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No. 04AA345

DISTRICT OF COLUMBIA
COURTS

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

BANNUM'S REPLY BRIEF

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January 20, 2005

BZA

CASE No.

17356

EXHIBIT No.

6

Board of Zoning Adjustment
District of Columbia
CASE NO. 17356
EXHIBIT NO. 6
2/5/05

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DISTRICT OF COLUMBIA COURT OF APPEALS

BANNUM, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 04AA345
	)	
DISTRICT OF COLUMBIA	)	
BOARD OF ZONING ADJUSTMENT,	)	
	)	
Respondent.	)	

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BANNUM'S REPLY BRIEF

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") correctly issued a building permit to Petitioner, Bannum, Inc. ("Bannum") to operate a federal Community Correction Center ("CCC") based on "temporary", matter of right zoning available in leased premises in an isolated Commercial-Manufacturing ("C-M") district for a period of 3 years to "correctional institutions". See 11 D.C.M.R. §801.7(k) ("Section 801.7(k). Respondent and Intervenor have failed to show that the decision of the District of Columbia Board of Zoning Adjustment ("BZA") which concluded that this federal CCC somehow is not a "correctional institution" or "temporary" is either legally supportable and/or based on substantial evidence. Indeed, the BZA's interpretation of the zoning regulations violates the Constitution by preempting the National Capital Revitalization Act, Public Law 105-33; 111 Stat. 712 ("NCRA"); DC ST §24-101, and by disparately treating Bannum's federal CCC.

Finally, the BZA decision violates equitable doctrines, was issued without jurisdiction as the appeal of the Advisory Neighborhood Commission 5-B ("ANC 5-B") was untimely, and ANC 5-B is not an "aggrieved" party, a mandatory jurisdictional requirement under the Zoning Act. The BZA's decision should be reversed.

I. Standard of Review

This Court must reverse a BZA decision which is contrary to law and not supported by substantial evidence. George Washington University v. BZA, 831 A.2d 921 (D.C. 2003). Reversal is appropriate here, as shown below.

II. The Plain Meaning Rule Requires Reversal of the BZA's Order

The plain language of Section 801.7(k) provides matter-of-right zoning in a C-M district for a:

“... temporary detention or correctional institution on leased property for a period not to exceed three (3) years....”

While Respondent (“District”) argues that a “community correctional center” not currently defined in the zoning regulations, the Zoning Commission knew that a “community correction center” and “halfway house” were a correctional or penal institution in 1971 when Section 801.7(k) was promulgated. Brawner Building, Inc. v. Sheyn, 442 A.2d 847, 850, 857-58 (1971).

Since 1981, these institutions have been renamed Adult Rehabilitation Homes, a type of Community Based Residential Facility (“CBRF”), which are traditional penal institutions. Griffin v. United States, 850 A.2d 313 (D.C. 2004); Armstead v. United States, 310 A.2d 255, 257, fn. 5 (D.C. 1973). Since 2001, under the NCRA, the Federal Bureau of Prisons (“BOP”) has authority over the imprisonment of D.C. felons. A federal CCC is defined as a “penal or correctional institution”. 18 U.S.C. §3624(c); J. App. 60¹ (BOP Program Statement 7310.04 (1998)).

While the District disagrees to support the BZA decision, no attempt is made to distinguish Brawner, or this Court’s precedent in Armstead, and Griffin.

¹ J. App. ____” refers to Joint Appendix.

Not surprisingly, neither the BZA, nor the District, nor ANC 5-B has identified any supposed “ambiguity” in the broad term chosen by the Zoning Commission for this facility: “temporary ... correctional institution”. The District contends, as did the BZA, that because the words “temporary”, “correctional” and “facility” are not found together in the dictionary, the Zoning Commission intended a “very specific type of use”. This claim, if accepted, would require resort to the legislative history any time a lawmaker used an adjective and undermine the plain meaning rule. While the dictionary does not contain a special definition for “temporary”, “correctional”, and “institution” together, the definitions of each of these words is plain and as shown above, was understood.

