BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs (DCRA) for the issuance of Building Permit No. B425438, for the renovation of a warehouse for use by a community corrections center.	)	BZA Appeal No. 16998

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' OPPOSITION TO APPELLANT'S MOTION TO INTRODUCE TRANSCRIPT OF DENZIL NOBLE'S HEARING TESTIMONY

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") opposes, in part, the April 22, 2003 oral motion of Appellant ANC 5B ("Appellant") that the Board of Zoning Adjustment ("BZA") receive as evidence in this appeal a partial transcript of testimony taken at an April 3, 2003 preliminary injunction hearing in *Bar, et al. v. District of Columbia, et al.*, Civ. No. 03-CA-1639 (D.C. Super. Ct.). Although not part of the record in this case, the partial transcript, which consists entirely of testimony by Mr. Denzil Noble, has been submitted by Appellant for review by counsel for the BZA and by counsel for the other parties in this case.

As a preliminary matter, it appears from the partial transcript that Mr. Noble's testimony may not have concluded on page 66, the last page of the partial transcript (as submitted). Before making a decision as to any portion of the partial transcript, the BZA should satisfy itself that the submission represents all of Mr. Noble's testimony at the hearing.

BZA
Case No. 16998
Exhibit No. 30

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 30

The BZA's Rules of Practice and Procedure provide: "Evidence shall be taken in conformity with D.C. Official Code § 2-509(b)(2001) (formerly codified at D.C. Code 1-1509(b)(1999 Repl.))." 11 DCMR § 3119.4 (2003). The cited provision of the D.C. Code states, in relevant part:

> Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

D.C. Official Code § 2-509(b) (2001).

Mr. Noble's hearing testimony is clearly relevant to this case to the extent that the testimony explains the basis for his own decisions or actions, or his approvals of the decisions or actions of others. At the time of the April 3, 2003 hearing, Mr. Noble was the Administrator for DCRA's Building and Land Regulation Administration, and the Zoning Administrator reported to him. Partial transcript at 22, lines 14-23. Since then, Mr. Noble has become the Acting Zoning Administrator.

One action that Mr. Noble took that relates to this case was his modifying and signing a February 21, 2003 letter from DCRA to Donald Temple, Esq. (**Attachment A** hereto), which responded to Mr. Temple's February 7, 2003 letter to DCRA's Director (**Attachment B** hereto).[1] Mr. Noble's testimony regarding this action may be found in the partial transcript at page 34, line 18, through page 38, line 25. DCRA does not object to that portion of Mr. Noble's testimony being received as evidence in this appeal.

[1] Attachments A and B are already in the record of this case. Copies of these documents were filed by DCRA as part of its April 17, 2003 supplementation of the record. Letter from Bennett Rushkoff to Jerrily R. Kress, FAIA, dated April 17, 2003, and the attachments thereto.

In contrast, most of the hearing testimony proffered by Appellant is irrelevant and immaterial to this appeal. A review of the partial transcript does not show that Mr. Noble was personally involved in the decision from which Appellant appeals: the issuance of Permit No. B425438 on December 12, 2002. Nor does the Transcript show any personal involvement by Mr. Noble in reviewing or concurring with the December 11, 2000 or November 26, 2001 letters prepared by counsel for Bannum, Inc., and countersigned by the District's Zoning Administrators. Partial transcript, page 25, lines 18-22 & page 41, lines 12-20.

To the extent that Mr. Noble's testimony does not relate to an agency decision or action in which he was involved, it could still be relevant to this appeal if it qualifies as opinion testimony by an expert. However, the partial transcript does not provide a proper foundation for receiving Mr. Noble's testimony as expert opinion testimony.

Mr. Noble is a potential source of expert testimony regarding the District's zoning regulations. *E.g.*, partial transcript at page 24, lines 5-7, page 27, lines 16-23. But the partial transcript does not establish that, at the time he testified, Mr. Noble had sufficient knowledge about the operations of different types of correctional institutions to provide expert opinion testimony applying the District's zoning regulations to particular types of correctional institutions. Moreover, Mr. Noble readily acknowledged that he was not personally familiar with the application of zoning regulations to halfway houses:

> Q Are you familiar with what kinds of considerations go in to the question of whether a variance or an exception can be given to allow someone to locate a halfway house in a CM-2 district?
>
> A No, I'm not.

