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Via Overnight Courier

June 9, 2003

Geoffrey H. Griffis, Chairperson
DC Office of Zoning
Board of Zoning Adjustment
441 4th Street, NW
Suite 210 South
Washington, DC 20001

Re: Appeal of ANC 5B Re: 2210 Adams Place, NE
Filing of Pre-Hearing Motions

Dear Mr. Griffis:

Enclosed herewith for filing and consideration by the Board please find: (1) Bannum, Inc.'s Motion to Dismiss on New Grounds; (2) Verified Motion for Recusal; and (3) Motion for Reconsideration of Motion to Dismiss.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

Kevin M. Cox

Cc: Bannum, Inc., via mail
Donald Temple, Esq., via mail
Regina James, via mail
Bennett Rushkoff, Esq., via mail

BZA
Case No. 16998
Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 46

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	
	)	BZA Appeal No. 16998
Re: 2210 Adams Place, N.E.	)	

BANNUM, INC.'S MOTION TO DISMISS ON NEW GROUNDS

I.

Introduction

COMES NOW, BANNUM, INC. (hereinafter "Bannum"), intervenor in the above-captioned appeal pending before the Board of Zoning Adjustment ("Board"), and files this Motion to Dismiss on the following grounds: (1) the Board is without jurisdiction to consider the instant appeal regarding the issuance of a building permit to Bannum for the operation of a Community Corrections Center ("CCC") at 2210 Adams Place, NE because DC has recently issued a Certificate of Occupancy to Bannum for the property; (2) the Board is without jurisdiction to hear the instant appeal because ANC 5B never ratified the filing of the appeal of the issuance of a building permit to Bannum; and (3) alternatively, assuming ANC 5B did ratify the filing of the instant appeal, the Board is without jurisdiction to hear the instant appeal since ANC 5B has failed to file the required authorization with the BZA as required by the rules and as specifically ordered by the BZA on April 22, 2003.

In order to promote judicial expediency, Bannum respectfully requests that the Board consider and decide the instant jurisdictional motion at its June 17, 2003 public hearing.[1] In accordance with the holding in Smith v. Board of Zoning Adjustment, the Board must first address each of the foregoing jurisdictional objections before it may reach the merits of the

[1] See Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356 (D.C. 1975).

appeal case and whether Bannum's Community Corrections Center meets the matter-of-right provision of 801.7(k) of the Zoning Regulations.

II.

Facts

As this Board is aware, on January 22, 2003, without any authorization from ANC 5B, Regina James filed an appeal solely on the issuance of the building permit (No. B425438). It was not until February 6, 2003 that ANC 5B Commissioner William Shelton moved to ratify and submit a letter of appeal to the BZA on behalf of ANC 5B. However, the purported letter of authorization falls short of even authorizing an appeal to be filed regarding the issuance of the building permit. Rather, the purported letter of authorization merely provides authorization "...**to delay** DCRA's consideration for issuance of a permit for construction of a halfway house located at 2210 Adams Place, NE..." (emphasis added) See Exhibit "A" attached hereto.

With respect to the authorization required by ANC 5B to file the instant appeal, the Board convened on April 22, 2002 and requested the following:

> CHAIRMAN GRIFFIS: We're asking them for a report from the ANC that indicates the date in which the meeting was held, that it was properly noted that in fact there was a quorum present, the issues that were discussed, the motion that was before it, and then the vote on the motion that would have moved them to go to an appeal.

(Page 34, transcript of April 22, 2003 BZA hearing). To date, ANC 5B has not submitted the requisite documentation. According to the rules of practice before this Board, the written report is required to be submitted at least seven (7) days in advance of the hearing on the appeal. See Section 3115.1 of the Board of Zoning Adjustment Rules of Practice and Procedure.

Despite its recalcitrance of ANC 5B and Mr. Temple in following directives from this Board, and in following the Board's rules of practice and procedure, at the last hearing on May 20,

2003, Mr. Temple attacked Bannum for allegedly attempting to delay this appeal. Despite ANC 5B's rhetoric, and Mr. Temple's posturing and grandstanding, and the purported appeal of the issuance of the building permit, on May 2, 2003, the Director of the District of Columbia Department of Consumer and Regulatory Affairs made the determination the Bannum's zoning is valid and issued a Certificate of Occupancy to Bannum (see Exhibit "B"). In issuing the Certificate of Occupancy, the Director determined that Bannum's use was "a temporary correctional institution on leased property for a period not to exceed three years." The Certificate of Occupancy does not expire until May 2, 2006.

III.

The Board is Without Jurisdiction Due to Issuance of Certificate of Occupancy to Bannum

As seen from the foregoing facts, a quasi-judicial officer, David A. Clark, Director of the DC DCRA, has made a determination that Bannum is in full compliance with the zoning laws. This determination bars the Board from having jurisdiction over this matter at the present time, since no appeal has been taken by ANC 5B on the issuance of the Certificate of Occupancy. See Section 118.5 attached hereto at Exhibit "C". The Director's decision is a quasi-judicial determination that zoning is valid after the appeal of the building permit, which cannot be challenged by ANC 5B, or this Board, absent an appeal in accordance with Section 118.5.

