitored the District's compliance with coming into compliance with those civil suits, and part of that was that they were -- the District was looking for some type of relief in the event of

overcrowding.

I think a number of things impacted upon that. You had the D.C. Emergency Powers Act that at one time would push up the sentence -- I'm sorry -- the parole eligibility date of inmates to ease the overcrowding at Lorton. The idea of the temporary detention facilities was also another way of looking at easing the overcrowding.

The Department of Corrections, to my knowledge, did not use that zoning for temporary jails, but did use it as a way of being able to establish community correctional centers to ease the overcrowding not only at the D.C. Jail, but to ease the overcrowding in the prisons, because inmates were moved from the prisons who were close to their parole eligibility date into the community correctional facilities as a way of easing the overcrowding conditions at Lorton.

(See July 8, 2003 Transcript, pgs. 157-58, 159-60.)

Finally, Mr. Willis testified that, contrary to the apparent argument put forth by ANC 5B in this appeal, a facility does not have to be a total "lockdown" facility in order to qualify as a detention or correctional facility. Mr. Willis testified that correctional or detention facilities of all differing security levels exist, but they are all, nonetheless, detention or correctional facilities. Specifically, Mr. Willis testified as follows in this regard:

A Well, first of all, there are different levels of correctional facilities. You have your super-max facility, which is the highest level of security, you have your maximum security, you have your medium security, you have your minimum security, you have your camps, and then you have this community corrections facilities. At each level of security it determines what type of perimeter you have, what type of patrols you have, what type of officers are in those facilities.

For example, when I was a contract monitor for Virginia, the super-max and the max facilities were -- the officers were allowed to carry non-lethal weapons inside the facilities. The lowest or minimum security facilities or community correctional

facilities have no perimeters around them, which means that you have inmates or residents in those facilities, but if you don't have a fence, then you're a community correctional or a camp, and that's the lowest type of facility, and given that facility, you have no perimeter, no locks that can't be unlocked, but they're still under a sentence of incarceration.

Q So is it fair to say that there are different levels of security at these different facilities, but they are all correctional or detention institutes? Is that fair to say?

A Yes.

(see July 8, 2003 Transcript, pgs. 160-61.)

In response to questions from the Board, Mr. Willis advised that the former Lorton Prison facility operated by the D.C. Department of Corrections closed around April of 2002, at which time all of the prisoners were turned over to the Federal Bureau of Prisons ("BOP"):

MEMBER MILLER: Can you tell me how many prisoners they were placing and where they placed them?

THE WITNESS: Who?

MEMBER MILLER: Well, whoever was at the prison and had to leave Lorton, where did they go?

THE WITNESS: At the time of the closure, there were approximately 9,000 inmates under the custody of the D.C. Department of Corrections.

MEMBER MILLER: And where did they go?

THE WITNESS: To the Federal Bureau of Prisons. Not all at once. The District had to out-source a lot of the inmates. That's how I became the contract monitor in Sussex, Virginia. I was responsible for monitoring the contract of all approximately 1,200 inmates that were housed under the Virginia Department of Corrections.

> They out-sourced inmates to the Corrections Corporation of America, they were housed in New Mexico, Tennessee, various places throughout the country, Ohio as well, while the Bureau of Prisons was building more bed space and starting to identify where they were going to start locating those -- relocating those inmates and absorbing them.

(see July 8, 2002 transcript, pgs. 170-71). It is now primarily this group of prisoners formerly held by the D.C. Department of Corrections who are now held by Bannum at the subject property.

E. The testimony of William L. Willingham, an expert witness in the field of community corrections and correctional facilities (see July 8, 2003 Transcript, pgs. 209-14). Mr. Willingham worked for the Federal Bureau of Prisons ("BOP") for more than twenty (20) years, and retired as the community corrections assistant administrator in July of 2000 (see July 8, 2003 Transcript, pgs. 210-11). In that position, Mr. Willingham was responsible for, among other things, the supervision and oversight of all community corrections contract evaluation panels, the development and implementation of national policy with respect to all aspects of community corrections, providing training to all the community corrections field staff, including the community corrections managers, the contract oversight specialists, and the legal technicians, as well as being responsible for all of the operational reviews for the community corrections field offices (see July 8, 2003 Transcript, pgs. 211-12). More significantly, Mr. Willingham testified that he was involved in authoring the community corrections "Statement of Work" for the BOP (see July 8, 2003 Transcript, pg. 212). The "Statement of Work," which is part of the evidentiary record before the Board on this appeal, clearly defines a "community corrections center" as a "correctional facility" and "penal facility" (see July 8, 2003 Transcript, pgs. 228-29; also see, "CCC Statement of Work," Exhibit 20, Tab 12).

