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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Bannum, Inc., v. District of Columbia Board of Zoning Adjustment

Petition for Review of an Order of the District of Columbia Board of Zoning Adjustment

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BANNUM'S PRINCIPAL BRIEF

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September 14, 2004

BZA
CASE No. 173
EXHIBIT No. 4

Board of Zoning Adjustment
District of Columbia
CASE NO. 17356
EXHIBIT NO. 4

TABLE OF CONTENTS

TABLE OF CONTENTS AND TABLE OF AUTHORITIES.....i-v

BANNUM'S PRINCIPAL BRIEF 1

STATEMENT OF THE ISSUES..... 1

NATURE OF THE CASE 2

FACTUAL BACKGROUND 3

A. Bannum's Requirement to Secure Approved Zoning for the BOP Contract 3

B. DCRA Issues a Decision Finding Zoning for a CCC Proper at 2210 4
Adams Place N.E.

C. In Reliance on DCRA's Zoning Approval, the BOP Awards Bannum 6
a CCC Contract

D. Bannum Notifies the Advisory Neighborhood Commission of DCRA's 7
Zoning Decision

E. Bannum Incurs Significant Costs in Preparing to Perform the BOP Contract.....7

F. DCRA Issues Bannum the Building Permit 8

G. DCRA's Affirmance of Proper Zoning In of Spite of the BZA Appeal 8
and Other Objections

H. Proceedings Before DCRA and this Court 11

LEGAL ARGUMENT 11

I. Standard of Review.....11

II. DCRA's Decisions that Bannum Had Matter-of-Right Zoning 12
Were Correct

A. The Plain Meaning of the Regulation Confirms DCRA's Zoning Decision.....12

B. The Legislative History of Section 801.7(k) Also Confirms DCRA's 13
Zoning Decision

C. Section 801.7(k) Was Intentionally Retained in the 1981 Zoning Changes.....14

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -2 PM 3:55

III. The BZA's Arguments that Bannum's Federal CCC was Improperly Zoned Lack Merit 16

A. A Federal CCC is a Correctional Institution 16

1. A CCC Did Not Require a Special Zoning Definition to be "Correctional" 16

2. All Relevant Definitions Show that a Federal CCC is a "Correctional Institution 17

3. Contrary to the BZA's View, Federal CCCs Are Places of Confinement 18

4. "Lock Down" Correctional Institutions Were Not Specified 19

5. The BZA Ignored the Legislative Intent to Provide "Flexibility" 22

B. Bannum's Zoning for this CCC Was "Temporary" 23

1. The Word "Temporary" Did Not Add an "Intent" Requirement 23

2. The BZA's Findings on "Intent" Are Not Supported by Substantial Evidence 24

C. ANC 5-B's Claims Based on a Federal CCC Being a "Halfway House" Lack Merit 26

1. Bannum's CCC is not Technically a CBRF under Section 1.99 26

2. Even if a CCC was a CBRF, Matter of Right Zoning Still Exists for a Temporary CCC on Leased Premises in C-M Zones 27

3. The 1981 Zoning Regulations Permit Large Correctional Facilities 29

IV. The BZA's Decision Violates the Supremacy Clause of the Constitution 31

V. Bannum Has Been Denied Due Process 33

VI. ANC 5-B's Appeal Was Untimely and Alternatively Should be Dismissed under Laches 34

A. ANC Failed to Time Appeal DCRA's Decision 34

B. Alternatively, ANC 5-B's Unreasonable Delays Bars Its Appeal Under Laches 36

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -2 PM 3:55

VII. The District of Columbia is Estopped from Disavowing the Building Permit 37

VIII. The BZA Lacked Jurisdiction Because ANC 5B Is Not An Aggrieved Party....38

CONCLUSION 40

TABLE OF AUTHORITIES

COURT CASES

Armstead v. United States, 310 A.2d 255 (D.C. 1973) .....passim

Brawner Building, Inc. v. Sheyn, 442 A.2d 847, 850 (1971) .....passim

Campbell v. Magruder, 416 F. Supp. 111 (D.D.C. 1976) 14, 21

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) 31

City of Cleburne, Texas v. Cleburne Living Center, et al, 473 U.S. 432 (1985)....34

Crystal Bay Marina v. Sweeden, et al., 939 F. Supp. 839 (N. D. Okla. 1996) 32

George Washington University v. District of Columbia 11
Board of Zoning Adjustment, 831 A.2d 921 (D.C. 2003)

Goto v. District of Columbia Board of Zoning Adjustment, ...36, 39
423 A.2d 917 (D.C. 1980)

Goodwin v. District of Columbia Board of Education, ...28-29
343 A.2d 63 (D.C. 1975)

Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987).....20

Griffin v. United States, 850 A.2d 313 (D.C. 2004) 19

Howard v. Ashcroft, 248 F.Supp.2d 518, 538-41 (M.D. La. 2003).....passim

Larinoff v. United States, 533 F.2d 1167 (D.C. Cir. 1975).....34

Lynch v. United States, 292 U.S. 840 (1934).....34

Lund v. Watergate Investors Limited Partnership, 728 A.2d 77, 83 (D.C. 1998) 39

Morton v. Mancari, 417 U.S. 535, 547-50 (1974) 24, 28, 30

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -2 PM 3:55

President and Directors of Georgetown College 11
v. District of Columbia Board of Zoning Adjustment, 837 A.2d 58, 67 (2003)

Saah v. District of Columbia Bd. of Zoning Adjustment, ... 37-38
433 A.2d 1114, 1116 (D.C.1981)

Sheridan Kalorama Historical Assoc. v. Christopher, ... 32
49 F.3d 750, 758 (D.C. Cir. 2001)

Speyer v. Barry, 588 F.2d 1147 (D.C. 1991) 28

United States v. Alsbrook, 336 F. Supp. 971 (D.D.C. 1971) 13, 21

United States v. Village of New Hempstead, New York, ... 32
832 F. Supp. 76 (S.D.N.Y. 1993)

Washkoviak v. Student Marketing Loan Association, 849 A.2d 37 (D.C. 2004) 12

Woodley Park Community Ass'n v. District of Columbia Bd. 36
of Zoning Adjustment, 490 A.2d 628, 635 (D.C.1985)

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -2 PM 3:55

ADMINISTRATIVE DECISIONS

United States Steel Corporation, ASBCA No. 29111, 85-1 BCA ¶17,761 25

STATUTES AND REGULATIONS

18 U.S.C. §3621 ..... passim

18 U.S.C. §3624 ..... passim

National Capital Revitalization Act, Public Law 105-33; 111 Stat. 712 ..... passim

P.L. 107-113, 115 Stat 2099 (January 8, 2002) 18, 26

DC ST §1-207.38 41

DC ST §1-309.10(a) 41

D.C. Code §2-510(a)(3)(A)(2001) 15

DC ST §6-641.07 ..... passim

DC ST §24-101 ..... 2, 20

DC ST 24-201.26 19

DC ST §24-201.72.....18, 24

Zoning Act of 1938 .....passim

11 DCMR §801.7(k) or Section 801.7(k) .....passim

11 DCMR §199.1.....passim

11 DCMR §741.5, §751.2, and §761.....15, 30

11 DCMR §801.6.....28

11 DCMR §3100.2.....34

11 DCMR §3112.2 .....34, 38

31 DCMR §3103 24-25

U.S. Sentencing Guidelines, §5F.1.1.....20

ADDENDUM OF TEXT OF STATUTES AND REGULGATIONS

INDEX TO THE APPENDIX, VOLUMES I AND II

RECEIVED
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2005 MAY -2 PM 3:55

BANNUM'S PRINCIPAL BRIEF

STATEMENT OF THE ISSUES

1. Whether DCRA's issuance of a building permit to Bannum to renovate a building for purposes of operating a Community Correctional Center ("CCC") for a period not to exceed 3 years on leased premises in a Commercial-Manufacturing Zone was properly based on matter of right zoning available for a "temporary ... correctional institution" under 11 DCMR §801.7(k).

2. Whether the BZA's determination that Bannum's CCC was neither a "temporary ... correctional institution" nor a type of Community Based Residential Facility ("CBRF") because the facility was too large, thereby finding DCRA's building permit invalid:

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2005 MAY -2 PM 5:

(a) interfered with and attempted to pre-empt the statutory obligations of the Bureau of Prisons to administer the imprisonment of District of Columbia felons in violation of the Supremacy clause of the Constitution;

(b) treated Bannum in a disparate manner than other similarly situated operators federal CCCs with over 20 residents without a reasonable basis and denied Bannum Equal Protection under the Due Process component of the Fifth Amendment of the Constitution.

3. Whether Intervenor Advisory Neighborhood Commission ("ANC") 5-B is barred from challenging the DCRA's issuance of Bannum's building permit because it failed to timely appeal to the BZA DCRA's decisions confirming proper zoning for Bannum's CCC in 2000 or alternatively, under the doctrine of laches.

4. Whether the District of Columbia is estopped from contesting DCRA's decision under the equitable doctrine of estoppel.

5. Whether the BZA lacked jurisdiction to entertain ANC 5-B's appeal where the ANC had not demonstrated that it was an "aggrieved party" and had standing under the Zoning Act of 1938.

NATURE OF THE CASE

Petitioner, Bannum, Inc. ("Bannum") seeks the reversal of an order of the District of Columbia Board of Zoning Adjustment ("BZA") entered on March 31, 2004. The BZA overturned repeated decisions of the District of Columbia Department of Consumer and Regulatory Affairs' ("DCRA") which were issued prior to and maintained before the BZA.