The case law is very clear that a "certificate of occupancy enjoy a presumption of validity." See Burka v. Aetna Life Insurance Co., 945 F.Supp. 313, 318 (D.C. 1996), quoting Brawner Bldg., Inc. v. Shehyn, 442 F.2d 847, 855 (D.C.Cir.1971). The Board cannot rescind a duly issued certificate of occupancy because it would be improperly acting as a Court of Appeals over an administrative department when no appeal has even been filed. See Kopff v. District of Columbia Alcoholic Beverage Control Board, 413 A.2d 152, 154 (D.C.App.1980) (Court stated that "[i]f the

Board had gone behind the certificate of occupancy to ascertain whether or not it was properly issued, the Board would have been acting in effect as a court of appeals over other coordinate administrative departments.") If this Board insists on going forward with this appeal without jurisdiction, it must give the certificate of occupancy a presumption of validity, and this Board must show that David A. Clark committed an illegal act when he issued it.

Furthermore, the instant appeal has been rendered moot by the issuance of the Certificate of Occupancy. "The doctrine of mootness has emerged to assure that the courts limit their decisions to the resolution of live cases and controversies between specific parties. A court should not render a decision if it "cannot affect the matter in issue in the case before it." Kopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372 (D.C.App.1978); Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895); Alpert v. Wolf, D.C.Mun.App., 73 A.2d 525, 528 (1950). Although the issue has not been litigated extensively in the District of Columbia, other Court have made it clear that if "the work encompassed by the building permit has been completed and a certificate of occupancy obtained, **the appeal has been rendered moot.**" See G.Z.T. Industries Inc. v. Planning Board of the Town of Fallsburg, 245 A.D.2d 741, 665 N.Y.S.2d 736 (1997); Matter of Fallati v. Town of Colonie, 222 A.D.2d 811, 813, 634 N.Y.S.2d 784; Matter of Bytner v. City of Albany Bd. Of Zoning Appeals, 211 A.D.2d 1000, 621 N.Y.S.2d 960; Center Square Association Inc. v. Board of Building, Zoning and Housing Appeals of the City of Albany, 195 A.D.2d 684, 599 N.Y.S.2d 897; Ughetta v. Barile, 210 A.D.2d 562, 619 N.Y.S.2d 805.

III.

No Authorization by ANC 5B to File Appeal

As stated above, on January 22, 2003, Regina James filed an appeal of the issuance of the building permit to Bannum without the authority of ANC 5B. On February 6, 2003, James

attempted to get the Board to ratify the filing of the appeal. However, Regina James fell short in her attempt to do so. Specifically, ANC 5B Commissioner William Shelton submitted a purported letter of appeal to the BZA on behalf of ANC 5B, stating that ANC 5B had provided authority "...to delay DCRA's consideration for issuance of a permit for construction of a halfway house located at 2210 Adams Place, NE," not to file an appeal of the issuance of the building permit with the Board.

Furthermore, on April 22, 2003, this Board specifically ordered ANC 5B to file "a report from the ANC that indicates the date in which the meeting was held, that it was properly noted that in fact there was a quorum present, the issues that were discussed, the motion that was before it, and then the vote on the motion that would have moved them to go to an appeal." (see Page 34, transcript of April 22, 2003 BZA hearing). According to the rules of practice before this Board, the written report is required to be submitted at least seven (7) days in advance of the hearing on the appeal. See Section 3115.1 of the Board of Zoning Adjustment Rules of Practice and Procedure. However, as stated above, ANC 5B has not submitted the requisite documentation. As such, this Board had not been given authority by ANC 5B to proceed with this appeal, and therefore it is without jurisdiction or authority to proceed any further. ANC 5B has delayed its challenge to the building permit by not filing the proper reports and authorization with this Board. The fact that ANC 5B, or Mr. Temple, are not being paid does not excuse the violations of the statutory provisions that severely prejudice Bannum and the District of Columbia.

Conclusion

For the reasons stated above, Bannum respectfully requests that the BZA DISMISS the instant appeal.

Dated: June 9, 2003

Respectfully submitted,

Joseph A. Camardo, Jr.
127 Genesee Street
Auburn, New York 13021
Tel: (315) 252-2846
Fax: (315) 252-3508

Attorney for Intervenor Bannum, Inc.

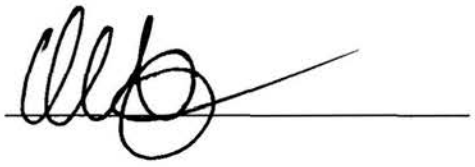
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion To Dismiss on New Grounds were served this 9th day of June, 2003, by first-class mail, postage prepaid, to the following:

Donald Temple, Esq.
Temple Law Offices
1200 G Street, N.W.
Suite 370
Washington, D.C. 20001
Counsel for Appellant ANC 5B

Bennett Rushkoff, Esq.
Civil Division
Office of Corporation Counsel
441 4th Street, N.W. Suite 540N
Washington, D.C. 20001

Chair
Advisory Neighborhood Commission 5B
1363 Adams Street, N.E.
Washington, D.C. 20018

By: 

VIII. COMMISSION ACTION:

Commissioner Mc Michael, moved to have a special ANC 5B public meeting with the community to discuss concerns and vote on the Public Hall application at 1730 Hamlin Street, and Rhode Island Avenue Northeast. Seconded by Commissioner Black. THE MOTION PASSED.