Mr. Willingham testified that "[a] community corrections center is a...penal institution" (see July 8, 2003 Transcript, pg. 224), and offered his expert opinion that Bannum's facility at 2210 Adams Place, N.E. is a "community corrections center," is therefore a place or imprisonment (see July 8, 2003 Transcript, pg. 234). Mr. Willingham further testified that the community corrections center which Bannum is presently operating at 2210 Adams Place, N.E. is most analogous to a "prison" or "prison camp":

> Q ...Mr. Willingham, could you describe the similarities, if any, of the CCC program to a prison?
>
> A Oh. Yes, there you go. The best way, and I've made this comparison many times over the years, the best way that you can describe a community corrections center is back to a federal prison camp. A federal prison camp is an entity all of its own. There are no fences. We can clear up the issue about the weapons. Nobody is armed at a federal prison camp, but every inmate there, they are in the custody of the Attorney General of the United States serving a federal sentence.
>
> They get up in the morning, they all go to work under very minimal supervision, if any type of supervision, and basically the federal prison camp runs just like the community corrections center. Periodic job checks are made to make sure they're on the job, we check with their work foreman to make sure that they are always on the job timely and they're not skipping out. We do random UA checks on them when they're in the federal prison camp the same way they do when they're in the community corrections center.
>
> In the prison camp, they are eligible for increased what we call levels of responsibility. You know, they are eligible for certain types of furloughs after an appropriate amount of time at the camp with a discipline-free record, and the same similarity goes to the community corrections center.
>
> A pass or a furlough is not an automatic right. They have to show a continued pattern of good

behavior, no incident reports, good work performance, then we'll consider them for a pass. All passes have to be approved by the Bureau of Prisons. The facility can't do that on their own.

(see July 8, 2003 Transcript, pgs. 221-22). Furthermore, Mr. Willingham testified that all of the inmates at the CCC must work and pay subsistence to the BOP, just like in a prison (see July 8, 2003 Transcript, pg. 223).

In addition, Mr. Willingham offered testimony that if an inmate at Bannum's CCC could not be accounted for, that prisoner would be placed on "escape status," and "becomes an escaped federal inmate with another felony charge" (see July 8, 2003 Transcript, pgs. 223-24). Mr. Willingham added that the escaped prisoner would, once apprehended by the United States Marshalls, be placed into the nearest federal institution by the BOP (see July 8, 2003 Transcript, pg. 224).

Appellant has argued throughout this proceeding that Bannum's community corrections center at 2210 Adams Place, N.E. is not a temporary detention or correctional institution, but rather a "halfway house," a term which has no definition in D.C. Zoning Regulations. As such, Appellant has attempted to argue that Bannum is a "CBRF," which it believes includes "halfway houses," and therefore cannot be a temporary correctional institution. However, Mr. Willingham addressed this point during his testimony, and stated clearly that a community corrections center is not a "halfway house" in a strict sense of the word:

Q Mr. Willingham, if you would, I'm looking at the definition of adult rehabilitation home contained in Title 11, DCMR Section 199.
A Right.
Q Is that what you looked at earlier?
A Oh. Right. I've read that several times.
Q Okay. Now, the definition for adult rehabilitation home specifies, among other things, it's a facility providing residential care. Is a CCC

a facility that provides residential care?
A No.
Q And it references residential care for one or more individual 16 years of age or older. Does --
A We have no juveniles in a community corrections center, and the way we classify a juvenile with the Bureau of Prisons is whatever the age of majority is for their particular state of residence.
Q And the definition goes on to further state, "or any individual 21 years of age or older under pretrial detention." Does the CCC house any individuals under pretrial detention?
A A community corrections center does not house any pretrial-type residents.
Q And then finally, it says, "or sentenced court orders."
A And we have no court-ordered placements in a community corrections -- I mean in an adult rehabilitation home.

