BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of	)	
	)	**BZA Appeal No. 17356**
Bannum Inc.	)	
	)	
Re: 2210 Adams Place, N.E.	)	
	)	

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REGINA JAMES MOTION FOR SUMMARY ADJUDICATION ON *RES JUDICATA*, COLLATERAL ESTOPPEL AND OTHER GROUNDS

Comes now, Regina James (James) by the undersigned counsel, and respectfully moves this honorable board to dismiss the immediate appeal on the grounds of *res judicata* and/or collateral estoppel and/or by summary adjudication. This panel has more than adequately considered and determined pertinent factual and legal issues directly related to the fundamental question as to whether Bannum's intended and actual use violates D.C. zoning laws.

ARGUMENT

The issues raised in this case will mirror the issues raised in the previous case, Case Number 16998. . Therefore, our case law suggest that this panel should therefore bar Bannum's appeal on the basis of *res judicata* and or collateral estoppel.

Indeed, the BZA Chairman appreciated this issue when he opined in the initial proceedings as followed:

> ...Say for whatever reason-I'll just use it as hypothetical but to make it very clear- this appeal fails. *You won't have recourse to go and now appeal the certificate of occupancy based on the same facts that are presented in this appeal.*
> Hearing Transcript at 77.

Mr. Griffis keyed into the very issue which the Board now faces, which is repetitive,

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economically wasteful, reconsideration of the same legal and factual issues which this Board previously considered in great detail and upon which it rendered an extensive prior ruling. The converse of Mr. Griffis' thinking should enjoy the same persuasive logic; if James prevailed, as she did, then Bannum should not be allowed to raise the same issues under the guise that its certificate of occupancy complied with D.C. zoning laws.

CLAIM PRECLUSION::RES JUDICATA

Generally speaking, once a claim has been finally adjudicated, the doctrine of claim preclusion, or *res judicata,* prevents the same parties from re-litigating the same claim, including any issue that either was or might have been raised in the first proceeding. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *Henderson v. Snider Bros., Inc.,* 439 A.2d 481, 485 (D.C.1981) (en banc); Restatement, Second, Judgments § 17 (1982). Further, our courts have noted as a corollary, the doctrine of issue preclusion, embracing the concepts of direct and collateral estoppel, prevents the same parties from re-litigating an issue actually decided

in a previous, final adjudication, whether on the same or a different claim. *Allen* 449 U.S. at 94, 101 S.Ct. at 414;*Henderson,* 439 A.2d at 485; *Segal v. American Telephone & Telegraph Co., Inc.,* 606 F.2d 842, 845 (9th Cir.1979); Restatement, Second, Judgments §§ 17(3), 27.

This appeal involves the same parties and the same issues. In *Rhema Christian Center v. District of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 35 Ed. Law Rep. 444. The BZA concluded that a second application for special exception or variance reflected the same claim as one previously denied and the Court of Appeals affirmed on grounds of issue preclusion. In determining whether preclusion doctrine was applicable in a particular case, the court ruled that

BZA proceedings were the essential equivalent of a judicial proceeding, as was its prior proceeding regarding the legality of Bannum's permit. The court determined that the BZA is an adjudicatory agency; it hears and decides cases (applications and appeals) initiated by parties other

than the Board itself. D.C.Code § 5-424 (1981). Moreover, the court noted that our local Administrative Procedure Act, D.C.Code §§ 1-1501 to 1510 (D.C.1981), as well as the Board's own procedural regulations, 11 D.C.M.R. §§ 3300-3399 (1985), ensure the essential elements of due process in adjudication, including notice, representation, a hearing with presentation of evidence and cross-examination, and a written decision with findings of fact and conclusions of law. *Rose Lees Hardy Home and School Association v. District of Columbia Board of Zoning Adjustment,* 324 A.2d 701, 707 (D.C.1974).

There is no question that these procedural requirements were met in the first proceeding in this case, Appeal No. 16998. Thus, as in *Rhema*, the "threshold inquiry" for preclusion is satisfied. The court noted that *absent a material change of circumstances*, the BZA should not reconsider a matter that it has already ruled on, especially given the need for finality on particular issues. (No where is that need greater than here.)

The court stated:

> We believe it states the proper basis for deciding whether a second application for a previously denied variance or special exception is the same claim and thus should be barred by *res judicata,* not denied after a laborious analysis of the merits: When a material change of circumstances affecting the merits of the application has not occurred or [and] the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Rhema supra. at 194.

Albeit that the facts of the immediate case are somewhat different, the merits of the two cases here are based on substantially the same facts and legal issues. Moreover, Bannum simply cannot show a material change in circumstances. The BZA has heard the evidence regard its intended use and its procurement of its permit. The legal principle "false in one, false in all is applicable here." Bannum cannot now show that its illegal permit justifies a legal certificate of occupancy. That reasoning is disingenuous and intellectually dishonest. Bannum's intended use violates zoning laws for permit and any other related use purposes. This is a simple, logical proposition. Therefore, this case should be barred by the principle of *res judicata.*