Partial transcript, page 34, lines 13-17.

> THE COURT: Can you tell me if you understand it what's the difference between a halfway house which is not allowed as of right in a CM-2 district and a community correctional center which apparently at least according to you is allowed as of right in a CM-2 district? What's the difference between the two facilities? What does one have that the other doesn't have?
>
> THE WITNESS: From speaking to the zoning technicians that generally review these projects because I don't do, they do reviews, a halfway house is where people go and come. The detention center, correctional institution is where they are housed in for hours. That's how it would be looked at.

Partial transcript, page 39, lines 5-18.

Therefore, the only portions of the partial transcript that are relevant to and should be received as evidence in this appeal are the portions that relate to Mr. Noble's February 21, 2003 letter to Donald Temple, Esq. (**Attachment A** hereto) or that provide necessary background information about Mr. Noble. These portions are at page 22, line 6, through page 27, line 23, and at page 34, line 18, through page 38, line 25.

Respectfully submitted,

ARABELLA W. TEAL
Interim Corporation Counsel

CHARLOTTE W. PARKER (#186205)
Deputy Corporation Counsel
Civil Division

BENNETT RUSHKOFF (#386925)
Senior Counsel
Office of the Corporation Counsel
441 4th Street, N.W., Suite 450-N
Washington, DC 20001
(202) 727-5173 phone
(202) 727-6546 fax
bennett.rushkoff@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2003, copies of the foregoing Opposition, Attachments A and B thereto, and the Proposed Decision and Order were faxed and mailed, first-class postage prepaid, to:

Donald M. Temple, Esq. fax: 202-628-1149
Temple Law Offices
1200 G Street, N.W.
Suite 370
Washington, DC 20005

Whayne S. Quin, Esq. fax: 202-955-5564
Mary Carolyn Brown, Esq.
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, DC 20006

mailed, first-class postage prepaid, to:

Regina James, Chair
Advisory Neighborhood Commission 5B
1363 Adams Street, N.E.
Washington, DC 20018

and hand-delivered to:

Lori Monroe
Assistant Corporation Counsel
Office of the Corporation Counsel
441 4th Street, N.W., 6th Floor-N
Washington, DC 20001

Bennett Rushkoff

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS



Building and Land Regulation Administration
Office of the Administrator

Attachment A

February 21, 2003

Donald Temple Esq.
Temple Law Offices
1200 G Street NW
Suite 370
Washington DC 20005

RE: 2210 Adams Street NE Zone, C-2-M

Dear Mr. Temple:

This letter is in response to your letter dated February 7, 2003, concerning the referenced address. The intended use, a 150-bed community corrections center, is institutional. The property is located in a C-M-2 zone, which permits such a use.

The building permit that was issued for this property (#B425438) does not have a three year expiration date. However, pursuant to DCMR 11, 801.7 (k), a...."temporary detention or correctional institution on leased property " is limited to a period of use not to exceed three years in a C-M zone, unless a special exception has been approved by the Board of Zoning Adjustment. DCRA will ensure that the certificate of occupancy for this property, when issued, specifically limits the use of this property as a correctional institution to three years, as stated in the zoning regulations.

In your letter you indicate that the approval of a construction permit was not consistent with the District of Columbia laws. It would assist us in providing a response if you could provide us with the sections of the codes and or laws to which you refer.

Your concerns involving previous Zoning Administrators' concurrences on non-governmental stationary have been addressed. This practice is no longer used by this office.

Should you have questions, contact me at 442-4455.