Commissioner Shelton, moved to have a special meeting for discussion of proper meeting behavior, and tempered emotions during meetings. (Commissioner Woodland, directed remarks to the Chair which provoked a spirited exchange), due to DCRA's failure to notify ANC 5B in a timely manner. Seconded by Commissioner Henderson. THE MOTION PASSED.

ANC – 5B Commissioners, discussed and agreed to allocate funds for the staff to copy at KINKO's, due to a period of transition for the ANC 5B office. Commissioner Black, moved to approve expenditures. Seconded by Commissioner Jean Taylor. THE MOTION PASSED.

ANC – 5B Commissioners, also, discussed and agreed to house the checkbook at the Treasurer's place of residence, until office space is acquired. Commissioner Henderson, moved to accept the arrangement. Seconded by Commissioner Taylor. THE MOTION PASSED.

Commissioner William Shelton, moved to ratify and submit a letter of appeal to the BZA on behalf of the ANC – 5B Commission to delay DCRA's consideration for issuance of a permit, for construction of a halfway house located at 2210 Adams Place Northeast. As well as, issuance of a letter to the Bannum Corporation clearly stating that ANC 5B is not currently, or a future supporter of the placement of a halfway house, located at 2210 Adams Place, Northeast. Seconded by Commissioner Henderson. THE MOTION PASSED(Commissioners Chappelle and Woodland, abstained). ✶

Commissioner Terrance Mc Michael, moved to pay all necessary bills for the month of February 2003. Seconded by Commissioner Shelton. THE MOTION PASSED.

Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, NE, 2nd Floor
Washington, D.C. 20002
Tel. (202) 442-4570 Fax (202) 442-4862

C of O

CERTIFICATE OF OCCUPANCY

PERMIT NO.
CO 53679

THIS PERMIT IS VALID ONLY FOR THE PREMISES OF THE PROJECT ADDRESS

DATE : 5/2/2003

ADDRESS	FLOOR(S):	PRCLID : PAR- (SQUARE) 0154-0 (LOT) 081	
1210 ADAMS PL NE	1ST FLOOR	WARD : 5	ZONE : CM2

PERMISSION IS HEREBY GRANTED TO
CORPORATION : BANNUM INC
ID No.: 211408

TRADING AS:

APPROVED USES	PREVIOUS USES
OTHER - SEE DESCRIPTION	OTHER - SEE DESCRIPTION

TYPE :	BZA NO.	OCCUPIED SQ. FOOTAGE	OCCUP. LOAD	EXPIRATION DATE:
USE CHANGE		12,739	150	NONE

DESCRIPTION OF USE
TEMPORARY CORRECTIONAL INSTITUTIONAL ON LEASED PROPERTY FOR A PERIOD NOT TO EXCEED THREE (3) YEARS. THIS CERTIFICATE EXPIRES ON MAY 02, 2006

FEE : $[illegible]

THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID IMMEDIATELY, unless an expiration date is stated. VALID ONLY for the premise at the above address or part thereof, and for the purpose(s), indicated above, and IS NOT TRANSFERABLE to another person or premises under ANY conditions. ANY CHANGE in the type of business, ownership of business, or part of premises used therefor, will render this Certificate VOID and a NEW certificate must be obtained.

David A. Clark
DIRECTOR

PERMIT CLERK
THINGOC MACXOAN

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

CERTIFICATE

THIS IS TO CERTIFY that all applicable provisions of the District of Columbia Business Corporation Act have been complied with and accordingly, this ***CERTIFICATE OF INCORPORATION*** is hereby issued to:

BANNUM PLACE OF WASHINGTON DC, INC.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed as of the **7th** day of **May , 2003 .**

David Clark
Director

Elizabeth O. Kim
Administrator
Business Regulation Administration

Maxine M. Hinson
Act. Assistant Superintendent of Corporations
Corporations Division

Anthony A. Williams
Mayor

118.4.5 Completion of Construction Work: Any certificate of occupancy previously issued or issued pursuant to Section 118.0 shall be revoked by the Director, after notice, notwithstanding a change of use of occupancy not being involved if upon completion of work done under a duly issued building permit the applicant does not apply for a new certificate of occupancy within thirty (30) days.

118.4.6 Notice of Revocation: Notice of the proposed revocation of the Certificate of Occupancy shall be given in writing, setting forth specifically the grounds for the action. The notice shall be sent by certified mail, at least ten (10) days prior to the date of proposed action.

118.5 Appeal From Action: Any person aggrieved by the action of the Director granting, withholding, or revoking a Certificate of Occupancy may appeal the action to the Board of Zoning Adjustment, pursuant to D.C. Code Subsection 5-424(F) (1981), and the District of Columbia Zoning Regulations

118.6 Certificate of Occupancy Fees: A fee for the processing and issuance of a certificate of occupancy shall be paid to the D.C. Treasurer in accordance with the applicable fee schedule.

118.6.1 Fee Schedule: The Director is authorized to establish, from time to time, by approved rules, a schedule of unit rates and other fees for certificates of occupancy, partial certificates of occupancy and other related miscellaneous services.