(see July 8, 2003 Transcript, pgs. 225-26). As Mr. Willingham added, "a community corrections center has been called a halfway house *by federal inmates* for years and years" as a slang term, "but it's still a community corrections center, it's still a penal institution" (emphasis added) (see July 8, 2003 Transcript, pg. 229-30).

Appellant also has attempted to argue that the only type of facility which can qualify as a temporary correctional facility under Section 801.7(k) of the D.C. zoning regulations is a "lockdown" facility, but has not ever defined what that term means. In any event, Mr. Willingham testified that a "lockdown" is only one type of correctional institution, and that there are several other less secure facilities which nonetheless qualify as a correctional facility:

A I think somebody else kind of went into that testimony. When I think about the term "lockdown," I think about our maximum-security penitentiary in Florence where the inmates are locked down 24 hours a day and escorted by three staff members wherever they go. That's a true lockdown facility.

> When a federal inmate enters the federal prison system, he is classified as to a particular security need for that inmate, and he may start out at a prison camp or he may actually start out at a maximum-security prison.
>
> According to the length of the confinement, well, the goal of the federal prison system is to have that inmate's security level decreased, and the way that happens is by a period of good conduct and good institutional adjustment, and the Bureau of Prisons does not rehabilitate, but we offer numerous programs that the inmates can take advantage of if they choose to, so naturally we look at this to see what kind of programs they've participated in. That's how they work their way down the institutional level to a federal prison camp and then on out to a community corrections center.
>
> Q So there are different levels of security in different correctional institutions; is that fair to say?
>
> A Yes.
>
> Q But they are all nonetheless correctional or detention facilities?
>
> A Right. They are all federal prison facilities.

(see July 8, 2003 Transcript, pgs. 226-28).

During his testimony, Mr. Willingham introduced and explained the "Utilization and Transfer" portion of the BOP CCC Program Statement to the Board (see Bannum "Exhibit 1" of William Willingham Testimony (July 8, 2003 Transcript, pg. 232)). As Mr. Willingham read from this part of the BOP's CCC Program Statement, "[t]he Bureau may designate any available penal or correctional facility the Bureau determines to be appropriate and suitable. **A CCC meets the definition of a penal or correctional facility"** (emphasis added) (see July 8, 2003 Transcript, pg. 233).

Finally, Mr. Willingham testified that Bannum has a three year contract with the BOP for operation of the CCC at 2210 Adams Place, N.E., and therefore its facility meets the three (3) year requirement of Section 801.7(k) of the D.C. Zoning Regulations (see July 8, 2003 Transcript, pgs. 235-40).

F. Excerpts from Bannum's lease for subject property, which show that the lease runs concurrently with Bannum's contract with the BOP, making it a three year lease as required by Section 801.7(k) (Exhibit introduced into evidence at the July 22, 2003 Hearing).

G. The redacted letter from Bannum to BOP showing that its lease was only for a period of three (3) years (Exhibit introduced into evidence at the July 22, 2003 Hearing).

H. The testimony of David Lowry, who testified that Bannum's contract with the BOP is for a base period of only one (1) year, and contains four (4) one-year options. During the hearing, portions of Bannum's proposal to the BOP was submitted which shows that Bannum advised the BOP that it only had zoning for three (3) years. As a result, the BOP issued Bannum's contract based upon this information.

(ii) Bannum's Facility Is On Leased Property:

Obviously Bannum is not the owner of the property and, while under no requirement to do so, Bannum, at the July 22, 2003 hearing, introduced portions of its lease document which show that Bannum is on leased property for a duration to run concurrently with its BOP contract. Thus, Bannum has fulfilled this requirement.

(iii) Bannum's Facility Is Temporary For a Period Not To Exceed Three (3) Years:

The Certificate of Occupancy issued by D.C. to Bannum on May 2, 2003 states specifically that it expires on May 2, 2006. Obviously, after this date, Bannum has no right to operate the facility. Thus, regardless of any and all speculation by Appellant, Bannum will not

exceed the three (3) years as required by the regulation unless the District allows it to do so. What Bannum intends to do after the three (3) years is up is not an issue relevant to the subject of this appeal. Furthermore, as former community corrections contracting chief Bill Willingham testified, Bannum's contract with the BOP was awarded, and is based, upon the three-year matter-of-right zoning.