In its initial and reconsideration decisions, the BZA held that a building permit for a federal Community Corrections Center or "CCC" being operated and monitored under a Federal Bureau of Prisons ("BOP") contract was supposedly illegally zoned because it was neither a "temporary ... correctional institution on leased premises" nor a type of Community Based Residential Facility ("CBRF") called an "Adult Rehabilitation Home". J. App. 12-42.[1]

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2005 MAY -2 P 3:24

In 1997, Congress transferred authority for the confinement of D.C. felons to the BOP. National Capital Revitalization Act, Public Law 105-33; 111 Stat. 712 ("NCRA"); DC ST §24-101. In the federal BOP system, imprisonment in correctional institutions is aimed, where possible, at decreasing the inmate's levels of confinement. A CCC is a federal correctional institution in which the BOP selects D.C. felons for assignment from federal prisons around the country for confinement in a D.C. CCC to serve the last 10% of their sentences. The intent is to successfully reintegrate them into D.C. society but in a correctional setting.

As discussed below, the BZA's interpretation of the zoning regulations will effectively ban this type of facility from D.C. The BZA's strained interpretations of "correctional institution" to exclude a federal Community Corrections Center, and "temporary", to create an "intent" requirement, are supported neither by the plain meaning of the broad terms chosen, the legislative history, canons of regulatory construction, nor substantial evidence.

[1] "J. App. ____" refers to Joint Appendix. The Index to the Appendix contains the corresponding Record cites.

The above zoning regulations were promulgated in response to Brawner Building, Inc. v. Shevn, 442 A.2d 847, 850, 857-58 (1971), a case involving an attempt to zone a community correctional center as a rooming house. The new regulations were to facilitate placement of these lower security correctional institutions, which was and continues to be difficult regardless of their value to the D.C. community. Contrary to the BZA's view, 11 DCMR §801.7(k) was not intended to create zoning for temporary high security prisons to deal with a "one-time" crisis.

Unless reversed, the BZA order would make all but one federal CCC in D.C. nonconforming uses. This would unduly interfere with Congress' delegation to the BOP of authority over and confinement of D.C.'s felons, pre-empting the BOP's mission in violation of the Supremacy Clause of the Constitution. Moreover, because the direct effect of the BZA's decision is to ban only Bannum's CCC, while allowing other comparable CCCs to continue to operate, the BZA's order would violate the Equal Protection component of the Fifth Amendment of the Constitution.

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Alternatively, the appeal should be reversed because Intervenor, Advisory Neighborhood Commission ("ANC") 5-B failed to timely appeal the DCRA's decisions and alternatively, its appeal is barred by laches. The District of Columbia also is estopped from attacking DCRA's decisions. Finally, ANC 5-B is not an aggrieved party and lacked standing. The BZA lacked jurisdiction over the appeal.

FACTUAL BACKGROUND

A. Bannum's Requirement to Secure Approved Zoning for the BOP Contract

Bannum, a Kentucky corporation, has specialized in providing correctional institution services to the BOP since 1984. Bannum operated 16-17 CCCs in the United States pursuant to BOP contracts. BOP is Bannum's only customer. J. App. 43-44, ¶3-¶5, 51.

On or about March 24, 2000 and April 3, 2000, the BOP issued a number of requests for proposal ("RFP") reflecting a need for CCC services in the Washington, D.C. area including RFP Nos. 200-0593-MA and 200-06-04-MA. J. App. 44, ¶7. The BOP's need for Bannum's CCC arose as a result of the impending closure of Lorton Prison in 2002 and the transfer of authority over D.C. felons and their confinement to the BOP under the NCRA. J. App. 53-56.

The BOP RFPs required the offeror to locate a suitable property for a CCC, properly zoned, that would house the offenders BOP selected under BOP standards. J. App. 57-70, 72-73. To submit a compliant proposal, Bannum had to verify that it had zoning by submitting documentation from local zoning officials whose approval or concurrence was required under applicable law, here, to DCRA officials. J. App. 44, ¶¶6-7, 73-74.

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Bannum identified a warehouse at 2210 Adams Place N.E. as an appropriate building for renovation to function as a federal CCC. The facility is located in a Commercial-Manufacturing ("C-M") zoning district. It has the advantage of being in an area that is isolated from residential areas by railroad tracks and commercial businesses. J. App. 74-75.

B. DCRA Issues a Decision Finding Zoning for a CCC Proper at 2210 Adams Place N.E.

In November 2000, Bannum notified the Mayor, his Chief of Staff and the Chief of Police of its intent to open a CCC at this location. J. App. 45, ¶8.

By letter entitled "Temporary Correctional Facilities" dated December 11, 2000, Bannum, through its counsel, also advised the DCRA of its intent to operate a federal CCC at 2210 Adams Place, N.E. and sought confirmation that the proposed temporary CCC would fall within matter-of-right zoning in a Commercial-Manufacturing zone ("C-M") under 11 DCMR §801.7(k) ("Section 801.7(k)). The letter stated:

> This office represents Bannum, Inc. ("Bannum"), a company that provides residential rehabilitation services to individuals referred by appropriate committing authorities. 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 as [sic] a federal institution.
>
> The property at 2210 Adams Place, N.E. is located in the C-M-2 District. Under Section 801.7(k) of the zoning regulations, a "[t]emporary detention or correctional institution on leased property for a period not to exceed three (3) years" is permitted as a matter of right in the C-M District. Accordingly, Bannum's proposed use of the property as a residential Community Corrections Center can be established as a matter of right at the Adams Street location.
>
> If you concur with our interpretation of this section of the zoning regulations, kindly indicate so by signing on the line provided below." J. App. 76-77.

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DCRA Zoning Administrator Michael Johnson signed Bannum's letter on or about that date. Id. With this DCRA approval, on January 23, 2001, Bannum sent a letter to the BOP advising the BOP that the property was only zoned for a three year period. J. App. 78-79. Bannum also submitted to the BOP, the DCRA decision letter and excerpts from the BOP RFP. Id., J. App. 81-82, 84-86.

The BOP directed Bannum to notify the Ward 5 Councilman of the intent to open a federal CCC in his ward. J. App. 88-89. By letter dated March 12, 2001, Bannum sent this notice. J. App. 90-92. Bannum provided excerpts of its BOP contract with this letter. J. App. 92.

Before the BOP accepted Bannum's offer, the BOP strongly suggested that Bannum again notify the Mayor, Chief of Police and local D.C. Councilman. Id. Bannum did so by letters dated April 10, 2001. J. App. 95-215. The letters identified the maximum number of potential residents (100-260), the total contract term (5 years), and the confinement level at the CCC. J. App. 95-97. The letter requested that any concerns be directed to Michele Aceto of the BOP

whose address and phone number was provided. J. App. 97. The BOP required these notices. J. App. 93, 106.

On November 5, 2001, the Councilman for Ward 5 wrote a letter to the BOP asking that the BOP withdraw its plans to open the CCC at 2210 Adams Street N.E. The reason given was that of the 6 existing halfway houses, with a combined capacity for 546 persons, three bordered on or were in Ward 5. The Councilman noted that Hope Village, which was located in Southeast Washington, housed 194 persons. J. App. 107. Hope Village is a federal CCC. J. App. 110-113.

C. In Reliance on DCRA's Zoning Approval, the BOP Awards Bannum a CCC Contract

Notwithstanding this complaint, in reliance on the DCRA's confirmation of proper zoning for the proposed CCC, BOP's own site inspections, and Bannum's compliance with BOP community notification requirements, on November 16, 2001, the BOP awarded Bannum the contract. J. App. 46-47 ¶9, 81-82. Upon information and belief, this was the only proposal received that was compliant with the above terms in the BOP RFPs. J. App. 47 ¶9.

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The contract guaranteed Bannum a 2-year contract with BOP having 3 one-year options for a total of 5 years; however, the BOP contract expressly incorporated Bannum's proposal which stated that it was based on temporary zoning for a 3-year period. J. App. 44, 114 (Block 18(a) of the form), 118. Absent new zoning, the maximum contract period was 3 years. 120-123.

On November 16, 2001, the BOP sent a letter to the Ward 5 Councilman advising him of the contract award to Bannum. The Ward 5 Councilman responded that he opposed an "additional correctional facility in ward 5". J. App. 124. However, he wrote no further letters.

Shortly following the contract award, as part of its due diligence before beginning preparations to perform, on November 26, 2001, Bannum asked the new DCRA Acting Zoning Administrator Olutoye Bello to re-confirm that the temporary zoning authorized previously was

proper. Bannum's letter contained exactly the same language as the first decision letter signed by Mr. Johnson. On or about that date, Mr. Bello also signed on behalf of DCRA, indicating that Section 801.7(k) zoning at that location was proper. J. App. 125-26.

D. Bannum Notifies the Advisory Neighborhood Commission of DCRA's Zoning Decision

In April 2002, after public announcements were made that a CCC was going to be operated at 2210 Adams Place N.E., Bannum met with community organizations including ANC 5-B leaders and its then-President, the PTA and parents at Langdon Elementary School. Bannum also met with the general community at the Harbor Light Center. J. App. 45, 127-28.

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2005 MAY 12 P 3:48

At the meeting where ANC 5-B leaders were present, Bannum explained the CCC programs and put the ANC on notice of the DCRA decisions confirming Bannum's matter of right zoning for a CCC at 2210 Adams Place N.E. J. App. 131-33. Bannum passed out excerpts from the BOP Contract's statement of work and explained how a CCC functions. J. App. 84-86.