118.6.2 Filing Fee: The fee for filing an application for certificate of occupancy shall be in accordance with the current user fee schedule.

118.7 Records: The Director or his or her designee shall be the custodian of Certificate of Occupancy records. The records shall include, but not be limited to, the following:

1. Pending Certificate of Occupancy applications;
2. Extensions granted pursuant to sections 118.2.3 through 118.2.3.3; and
3. All approved applications for Certificates for Occupancy, issued Certificates of Occupancy and copies of all cancellation notices and related correspondence.

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	
	)	
	)	BZA Appeal No. 16998
Re: 2210 Adams Place, N.E.	)	
	)	

VERIFIED MOTION FOR RECUSAL

COMES NOW, BANNUM, INC. (hereinafter "Bannum"), intervenor in the above-captioned appeal pending before the Board of Zoning Adjustment ("BZA"), and files this Motion for Recusal of BZA Member and Vice Chairperson of the District of Columbia Zoning Commission, Anthony J. Hood, and states as follows:

I.

Background

On April 22, 2003, the BZA held a hearing on ANC 5B's appeal in the above-captioned matter. Present at the hearing, among others, was BZA member Anthony J. Hood, Vice Chairperson of the District of Columbia Zoning Commission, and resident of Ward 5B.

During the hearing, the subject of which was the building permit issued to Bannum for the operation of a community corrections center at 2210 Adams Place, N.E., Hood made comments to events unrelated to the proceeding which exhibited a clear bias on his part against Bannum. Hood's comments evidenced clearly an inability on his part to be fair and impartial with Bannum and the District of Columbia ("D.C."). In fact, Hood's comments demonstrate a clear bias on his part in favor of Advisory Neighborhood Commission 5B ("ANC 5B"), the appellant in this proceeding.

Notably, Hood is a resident of Ward 5, a former secretary of Ward 5 Democrats, and is politically affiliated and aligned with Councilman Vincent Orange, who has been publicly

outspoken on several occasions against Bannum's operation of a Community Corrections Center in Ward 5. For example, at a public meeting on February 11, 2003, Ward 5 Councilman Vincent Orange and several advisory neighborhood commissioners publicly expressed their opposition to Bannum and their proposed community corrections center. Furthermore, Councilman Orange has made requests with the District of Columbia to issue a "stop-work order" on Bannum's renovation of the property at 2210 Adams Place, N.E. for operation of a Community Corrections Center, and, upon information and belief, asked D.C. Auditor Deborah K. Nichols to investigate the issuance of a building permit to Bannum.

Additionally, Hood has been heavily involved in ANC 5B and neighborhood politics and activism for many years. At no time did Hood ever disclose to the member of the Board nor to the parties or their attorneys his connections and activities in the surrounding neighborhood, his residence in close proximity to the property, nor his associations and alignment with Councilman Orange. Hood began the meeting with unsolicited, clearly biased commentary against Bannum, Inc., and immediately attacked Bannum, Inc.'s counsel, Whayne Quin, attempting to block him from even arguing Bannum case as the Intervenor. When his efforts to keep Bannum from being heard were unsuccessful, Hood further demonstrated his clear bias against Bannum, Inc. in specific comments made by Hood during the April 22, 2003 hearing. Hood's comments evidence his bias against Bannum and D.C., and for Ward 5, were made during an exchange with Bannum's Executive Director, David Lowry, who was testifying on direct at the time:

> COMMISSIONER HOOD: Excuse me, Mr. Chairman. Mr. Lowry?
>
> MR. LOWRY: Yes.
>
> COMMISSIONER HOOD: This trip to Orlando, I have some problems with that.
>
> MR. LOWRY: What is your problem?

COMMISSIONER HOOD: My problem with the trip to Orlando is first of all you are doing business with ANC Commissioners. **Mr. Chairman, I know I may be going off on the wrong end because we are going to have a hearing. But I would like to say I have some serious concerns about your doing business in the city --**

MR. LOWRY: The Mayor's representative suggested the trip.

COMMISSIONER HOOD: It doesn't make any difference.

MR. LOWRY: I didn't suggest the trip.

COMMISSIONER HOOD: But still. I would hope --

MR. LOWRY: It was the Mayor's representative.

COMMISSIONER HOOD: Let me just finish, Mr. Lowry. I would hope that maybe the ANC Commissioners would have done like I did some years ago when they asked me to go somewhere as a Commissioner on this Zoning Commission and turn it down.

(Applause.)

CHAIRMAN GRIFFIS: All right.

COMMISSIONER HOOD: **I just say that because I have some serious problems with this agenda I see in front of me.**

MR. LOWRY: What, may I ask, is the problem?

COMMISSIONER HOOD: First of all, the trip to Orlando.

MR. LOWRY: You don't think I notified the community.

COMMISSIONER HOOD: No, I didn't say that. Don't tell on yourself. I didn't say that. I'm just concerned about ANC Commission --

MR. LOWRY: Mr. Hood, the Mayor's representative suggested that I fly people to Orlando. I bought two $250 tickets.

COMMISSIONER HOOD: Let me just ask my question. On April 18, 2002, you said you met with three leaders of ANC. You only named two.