COLLATERAL ESTOPPEL

Collateral estoppel also bars re-litigation of an issue "in substance the same" as that resolved in an earlier proceeding. *See Kidwell v. Department of Army,* 56 F.3d 279, 286-87 (D.C.Cir.1995). If the issue was actually litigated in a prior proceeding, was actually and necessarily determined by a court of competent jurisdiction, and the application of the doctrine does not create unfairness to the litigant, collateral estoppel will bar re-litigation of the issue. *See McLaughlin v. Bradlee,* 803 F.2d 1197, 1201-02 (D.C.Cir.1986); *Otherson v. Department of Justice,* 711 F.2d 267, 273 (D.C.Cir.1983). Where, as here, the prior decision was not rendered by a court, "it must not only satisfy the ordinary requirements of collateral estoppel but must also result from a process sufficiently similar to a judicial proceeding." *Sea-Land Service, Inc. v. Department of Transp.,* 137 F.3d 640, 649 (D.C.Cir.1998) (citing *Restatement (Second) of Judgments* § 83 (1982)). We show above that it did satisfy this requirement. This case is classic collateral estoppel. Thus, even if the parties are different but the issues are the same, the claim is

barred.

The issues in this case are substantially similar, if not identical, to those in the previous Appeal in which this panel has ruled and should therefore be treated accordingly, to wit, that the immediate matter is barred by virtue of collateral estoppel.

SUMMARY ADJUDICATION

James submits that there is no basis to hold duplicative and redundant factual hearings on the merits of the Banum appeal. The BZA has already created an extensive record regarding the circumstances that led to the issuance of the permit and certificate of occupancy in Case No 16998. Its prior decision is related to the exact same property and Bannum's same intended use of that property as a halfway house, which issues are indisputably the same in this appeal. It is thus axiomatic that this Board having ruled that Bannum's permit was illegally obtained on virtually fraudulent grounds must rule that its certificate of occupancy is equally illegal. The BZA has ruled Bannum's intended use violates D.C. zoning laws, i.e. "that Bannum's facility is not the type of institution envisioned by the Zoning Commission in 1971 when it enacted Section 801.7(k), both because of the intended nature and length of the proposed use. Furthermore, as this panel has determined, Bannum has committed a sham on the District of Columbia government. To date, despite orders from the DCRA revoking its COO and respective orders from the District of Columbia Superior and United States District Courts denying Bannum's motions that they be allowed to remain open in the face of the DCRA's revocation, Bannum has

remained open and continues to exploit every possible opportunity to defy this Board's September 2003 order.

The BZA and the D.C. government are well established in their legal view that Bannum's facility is in violation of District of Columbia law. In fact, on October 20, 2005 the District of Columbia argued on the BZA's behalf (in defense of its September 2003 decision) that Bannum is operating illegally and is in violation of D.C. zoning law. The BZA's Findings of Fact and Conclusions of law in Case No. 16998 are instructive and should guide the BZA on any further consideration of the legality of the intended use at issue and the related certificate of occupancy.

CONCLUSION

Bannum has manipulated and attempted to bully this panel and other instruments of our local government with all of the resources that it commands, including a civil action against Appellant, community activists and even its landlord, to force these various entities to embrace its illegal zoning use. This panel has invested more time and resources ensuring fairness and equity. But the law requires it to do no more than it has. The issues at hand are transparent and clear.

The BZA should therefore determine, based upon its related factual record, that Bannum and principles of *res judicata* and collateral estoppel, that Bannum's appeal should be denied.

In lieu thereof and in abundance of caution, the BZA should give Bannum ten (10) days to explain any change in material circumstances that distinguish this appeal from the previous one, factually and legally. Based thereupon, the BZA would be able to rule on this case on accordingly.

Respectfully submitted,

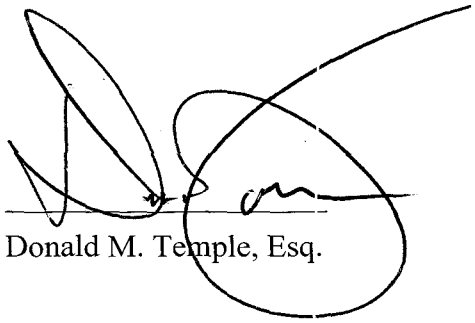
Donald M. Temple
1229 15th Street, NW
Washington, D.C. 20005
(202) 628-1101

CERTIFICATE OF SERVICE

Regina James hereby certifies that she mailed a copy of this Motion for Summary Adjudication on this 22nd day of November, 2005 to the following attorneys:

Shawn Whittaker, Esq.
Holmes and Gordon
17 West Jefferson Street, Suite 202
Rockville, Maryland 20830

Bennet Rushkoff, Esq.
Civil Division
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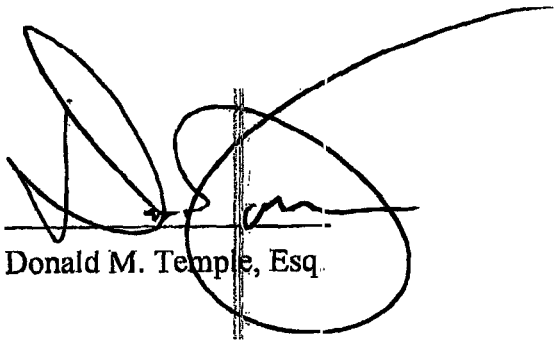
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Donald M. Temple, Esq.

October 24, 2005

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