E. Bannum Incurs Significant Costs in Preparing to Perform the BOP Contract

In reliance upon DCRA's determinations and the building permit, Bannum entered into a binding lease for the 2210 Adams Place N.E. property that was to begin on December 1, 2002. J. App. 47 ¶10, 81-82, 134-37. However, because the zoning was temporary, the lease was structured to run concurrently with Bannum's BOP contract for operation of a CCC. J. App. 118, 134.

Further, paragraph 5.02 of the lease enabled Bannum to cancel the lease if the D.C. government did not extend use at that location beyond the 3-year temporary period under new zoning. J. App. 135-36.

Bannum also contracted for building design work to prepare to renovate the facility for CCC use and entered into agreements with utility companies. J. App. 47, ¶10.

F. DCRA Issues Bannum the Building Permit

When the design was approved, on October 9, 2002, more than 6 months after notifying the ANC of the DCRA decisions, Bannum submitted an application for a building permit to DCRA. J. App. 138. The application stated that the proposed use was as a "community corrections center", a term taken directly from the BOP's RFP, under which a CCC is defined as a "penal or correctional institution". J. App. 140.

On December 12, 2002, DCRA issued Bannum Building Permit No. 425438 to "Change tenant warehouse space to 150 bed community corrections center." J. App. 141.

On January 8, 2003, when advised by DCRA that the application and permit were in error, Bannum submitted a revised application to DCRA stating the proposed use as a "3 year temporary use community corrections center". J. App. 142-45. On January 17, 2003DCRA then issued to Bannum, Building Permit No. B448325. J. App. 146. The corrected permit was revised to read "3 yr temporary use," and authorized use for a "[t]emporary 150 bed community corrections center on leased property for a period not to exceed (3) years." Id.

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G. DCRA's Affirmance of Proper Zoning In of Spite of the BZA Appeal and Other Objections

On January 15, 2003, the Ward 5 Councilman wrote to DCRA to request that DCRA issue a stop work order on construction of the renovations at 2210 Adams Place N.E. J. App. 147. On January 24, 2003 Regina James, a new President of ANC 5B, filed an appeal of only the superseded December 12, 2002 building permit (No. 425438) to the D.C. BZA. J. App. 148-50.

In the appeal, Ms. James argued that ANC 5-B was "aggrieved" based solely on her interpretation of the terms of the zoning regulation. The only other harm was a generalized allegation that:

"... this location is not conducive to productive and supportive environment. It is actual a place of desolation with little or no lighting in the area. No bus line travels to this area. With a population of 150 residents, in one location, we feel that the community will be adversely affected." J. App. 150.

On January 31, 2003, DCRA declined to issue the stop work order requested by the Ward 5 Councilman. DCRA assured the Ward 5 Councilman that the Certificate of Occupancy ("CofO"), when issued, would limit the use of CCC as a correctional institution for 3 years. J. App. 151. On February 21, 2003, DCRA denied another request from counsel for ANC 5-B that work be stopped. J. App. 152-53.

ANC 5-B did not limit its action to the BZA appeal. On March 7, 2003, the residents of Ward 5, again represented by ANC 5-B counsel, filed an action for temporary, preliminary and permanent injunctive relief in D.C. Superior Court to prevent Bannum from opening the CCC. A hearing was conducted and the Ward 5 citizens were given the opportunity to present their witnesses and documents. On April 8, 2003 Judge Kravitz denied the motion for a preliminary injunction. J. App. 154-59A.

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With respect to the likelihood of success on the merits, the court noted that the pending BZA appeal raised issues of first impression regarding Section 801.7(k) zoning. However, the court found no evidence of any special harm and seriously questioned whether plaintiffs had standing as an "aggrieved party." The court noted the public's strong interest in having a CCC, particularly in light of the "federalization of District's criminal Justice system and the resultant incarceration of our convicted felons in federal prisons around the country." The court recognized that all citizens had an interest in reintegrating these persons into D.C. society in a productive fashion. J. App. 159.

On April 10, 2003, ANC 5-B purported to ratify Ms. James' appeal which had been submitted in January 2003 without authority of the ANC. J. App. 160.

On approximately May 1, 2003, the renovation of the CCC was completed. Bannum had previously applied for a Certificate of Occupancy ("CofO") for a "temporary correctional institution on leased property for a period not to exceed 3 years". J. App. 161.

In spite of the ANC 5-B appeal and requests for suspensions, on May 2, 2003, DCRA issued Bannum a CofO for a "temporary correctional institutional on leased property for a period not to exceed three (3) years" for the community corrections center at 2210 Adams Place, N.E. The CofO specifically stated that it "expires on May 02, 2006." J. App. 162-64. This last DCRA decision enabled Bannum to comply with its BOP contract and begin operations in May 2003 at a cost at the time of the appeal of approximately $450,000. J. App. 47. Bannum began operating a CCC at that site in May 2003. J. App. 166. ANC 5-B did not appeal DCRA's issuance of the CofO to the BZA.

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On March 31, 2004, the BZA granted the appeal of ANC 5-B, reversing DCRA's administrative decision to issue the building permit No. B425438 to Bannum. J. App. 12-32.

On April 5, 2004, DCRA filed a "Motion for Reconsideration and For a Stay of the Effect of the Board's Final Decision" with the BZA. Bannum also filed a Motion for Reconsideration and Motion for Stay of the BZA's March 31, 2004 Decision with the BZA on April 13, 2004.

At its May 4, 2004 public meeting, the BZA denied Bannum's Motion for Reconsideration and Motion for Stay. The BZA's written order denying the motions for reconsideration was dated September 3, 2004. The written reconsideration decision supported all of the BZA's prior findings, rationale and conclusions. J. App. 33-42.

On April 27, 2004, DCRA issued a notice of intent to revoke the CofO, citing therein the BZA's March 31, 2004 written decision revoking the building permit as the sole basis for revocation of the CofO. Bannum's Motion for Stay, Ex. B.

H. Proceedings Before DCRA and this Court

In a motion dated June 20, 3004, ANC 5-B moved for summary affirmance of the BZA's decision. ANC-5B's motion was denied by this Court on July 28, 2004.

On July 30, 2004, Bannum moved for a stay and injunction. The Court denied this motion on August 5, 2004.

On August 6, 2004, the DCRA Administrative Law Judge orally deferred ruling on Bannum's appeal of the intent to revoke its CofO until this Court reaches a decision.

For the reasons discussed below, the BZA's decision should be reversed.

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LEGAL ARGUMENT

I. Standard of Review

This Court reviews BZA decisions on issues of fact under a deferential test—whether the factual conclusions are based on substantial evidence based on the record as a whole, i.e. whether a reasonable trier of fact would find the relevant evidence adequate to support the conclusion reached. As stated in President and Directors of Georgetown College v. District of Columbia Board of Zoning Adjustment, 837 A.2d 58, 67 (2003), quoting George Washington University v. District of Columbia Board of Zoning Adjustment, 831 A.2d 921 (D.C. 2003):

> "We must determine (1) whether the agency made a finding of fact on each material contested issue of fact; (2) whether substantial evidence in the record supports each finding; and (3) whether the conclusions of law follow rationally from the findings. (citations omitted) ...
>
> The Board's conclusions must be sustained unless they are "[a]rbitrary, capricious, (footnote omitted) an abuse of discretion, or otherwise not in accordance with law." D.C. Code §2-510(a)(3)(A)(2001) "It is[, however,] emphatically the province and duty of the judicial department to declare what the law is," (citation omitted), and although we accord weight to the agency's construction of the statutes [and regulations] which it administers, the ultimate responsibility for deciding questions of law is assigned to this court." (citation omitted, emphasis added).

As shown below, the key BZA findings supporting its decision are not supported by substantial evidence and the BZA's conclusions on questions of law are in error. The BZA order should be reversed.

II. DCRA's Decisions that Bannum's CCC Had Matter-of-Right Zoning Were Correct

A. The Plain Meaning of the Regulation Confirms DCRA's Zoning Decision

The D.C. Zoning regulation at issue, Section 801.7(k), allows matter-of-right zoning in a C-M Zone for a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years". DCRA found that Bannum's proposed use was proper. Bannum's CCC is (1) a correctional institution, (2) located on leased premises, (3) for a period not to exceed three years (items 2 and 3 are undisputed).

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Further, the zoning for the building permit for which Bannum applied and which was issued by DCRA specifically designated the facility for "temporary use". J. App. 146.

Accordingly, the DCRA's decision that zoning was proper was based on the plain and ordinary meaning of the regulation. As a matter of law, no further inquiry into the legislative history is necessary. Washkoviak v. Student Marketing Loan Association, 849 A.2d 37 (D.C. 2004).

B. The Legislative History of Section 801.7(k) Also Confirms DCRA's Zoning Decision

Contrary to the BZA's views, no substantial evidence shows that this regulation was generated as a result of court decisions and decrees regarding overcrowded D.C. prisons. J. App. 26. All but one of the court decisions cited by DCRA post-date the notice of this proposed zoning regulation, which was issued on December 17, 1971. See DCRA's June 17th Response to the Board's Request for Additional Information, dated June 17, 2003, pp. 4-5 (hereinafter "DCRA's June 17th Response").

The only court decision even close to the time of the public notice of these regulations-- United States v. Alsbrook, 336 F. Supp. 971 (D.D.C. 1971), was issued provisionally on December 1, 1971 subject to review of the full Court. Id. at p. 979. A hearing on that plan in that case was only held on December 23, 1971, a week after the companion regulation already had been issued. The actual order of the court was issued that same day. Id. at p. 981. These events were too close in time to be the Zoning Commission's reason for promulgating these regulations.