“Correctional” is defined as “involving penal custody”. J. App. 212-14. Inmates in a community correctional center or halfway house are in custody “whatever their privileges.” Days v. United States, 407 A.2d 792, 704 (D.C. 1979). Likewise, inmates in a federal CCC, are and remain in the “custody” of the BOP until their sentences expire and they are released. 18 U.S.C. §3624(c).

The District argues that the BZA’s “common parlance” of a “typical” correctional institution creates an ambiguity. However, absent a clear indication that anything other than the ordinary meaning applies to “correctional institution”, which term was and has been defined to include a CCC by case law in 1971 and currently, by federal statutes and regulations, such common parlance or what the BZA considers implausible is irrelevant.

Renaming a federal CCC a “rehabilitative transitional facility” changes nothing. While the new name describes the rehabilitative attribute of a CCC, the District’s own description of a federal CCC as housing “inmates” who are serving “sentences” highlights the “correctional” attribute that makes the facility a “correctional institution.”

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Contrary to the District's and the BZA's view, the existence of a number of types of correctional institutions of varying degrees of confinement proves that the Zoning Commission's choice of the broad term "correctional institution" was not intended to be limited to a specific type.

The plain meaning of the word "temporary" is a limited time. In Section 801.7(k), the limited time was specified as "not to exceed 3 years." The BZA's claim of a special meaning based on the premise that these terms were not "redundant" is incorrect. No special meaning was intended because both terms were necessary: without "not to exceed 3 years", the word "temporary" would be ambiguous; without "temporary", Section 801.7(k) matter of right zoning could be renewed every 3 years.

In sum, there is nothing ambiguous about this regulation. DCRA's issuance of a building permit to Bannum on leased premises for a period not to exceed 3-years based on Section 801.7(k) zoning was correct under the plain meaning rule and no inquiry into the legislative history is necessary. Washkoviak v. Student Marketing Loan Association, 849 A.2d 37 (D.C. 2004). The BZA's order should be reversed.

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

A. Section 801.7(k) Was in Reaction to the Brawner Decision

The District avoids the significance of the Brawner decision in evaluating the legislative intent of Section 801.7(k). The court quoting the district court, noted:

"The problem, in his words, is that 'everybody wants them, but nobody wants them around them.'" 442 A.2d at p. 851.

The district court further stated:

"As 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.

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On December 17, 1971, 9 months after this decision, the Zoning Commission promulgated two companion zoning regulations that addressed the problem identified by the Browner court. No. 71-31 addressed permanent zoning for various types of facilities, including those in the “area of corrections” i.e. community correctional centers, which were renamed halfway houses. J. App. 167-69. Under No. 71-31, correctional “halfway house” facilities could now be located permanently as a matter of right in R-4 (“Residential”) and less restrictive residential districts. Other areas required variances and special exceptions, which could result in delays in the acquisition process. J. App. 176.

Recognizing the problems of a community’s typical reaction identified in Browner, No. 71-33 (which was codified as Section 801.7(k)) was promulgated to enable the government to temporarily house inmates in leased premises during delays in obtaining permanent zoning, when acquiring these correctional facilities was found necessary. The section was initially called “Detention or correctional institution on leased property” for:

“... interim or temporary locations for persons being confined by the Court until permanent facilities can be acquired and developed for such purposes.” J. App. 169 (emphasis added).

The purpose of this regulation 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.” J. App. 171 (emphasis added).

The D.C. Zoning Advisory Council further 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.

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Like the language of the regulation, the drafters of the legislative history used the broad terms “detention or correctional institution” and “correction facilities”. They stated that these temporary institutions and facilities were intended either to accommodate overflow population or as a temporary facility on leased premises to be used while the process of acquiring facilities with permanent zoning proceeded. These are the typical situations that exist when a decision is made that a new correctional facility is needed.