> MR. LOWRY: I don't recall the third one. Mr. Bowser, who went to Orlando, Rhonda Chapelle, and I don't recall the third one. Rahim Jenkins representing the Mayor, who was at the meeting, suggested they go to Orlando. I flew them down to Orlando. We started developing a memorandum of understanding. That's how far along it got.
>
> COMMISSIONER HOOD: Mr. Chairman, I don't want to continue. I'll continue my line of questioning if we proceed.

(See pgs. 98-100, Transcript of BZA Hearing, April 22, 2003) (emphasis added).

In addition, later in the BZA hearing on April 22, 2003, Hood made clear, on the record, his intention to disregard the law in order to achieve the revocation of the building permit issued to Bannum by the District of Columbia:

> COMMISSIONER HOOD: I keep hearing the substantial investment has been made. I think it needs to be clear and I don't want to get too far into that just in case we're going to hear the case. But I think it needs to be clear that the substantial investment that has already been made is a moot point because the applicant takes that on their own risk.
>
> CHAIRMAN GRIFFIS: Let me disagree just briefly on that in terms of estoppel. If there was a permit under the issues of looking at estoppel that there was an action based on confidence in administrative, the issuance of permit would give you the confidence to start building. Once the appeal is filed, you are at your own risk. But there is the notion of if there was expensive or permanent improvements based on the reliance, based on the decision.
>
> COMMISSIONER HOOD: Let me say this, Mr. Chair, we can agree to disagree...

(See pgs. 84-85, Transcript of BZA Hearing, April 22, 2003.)

Later in the hearing, Hood produced a letter from Councilman Orange to the Bureau of Prisons regarding Bannum's use of the subject property. No one else on the Board had ever seen the letter, nor had it previously been addressed by any of the parties in their papers. This is significant because it demonstrates Hood's personal and devious attempts to attack Bannum. The

letter ultimately proves that the City and community were fully aware of Bannum, Inc.'s intentions in the District at the subject property, however, Hood attempted to use it for some perverted purpose.

II.

Legal Support

"BZA members are quasi-judicial administrative officials who operate under the same recusal standards as judges." Gladden v. District of Columbia Board of Zoning Adjustment, 659 A.2d 249, 256 (D.C. 1995); Morrison v. District of Columbia Bd. Of Zoning Adjustment, 422 A.2d 347, 349-50 (D.C. 1980); Jarrott v. Scrivener, 225 F.Supp. 827, 835 (D.D.C.1964); cf. Vann v. District of Columbia Bd. Of Funeral Directors, 441 A.2d 246, 249-50 (D.C.1982). "Recusal is necessary when the alleged bias is traceable to a source *other than* the judge's participation in the case. Gladden v. District of Columbia Board of Zoning Adjustment, 659 A.2d at 256; Morrison v. District of Columbia Bd. Of Zoning Adjustment, 422 A.2d at 350.

"There is no controlling statute or board regulation governing the disqualification of board members. In order to insulate the administrative process and its decision makers from prejudice and bias, it has generally been recognized that the same rules requiring the recusal of judicial officers are applicable to administrative officers who act in an adjudicative or quasi- judicial capacity." Morrison v. District of Columbia Bd. Of Zoning Adjustment, 422 A.2d at 349; see also, 4 B. Mezines, J. Stein, & J. Gruff, Administrative Law s 36.02 (1) at 36-7 (1977) ("hearing examiners and agency members performing quasi-judicial functions are held to the same standards regarding bias, prejudice, and interest as are courtroom judges"); Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (the fundamental requirements of due process apply to administrative agencies which adjudicate as well as to courts); NLRB v. Phelps, 136 F.2d 562, 563

(5th Cir. 1943) (**rigidity of requirement of impartiality should apply "more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have ... been relaxed**"); 2 K. Davis, Administrative Law Treatise s 12.02, at 152 (1958) (emphasis added); 1 Am.Jur.2d Administrative Law s 63 at 859-60 (2d ed. 1962). A judicial or administrative officer must recuse himself whenever a claimant alleges facts which are legally sufficient to show personal bias. See Vann v. District of Columbia Board of Funeral Directors and Embalmers, 441 A.2d 246, 249-50 (D.C.1982). In the absence of a statute providing otherwise, a judge must recuse himself when his alleged bias arises from a source outside the "four corners of the court-room," Tynan v. United States, 126 U.S.App.D.C. 206, 210, 376 F.2d 761, 765, cert. denied, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111 (1967) (quoting In re Federal Facilities Realty Trust Co., 140 F.Supp. 522 (N.D.Ill. 1956)), and results "in an opinion on the merits on some basis other than what a judge learned from his participation in the case." In re Evans, D.C.App., 411 A.2d 984, 995 (1980), quoting United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966).

The District of Columbia jurisdiction has adopted a three-point test of the legal sufficiency of a claim of personal bias:

> 1. The facts (alleged) must be material and stated with particularity.
>
> 2. The facts must be such that, if true, they would convince a reasonable man that a bias exists.
>
> 3. The facts must show the bias is personal, as opposed to judicial, in nature.

Vann v. District of Columbia Board of Funeral Directors and Embalmers, 441 A.2d 246, 249-50 (D.C.1982); see also, In re Evans, D.C.App., 411 A.2d 984, 994 (1980); In re Bell, D.C.App., 373 A.2d 232, 234 (1977).