Moreover, Alsbrook dealt solely with overcrowding at one part of Lorton-- the Youth Center that required placement of youth offenders in adult areas. Nothing in Alsbrook or the legislative history indicated the adult areas of Lorton were overcrowded. Indeed, the youth offenders in overcrowded areas were being sent to the adult areas. Nothing in the legislative history or in the final language of these regulations refers to the Youth Center.

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Section 801.7(k) was likely generated by Brawner Building, Inc. v. Sheyn, 442 A.2d 847, 850, 857-58 (1971), decided in February 1971. This decision effectively disclosed a void in the D.C. zoning regulations regarding halfway houses, also known as "community correctional centers". Id. The Court, quoting the District Court stated:

> "The problem, in his words, is that 'everybody wants them, but nobody wants them around them.'" Id. at p. 851.

The Court further stated:

> "As to the parties to this suit and the District Court agree, community correctional centers, or halfway houses, are in the public interest. The question is, where are they to be located." Id. at 857.

The Zoning Commission thereafter took regulatory steps to deal with this situation. Nine months after Brawner was decided, on December 17, 1971, the Zoning Commission issued public notice of two companion regulations.

The first proposal, No. 71-32, made changes to the zoning regulations by providing matter-of-right zoning for government "halfway house or social service centers", which included "community ... correctional ... centers" in Residential 4 ("R-4") and less restrictive districts. J. App. 167-69.

In recognition of the difficulty of placing these important facilities, the companion proposed regulation, No. 71-33, which became Section 801.7(k) provided matter of right zoning in C-M districts for "temporary ... correctional institutions". J. App. 169-70. The final legislative history, J. App. 171-72, indicated that the purpose of the "temporary ... correctional institutions" in leased premises permitted in Section 801.7(k) was:

> "... 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 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." (emphasis added). J. App. 171 (emphasis added).

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Thus, the intent of these regulations intent was to provide 3-year matter of right zoning in C-M and M (General Industry) Zones for any overflows or for temporary facilities until zoning for a permanent facility was acquired. Permanent facilities could be obtained either in zones that permitted permanent correctional facilities as a matter of right or by variance. See DC ST §6-641.07.

C. Section 801.7(k) Was Intentionally Retained in the 1981 Zoning Changes

In 1981, in response to court orders involving prison overcrowding of the D.C. Jail in 1975 and 1976, Campbell v. Magruder, 416 F. Supp. 111 (D.D.C. 1976), the Zoning Commission deleted the 1971 definitions of "halfway house and social service centers" and redefined them as 7 types of "Community Based Residential Facilities" ("CBRF"). J. App. 175-211.

The only type of CBRF that was a correctional institution that housed adult offenders was an Adult Rehabilitation Home. J. App. 187. This type of CBRF could only be zoned through a special exception in some residential and lower density commercial zones.

However, all types of CBRFs were allowed as a matter of right in C-3, C-4 and C-5 zones. Rather than being "severely restricted" in commercial zones, as the BZA claimed, the regulations show that these CBRFs had no limitation on the number of residents. See 11 DCMR §741.5(c), §751.1 and §762.1. Further, the CBRFs in C zones were permanent and not required to be on leased property.

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Contrary to the BZA's implication, the Zoning Commission did not accidentally forget to repeal Section 801.7(k). Zoning regulations for the C-M Zones were specifically examined and changed in the 1981 regulation. J. App. 210. While CBRFs were not permitted as a matter of right in C-M and M zones on a permanent basis, matter of right zoning in Section 801.7(k) for temporary correctional institutions on leased premises was retained. Id. Retention of this zoning thus would continue to provide temporary matter of right zoning on leased premises for correctional institutions, such as an Adult Rehabilitation Homes and Youth Rehabilitation Homes. J. App. 187. Thus, the legislative history supports DCRA's position that Bannum's CCC was properly zoned at 2210 Adams Place N.E.

As discussed below, the BZA attempted to avoid the obvious meaning of the broad terms chosen by the Zoning Commission in 1971 to redefine the zoning in Section 801.7(k). The BZA's result-oriented interpretations to exclude Bannum's CCC are contrary to law and are not supported by substantial evidence.

III. The BZA's Arguments that Bannum's Federal CCC was Improperly Zoned Lack Merit

A. A Federal CCC is a Correctional Institution

According to the BZA, a federal CCC is not really a "correctional institution." The reasoning for this claim cannot withstand scrutiny.

1. A CCC Did Not Require a Special Zoning Definition to be "Correctional"

While a CCC was not specifically defined in current zoning regulations, contrary to the BZA's view, J. App. 24-25, DCRA had knowledge of what a federal CCC was when Bannum's zoning was determined to be proper. Facilities similar to a federal CCC called "halfway houses" and "community correction centers" were in existence and had been considered "penal institutions" under D.C. law. See Brawner, supra, 442 A.2d at 850, 857, fn. 13 (1971)(referring to "community correction centers" and noting their status as "penal and correctional institutions"); see also Armstead v. United States, 310 A.2d 255 (D.C. 1973) (escape from a "halfway house" was an escape from a "penal institution"). Further, Bannum provided portions of the BOP Statement of Work to DCRA officials. J. App. 84-86.

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The BZA's belief, J. App. 1982, that there has never been a temporary correctional facility zoned under Section 801.7(k) is irrelevant to the Zoning Commission's intent, and in any event, also is not supported by substantial evidence. DCRA records did not contain the regulatory basis for zoning of halfway houses or community correctional centers. See DCRA's June 17th Response, p. 3.

Moreover, DCRA indicated that there had been a CCC in CM-2 district, a Department of Corrections Community Correction Center No. 4 ("CCC4"), since 1974, i.e. after Section 801.7(k) was enacted in April 1972. Id. at p. 7. If CCC4 began operating in 1974 in the CM-2

Zone, the facility could have been zoned temporarily under Section 801.7(k) in 1971 and extended by variances until it was closed sometime after 1989. See DC ST §6-641.07.

But even if no CCCs had been proposed by the D.C. Department of Corrections under Section 801.7(k), this does not reasonably indicate that a federal CCC was outside of the "correctional institutions" intended by the Zoning Commission in 1971.

2. All Relevant Definitions Show that a Federal CCC is a "Correctional Institution"

Webster's Dictionary defines the term "correctional" to include "treatment of offenders through a program involving penal custody ..." J. App. 212-14. Federal CCCs obviously fall within this definition. But even if one could attempt to force some ambiguity out of the dictionary definition, the BOP definitions are unequivocal and they are controlling.

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In 1997, Congress passed the National Capital Revitalization Act, Public Law 105-33, 111 Stat. 712 ("NCRA"); DC ST §24-101. This statute closed the majority of the D.C. prison system and transferred the administration and confinement of D.C. felons to BOP:

> "(a) FELONS SENTENCED PURSUANT TO THE TRUTH-IN-SENTENCING REQUIREMENTS.--Not later than October 1, 2001, any person who has been sentenced to incarceration pursuant to the District of Columbia Code or the truth-in-sentencing system as described in section 11211 shall be designated by the Bureau of Prisons to a penal or correctional facility operated or contracted for by the Bureau of Prisons, for such term of imprisonment as the court may direct. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed.
>
> (b) FELONS SENTENCED PURSUANT TO THE D.C. CODE.-- Notwithstanding any other provision of law, not later than December 31, 2001, the Lorton Correctional Complex shall be closed and the felony population sentenced pursuant to the District of Columbia Code residing at the Lorton Correctional Complex shall be transferred to a penal or correctional facility operated or contracted for by the Bureau of Prisons. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.

(c) PRIVATIZATION.--

(1) TRANSITION OF INMATES FROM LORTON.--The Bureau of Prisons shall house, in private contract facilities--

(A) at least 2000 District of Columbia sentenced felons by December 31, 1999; and

(B) at least 50 percent of the District of Columbia sentenced felony population by September 30, 2003." (emphasis added).

Thus, under §11201(a) and (b) of the NCRA, Congress stated that the confinement of all D.C. felons was to be in BOP "penal or correctional facilities" and subject to the laws of the United States. See also DC ST §24-201.26. A federal CCC is a "penal or correctional institution". J. App. 60.

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Further, under part (c), BOP was to acquire 50% of these correctional institutions from the private sector by 2003. See NRCA, §11201(c). Acquisition of facilities, including leased facilities has been authorized by Congress. See e.g. Pub. L. 107-113, 115 Stat 2099 (January 8, 2002); DC ST 24-201.72.[2]

In the federal system, imprisonment in correctional institutions is aimed where possible at decreasing the inmate's levels of confinement. J. App. 57, 59-60, 216. A CCC is a federal correctional institution in which the BOP selects D.C. felons for assignment from higher security federal prisons around the country for confinement in a D.C. CCC to serve the last 10% of their sentences in order to enable them to successfully reintegrate into D.C. society, but in a correctional setting. Id.; 18 U.S.C. §3621 and §3624(c).

Under BOP regulations and case precedent, a BOP CCC is a "penal or correctional institution" and a place of "confinement." J. App. 59-60, 63; Howard v. Ashcroft, 248 F.Supp.2d 518, 538-41 (M.D. La. 2003) (discussion explaining why one of Bannum's federal CCCs is a "penal or correctional" institution).

[2] see generally http://www.congress.gov/cgi-in/cpquery/?&dbname=cp107&&r_n=sr042.107&sel=TOC_147498&.

Undisputed testimony at the BZA hearing also confirmed this fact. Hulon Willis and William Willingham repeatedly testified that Bannum's federal CCC is a "penal" or "correctional" institution. J. App. 218, 220-21, 223-24.