Notwithstanding what the history actually said, the BZA concluded that the Zoning Commission intended Section 801.7(k) as a response to court consent decrees and prison population caps in the late 1960s and early 1970s that were designed to relieve on a one-time basis, a short-term prison overcrowding crisis. J. App. 26. From this predicate, the BZA somehow concluded that the “correctional institutions” were specifically limited solely to high security or “lock-down” facilities on leased premises. App. 26. None of this is supported by the facts or otherwise makes any sense.

The District has pointed to nothing in the actual regulation or legislative history that would justify the BZA’s “interpretation”. No specific type of correctional institution was identified. “Overflows” arise from time to time in normal circumstances, such as population increases, replacement of an aging facility, or a variety of other factors. The District’s change in wording in its brief to describe the purpose in the quoted passage to “until” from “or as a temporary facility” is telling. The Zoning Commission’s choice of the word “or” shows that acquisition of temporary correctional facilities on leased premises was contemplated in situations other than only when an “overflow” existed. Such typical difficulties exist in acquisition of permanent zoning for a correctional facility in many districts in D.C.

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B. Nothing Indicates the Consent Decrees Were Related to Section 801.7(k)

The court consent decrees and population caps referenced in the BZA's decision were issued at a time either too close to, or long after Section 801.7(k)'s promulgation to have been the reason for the regulation. The District however contends that the cases of Campbell v. Magruder, 416 F. Supp. 100 (D.D.C. 1975), 416 F. Supp. 106 (1975), 416 F. Supp. 111 (1976) aff'd 580 F.2d 521 (D.C. Cir. 1976), were filed by pre-trial detainees in July 1971, implying that the overcrowding "crisis" was known to the Zoning Commission prior to the promulgation and enactment of Section 801.7(k). However, no court decisions indicate that the Zoning Commission was considering resolution of a prison overcrowding crisis through temporary correctional facilities on leased premises or any other such action by the D.C. officials at that time.

The District points to a statement in the dissent in the appeal of the district court's injunctions in Magruder that asserted that D.C. had argued that it had taken "steps" to alleviate the overcrowded conditions a year and a half earlier (presumably in the late 1960s) by the construction of new facilities, and thus, should not be sanctioned. However, no such finding was made by the trial court or the majority on appeal.

Moreover, nothing in the decision indicates that these pre-construction activities involved a direction to the Zoning Commission to change zoning laws to acquire temporary correctional facilities on leased premises while the new prison facility was being built. If zoning to authorize correctional institutions temporarily had been one of the steps that had allegedly been considered to address the prison overcrowding crisis at any point, D.C. would have highlighted that action in its defense.

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That leaves the memory of Hulon Willis, a D.C. Department of Corrections (“DOC”) employee who began working almost 18 years after Section 801.7(k) was promulgated. Mr. Willis was qualified as an expert in corrections, not zoning. J. App. 828-29. His factual views could not have been based on any personal knowledge. While Mr. Willis believed that the first consent decrees were issued in 1967 or 1969, he conceded that he was basing this statement on memory. J. App. 831-32, 863. As shown above, his memory of these dates was faulty. Indeed, Mr. Willis later admitted he did not know what the City intended in Section 801.7(k) or even what Section 801.7(k) was. Id. Therefore, his testimony does not “corroborate” the BZA’s finding that the Zoning Commission enacted Section 801.7(k) in response to consent decrees and population caps to deal with a one-time prison overcrowding crisis in the late 1960s and early 1970s.

C. The Consent Decrees Show that CCCs Were a Remedy for Overcrowding

But even assuming for the sake of argument that the regulation was developed in part to deal with overcrowded prison conditions, Mr. Willis testified that CCCs were a type of “correctional institution” that was used to relieve overcrowded “lock down” prisons after all of the consent decrees and population caps were in place. J. App. 54-55.

Indeed, directly contrary to emotional and unsupported claims about the alleged lack of security of a CCC made now by the District, the Magruder court found that the actual overcrowding problems were caused in large part because inmates who should have been housed in lower confinement facilities, like CCCs, were being housed in the “lock-down” facility. 411 F. Supp. at 103, 411 F. Supp. 116. D.C. officials even argued that they had assigned some inmates to halfway houses. Id. While this defense was not considered sufficient, CCCs, as a fact, were used to relieve prison overcrowding.