The District of Columbia Office of Campaign Finance ("OCF") has also established its own internal set of rules regarding public officials and what it refers to as "conflicts of interest." The OCF, among other things, regulates the conduct of government officials who are elected or appointed to public office, by administering and enforcing D.C. laws pertaining to, among other things, conflict of interest matters and the ethical conduct of public officials. Section 3300.1 of the D.C.M.R. provides that "[a] public official shall not act or decide on any matter upon which there is conflict or potential conflict, created by their financial, personal, family, business, or client interest." Section 3300.2 defines "public officials" as, among others, "[m]embers of boards or commission required to file financial disclosure statements." According to Section 3302.1 of the D.C.M.R., "[w]hen confronted with a conflict or potential conflict of interest, a public official **shall remove himself or herself from influence over actions and decisions on the matter on which there is a conflict or potential conflict**" (emphasis added). "Removal from influence over actions and decisions shall be accompanied by the public official when the public official refrains from taking any action or making any decision that would affect **or appear to affect**, directly or indirectly, the matter under investigation or the conflict" See Section 3303.2, D.C.M.R. (emphasis added). Section 3303.2(b) of the D.C.M.R. provides that "[a] public official **shall** remove himself or herself from influence over actions and decisions…[w]hen the public official would be required to take any official action on a matter when a conflict situation is created by a personal, family or client interest" (emphasis added).

III.

Argument

Whether applying the common law or administrative standards set forth, it is clear that Anthony Hood has a duty to recuse himself from any further proceedings in this case. As stated

above, Hood lives in Ward 5 where Bannum's community corrections center is to be located. As evidenced by Ward 5's appeal of the District's issuance of a building permit to Bannum, there is obviously opposition to Bannum operating the community corrections center in the neighborhood. As a resident of Ward 5, Hood may himself be personally opposed to Bannum's operation of its facility in his neighborhood in which Hood resides. Based on these facts alone, a reasonable person would undoubtedly conclude that Hood is or may be biased against Bannum and inclined to vote for the revocation of its building permit. However, as also stated above, Hood is the former secretary of the Ward 5 Democrats, and is politically aligned and affiliated with Councilman Vincent Orange, a very vocal critic and opponent of Bannum's operation of a community corrections center in Ward 5. Orange has made no secret about his negative feelings about Bannum, speaking out at public meetings with ANC commissioners against Bannum, asking the District to issue a "stop work order" to Bannum for renovation of the 2210 Adams Place, N.E. property, asking the District's auditor to investigate the issuance of the building permit, and addressing his strong opposition to BOP personnel on numerous occasions. Hood's place of residence and political affiliations clearly render him unable to be impartial with Bannum and the District in this proceeding.

Furthermore, at the BZA hearing in the instant matter on April 22, 2003, Hood indicated that he had a problem with Bannum allowing Ward 5 members to tour its community corrections center in Orlando, stating "I have some problems with that." Hood stated further that "[m]y problem with the trip to Orlando is first of all you (Bannum) are doing business with ANC Commissioners." Even though Hood acknowledged that he knew he "may be going off on the wrong end," he still made clear that "I have some serious concerns about your (Bannum's) doing business in the city-" Notably, at the time Hood made these comments, Mr. Lowry was in the

middle of his direct examination by counsel on Bannum's motion to dismiss Ward 5's appeal. Hood's comments were entirely gratuitous, and were, upon information and belief, made for the benefit of the many Ward 5 residents and proponents in attendance at the hearing. Hood's comments were unrelated to the line of questioning from Bannum's attorney, and had nothing to do with the legal or factual grounds of the motion being addressed. As evidenced by his comments, Hood was not concerned with the motion to dismiss which was being argued, but rather grandstanding for the Ward 5 attendees by attempting to paint Bannum in a negative light. It is worth noting, as shown above, that following Mr. Hood's comments, the Ward 5 supporters in attendance at the hearing erupted with cheers and applause.

It is also worth noting that Mr. Hood's comments regarding Bannum allowing Ward 5 members to tour its Orlando community corrections center mirror the recent sentiments being expressed by a Ward 5 group formed solely to run Bannum out of town, namely "Citizens for a Safe Ward 5, Inc." More specifically, Citizens for a Safe Ward 5 has issued press releases which accuse Bannum, among other things, of an "attempt to buy local official's votes by taking them to Orlando, Florida for three days..." (see Citizens for a Safe Ward 5, Inc. press release dated February 28, 2003), and "numerous 'unscrupulous' activities to make Bannum's plan to locate in this zone work to include taking ANC chairs to Orlando, Florida to 'observe' one of their sites" (see Citizens for a Safe Ward 5, Inc. press release dates April 28, 2003.

Finally, Hood's comments during the BZA hearing also indicate a that he is not concerned with the law when it applies to Bannum. Hood has made it clear that he will "disagree" with the law of estoppel as it applies to Bannum, as it was explained to him by the honorable BZA Commissioner Griffis, and is not concerned with the legal implications of the substantial investment made by Bannum in reliance upon the District's lawful issuance of a building permit. It is readily

apparent that Hood personal bias against Bannum has, and will continue to, cloud his judgment and made it impossible for him to be impartial.