3. Contrary to the BZA's View, Federal CCCs Are Places of Confinement

The BZA's claim, at J. App. 26-27, that the offenders in the CCC "choose" to be there that the "... purpose for being there [in the CCC] is not to be confined but to be freed ...." ignores the fact that whatever the inmate's "choice", it is the BOP which decides who will be assigned to a CCC. 18 U.S.C. §3621(b); J. App. 60-61, 64-65, 228; Howard, supra. The BZA incorrectly focused on one goal of this type of correctional facility—reintegration into D.C. society— and ignored the key element of "correction" in which these goals are to be met: custody of the Attorney General and confinement. J. App. 59-60, 226; DC ST §24-201.26.

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The BZA's related claim that CCC residents can "come and go as they please" is contrary to the facts. The record shows that inmates at a CCC are not free to come and go as any free person would understand that term. Id., J. App. 230-33. While CCC inmates can receive permission to leave the CCC and engage in specified activities not permitted at a higher level federal security facility, such as being employed, virtually everything they do is subject to strict rules and is closely monitored. J. App. 230-33, 235-37. If a CCC inmate violates the rules, he is subject to discipline. If he is not where he is supposed to be, he is placed in escape status, a federal felony. J. App. 229, 235-37, 241-44; Armstead, supra; cf. Griffin v. United States, 850 A.2d 313 (D.C. 2004).

The BZA's emphasis on the possibility that on rare occasions, a probationer might be assigned to a federal CCC is irrelevant. It does not change the nature of a federal CCC as a correctional institution. J. App. 246-48, 250-52.

Probationers in CCCs are hardly "free". See Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987). Contrary to the BZA's opinion, the rare probationer at a CCC would only be confined there by sentence of a court. See e.g. U.S. Sentencing Guidelines, §5F.1.1, in which a judge may sentence an offender by ordering "Community Confinement" in a CCC. Probationers must comply with CCC rules and remain in the correctional system. Griffin; supra; see also J. App. 253-54, 256. The rare possibility of a few residents on court-ordered probation does not reasonably convert a CCC into a hotel. A federal CCC is still a "correctional institution".

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4. "Lock Down" Correctional Institutions Were Not Specified

Nothing in the language of the regulation or the final legislative history purports to restrict "correctional facilities" in Section 801.7(k) to high security or "lock down" prisons. The language quoted by the BZA that the facilities were "for persons confined by the Court" is far from substantial evidence that a specific type of correctional institution was intended.

First, this alleged limitation was included in neither the final legislative history nor the broad language of the final regulation. J. App. 171-74. Thus, the Zoning Commission's election to choose broad language for the final regulation is inconsistent with any interpretation that a specific type of correctional institution was intended.

Second, "persons confined by the court" necessarily includes those persons confined in a community correctional center. Brawner, supra; Armstead, supra.

Third, as a practical matter, the time and cost to build a higher security prison is inconsistent with a three-year temporary use on leased premises. The intent was a lower security facility—a CCC. J. App. 258-60.

In sum, given that the companion regulation to Section 801.7(k) deals with an extensive revision of zoning for halfway houses, and the practical difficulties of building a higher security

correctional institution, it is apparent that both regulations were generated by the Brawner decision. Thus, the correctional institutions primarily addressed in Section 801.7(k) were those at lower levels of confinement, such as "community correction centers". Id.

The BZA's similar reliance on statements in the legislative history regarding the "overflow" of prisoners from established installations to show that "lock down" facilities were intended misses the mark. J. App. 27-28. Mr. Willis' testimony regarding the intention of Section 801.7(k) to alleviate "overcrowding" is not substantial evidence of the Zoning Commission's intent in 1971. Mr. Willis never worked for or with the Zoning Commission. Mr. Willis' response to the BZA panelist's compound and lengthy question, at best, can only be his speculation based on his "post-1971" experience working for the Department of Corrections, which began in 1989, 18 years after Section 801.7(k) was enacted. J. App. 262, 264-65.

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The BZA's similar reliance on Mr. Willis' recollection of the date of court consent decrees ands caps on the D.C. Jail to support their interpretation of "overflow" also appears misplaced. See DCRA's June 17th Response which cites only United States v. Alsbrook, 336 F. Supp. 971 (D.D.C. 1971) and Campbell v. Magruder, 416 F. Supp. 111 (D.D.C. 1976) as the consent decrees and decisions. No caps were imposed in the Alsbrook case and neither caps nor consent decrees were mentioned in the 1971 legislative history of Section 801.7(k).

The word "overflow" was not used in the final regulation and does not reasonably imply a "one-time" problem but rather, a general issue subject to evolving needs. J. App. 174. That is why it was retained in 1981 and is still the law. Thus, the BZA's finding at J. App. 26, that Section 801.7(k) "appeared" to have been enacted in early 1972 to relieve overcrowding on a "one-time" basis in response to court decisions, consent decrees and prison caps is not supported by law or substantial evidence.

5. The BZA Ignored the Legislative Intent to Provide "Flexibility"

The BZA's selective interpretation of a few terms in the legislative history ignores the overriding reason that the Zoning Commission chose broad language in the final regulation. In enacting Section 801.7(k), the D.C. Zoning Advisory Council stated that:

> "...the Department of Corrections needs the flexibility provided by this amendment. By providing the installations in industrial areas, the impact on residential areas of the city will be minimized." (emphasis added). J. App. 171.

The need for "flexibility" foreseen by the Zoning Commission in 1971 is inconsistent with the BZA's finding. It shows that this regulation, which the Zoning Commission has retained for more than 33 years, was no accident. Indeed, this flexibility is needed now.

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In 1997, the BOP assumed responsibility for D.C. felons under the NCRA. Since 2002, when Lorton Prison was closed, there were no D.C. prison facilities at all. As Mr. Willis testified, over 9000 D.C. felons have been placed in federal correctional institutions around the United States. J. App. 267-68. These D.C. offenders are all "overflow" inmates from a now non-existent D.C. prison system. Most will be returning to D.C. at some point. Id.

The BOP, which is obligated to assign suitable D.C. inmates to a CCC under 18 U.S.C. §3621 and §3624, determined that there was a need for Bannum's CCC. J. App. 270-71. Upon information and belief, there were no other compliant proposals to fill this need. J. App. 46-47 ¶9. The BOP was aware when it awarded the contract that Bannum would only be able to provide temporary zoning and continued to express a need for CCC services on that basis as shown by BOP's acceptance of Bannum's conditional offer. Id. Until the permanent correctional facilities Congress authorized in the NCRA, including leased facilities, are acquired to end the "overflow" situation in D.C., as contemplated by the Zoning Commission, the BOP will continue to attempt to acquire CCCs wherever it can obtain zoning. J. App. 271, 274-75.

In sum, in addition to the plain language of the regulation, the legislative history of Section 801.7(k) can only be reasonably interpreted as was done by DCRA -- that Bannum's building permit was properly given temporary zoning for the renovation of a warehouse on leased premises for use as a CCC, a "correctional institution", for a period not to exceed 3 years.

B. Bannum's Zoning for this CCC Was "Temporary"

Apparently recognizing that its interpretation of "correctional institution" was at best, strained, the BZA contends that Bannum's building permit, while admittedly for a 3-year term at a leased facility, was not "intended" by Bannum to be a "temporary" facility. This claim is equally unsupportable.

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1. The Word "Temporary" Did Not Add an "Intent" Requirement

The proposed amendment to add the word "temporary" was considered so consistent with the 3-year period already in the regulation that the Zoning Advisory Board felt that an additional public hearing was unnecessary to adopt it. J. App. 171. This statement strongly weighs against the creation of a new "intent to be temporary in that location" requirement.

In the context of this zoning law and the above statement, the word "temporary" simply meant that one could not apply for matter of right zoning for a correctional institution use in a C-M Zone after 3-years so as to effectively make the "temporary" use effectively "permanent". That is what the Zoning Commission intended from the start by limiting the temporary use to a 3-year period.

If BOP's need for this facility remains after 3 years, Bannum could not reapply for continued use under temporary zoning under Section 801.7(k) as a matter of right. Bannum would need to seek a variance, or relocate to another facility or the BOP contract would expire.

Indeed, the BZA's new "temporary intent" requirement would repeal the regulatory right to seek a variance under DC ST 6-641.07 and 31 DCMR §3103 and violate canons of regulatory construction. See generally Morton v. Mancari, 417 U.S. 535, 547-50 (1974). In any event, this reasonable interpretation of "temporary" is in also accordance with the legislative history of the two regulations introduced in 1971.

As noted above, BOP is administering D.C. felons because all D.C. correctional facilities are in an "overflow" situation, meeting the first purpose. Congress has authorized funds to acquire new facilities for D.C., including leased facilities See e.g. P.L. 107-113, 115 Stat 2099 (January 8, 2002), DC ST §24-201.72. By accepting Bannum's 3-year offer, as discussed below, the BOP has stated its need for temporary correctional facilities until permanent facilities are acquired. Thus, even the then-current 1971 purposes in the legislative history are present.

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2. The BZA's Findings on "Intent" Are Not Supported by Substantial Evidence

Assuming for the sake of argument that the BZA could add a new "temporary intent" requirement, the BZA's finding regarding Bannum's supposed "intent" is not supported by substantial evidence. Although the BZA made Bannum's supposed non-temporary intent a major basis for its decision, neither counsel nor any of the BZA members asked any Bannum or DCRA witness one question about Bannum's "intent". Moreover, the record is consistent only with an application for a temporary zoning.

Bannum's letters to the DCRA all expressly sought temporary zoning at 2210 Adams Place N.E., leased facilities, not to exceed a period of three years. J. App. 76-77, 125-26.