3. Bannum's Reliance Upon DCRA's Actions and the Procedural Irregularities:

On April 22, 2003, Bannum was heard on its Motion to Dismiss on the following grounds: (i) ANC 5B has failed to file necessary authorization to proceed with appeal; (ii) ANC 5B does not meet the requirements for aggrievement under the Zoning Enabling Act and Board of Zoning Adjustment; (iii) the subject appeal was not timely filed; and (iv) the appeal is barred under the equitable doctrines of laches and estoppel. Bannum addresses each of this grounds briefly herein below.

(i) ANC 5B Has Not Filed Required Authorization to Proceed:

On January 22, 2003, Regina James filed an appeal of the issuance of the building permit to Bannum without the authority of ANC 5B. On April 22, 2003, this Board specifically ordered ANC 5B to file "a report from the ANC that indicates the date in which the meeting was held, that it was properly noted that in fact there was a quorum present, the issues that were discussed, the motion that was before it, and then the vote on the motion that would have moved them to go to an appeal." (see April 22, 2003 Transcript, pg. 34). According to the rules of practice before this Board, the written report is required to be submitted at least seven (7) days in advance of the hearing on the appeal. See Section 3115.1 of the Board of Zoning Adjustment Rules of Practice and Procedure. However, ANC 5B did not submit the requisite documentation in a timely fashion.

(ii) ANC Is Not An Aggrieved Party:

During the BZA hearing on April 22, 2003, the Board denied Bannum's Motion to Dismiss for ANC 5B's lack of aggrievement. The basis for the Board's denial was that ANC 5B is automatically an aggrieved party just by virtue of being and ANC. However, a close reading of the law shows that this is simply not the case.

"A mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA (5 U.S.C. s 702)." Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (quoted in United States v. Richardson, 418 U.S. 166, 177, 94 S.Ct. 2940, 2946, 41 L.Ed.2d 678 (1974)). In zoning review cases, where aggrieved person language is frequently employed, the test if generally whether the applicant for relief "show(s) a sufficient interest in the subject matter of the application that he will actually be injured by the governmental action.... The rule that one without some right, title or interest in property cannot apply for relief, rests on the theory that hardship ... cannot be incurred by a person who is without some valid attachment to the land to which the application relates. Rohan, *Zoning and Land Use Controls* § 51.02(1) (1979). "In a sense, every citizen of the community has a stake in the disposition of each zoning dispute, and may be 'aggrieved' by administrative decisions which he regards as erroneous. But it seems unlikely that the draftsmen ... could have intended to give standing to such a broad class of persons." Anderson, *American Law of Zoning* § 21.06 (1968); See also 3 A. Rathkopf, *Law of Zoning and Planning* § 37.03 (4th ed. 1979). The cases generally require a "specific, personal and legal interest," Krejpcio v. Zoning Board of Appeals, 152 Conn. 657, 659, 211 A.2d 687, 689 (1965), and, **more than a general interest in the viability of the community zoning plan**, "a pecuniary interest injuriously affected." Tyler v. Board of Zoning Appeals, 145 Conn. 655,

659, 145 A.2d 832, 835 (1958) (emphasis added). One test is the person or organization " 'direct', 'immediate', 'pecuniary' and 'substantial' interest in the subject matter of the litigation ...." Baker v. Zoning Hearing Board of West Goshen Township, 27 Pa.Cmwlth. 602, 607, 367 A.2d 819, 822 (1976).

In light of the general consensus in federal law and in zoning appeals cases that "aggrieved" organizations must represent their members' concrete interests in a contested administrative decision, and in view of the specific language in § 8102 of our Regulations that these appeals be made by an "organization authorized to represent (an aggrieved) person," and the lack of any per se standing exemptions in the regulations for citizens groups, the BZA must, before asserting jurisdiction, establish both "the existence of a logical and adequately direct nexus," Citizens Association of Georgetown v. Simonson, 403 F.2d 175, 176 (1968), between the interests of its members and the administrative decision it is contesting, and its own authority to represent those interests. Furthermore, these "interests" must be specific and significant, viewed under the standards enumerated in Basiliko v. Government of the District of Columbia, 283 A.2d 816, 818 (D.C.App.1971).