D. The BZA's Limitation Conflicts with the Stated Intent to Provide Flexibility

Neither the ANC 5-B nor the District have explained how the BZA's claim that Section 801.7(k) reflected an unstated requirement for a special type of temporary "lock down" facility can be consistent with the Zoning Commission's expressed intention of providing "flexibility". The District argues that the "flexibility" belongs only to the DOC, implying that it cannot be "stretched" to apply to a "private contractor". This supposed limitation to DOC in the legislative history was not included in the text of the regulation.

Moreover, the DOC could acquire correctional facilities by contract. DC ST 24-425 (1971); Armstead, supra. When the regulations were changed in 1981, the Zoning Commission clarified C-M zoning to indicate that permanent CBRFs were not permitted but retained the flexibility in Section 801.7(k). This confirmed that "correctional institutions"² could be located in a C-M Zone only on a temporary basis. J. App. 210. In 2001, the DOC transferred its rights to the BOP in the NCRA. Congress also expected private contractors to operate correctional institutions. DC ST 24-1201(c)(1).

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E. The Use of Section 801.7(k) After Its Passage is Unknown and Irrelevant

The District's claim that Section 801.7(k) zoning had "never" been used before to support the BZA's analysis is overstated and irrelevant. DCRA admitted that there was no way to confirm whether this zoning had been used because the basis for zoning was not recorded, then or now. See J. App. 972, 138, 315, 976.

² The District's argument that there was no reason to change Section 801.7(k) because "halfway houses" are not "correctional institutions" is contradicted by the 1981 legislative history, which defined a halfway house as a "correctional" facility. J. App. 176.

³ As stated in the principal brief, a federal CCC does not fit the technical definition of a CBRF, Adult Rehabilitation Home. Whether it fits this definition or not will not change its status as a "correctional institution" within the types of such institutions then existing in 1971 or now. J. App. 176.

The evidence shows that Community Correction Center 4 (“CCC4”), located in a C-M district, likely was zoned initially on a temporary basis since no other zoning was available for a CCC in that zone. J. App. 176, 976. DCRA’s position to the contrary -- that CCC4 was operating in 1974 based on McMillian v. United States, 326 A.2d 241 (D.C. 1974) and other cases, prove nothing. The cases cited do not indicate the basis for CCC4’s zoning—only that it was operating.

In any event, whether a regulation is actually used for its intended purpose does not give the BZA the right to ignore the law as written. Likewise, the BZA’s unsupported belief that this law was likely retained by “mistake” is not an excuse for effectively writing Section 801.7(k) zoning out of existence by insisting that only “lock down” facilities could be “constructed” on leased premises for a period not to exceed 3 years; and even then, as shown below, only if the applicant proved that it did not to intend to seek to exercise its statutory right to a variance in the future.

F. The Legislative History Also Confirms the Plain Meaning of “Temporary”

The District and ANC 5-B have offered no case law, legislative history or evidence to support the BZA’s new “intent to be temporary and not seek a variance” requirement. None exists. That No. 71-33 initially did not state that the facilities were to be used on a “temporary” basis proves nothing. The Zoning Advisory Board stated that adding the terms “temporary”, and the 3-year period to define it, were with the context of the proposed regulation, i.e. they were not substantive changes. J. App. 171.

The District concedes that Bannum had a statutory and regulatory right to seek a variance for that facility in a C-M district under DC ST 6-641.07 and 31 DCMR §3103. Absent any clear indication in the regulation or legislative history, which indication does

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not exist, there was no basis for the BZA to impose an obstacle that would effectively repeal the above statutes and regulations and violate canons of regulatory construction. See generally Morton v. Mancari, 417 U.S. 535, 547-50 (1974).