Bannum's BOP contract, and all BOP's contracts for CCCs, are "temporary" since they were awarded for a base period of less than 3 years with options to be exercised only if the BOP determines that it continues to need the facility. J. App. 53, 273-75, 277-78.

Bannum's offer to the BOP, which included the letter to the DCRA, indicated that Bannum had temporary zoning for 3 years. J. App. 78-79, 82. This particular BOP contract was expressly conditioned on Bannum's 3-year temporary zoning as Bannum's offer was incorporated into the contract. J. App. 114, 78-79.

Under government contract law, the BOP could not exercise Bannum's options beyond 3 years unless different zoning outside of that based on Section 801.7(k) was obtained. See United States Steel Corporation, ASBCA No. 29111, 85-1 BCA ¶17,761 (holding that where an offer is incorporated into the contract which contains terms in conflict with a government contract clause, the government clause will be ineffective). This was confirmed by Mr. Willingham, a BOP contracting expert. J. App. 121, 277, 123. The BOP contract was therefore "temporary". The BZA's reliance on the BOP contract as showing a period exceeding 3 years is not supported by law or substantial evidence.

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Finally, Bannum's lease, which the BZA distorted as a "sham", J. App. 27, also is totally consistent with seeking zoning for the temporary correctional facility in leased facilities envisioned in Section 801.7(k). It is uncontested that the lease was to run concurrently with the "temporary" 3-year BOP contract. J. App. 118, 134. To assure this, Bannum reserved the right to cancel the lease. J. App. 135-36. While Bannum noted that if zoning was obtained from the D.C. Government, the lease could be extended, no evidence indicates that the new zoning which Bannum would seek would be matter of right zoning under Section 801.7(k).

DCRA had specified that Bannum's CofO would expire in 3 years. Thus, Bannum would necessarily have to seek to exercise its right to a variance under DC Stat. §6-641.07 and 31 DCMR §3103 to stay at that facility. This application, in turn, would be for new and different

zoning than that applied for in the building permit at issue. Zoning would be based on a new determination to be made solely by the D.C. Government, as recognized in the lease. Id.

In short, Bannum's lease simply showed sound and necessary business judgment. Yet, on the basis of this supposed "sham" lease, the BZA improperly attributed an intent to seek permanent zoning from Bannum's initial building permit application. This implication is not supported by substantial evidence. The record, when fairly interpreted, shows that this initial building permit application was inadvertently incomplete and was quickly corrected to reflect Bannum's uniform prior written statements of its and DCRA's intent. In sum, the BZA's interpretation of "temporary" is not supported by law or substantial evidence.

C. ANC 5-B's Claims Based on a Federal CCC Being a "Halfway House" Lack Merit

Before the BZA, DCRA and ANC 5-B contended that a CCC was a type of "CBRF called an Adult Rehabilitation Home. However, a federal CCC, under BOP policy since 2002, Howard, supra, does not technically fit the definition of this or any other type of CBRF.

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1. Bannum's CCC is not Technically a CBRF under Section 1.99

A CBRF is defined in 11 DCMR §199.1 ("Section 199.1") as:

> "a residential facility for persons who have a common need for treatment, rehabilitation, treatment, assistance or supervision of their daily living. This definition includes but is not limited to facilities ... formerly known as convalescent or nursing home, halfway house or social service center, philanthropic or eleemosynary institution or personal care home. If an establishment is a community-based residential facility 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 (1) or more of the following subcategories: ...." (emphasis added).

Thus, if a facility does not fall within one of the 7 defined CBRF subcategories-- the facility is not a CBRF. The only CBRF category that could apply to a CCC is an Adult Rehabilitation Home, defined as follows:

"(1) **Adult rehabilitation home**—a facility providing residential care for one (1) or more persons 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 or older, under pre-trial detention or sentenced court orders ..." (emphasis added).

The testimony showed that no federal inmates are in a CCC while being "charged" or are in "pre-trial detention". J. App. 280-82. Thus, 2 of the 3 categories of residents authorized at an Adult Rehabilitation Home defined in the regulations do not reside in a federal CCC.

With respect to "sentenced court orders", almost all inmates in Bannum's CCC are D.C. felons who were assigned by the BOP. They were not sentenced to a CCC by a court. Id. The composition of the inmates in Bannum's CCC follows a 2002 BOP Policy Memorandum, which applies to Bannum's contract. J. App. 284, 285-91 (cited in Howard, supra at p. 523, see e.g. J. App. 292-94).

As noted above, on rare occasions, a court could sentence a probationer or parolee to a federal CCC. J. App. 113, 250-51. However, since the vast majority of inmates are not within the regulatory definition, common sense dictates that the possible existence of a very small percentage of court-sentenced inmates does not convert a federal CCC into a CBRF Adult Rehabilitation Home. Id. In sum, persons in a CCC are not "charged" with a crime, are not "pre-trial detainees", and all but a rare inmate, are not there on "court sentenced orders". Thus, a federal CCC, while a "correctional institution", technically does not fit the definition of a CBRF, Adult Rehabilitation Home.

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2. Even if a CCC was a CBRF, Matter of Right Zoning Still Exists for a Temporary CCC on Leased Premises in C-M Zones

DCRA contended that the use of a federal CCC is close enough to be classified as a CBRF, Adult Rehabilitation Home. ANC 5-B argued that a CCC is a CBRF prohibited as a matter of right in a C-M Zone, relying on Section 199.1 which states that:

"If an establishment is a community-based residential facility as defined in this section, it shall not be deemed to constitute any other use permitted under the authority of these regulations ...."

Assuming for the sake of argument that a federal CCC was sufficiently similar to be classified as an Adult Rehabilitation Home, a federal CCC still would not be "banned" in a C-M Zone as a matter of right. As DCRA explained, the prohibition against a CBRF constituting "any other use permitted by authority of these regulations" still allows CBRF uses if such uses have been expressly permitted as a matter of right. See DCRA's Supplemental Memorandum of Points and Authorities, pp. 3-4, dated May 15, 2003.

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That would be the case here because Bannum's CCC would be a distinct type of CBRF use – as a "temporary ... correctional institution" at a "leased facility for a period not to exceed three years" for correctional purposes – a special CBRF use that is expressly permitted in C-M Zones under Section 801.7(k) as a matter of right. In contrast, a CBRF could not also be used as a "hotel or inn" in a C-M Zone under 11 DCMR §801.6 because use of a CBRF as a hotel would not be a "correctional" use authorized in the CBRF definitions of an Adult Rehabilitation Home.

Accordingly, even assuming that a CCC is a type of CBRF, these regulations are in harmony. Speyer v. Barry, 588 F.2d 1147 (D.C. 1991). Indeed, ANC 5-B's interpretation would repeal Section 801.7(k), a violation of canons of construction. See Mancari, supra.

But even if the Section 801.7(k) and Section 199.1 were in irreconcilable conflict, under the canons of construction, the temporary use on leased premises specified in Section 801.7(k) would govern over the general definitional regulation of a CBRF, which only addresses "permanent" facilities, whether owned or leased. See Mancari, supra, 417 U.S. at pp. 550-51 ("a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"); see also Goodwin v. District of Columbia Board of

Education, 343 A.2d 63 (D.C. 1975) (specific pre-existing regulation permitting closed door hearing was retained in spite of passage of general regulation requiring public hearings.)

3. The 1981 Zoning Regulations Permit Large Correctional Facilities

To avoid the above canons of construction, the BZA attempted to define Bannum's federal CCC completely out of existence. The BZA claimed that this CCC, while similar, was not a CBRF Adult Rehabilitation Home because 150-person capacity was not "family-sized". In the BZA's view, a CBRF of approximately 20 persons was the "outermost range" of a CBRF. J. App. 25. The BZA argued that its view was supported by the general "ban" on CBRFs in CM zones and later, in its reconsideration decision, on the belief of one of the panelists. J. App. 36. The BZA's result-oriented interpretation again distorts the legislative history of the CBRF regulations.

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In 1981, the Zoning Commission issued new regulations redefining "halfway houses and social service centers" as CBRFs. The Zoning Commission also identified the type of zoning for all types of CBRFs in each zone to enable them to be placed in various zones around D.C. As stated by the Zoning Commission:

> The effect of the proposed changes to the regulations would be to permit all kinds of community based community based residential facilities in all zones, with the size of the facility depending on the general density of the zone. As compared to the existing regulations, the proposals for the R-1, R-2 and R-3 Districts are less restrictive, while the proposals for the R-4, R-5, W, CR, and SP Districts are more restrictive." J. App. 177.

In discussing the benefits of smaller facilities, selectively quoted by the BZA, the Zoning Commission reiterated this point regarding the size of the facility, stating:

> "3. Smaller facilities, approximating the size of and characteristics of families, should be encouraged to lessen impact, increase compatibility and provide true alternatives to institutional settings." J. App. 178. (emphasis added).

However, the BZA ignored the Zoning Commission's following paragraph:

"4. The size and density of such facilities should be generally consistent with the size and density permitted in various zone districts contained in the Regulations." Id.

Thus, while the Zoning Commission "encouraged" smaller facilities, it expressly recognized that a zone's size and density were the key factors that would determine the size of a CBRF. Since the population density of C and C-M Zones is smaller than residential zones, one would therefore expect that larger CBRFs would be located there.

The 1981 regulatory changes to implement the CBRF definitions confirm this intent. Matter-of-right zoning for all types of CBRFs without any limitation on the number of residents was permitted in Commercial ("C") C-3, C-4, and C-5 Zones, see 11 DCMR §741.5 , §751.2, and §761. Contrary to the BZA panelist's recollection of Zoning Commission discussions, the regulation itself, 11 DCMR §741.5(c), which dictates the zoning for C-3 through C-5 zones, contains no limits the types of CBRFs or restricts the number of residents in these zones.