The record in this case is devoid of anything but vague, generalized assertions of injury. Nor is there any allegation that AND 5C members live in the area of the community corrections center or are affected in any way by its construction. During the hearing in Superior Court when Judge Kravitz denied Mr. Temple's motion for injunctive relief, the Court stated that "there is no evidence that the plaintiffs' fear are based on anything more than a reaction to the opening of the facility." Judge Kravitz went on to say that "[n]or have the plaintiffs mounted a serious challenge to the testimony presented by Bannum's executive director that the company runs its halfway houses with significant controls and that it's under the jurisdiction." There is simply nothing that goes to

the issue of aggrievement as it is required under law, i.e. some specific allegation that is different in injury. As argued during the April 22, 2003 BZA hearing, the 2210 Adams Place, NE property is surrounded by railroad tracks and arteries that isolate it, and even to the west of the railroad track there is more industrial zoning before you get to a residential area. The location is isolated, and it is not likely to have any adverse effect on the residents. Furthermore, the proposed use of the property as a community corrections center is a controlled use with strong supervision over the prisoners, and with very specific rules of conduct for the prisoners. As such, ANC 5B is clearly not an aggrieved party, and may not pursue the instant appeal.

(iii) The Appeal Was No Timely Filed:

The general requirement when considering timeliness is that an appeal shall be filed within sixty (60) days from the date the party appealing the administrative decision had notice or knowledge of the decision, or reasonably should have had notice or knowledge of the decision, on which the appeal is based. Here, there was a meeting on April 18, 2002 at which the Bannum people made a full presentation to ANC 5B about the nature of its proposed community corrections center. During the meeting, Bannum told appellant that its zoning had been approved by the District of Columbia. The meeting was held nine (9) months before the appeal was filed. As such, ANC 5B's appeal was not filed within the required sixty (60) days, and this Board is without jurisdiction to even consider the appeal.

(iv) Appeal is Barred by Laches and Estoppel:

a. Estoppel:

The elements of estoppel are: (1) the applicant proceeded in good faith; (2) the affirmative acts of the District; (3) the reliance upon the actions with substantial change in position and expensive improvements; and (4) the equities favor the claimant. Bannum has met all of these tests.

Bannum proceeded in good faith by sending the District two separate letters asking for its affirmation or confirmation that Bannum's proposed use as a community corrections center allowed it matter-of-right zoning at the 2210 Adams Place, NE location. The District signed both of the letters, on two separate occasions, and in so doing indicated clearly that Bannum had matter-of-right zoning at the proposed location. As a result of the determination made by the District regarding Bannum's matter-of-right zoning, in total and complete reliance thereupon, Bannum was awarded a contract by the BOP for operation of a community corrections center, and proceeded to expend hundreds of thousands of dollars preparing the property for said use (see Affidavit of David Lowry at Exhibit "Q" of Bannum's original Motion to Dismiss). Finally, the public benefits to society are very strong as acknowledged and stated by Judge Kravitz when he denied Mr. Temple's motion for injunctive relief, and as acknowledged by the Court in the Brawner decision. In that opinion, the Court talked about the importance of having correctional institutions like this. Judge Kravitz quoted that provision out of the Brawner decision, and then said these benefits are even greater importance now due to the recent federalization of the District's criminal justice system, and the results of incarceration of our convicted felons in Federal prisons around D.C.

b. Laches:

Laches is a species of estoppel that deals with the omission to assert a right for unreasonable length of time with prejudice to the party who asserts laches. This clearly applies to Appellant, just as it would to the District if it were taking a position to revoke Bannum's permit. Notably, not only has the District not taken this position, but it has recently re-affirmed Bannum's matter-of-right zoning by issuing a Certificate of Occupancy for the property. Appellant had a clear opportunity to file a BZA appeal a year ago and did not do so. Bannum proceeded with its lease, its

contract, and its construction, and all the expenses that are laid out in the Lowry affidavit, and clearly changed its position.

As indicated above, the Board made several statements that Bannum can not rely on the issuance of the issuance of a building permit once an appeal has been filed. As indicated above, despite repeated request from the appellant for a stop work order, the District refused to issue one. As such the filing of an appeal cannot stop any detrimental reliance by Bannum. Furthermore, subsequent to the appeal, Bannum applied for and was issued a certificate of occupancy which it has also relied been upon.