IV.

Conclusion

For the reasons stated above, Bannum respectfully requests that Anthony Hood recuse himself from any further involvement in the subject BZA proceeding, or that he be compelled by the BZA to do so.

Dated: June 9, 2003

Respectfully submitted,

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Representatives of Intervenor Bannum, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion for Recusal were served this 9th day of June, 2003, by first-class mail, postage prepaid, to the following:

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Counsel for Appellant ANC 5B

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Regina James, Chairperson
Advisory Neighborhood Commission 5B
1363 Adams Street, N.E.
Washington, D.C. 20018
(first-class mail)

By: 

VERIFICATION

DAVID LOWRY, being duly sworn, says that he is the Executive Director of Bannum, Inc., Intervenor in the action identified above, that he has read the foregoing document and that he has personal knowledge, that its contents are true and correct, except those matters stated to be made on information and belief, which he believes to be true and correct.

David Lowry

Sworn to before me this
10th day of June, 2003.

Notary Public

JOHN D. RICH
MY COMMISSION # DD 030003
EXPIRES: September 29, 2005
Bonded Thru Notary Public Underwriters

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of ANC 5B	)	
	)	BZA Appeal No. 16998
Re: 2210 Adams Place, N.E.	)	
	)	

MOTION FOR RECONSIDERATION

Introduction

COMES NOW, BANNUM, INC. (hereinafter "Bannum"), intervenor in the above-captioned appeal pending before the Board of Zoning Adjustment ("Board"), and files this Motion for Reconsideration of the Board's denial of the Motion to Dismiss of Bannum, Inc. argued on April 22, 2003. Specifically, Bannum moves the Board for reconsideration of the following grounds supporting its Motion to Dismiss: (1) ANC 5B has failed to file necessary authorization to proceed with appeal; (2) ANC 5B does not meet the requirements for aggrievement under the Zoning Enabling Act and Board of Zoning Adjustment; (3) The subject appeal was not timely filed; and (4) The appeal is barred under the equitable doctrines of laches and estoppel.

In order to promote judicial expediency, Bannum respectfully requests that the Board consider and decide the instant jurisdictional motion at its June 17, 2003 public hearing.[1] In accordance with the holding in Smith v. Board of Zoning Adjustment, the Board must first address each of the foregoing jurisdictional objections before it may reach the merits of the appeal case and whether Bannum's Community Corrections Center meets the matter-of-right provision of 801.7(k) of the Zoning Regulations.

[1] See Smith v. District of Columbia Board of Zoning Adjustment, 342 A.2d 356 (D.C. 1975).

I.

ANC 5B Has Not Filed Required Authorization to Proceed

On January 22, 2003, Regina James filed an appeal of the issuance of the building permit to Bannum without the authority of ANC 5B. On April 22, 2003, this Board specifically ordered ANC 5B to file "a report from the ANC that indicates the date in which the meeting was held, that it was properly noted that in fact there was a quorum present, the issues that were discussed, the motion that was before it, and then the vote on the motion that would have moved them to go to an appeal." (see Page 34, transcript of April 22, 2003 BZA hearing). According to the rules of practice before this Board, the written report is required to be submitted at least seven (7) days in advance of the hearing on the appeal. See Section 3115.1 of the Board of Zoning Adjustment Rules of Practice and Procedure. However, ANC 5B has not submitted the requisite documentation.

II.

ANC Is Not An Aggrieved Party

During the BZA hearing on April 22, 2003, the Board denied Bannum's Motion to Dismiss for ANC 5B's lack of aggrievement. The basis for the Board's denial was that ANC 5B is automatically an aggrieved party just by virtue of being and ANC. However, a close reading of the law shows that this is simply not the case.

"A mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA (5 U.S.C. s 702)." Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (quoted in United States v. Richardson, 418 U.S. 166, 177, 94 S.Ct. 2940, 2946, 41 L.Ed.2d 678 (1974)). In zoning review cases, where aggrieved person language is frequently employed, the test if

generally whether the applicant for relief "show(s) a sufficient interest in the subject matter of the application that he will actually be injured by the governmental action.... The rule that one without some right, title or interest in property cannot apply for relief, rests on the theory that hardship ... cannot be incurred by a person who is without some valid attachment to the land to which the application relates. Rohan, *Zoning and Land Use Controls* § 51.02(1) (1979). "In a sense, every citizen of the community has a stake in the disposition of each zoning dispute, and may be 'aggrieved' by administrative decisions which he regards as erroneous. But it seems unlikely that the draftsmen ... could have intended to give standing to such a broad class of persons." Anderson, *American Law of Zoning* § 21.06 (1968); See also 3 A. Rathkopf, *Law of Zoning and Planning* § 37.03 (4th ed. 1979). The cases generally require a "specific, personal and legal interest," Krejpcio v. Zoning Board of Appeals, 152 Conn. 657, 659, 211 A.2d 687, 689 (1965), and, **more than a general interest in the viability of the community zoning plan**, "a pecuniary interest injuriously affected." Tyler v. Board of Zoning Appeals, 145 Conn. 655, 659, 145 A.2d 832, 835 (1958) (emphasis added). One test is the person or organization " 'direct', 'immediate', 'pecuniary' and 'substantial' interest in the subject matter of the litigation ...." Baker v. Zoning Hearing Board of West Goshen Township, 27 Pa.Cmwlth. 602, 607, 367 A.2d 819, 822 (1976).