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C Zones, like C-M Zones, have lower population densities. The placement of CBRFs in C-M Zones was specifically considered and the regulation was changed to preclude a permanent CBRF as a commercial use as a matter of right. J. App. 210. However, the specific, matter of right zoning for "temporary ... correctional institutions ... on leased premises", was retained for C-M and General Industry ("M") zones. Section 801.7(k), like the other sections of the zoning regulations, must therefore be given effect.

Indeed, the BZA's view that Bannum's federal CCC could not be a CBRF based on the number of residents would prohibit all larger-sized CBRFs (and federal CCCs) anywhere in D.C., and effectively repeal of 11 DCMR §741.5, §751.2, and §761 in violation of canons of construction. Mancari, supra. Further, all but one federal CCC have more than 20 residents. J. App. 107, 295-318. Since the 1981 regulations did not allow exceptions for pre-existing uses, all but one of these CCCs is non-conforming, creating a constitutional violation. J. App. 182.

IV. The BZA's Decision Violates the Supremacy Clause of the Constitution

The Supremacy Clause requires that federal laws be given preeminent position over conflicting state and local laws:

> "If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with the state and federal law or where the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress."

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987) (emphasis added).

In this case, the federal laws in question which completely govern the confinement of D.C. felons, the NRCA, Public Law 105-33; 111 Stat. 712, and 18 U.S.C. §3621 and 18 U.S.C. §3624, would "preempt" any conflicting state and local laws.

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Confinement of D.C. felons is an important federal program involving public safety, which Congress has specifically legislated and for which was a current need in D.C. Id., J. App. 53, 71. In the NCRA, Congress transferred all authority for the administration of D.C. felons, including control over their confinement and rehabilitation, and required that this confinement be carried out in accordance with federal law. See DC ST §24-101. Federal statutes obligate the BOP to place suitable felons who the BOP determines qualify for CCCs in this type of correctional facility for the last 10% of their terms. 18 U.S.C. §3621, §3624, J. App. 59-60.

The BZA's order would eliminate and/or place undue restraints on the confinement of D.C. felons in federal CCCs, temporary and permanent, of "much" over 20 persons, including in Bannum's CCC. This newly enacted limit occurs regardless of whether a CCC is called a "correctional institution" or a "CBRF, Adult Rehabilitation Home". The BZA's order thus creates an irreconcilable conflict with federal law since all but one CCC in district have more than 20 residents. See J. App. 107 (residents in 3 federal CCCs in or near Ward 5 and a "halfway house" with 194 residents at Hope Village, a federal CCC. J. App. 110-113, 314-17).

Although the record shows that most of the CCCs and halfway houses are classified as CBRF, Adult Rehabilitation Homes, as shown above, the current D.C. zoning definitions of this facility do not cover the vast majority of the types of residents that are confined in federal CCCs under current policy. Thus, the BZA finding, reaffirmed on reconsideration, that Bannum's federal CCC is not a "correctional institution" (or a CBRF if it has "much over" 20 residents), combined with the CBRF definitions, effectively writes federal CCCs out of existence in D.C.

Federal law has been found to preempt zoning regulations. In Crystal Bay Marina v. Sweeden, et al., 939 F. Supp. 839 (N. D. Okla. 1996), the Corps of Engineers had leased land to a private developer/contractor for creation of a recreational facility. Local zoning laws prohibited the federally authorized recreational facility from being implemented. The court held:

> "Recreation was one of the stated purposes of the Flood Control Act. Congress authorized the Corps to permit local interests to construct, operate, and maintain recreational facilities at the Skiatook project. The Corps approved the Marina's plans for the development of recreational facilities on the land, including the construction and operation of a recreational vehicle park. The zoning ordinance at issue designates the site of the proposed recreational vehicle park as a "single family residential district." Enforcement of that ordinance would preclude the development of the recreational vehicle park. Clearly, the ordinance directly conflicts with the federally approved use of federal land. The court therefore concludes that the zoning ordinance as applied to the federal land sublet to the Marina, is pre-empted. [Id. at 842].

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In United States v. Village of New Hempstead, New York, 832 F. Supp. 76 (S.D.N.Y. 1993), local regulations interfered with and prevented a federal contractor/lessee from carrying out the federally mandated purpose under a statute calling for the settlement of homeless families on unused federal properties. See also Sheridan Kalorama Historical Assoc. v. Christopher, 49 F.3d 750, 758 (D.C. Cir. 2001) (discussing the specific preemption of local zoning law in D.C.).

The BZA's rewriting of D.C. zoning laws to deny Bannum's facility zoning attempts to unduly interfere with the BOP's statutory mission in confining D.C. felons under the NCRA, 18 U.S.C. §3621, and 18 U.S.C. §3624. Such order is unconstitutional and should be reversed.

V. Bannum Has Been Denied Due Process

As shown above, both a CBRF under D.C. zoning law and a federal CCC are "correctional institutions". Likewise, Bannum's federal CCC is a temporary correctional institution since Bannum's building permit was not based on permanent zoning in the C-M Zone in which it is located.

As a result of the BZA decision, however, DCRA will have approved zoning for Hope Village as a CBRF, Adult Rehabilitation Home, which is a federal CCC with 194 residents, while denying zoning for Bannum Place, a 150-bed temporary federal CCC which allegedly is not a CBRF, Adult Rehabilitation Home, because it has more than 20 residents. J. App. 107, 110-13. Only one federal CCC in D.C. possibly meets the BZA's new criteria. J. App. 107.

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A CCC and a CBRF, Adult Rehabilitation Home are "correctional institutions" based on federal law and the classification of predecessor facilities under D.C. law. See Howard, supra; Brawner, supra; Armstead, supra. Thus, even if a federal CCC was found to be a CBRF, Adult Rehabilitation Home, a "temporary" federal CCC would still be a "correctional institution" which use is a specific exception in C-M zones to the prohibited "other" non-CBRF uses in Section 199.1.

Further, it appears that Community Correctional Center run by the D.C. Department of Corrections in a C-M Zone, "CCC4" after the 1981 CBRF regulations were enacted had between 158-250 residents after the current CBRF Adult Rehabilitation Home regulations were issued in 1981. J. App. 320. Thus, the BZA's size definition also is in conflict with DCRA practice.

There is no reasonable basis to disallow a temporary correctional institution with more than 20 residents while allowing permanent CBRFs of much the same or similar size. J. App. 107, 110-13, 314-17 (Hope Village, a federal CCC had 194 residents 2001), 295-313.

Bannum has a property interest in its BOP contract and CCC services business. Lynch v. United States, 292 U.S. 840 (1934); see also Larinoff v. United States, 533 F.2d 1167 (D.C. Cir. 1975). The BZA's order disparately treats similarly situated CCCs without a reasonable basis and appears to rest on antagonism to Bannum or to CCCs not owned by persons in the local D.C. area. App. 314-18, 321, 323, 325-26. Accordingly, Bannum has been denied Equal Protection under the Due Process component of the Fifth Amendment of the Constitution. See City of Cleburne, Texas v. Cleburne Living Center, et al, 473 U.S. 432 (1985).

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VI. ANC 5-B's Appeal Was Untimely and Alternatively Should be Dismissed under Laches

A. ANC Failed to Timely Appeal DCRA's Decision

Under DC ST §6-641.07(f), appeals may be taken from

> "(f) Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of the Inspector of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter...." (emphasis added); see also 11 DCMR §3100.2.

All appeals must be "timely" under 11 DCMR §3112.2. As timeliness was applied by the Board, ANC 5-B's appeal had to have been filed within 60 days of the date when the person appealing the decision had notice thereof. J. App. 20. ANC 5-B admittedly failed to do so.

The BZA's reasoning does not withstand scrutiny. The BZA found that DCRA's decisions in 2000 and 2001, which determined Bannum's zoning for a CCC at 2210 Adams Place N.E. to be proper, were "administrative decisions" referred to in 31 DCMR §3112.2 and DC ST §6-641.07(f). Id. This finding was correct as the letters were based on a "zoning regulation"—Section 801.7(k). Yet, the BZA held these DCRA decisions could only be considered in connection with a building permit or CofO appeal.

Therefore, even though the BZA found that ANC 5-B had actual notice of the DCRA's decision on zoning in April 2002, the BZA found the appeal timely. J. App. 16-17, 20-21.

The BZA's decision improperly rewrites the Zoning Act. Under DC ST §6-641.07(f), there are three separate types of decisions that can be appealed which are separated by the word "or"—(1) a building permit, (2) a CofO, and (3) "any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter". The BZA would rewrite (3) to add "unless the decision could later become part of an appeal of a building permit or a CofO". Neither the statute nor the BZA's regulations create this distinction.

The BZA's claim that allowing appeals of zoning decisions would somehow harm the review process by piecemeal appeals, some of which might be unnecessary, is inconsistent with the statutory scheme. Each step of the decision-making process is treated separately as each can involve a variety of issues which are not necessarily interdependent.

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For example, a building permit can involve challenges to the specifics of construction details without ever involving zoning. Those issues could also be present in a CofO permit. Similarly, as is the case here, an appeal of underlying zoning for the proposed facility can have nothing to do with the specifics of construction that might apply to either a building permit or a CofO. Indeed, the fact that this BZA appeal was based solely on zoning proves this. So does the separate issue of Bannum's CofO, which is currently being considered for revocation by the DCRA based solely on zoning. See Bannum's Motion for Stay, Ex. B.