(5) The Board is Without Jurisdiction Due to Issuance of Certificate of Occupancy to Bannum:

On May 2, 2003, the Director of the District of Columbia Department of Consumer and Regulatory Affairs, David Clark, made a determination the Bannum's zoning is valid and issued a Certificate of Occupancy to Bannum (see Exhibit "B" of Bannum, Inc.'s Motion to Dismiss on New Grounds). In issuing the Certificate of Occupancy, the Director determined that Bannum's use was "a temporary correctional institution on leased property for a period not to exceed three years." The Certificate of Occupancy does not expire until May 2, 2006. Mr. Clark's determination and issuance of a Certificate of Occupancy to Bannum bars the Board from having jurisdiction over this matter at the present time, since no appeal has been taken by ANC 5B on the issuance of the Certificate of Occupancy (see Section 118.5 attached at Exhibit "C" of Bannum, Inc.'s Motion to Dismiss on New Grounds). The Director's decision is a quasi-judicial determination that zoning is valid after the appeal of the building permit, which cannot be challenged by ANC 5B, or this Board, absent an appeal in accordance with Section 118.5.

The case law is very clear that a "certificate of occupancy enjoy a presumption of validity." See Burka v. Aetna Life Insurance Co., 945 F.Supp. 313, 318 (D.C. 1996), quoting

Brawner Bldg., Inc. v. Shehyn, 442 F.2d 847, 855 (D.C.Cir.1971). The Board cannot rescind a duly issued certificate of occupancy because it would be improperly acting as a Court of Appeals over an administrative department when no appeal has even been filed. See Kopff v. District of Columbia Alcoholic Beverage Control Board, 413 A.2d 152, 154 (D.C.App.1980) (Court stated that "[i]f the Board had gone behind the certificate of occupancy to ascertain whether or not it was properly issued, the Board would have been acting in effect as a court of appeals over other coordinate administrative departments.") If this Board insists on going forward with this appeal without jurisdiction, it must give the certificate of occupancy a presumption of validity, and this Board must show that David A. Clark committed an illegal act when he issued it.

Furthermore, the instant appeal has been rendered moot by the issuance of the Certificate of Occupancy. "The doctrine of mootness has emerged to assure that the courts limit their decisions to the resolution of live cases and controversies between specific parties. A court should not render a decision if it "cannot affect the matter in issue in the case before it." Kopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372 (D.C.App.1978); Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895); Alpert v. Wolf, D.C.Mun.App., 73 A.2d 525, 528 (1950). Although the issue has not been litigated extensively in the District of Columbia, other Court have made it clear that if "the work encompassed by the building permit has been completed and a certificate of occupancy obtained, **the appeal has been rendered moot.**" See 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); Matter of Fallati v. Town of Colonie, 222 A.D.2d 811, 813, 634 N.Y.S.2d 784; Matter of Bytner v. City of Albany Bd. Of Zoning Appeals, 211 A.D.2d 1000, 621 N.Y.S.2d 960; Center Square Association Inc. v. Board of Building, Zoning and Housing Appeals of the City of Albany, 195 A.D.2d 684, 599 N.Y.S.2d 897; Ughetta v. Barile, 210 A.D.2d 562, 619 N.Y.S.2d 805.

Conclusion

As stated herein above, Appellant has failed to meet its burden of proof in this appeal. Appellant has put nothing into the record, either documentary evidence or testimony, which would permit this Board to grant the appeal. Appellant went the other way and actually presented evidence and testimony that supports DCRA's granting of a building permit to Bannum. On the other hand, Bannum has introduced expert testimony and documentary evidence which proves that Bannum's community corrections center is properly zoned as a matter-of-right as temporary detention of correctional institution on leased property for a period not to exceed three (3) years. Based on these facts, Bannum respectfully requests that the Board DENY Appellant's appeal, and affirm the decision made by DCRA in granting Building Permit No. B425438 to Bannum.

Dated: August 15, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Findings of Fact and Conclusions of Law was served this 15th day of August, 2003, by facsimile transmission and first-class mail, postage prepaid, to the following:

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By: _____
~~Joseph A. Camardo~~
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