1. Bannum's Contract and Lease are Consistent with the 3-Year Limit

Claims of improper intent in securing temporary zoning on Bannum's part when a 5-year contract was involved are baseless. ANC 5-B and the District, as did the BZA, ignore the legal significance of (a) Bannum's final proposal revision to the BOP which states that zoning has been obtained for 3 years, J. App. 78⁴, and (b) the fact that this final proposal was incorporated into the contract. J. App. 44, 114, 118. Further, David Lowry, Bannum's CEO, testified that he provided the DCRA's rulings to the BOP to prove the zoning he had obtained, and the award was made on that basis. J. App. 81-82. DCRA's ruling expressly indicated only "temporary" zoning "not to exceed 3 years". J. App. 198.

The District and ANC's reliance on the "total" contract term in Bannum's letters to DCRA and other D.C. officials is unjustified since the word "total" shows that the term could be for less than 5 years if an option was not exercised. As a matter of contract law, for which this Court owes the BZA no deference, the BOP had no right to exercise an option after the 3rd year at that location unless different zoning was obtained. In United States Steel Corporation, ASBCA No. 29111, 85-1 BCA ¶17,761, the Board held that when an offer, like Bannum's proposal, is incorporated into the contract and it contains terms in conflict with a government contract clause, such as the options here, the government clause will be ineffective.

⁴ While ANC 5-B and the District point to redactions in the proposal, it is apparent that only pricing was deleted. J. App. 79-80.

The lease is fully consistent with the approved zoning. It was to run concurrently with the BOP contract but permitted Bannum to cancel it in 3 years. J. App. 134-36. Bannum's assumption of the risk of obtaining new zoning only meant that Bannum, not the landlord was responsible for obtaining government approval of a variance. Such approval could not be based on an extension of Section 801.7(k).

IV. The BZA's Order Violates the U.S. Constitution

By holding that Bannum's federal CCC was neither a "correctional institution" (because only a temporary "lock down" facility on leased premises was intended) nor a CRBF (based on the exceeding the alleged maximum number of residents), the BZA has eliminated or unduly interfered with the BOP's full mission under the NCRA and 18 U.S.C. §3624(c). The Constitutional defects in this appeal were sufficiently raised in the motions for reconsideration. DCRA, in attacking the BZA's finding that a federal CCC was not a CBRF, Adult Rehabilitation Home, stated:

"... it is the Bureau of Prisons—and not this Board—that is responsible for determining the facility size that would most effectively and efficiently serve the facility's intended purpose." DCRA Motion for Reconsideration, p. 3, AR 1998-04

Likewise, in Bannum's Motion for Reconsideration, p. 1-2, AR 2207-08, Bannum challenged whether the BZA could question the BOP definition of "correctional" facility and argued that its interpretation of the regulations was unfairly interfering with its contract and "putting the federal program in jeopardy." Further, long before the reconsideration decision, Bannum moved to stay the BZA in this court and again raised these constitutional issues. The BZA, though the District, its counsel, had full notice.

In any event, the constitutional issues before this Court are substantive and should either be reviewed or remanded for further factual findings. See Kalorama Heights Limited Partnership v. DCRA, 655 A.2d 865 (D.C. 1994).

A. The BZA Order Preempts the BOP's Mission under the NCRA

ANC 5-B argues the BZA order does not conflict with local zoning laws and that a temporary federal CCC "in accordance with C-M Zone requirements" is permitted. No explanation is given and these claims appear to contradict all of ANC 5-B's arguments.

The District claims that the BOP does not consider its NRCA mission preempted because BOP's solicitation requires compliance with local zoning laws. The presumption underlying the BOP clause is that such laws, as interpreted, are constitutionally valid. Moreover, the BOP's statutory mandate under the NCRA to administer the imprisonment of D.C. felons in accordance with federal statutes such as 18 U.S.C. §3624, which requires the BOP to assign suitable prisoners to federal CCCs it selects, overcomes any self-serving interpretation of BOP's contractual clauses.

Bannum does not claim immunity from zoning laws or that it can locate a federal CCC wherever it likes-- only that the BZA's ruling be reversed because it unduly interferes with and preempts the BOP mission under which Bannum is operating its CCC. Far from repudiating its contractual obligations, Bannum took proper steps to comply with its contract by appealing to this Court to enforce the DCRA's correct interpretation of the zoning laws which the BOP required as a condition for award.