Sincerely,

Denzil Noble
Acting Administrator

Cc David Clark
Theresa Lewis
Robert W. Kelly

#166441

Temple Law Offices

1200 G Street, N.W., Suite 370
Washington, D.C. 20005

Telephone (202) 628-1101
Facsimile (202) 628-1149
E-mail: Templepc@aol.com

Donald M. Temple ★ ▶

Associate
Jeanett P. Henry ★ ✧

Of Counsel
Everett Bellamy ◀
Warner Session ★

Admitted District of Columbia Bar ★
Admitted Maryland Bar ✧
Admitted Ohio Bar ◀
Admitted Pennsylvania Bar ▶

Attachment B

URGENT ATTENTION REQUESTED

February 7, 2003

BY HAND DELIVERY

Mr. David Clark
Director
Department of Consumer
and Regulatory Affairs
941 North Capital Street, N.E.
Washington, D.C. 2002

Dear Mr Clark:

Please be advised that I have agreed to represent the Concerned Citizens for Ward 5, Inc. This letter is written on their behalf and underscores their strenuous opposition to Bannum, Inc.'s ("Bannum") efforts to locate a Community Based Residential Facility at 2210 Adams Street, NE without seeking proper zoning approval and appropriate input from its citizens and elected leaders, thereby strategically attempting to circumvent the law. To this end, we are carefully monitoring developments and have been made aware of a January 13, 2002 letter from Councilmember Vincent Orange to you and your January 31, 2002 response. Based upon the record in this matter we urge that the views stated in your response be retracted and further, that you immediately issue a stop work order at this facility until the contractor secures zoning approval, consistent with District of Columbia law.

On or around December 13, 2002 the United States Department of Justice, Bureau of Prisons ("BOP") awarded Bannum a contract to provide a Community Correctional Center in the District of Columbia. In its bid solicitation, the contractor was required to submit "satisfactory proof" in writing that it met all zoning requirements, including documentation from "necessary local officials stating that the contract may be performed at the proposed site(s) in accordance with the current zoning and other requirement of the local jurisdiction."

In response to this requirement Bannum's law firm, Holland & Knight, transmitted a letter dated December 11, 2000 to Michael Johnson, then Acting Zoning Administrator, which stated that Bannum intended to lease the subject property for use as a "Residential Community Corrections

Center ("CCC") under a contract with the Department of Justice. (See Attachment A). It then provided a definition of the CCC that essentially describes a Community Based Residential Facility ("CBRF"). That letter correctly noted that this area is zoned as Commercial Light Manufacturing ("CM-2") and that a "[t]emporary detention or correctional institution on leased property for a period not to exceed three (3) years" was permitted in this District as a matter of right. A CBRF, however, is not a "temporary detention or correctional institution." The letter peculiarly elicited a "concurrence" from the Acting Zoning Administrator with the law firm's "interpretation of this section of the zoning regulations" which Mr. Johnson gave. The same exact concurrence was taken almost a year later when the law firm wrote to Acting Zoning Administrator Olutoye Bello. (Attachment 2). Mr. Carter has discussed this matter directly with Robert Kelly, the present Zoning Administrator, who indicated that the aforementioned two letters were not in the official file on this case and further, that there is no matter of right zoning which permits Bannum's CBCF to be located in this CM-2 zoned area.

According to Title 11 DC Municipal Regulations Section 199, a CBRF is a "residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living." The Regulations further state: "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." The Regulations then provide a list of subcategories for this type of facility: adult rehabilitation home, Community residence facility, Emergency shelter, Health care facility, Substance abusers home, Youth Rehabilitation home and a Youth Residential Care home. Unless we are mistaken, the proposed facility is an Adult Rehabilitation Home. As explained to the community it fits no other definition in the Municipal Regulations.

Herein lies the problem. Two District of Columbia Acting Zoning Administrators, for some unexplained reason, did not understand that the CCC facility Bannum proposed to locate in this CM-2 zone was actually a CBRF, *not* a "temporary detention or residential facility." Thus, the facility did not enjoy "matter of right" zoning. Perhaps their repeated concurrences can be attributed to the fact that nowhere in these letters were the terms "Community Based Residential Facility" or "halfway house"referenced. Given their role as gatekeepers of the public interests and that their actions had significant legal implications, it is quite troubling that neither of these officials sought independent legal opinions from DC Zoning Commission attorneys and/or the Office of the Corporation Counsel prior to concurring with a private law firm's statement of the issue and view of the matter. We think that the circumstances surrounding the Zoning Administrators' execution of these two concurrences should be carefully scrutinized by appropriate government officials and agencies, including yourself, because the referenced concurrences and the manner in which Bannum has approached government
approval of the CBRF at issue may violate public policies and District of Columbia law.