In light of the general consensus in federal law and in zoning appeals cases that "aggrieved" organizations must represent their members' concrete interests in a contested administrative decision, and in view of the specific language in § 8102 of our Regulations that these appeals be made by an "organization authorized to represent (an aggrieved) person," and the lack of any per se standing exemptions in the regulations for citizens groups, the BZA must, before asserting jurisdiction, establish both "the existence of a logical and adequately direct

nexus," Citizens Association of Georgetown v. Simonson, 403 F.2d 175, 176 (1968), between the interests of its members and the administrative decision it is contesting, and its own authority to represent those interests. Furthermore, these "interests" must be specific and significant, viewed under the standards enumerated in Basiliko v. Government of the District of Columbia, 283 A.2d 816, 818 (D.C.App.1971).

The record in this case is devoid of anything but vague, generalized assertions of injury. Nor is there any allegation that AND 5C members live in the area of the community corrections center or are affected in any way by its construction. Judge Kravitz, during the hearing in Superior Court when he denied Mr. Temple's motion for injunctive relief, stated that "there is no evidence that the plaintiffs' fear are based on anything more than a reaction to the opening of the facility." Judge Kravitz went on to say that "[n]or have the plaintiffs mounted a serious challenge to the testimony presented by Bannum's executive director that the company runs its halfway houses with significant controls and that it's under the jurisdiction." There is simply nothing that goes to the issue of aggrievement as it is required under law, i.e. some specific allegation that is different in injury. As argued during the April 22, 2003 BZA hearing, the 2210 Adams Place, NE property is surrounded by railroad tracks and arteries that isolate it, and even to the west of the railroad track there is more industrial zoning before you get to a residential area. The location is isolated, and it is not likely to have any adverse effect on the residents. Furthermore, the proposed use of the property as a community corrections center is a controlled use with strong supervision over the prisoners, and with very specific rules of conduct for the prisoners. As such, ANC 5B is clearly not an aggrieved party, and may not pursue the instant appeal.

III.

The Appeal Was No Timely Filed

The general requirement when considering timeliness is that an appeal shall be filed within sixty (60) days from the date the party appealing the administrative decision had notice or knowledge of the decision, or reasonably should have had notice or knowledge of the decision, on which the appeal is based. Here, there was a meeting on April 18, 2002 at which the Bannum people made a full presentation to ANC 5B about the nature of its proposed community corrections center. During the meeting, Bannum told appellant that its zoning had been approved by the District of Columbia. The meeting was held nine (9) months before the appeal was filed. As such, ANC 5B's appeal was not filed within the required sixty (60) days, and this Board is without jurisdiction to even consider the appeal.

IV.

Appeal is Barred by Laches and Estoppel

a. Estoppel:

The elements of estoppel are: (1) the applicant proceeded in good faith; (2) the affirmative acts of the District; (3) the reliance upon the actions with substantial change in position and expensive improvements; and (4) the equities favor the claimant. Bannum has met all of these tests. Bannum proceeded in good faith by sending the District two separate letters asking for its affirmation or confirmation that Bannum's proposed use as a community corrections center allowed it matter-of-right zoning at the 2210 Adams Place, NE location. The District signed both of the letters, on two separate occasions, and in so doing indicated clearly that Bannum had matter-of-right zoning at the proposed location. As a result of the determination made by the District regarding Bannum's matter-of-right zoning, in total and complete reliance thereupon, Bannum was awarded a contract by the BOP for operation of a community corrections center, and proceeded to expend hundreds of thousands of dollars preparing the property for said use (see Affidavit of David Lowry

at Exhibit "Q" of Bannum's original Motion to Dismiss). Finally, the public benefits to society are very strong as acknowledged and stated by Judge Kravitz when he denied Mr. Temple's motion for injunctive relief, and as acknowledged by the Court in the Brawner decision. In that opinion, the Court talked about the importance of having correctional institutions like this. Judge Kravitz quoted that provision out of the Brawner decision, and then said these benefits are even greater importance now due to the recent federalization of the District's criminal justice system, and the results of incarceration of our convicted felons in Federal prisons around D.C.

b. Laches:

Laches is a species of estoppel that deals with the omission to assert a right for unreasonable length of time with prejudice to the party who asserts laches. This clearly applies to Appellant, just as it would to the District if it were taking a position to revoke Bannum's permit. Notably, not only has the District not taken this position, but it has recently re-affirmed Bannum's matter-of-right zoning by issuing a Certificate of Occupancy for the property. Appellant had a clear opportunity to file a BZA appeal a year ago and did not do so. Bannum proceeded with its lease, its contract, and its construction, and all the expenses that are laid out in the Lowry affidavit, and clearly changed its position.

Conclusion

For the reasons stated above, Bannum respectfully requests that the BZA reconsider its denial of, and grant, Bannum's Motion to Dismiss the instant appeal.

Dated: June 9, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion for Reconsideration were served this 9th day of June, 2003, by first-class mail, postage prepaid, to the following:

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By: Sandra Altz