B. The BZA Order Violates Bannum's Right to Equal Protection

The District's argument that equal protection is not an issue because there is no evidence of facilities similarly situated to Bannum's CCC is incorrect.

Similarly situated CCCs are not only those in C-M districts since according to the BZA, any CCC over 20 persons is not a CBRF and is thus, not allowed in any D.C. district. For example, Hope Village is a large federal CCC like Bannum's, J. App. 112-13, 850, and was classified as a CBRF. J. App. 315. Had the BZA found Bannum's CCC to be a CBRF, Adult Rehabilitation Home, a "correctional institution" under D.C. zoning law, J. App. 176, 180, as DCRA contended, the BZA's order would disparately allow a large CCC to operate as a CBRF in one district while excluding another large CBRF in another.

CCC4, another example of disparate treatment, likely was zoned initially as a temporary correctional institution under Section 801.7(k) since no other zoning existed in 1974 for a CCC in a C-M district. J. App. 176. CCC4 operated in the C-M Zone likely until 2001, well beyond 3 years. J. App. 1735. Since Section 801.7(k) was in effect when CCC4 operated, there is no basis to disparately treat Bannum's temporary and smaller CCC now, as the BZA has done, by finding that Bannum's CCC is neither a CBRF nor a "correctional institution." No reasonable basis exists for this disparate treatment.

V. ANC 5-B's Appeal is Untimely or Alternatively, Dismissed under Laches

A. ANC 5-B Had Actual Notice of the Decisions for 7 Months

The BZA found that ANC 5-B had actual notice at meetings in April 2002 that Bannum had obtained concurrence letters from DCRA, and that it believed it had zoning to operate a federal CCC at 2210 Adams Place N.E. J. App. 17, 76-77, 125-26. Each was found by the BZA to be an "administrative decision based ... upon any zoning regulation" under DC ST §6-641.07(f). J. App. 21. The time for appeal was 60 days. J. App. 20. Thus, ANC 5-B's appeal 7 months later of the decisions above was untimely.

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Recognizing ANC 5-B had actual notice of the DCRA rulings, and had “no doubt” that they were “administrative decisions” under the statute, the BZA claimed that only a building permit or certificate of occupancy following the earlier zoning “decision” had to be appealed. J. App. 21. While both ANC 5-B and the District generally support the BZA’s conclusion and claim the ANC 5-B was entitled to wait for the building permit, neither provides any authority for the BZA to rewrite the statutory and regulatory requirements. None exists.

The District’s claim that DCRA’s concurrence letters were not an “official” DCRA action was not DCRA’s position below and is contradicted by the BZA decision. J. App. 21. Even counsel for ANC 5-B called them “lower level rulings”.

Given ANC 5-B’s actual notice and because of the flaws in the BZA’s argument that the DCRA “decisions” do not need to be appealed because they have no regulatory “notice” requirements, ANC 5-B and the District contend that ANC 5-B officials did not have sufficient information to file an appeal. This claim has no basis.

At the April 2002 meeting with ANC 5-B, Mr. Lowry described the CCC, stated that he had received approval for matter of right zoning from the Zoning Administrator, and that BOP awarded the contract on that basis. J. App. 439-41. There was no “equivocation” regarding this notice. When asked whether he received approval from the Zoning Administrator, Mr. Lowry answered “Yes.” J. App. 439-40. While Mr. Lowry did not tell ANC 5-B officials the name of the Zoning Administrator (the “who” referred to by ANC 5-B), these officials knew where to appeal. Further, the BZA did not allow the ANC 5-B chairperson Bannum had brought to the hearing to testify. She would have confirmed this fact. J. App. 473. The appeal should be dismissed for lack of jurisdiction.

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B. The 7-Month Delay in Appealing the DCRA Decisions Invokes Laches

Alternatively, the appeal should be dismissed under the doctrine of laches. The District argues that ANC 5-B's delay was reasonable but this argument is based on when the building permit was issued. The actual undue delay from notice of DCRA's decision was 7 months.