One can't help but wonder why BOP's contract review staff accepted DC Zoning Administrators' "concurrences" on non-government stationery in response to an inquiry which never specifically mentioned the term "CBRF" or "halfway house" as satisfactory documentation

of compliance with DC zoning laws. It appears that the Bureau of Prisons procurement staff erroneously relied on these concurrences about broad and non-specific interpretations of the District of Columbia Zoning laws in awarding this contract and also failed consider the affected community's adamant opposition to the location of the facility thus engendering maximum distrust not only of Bannum and the BOP at a time when strong community support is needed most.

If you take no action on this issue, you will effectively sanction the possible circumvention and violation of District of Columbia zoning laws. Councilmember Orange's January 13, 2002 letter requested that you "immediately place a stop work order on this building construction" to prevent an inappropriate opening of the proposed 150 bed facility. Your January 31, 2003 response was woefully inadequate and was based on the same woefully inadequate interpretation of the facts to which former Zoning Administrators Johnson and Bello concurred, to wit, that "the intended use, a 150 bed community correctional center, is institutional." "Institutional" is not the applicable legal standard. Unless retracted, for for the third time the District Government will have failed to uphold its public duty to independently assess the specific proposed use of the property at issue thereby turning a blind eye to what may be a clear violation of District of Columbia zoning laws and circumvention of public interests.

Against this backdrop, The Concerned Citizens for Ward 5, Inc. reiterate Councilmember Orange's January 13, 2003 request that you immediately issue a "stop work" order on this facility and require the contractor to secure the necessary and appropriate zoning approvals required by District of Columbia law. Further delays by the government will only complicate this matter.

Should you wish to more fully understand the volatility and sensitivity of this issue, please feel free to attend our next Community meeting on February 11, 2003. On behalf of the Concerned Citizens of Ward 5, I thank you in advance for your immediate attention.

Respectfully,

Donald M. Temple, Esq.

cc: Councilmember Vincent Orange
Councilmember Sharon Ambrose
Councilmember Linda Cropp
Councilmember Adrian Fenty
Councilmember Kevin Chavous
Councilmember Sandy Allen
Councilmember David Catana
Councilmember Phil Mendelson
Ms. Kathyleen Hawksawyer, Bureau of Prisons
Charles Maddox, D.C. Inspector General

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs (DCRA) for the issuance of Building Permit No. B425438, for the renovation of a warehouse for use by a community corrections center.	)	BZA Appeal No. 16998

PROPOSED DECISION AND ORDER

At the April 22, 2003 hearing in this appeal, Appellant ANC 5B ("Appellant") made an oral motion that the Board receive as evidence in this appeal a partial transcript of testimony taken at an April 3, 2003 preliminary injunction hearing in *Bar, et al. v. District of Columbia, et al.*, Civ. No. 03-CA-1639 (D.C. Super. Ct.). The partial transcript, which consists entirely of testimony by Mr. Denzil Noble, then Administrator for the Department of Consumer and Regulatory Affairs' ("DCRA") Building and Land Regulation Administration, has been submitted for review by counsel for the Board and by counsel for the other parties to this appeal. Counsel for the Board has contacted counsel for Appellant and determined that the partial transcript includes all of Mr. Noble's testimony at the April 3, 2003 hearing.

The parties having briefed the motion, and the Board having been advised by its counsel, the Board determines that only the following portions of the partial transcript are relevant to and should be received as evidence in this appeal: page 22, line 6, through page 27, line 23, and page 34, line 18, through page 38, line 25. These are the portions that relate to Mr. Noble's February 21, 2003 letter to Donald Temple, Esq., or that provide necessary background information about Mr. Noble.

It is therefore **ORDERED** that Appellant's motion be, and hereby is, **GRANTED IN PART AND DENIED IN PART**, and it is

FURTHER ORDERED that the portions of the partial transcript at page 22, line 6, through page 27, line 23, and at page 34, line 18, through page 38, line 25, be, and hereby are, received as evidence in this appeal, and it is

FURTHER ORDERED that the other portions of the partial transcript proffered by Appellant not be received as evidence in this appeal.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE IN TEN DAYS AFTER IT BECOMES FINAL.