BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	
	)	BZA Appeal No. 16998
From the Decision of the Zoning Administrator Approving the Issuance of a Building Permit to Renovate the Existing Building at 2210 Adams Pl., N.E., for Use as a Temporary Correctional Institution in the CM-2 District	)	

D.C. OFFICE OF ZONING
2003 MAY -1 PM 12:31

BANNUM, INC.'S MEMORANDUM IN OPPOSITION TO ADMISSION OF THE SUPERIOR COURT TESTIMONY OF MESSRS. NOBLE AND KELLY

Bannum, Inc. ("Bannum"), the lessee of the property at 2210 Adams Place, N.E., respectfully submits its Memorandum In Opposition to Admission of the Superior Court Testimony of Messrs. Denzil Noble and Robert Kelly.

At the April 22, 2003, Board of Zoning Adjustment ("Board" or "BZA") hearing in the above-captioned matter, Appellant ANC 5B expressed its intent to introduce as substantive evidence in this proceeding portions of the transcript from the April 3, 2003, Superior Court preliminary injunction hearing, specifically the testimony of Messrs. Noble and Kelly.[1] Presumably, Appellant seeks to introduce the Superior Court testimony as substantive evidence as to the meaning of zoning regulations relevant to this appeal.

[1] At the April 22nd BZA hearing, counsel for Appellant represented that he would provide Bannum's counsel with copies of the transcripts of the testimony of Messrs. Noble and Kelly. It was then agreed that the parties would have seven days from the delivery of the transcripts to file a memorandum with the Board as to their admissibility in this proceeding. On April 23rd, counsel for Appellant provided Bannum's counsel with a transcript of Mr. Noble's testimony. Despite repeated requests to do so, Appellant's counsel has not yet provided Bannum's counsel with a transcript of Mr. Kelly's testimony.

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As set forth herein, the Board must decline to admit into evidence the testimony of Messrs. Noble and Kelly in lieu of their live testimony on the ground that their Superior Court testimony is unnecessary hearsay testimony and is not at all relevant to the issues before the Board. Neither Messrs. Noble or Kelly had any involvement in the zoning rulings issued on this matter in December 2000 and November 2001. Further, the Superior Court hearing did not address the merits of the zoning question. In the event that Messrs. Noble or Kelly testify at the BZA hearing, only then could Appellants (or any other party) introduce the Superior Court testimony to impeach these witnesses and as substantive evidence.

Under District of Columbia law, prior recorded testimony such as that now sought to be admitted into evidence by Appellant ANC 5B is admissible as an exception to the hearsay rule only when:

(1) the direct testimony of the declarant is unavailable;

(2) the former testimony was given under oath or affirmation in a legal proceeding;

(3) the issues in the two proceedings were substantially the same; and

(4) the party against whom the testimony now is offered had the opportunity to cross-examine the declarant at the former proceedings.

Warren v. U.S., 436 A.2d 821, 825 (D.C. 1981)(citing Henson v. U.S., 399 A.2d 16,19 cert. denied, 444 U.S. 848 (1979)).

While administrative proceedings do not prohibit hearsay, this standard is nevertheless instructive in ensuring a fair and efficient hearing process. Transcribed testimony does not capture a witness's demeanor, facial expression,

body language, voice inflection, tone, manner of speech, hesitancies or other nuances that reflect the full meaning of the words spoken. Consequently, live testimony is always preferred unless the four standards described above are met.

Here, the Appellant has made no proffer or showing as to the unavailability of the direct testimony of Messrs. Noble or Kelly in this proceeding. Second, putting aside the "availability" issue, the two proceedings - - the Superior Court preliminary injunction hearing and the BZA appeal - - do not involve the same or even substantially the same issues. Admittedly, the underlying facts (i.e., Bannum's operation of a temporary correctional center on leased property) are similar; however, the issues addressed at these proceedings are not.

In the Superior Court proceeding, Messrs. Noble and Kelly's testimony (and Bannum and the District's cross-examination of those witnesses) was limited to whether the District had changed its position as to whether Bannum's temporary use of the leased premises was permitted as a matter of right under applicable zoning regulations. Messrs. Noble and Kelly's testimony focused on the confirmations by District officials furnished to Bannum approving its proposed use and the information made available to said officials when making these determinations. The narrow issue at the preliminary injunction hearing was whether the Court should preliminarily enjoin Bannum's use of the facility pending resolution of the appeal now before the Board.

In the instant BZA appeal, Appellant now seeks to introduce this testimony as substantive evidence and expert testimony as to the meaning of certain provisions of the zoning regulations. However, on appeal to the BZA, the

interpretation of the relevant zoning regulations should be determined by the Board and not the zoning administrators, much less prior testimony of agency administrators at a Superior Court preliminary injunction hearing, particularly when those witnesses did not make the initial zoning rulings. It is unclear what light the Superior Court testimony could shed on the legal issue now before the Board. Mr. Kelly, for example only held his post as Zoning Administrator for eight months, which was his first zoning position. While Mr. Noble supervises the Zoning Administrator in his position as Administrator of the Building and Land Regulation Administration, his expertise is building code issues. Thus, the Superior Court testimony is of no value to the instant proceeding.

Moreover, the Board of Zoning Adjustment, not the Zoning Administrator, has final administrative responsibility to interpret zoning regulations. See D.C. Code §6-641.07. Accordingly, at this stage, statements made by Messrs. Noble and Kelly's at a preliminary injunction hearing regarding the interpretation of the zoning regulations at issue is not at all relevant to this proceeding and should not be considered. Under the D.C. Administrative Procedures Act and the Board's own rules of procedures, the chairman has a duty to exclude any irrelevant, immaterial or unduly repetitive testimony. *See* D.C. Code § 2-509(b) (2001); 11 DCMR § 3117.3(k) (2003). In the event that Messrs. Noble or Kelly testify at the BZA hearing, Appellant (or any party for that matter) is free to use the Superior Court testimony for impeachment purposes and as substantive evidence. In that regard, D.C. Code §14-102 provides:

§14-102. Impeachment of witnesses.

(a) The credibility of a witness may be attacked by any party, including the party calling the witness.
(b) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (1) inconsistent with the declarant's testimony, and was given under oath subject to the penalty or perjury at trial, hearing, or other proceeding, or in deposition, or (2) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, or (3) an identification of a person made after perceiving the person. Such prior statements are substantive evidence.

Thus, in the event that Messrs. Noble and Kelly testify in this proceeding and Appellant may use their prior testimony for impeachment purposes and as substantive evidence pursuant to D.C. Code §14-102. The District has already represented to the Board that it will make Mr. Noble available to the Board to answer any questions.

WHEREFORE, Bannum, Inc. respectfully request that the Board decline to admit as substantive evidence the prior testimony of Messrs. Noble and Kelly from the April 3, 2003, Superior Court hearing in lieu of their direct testimony before the Board in this proceeding.

Respectfully submitted,

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April 30, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served this 30th day of April, 2003, by fax and first-class mail, postage pre-paid, to the following:

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