The District also contends that Bannum was not prejudiced because "most" of the actual damages were incurred after the building permit was issued. That allegation, even if it were true, does not make the pre-building permit damages inconsequential. Bannum sufficiently described the costs, including the major contractual damages Bannum faced by entering into a binding 3-year contract with the BOP in reasonable reliance on the DCRA decisions that gave Bannum zoning for that term. J. App. 47, 441-42. Accordingly, all of the elements for application of laches are present.

VII. Estoppel Precludes the Application of the BZA's Order

The District argues that DCRA's rulings cannot estop the BZA because they were "informal" and could not be reasonably relied upon to incur expense. Nothing supports the claim. The BZA had "no doubt" that they were DCRA "decisions." J. App. 21.

The District then claims that a decision of the BZA is the only "final" authority on which one could reasonably rely before estoppel could apply. This contention is inconsistent with this Court's precedent.

In Goto v. District of Columbia Board of Zoning Appeals, 423 A.2d 917 (D.C. 1979), the BZA that was estopped from undoing acts taken by the D.C. zoning authorities after a 9-month delay. A pre-appeal to the BZA was not required in Goto for the doctrine of laches to apply.

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The District argues that Bannum was aware of community objections and thus could not rely on DCRA's actions in proceeding with its contract. However, the only objections made before Bannum entered its contract with the BOP on November 16, 2001, were made to BOP and were not based on whether matter of right zoning existed. J. App. 107-08. BOP proceeded to award the contract in reliance on the DCRA's concurrence letters. Moreover, the time for anyone to file an appeal of these DCRA decisions to the BZA had long passed before the building permit was issued in November 2002.

Bannum had a reasonable basis to incur these expenses. The BOP contract, which was entered in reasonable reliance on DCRA's ruling, required Bannum to incur the \$450,000 in expenses by the time of hearing and subjected Bannum to significantly greater damages for non-performance, as outlined in Mr. Lowry's declaration. J. App. 47-48. The equities strongly favor estoppel.

The District's claim that there is "evidence" of Bannum's bad faith is untenable. Each so-called fact argued in support of this position is incorrect. Bannum's then counsel, Mary Johnson of Holland & Knight, told Mr. Lowry that she had given the BOP Statement of Work to DCRA. J. App. 85-86. DCRA never requested the lease or any other proof of an "intent" not to seek a variance because no such requirement existed or could have been fathomed. DCRA never "acknowledge[d] that ... it neither requested nor received any information to verify that the CCC was permitted in this zone district before issuing the permit." District Brief. p. 13. No testimony was elicited from DCRA regarding the December 11, 2000 letter on which Bannum relied to enter the contract. Denzil Noble, the only DCRA administrator who testified, referred only to his personal knowledge. He did not know whether D.C. Corporation counsel had been consulted. J. App. 659.

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The District's claim that DCRA might have revoked the building permit if DCRA had known the duration of the BOP contract presumes that DCRA would have discovered an unconditional 5-year contract, which is not the case. DCRA would have found a 3-year contract consistent with Section 801.7(k). The District's reliance on DCRA's supposed potential revocation is further belied by (a) DCRA's receipt of a letter from Councilman Orange claiming that Bannum's contract was for 5 years, J. App. 147, (b) DCRA's actual decision to issue the certificate of occupancy, issued after the BZA appeal was filed, and (c) DCRA's continuing defense of the litigation, including its motion for reconsideration.

The District's argument about the supposed inequity of locating a CCC temporarily in an isolated commercial area because it could have a potential "adverse impact on the community claim" has no basis in fact, as discussed below. The claim of a "lack of supervision" at Bannum's CCC is false. District Brief, p. 23. This type of unsupported emotional overreaction to a CCC was noted in Brawner and led to the current regulations allowing these beneficial institutions. The public equities strongly favor estoppel.