There also are practical reasons for applying timeliness considerations to each of three subcategories of decisions. Here, had the ANC 5-B timely appealed after having actual notice of the DCRA's decision on the zoning of Bannum's facility (which Bannum would have been required to do if the decision had been negative), the BZA's decision on zoning would have been

issued at any early point in the process, thereby giving Bannum the opportunity to mitigate damages. J. App. 328. If zoning was proper and issues developed relating to the building permit or the CofO, only then could those issues be timely appealed. Therefore, the contemplated statutory process serves judicial and practical economies.

The BZA's statements about mandatory public notice for a building permit or CofO are irrelevant. The statute authorizing appeals of the three types of decisions was written with awareness that some DCRA "decisions" would not be subject to mandatory notice to the ANC. See DC ST §1-309.10. That is why the timeliness of an appeal has always been based on a "knew or should have known" standard. See Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment, 490 A.2d 628, 635 (D.C.1985) ("the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of.")

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In this case, ANC's then-acting Chairperson and other ANC Board members had actual notice of DCRA's zoning decision and Bannum's facility in April 2002, nine months before an appeal was filed in January 2003. Accordingly, the BZA should have dismissed this appeal for lack of jurisdiction. Goto v. District of Columbia Bd. of Zoning Adjustment, 423 A.2d 917, 923 (D.C.1980) ("question of timeliness is jurisdictional").

B. Alternatively, ANC 5-B's Unreasonable Delays Bars Its Appeal Under Laches

To establish laches, Bannum was required to show that due to an unreasonable delay in bringing an appeal, it has suffered unwarranted prejudice. Goto; supra. ANC 5-B offered no legitimate explanation for its 9-month delay. Bannum incurred substantial costs after notifying the ANC of the DCRA decisions and cannot be penalized because ANC leaders allegedly did not notify some of their constituents.

In preparing its facility to perform its Government contract, Bannum incurred expenses for the design of the facility, agreements with local utilities, equipment purchases and its lease. J. App. 48, 135, 328. While the amount of each cost was not specified, any reasonable estimate from the total incurred by the time of the appeal would constitute significant damages that could have been mitigated had the appeal been timely filed. J. App. 328. Thus, alternatively, the BZA's order should be reversed based on an untimely appeal under laches.

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VII. The District of Columbia is Estopped from Disavowing the Building Permit

To estop the District of Columbia from disavowing its zoning decisions, Bannum was required to show that in good faith reliance on affirmative acts of a municipal corporation, here DCRA, Bannum made expensive and permanent improvements to a property; and that the equities strongly favor retention of that use. See Saah v. District of Columbia Bd. of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C.1981).

Bannum met these legal tests. Before entering into the BOP contract, Bannum, in good faith, twice sought written DCRA confirmation that Bannum's proposed use of a structure as a federal "community corrections center" was allowed under D.C. zoning law in a C-M Zone as matter-of-right. Each time, authorized persons within DCRA confirmed in writing that proper zoning was present. J. App. 76-77, 125-26.

Bannum relied on DCRA's actions and created a number of occasions when the DCRA could have reexamined its decisions. After the first DCRA decision confirming Bannum's zoning as a matter of right, in 2000, Bannum notified the office of the D.C. Mayor, the Chief of Police, and the Ward 5 Councilman. J. App. 45 ¶8, 127-28. No objections were received.

On January 23, 2001, Bannum submitted its offer to the BOP, based on the zoning in the DCRA letters. J. App. 78, 81-82. The BOP asked Bannum to provide additional notice before

making the award and letters were sent again to the D.C. Mayor, the Chief of Police, the Ward 5 Councilman, and to the DCRA. J. App. 90-106. DCRA made no objection. On November 16, 2001, the BOP awarded the contract to Bannum. J. App. 114. This obligated Bannum to perform CCC services for a period of up to 3 years. On November 2001, DCRA reaffirmed that Bannum's zoning was proper. J. App. 125-26.

After Bannum had incurred significant costs in reliance on these DCRA actions, as well as committing itself contractually to the BOP and BOP contractual penalties for non-performance, DCRA received requests to stay performance of the construction authorized from the Ward 5 Councilman and a citizen group and ANC 5-B filed its appeal. J. App. 148-50, 152-53. DCRA rejected those requests and issued Bannum the building permit and took the extraordinary step of issuing Bannum a CofO after the BZA appeal was filed. J. App. 147, 151, 161-54.

Given Bannum's expenditure of approximately $450,000 at that point, J. App. 47-48 ¶10, these and other equities below estop the District of Columbia from disavowing the issuance of its building permit and CofO. Saah, supra.

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VIII. The BZA Lacked Jurisdiction Because ANC 5B Is Not An Aggrieved Party

The Zoning Act of 1938 and its implementing regulations permit an appeal of a D.C. zoning decision by "any person aggrieved, or organization authorized to represent such person". See Pub.L. No. 684, 52 Stat. 797 (1938) DC ST §5-420; 11 DCMR §3112.2. Under the Zoning Act of 1938, ANCs are permitted to "advise" D.C. executive agencies and Boards, including the BZA, on zoning matters. DC ST §1-309.10(a).

Because ANC 5-B, while claiming to be aggrieved, J. App. 148, had failed to submit any evidence to support this claim, the BZA claimed that DC ST §6-641.07 effectively created automatic standing for an ANC because ANC 5-B, as a "department of the District of

Columbia", was somehow "affected". This conclusion is not supported by the above statute which provides in pertinent part:

> (f) Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected ..."

ANCs are not "officers or departments of the District of Columbia". They are organizations who are authorized represent the citizens in their area. DC ST §1-207.38. The ANC mandate is to advise those "D.C. departments" who make the decisions. DC ST §1-309.10(a). Thus, ANC 5-B as an organization must show that it represents an aggrieved person.

This Court has held that to be "aggrieved", a person must show an injury greater than that suffered by the general public. Goto, supra, 423 A.2d at 923. This is consistent with this Court's precedents involving review of administrative decisions where "aggrieved" or even "affected" status has required some concrete injury that is more than showing a mere violation of a regulation. Cf. Lund v. Watergate Investors Limited Partnership, 728 A.2d 77, 83 (D.C. 1998) (holding "special damages" not met by mere violation of a zoning regulation).

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Here, no harm is alleged other than an alleged zoning regulation violation that would indicate that ANC 5-B represented an "aggrieved" person. Regina James, then Chair of ANC 5-B, testified that she had no objection to a CCC and if Bannum's facility were there 3 years, as the application indicated, she and the rest of the ANC would have no objection. J. App. 323.

Indeed, Ms. James suggested as an appropriate permanent alternative that Bannum move to the location of a closed CCC in the same zone -- CCC4. Indeed, Ms. James had recently supported another local contractor for that use in 2001. J. App. 321, 325-26.

No testimony from Ms. James or any other witness contained any relevant basis for finding that ANC 5-B represented an "aggrieved" person. After the fact generalized claims of decreased property values and vague danger do not meet this burden were totally unsubstantiated by testimony or evidence. J. App. 329-30. Unsupported allegations regarding the environment with regard to the inmate's health are irrelevant to zoning. Moreover, ANC 5-B does not represent the inmates.

The BZA's speculation that Bannum's facility could "destabilize adjacent residential neighborhoods" has absolutely no basis in the record. As Superior Court Judge Kravitz held in denying ANC 5B's and other plaintiffs' motions to preliminarily enjoin the operation of Bannum's CCC:

> "None of the plaintiffs is an immediate neighbor of the Adams Place property, and the plaintiffs have not established, either individually or as a group, that the operation of the facility would have any negative impact specific to them." J. App. 159.

Accordingly, the BZA lacked jurisdiction over this appeal.

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CONCLUSION

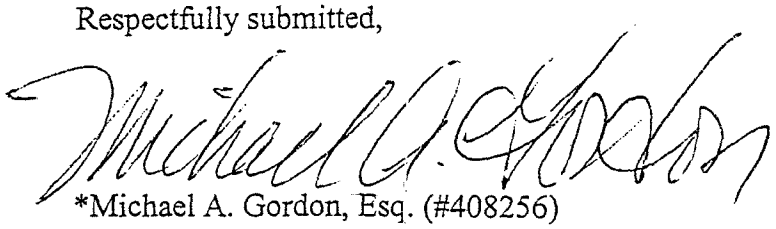
Under the plain meaning rule and other canons of construction, DCRA correctly found Bannum's CCC to be a "temporary ... correctional institution" as a matter of right for 3 years. The BZA's distortion of the legislative history should be rejected.

Indeed, the BZA's order, if upheld, would unduly interfere with and preempted Congress' delegation of confinement of D.C. prisoners under federal law to the BOP and would effect disparate treatment of Bannum as against similarly situated CCCs.

Even assuming arguendo that DCRA was incorrect, the BZA lacked jurisdiction over the appeal on the grounds of timeliness and standing since that ANC 5-B does not represent an "aggrieved" person. Further, the appeal is barred by laches and estoppel.

For the above reasons, Bannum respectfully requests that the BZA order be reversed and that this Court hold that DCRA's building permit was based on proper zoning.

Respectfully submitted,



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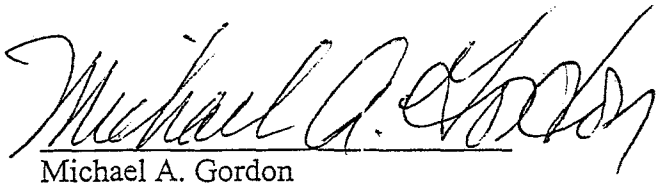
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing "BANNUM'S PRINCIPAL BRIEF was served this 14th day of September, 2004, by first-class mail, postage prepaid, to the following:

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