VII. ANC is not an "Aggrieved" Party; the BZA Lacks Jurisdiction

While the District quotes part of the Zoning Act of 1938, neither it nor ANC 5-B express support for the BZA's stated rationale—that an ANC is a "department of the District of Columbia". That is because an ANC is not such a department and has no "special status". A D.C. "department" is the only entity that can appeal to the BZA when it is affected.

A regulation cannot expand the specific, statutorily designated class of persons entitled to appeal a BZA decision. Yet, the District cites 11 DCMR §3199.1, claiming that by definition, an ANC is a "party". No attempt is made to explain how this definition can be in harmony with the repetition of the statutory requirement in 11 DCMR §3112.2.

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The only interpretation that can be in harmony with the statute is that ANC as a “party” under 11 DCMR §3199.1 must also be an “aggrieved” person to file an appeal.

ANC 5-B’s related argument that 11 DCMR §3112.15 permits “any other person” who the BZA believes is “affected” to intervene also fails. This regulation presumes that an appeal has already been filed by an “aggrieved party”.

Finally, the BZA did not find ANC 5-B to be aggrieved. The District’s and ANC 5-B’s attempts now to argue that ANC 5-B was actually “aggrieved” have no basis in reality.

No authority is offered for the claim that a party can be aggrieved based solely on the violation of a zoning law, the reason repeatedly expressed by ANC 5-B for its appeal. None of the cited testimony shows an injury that would constitute harm sufficient to be an aggrieved person, the likely reason neither ANC 5-B nor the District has identified any specific harm. Judge Kravitz of the D.C. Superior Court heard substantially the same testimony and arguments by a group of plaintiffs living in ANC 5-B who were represented by ANC 5-B’s counsel. His decision, in the administrative record, stated that:

“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.

Finally, neither ANC 5-B nor the District have explained how ANC 5-B could possibly be “aggrieved” given the ANC Chairperson’s testimony that neither she nor the other ANC 5-B Commissioners had a problem with Bannum’s CCC if it only remained in operation for 3 years at 2210 Adams Place N.E. J. App. 323. That is exactly the temporary zoning Bannum applied for and all that DCRA’s building permit and certificate of occupancy allow. ANC 5-B had no right to appeal DCRA’s decision and the BZA’s order should be reversed for lack of jurisdiction.

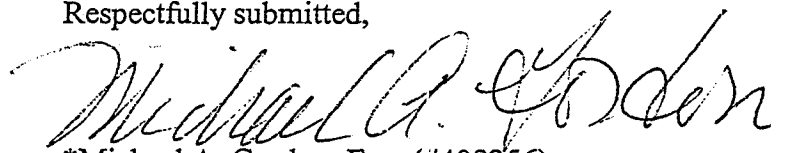
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CONCLUSION

The BZA's decision is a reaction to the exact problem identified in the Brawner case 33 years ago. In the apparent zeal to appease any segment of the community opposing a CCC, the BZA distorted or ignored a plainly worded zoning regulation, legislative history, case precedent, its own regulations and the Zoning Act to achieve an illogical, illegal and inequitable result. Indeed, the BZA's distortion of the law was necessary to even hear the appeal. Moreover, the decision, as written, violates the U.S. Constitution.

For the above reasons, Bannum respectfully requests that the BZA order be reversed and that this Court permit Bannum to fulfill its 3-year contract with the BOP at what is an optimal location for this facility. Upholding DCRA's building permit will continue to provide much needed CCC services to D.C. felons returning from prisons around the U.S. who, by virtue of the CCC services provided, will be released from BOP custody into the D.C. community with a job and a far better chance to become a productive member of society.

Respectfully submitted,



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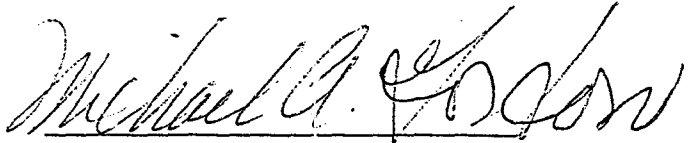
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing "BANNUM'S REPLY BRIEF" were served this 20th day of January 2005, by U.S. mail, postage pre-paid, to the following:

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