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 INTERVENOR BANNUM, INC.'S MOTION FOR RECUSAL

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") opposes the motion of Intervenor Bannum, Inc. ("Bannum") for recusal of Board of Zoning Adjustment ("BZA") member and Zoning Commissioner Anthony J. Hood. Much of Bannum's argument focuses on alleged bias that is not a basis for recusal because it is "traceable" to Commissioner Hood's "participation in the case." *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 256 (D.C. 1995). And to the extent that Bannum's motion alleges influences that do not appear to flow from the case itself, the allegations are too vague to establish that recusal is necessary in order to "insulate the administrative process and its decision makers from prejudice and bias." *Morrison v. District of Columbia Bd. of Zoning Adjustment*, 422 A.2d 347, 349 (D.C. 1980).

Bannum begins by alleging (1) that Commissioner 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

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against Bannum's operation of a Community Corrections Center in Ward 5" (Motion at 1-2), and (2) that the Commissioner "has been heavily involved in ANC 5B and neighborhood politics and activism for many years" (Motion at 2). However, Bannum has failed to "assert specific *ex parte* contacts or non-public influences that were brought to bear in this case." *Gladden*, 659 A.2d at 257. Bannum has not alleged that the Commissioner lives within the boundaries of ANC 5B[1] or in the general proximity of Bannum's Community Corrections Center at 2210 Adams Place, N.E. Moreover, Bannum has provided no details regarding either the Commissioner's alleged political affiliation or alignment with Councilmember Orange or the Commissioner's alleged involvement in ANC 5B or neighborhood politics. That the Commissioner may once have served as a local Democratic party official would not appear to have any bearing on the issue of recusal, especially absent a suggestion that the sentiments of the community divide along partisan lines.

Bannum cites several comments that the Commissioner made at the April 22, 2003 hearing in this case as evidence of his "clear bias" against Bannum. Motion at 1. However, the Commissioner's statements, whether considered separately or together, do not support a finding of bias.

First, Bannum characterizes the Commissioner as "immediately attack[ing]" Bannum's counsel and "attempting to block him from even arguing Bannum['s] case as the Intervenor." Motion at 2. In fact, all the Commissioner did was question why certain legal arguments were being advanced by Bannum's counsel rather than by counsel for the

[1] In the second paragraph of its Motion, Bannum refers to Commissioner Hood as a "resident of Ward 5B." It is not clear whether Bannum intends to refer here to Ward 5 generally or to ANC 5B specifically. However, in the fourth paragraph of its Motion, Bannum refers to Commissioner Hood simply as "a resident of Ward 5." Motion at 1.

Department of Consumer and Regulatory Affairs ("DCRA"). The Commissioner never challenged or criticized the explanation then offered by counsel for DCRA that DCRA was not taking any position as to Bannum's preliminary motions and, therefore, was not yet playing an active role at the hearing.

Second, Bannum describes as "entirely gratuitous" certain comments that the Commissioner made regarding Bannum's arranging for Advisory Neighborhood Commission ("ANC") members to travel to Orlando, Florida, in order to visit a Bannum facility. Motion at 9. But the Commissioner was reacting quite directly to an attempt by Bannum to show that it had paid for these trips in reliance on DCRA's having approved two opinion letters drafted by Bannum's counsel. To the extent that Bannum was seeking to establish some sort of estoppel against the ANC, it was entirely reasonable for the Commissioner to question whether Bannum had acted ethically (*i.e.* with clean hands) when it provided the ANC members with free trips to Florida.

Third, Bannum suggests that the Commissioner displayed an intention "to disregard the law" (Motion at 4) because he did not agree "with the law of estoppel as it applies to Bannum, as it was explained to him by the honorable BZA Commissioner Griffis." However, the fact that the two Commissioners may disagree at this time as to how the law of estoppel applies to this case does not mean that either Commissioner intends to disregard the law. The clear meaning of Commissioner Hood's statement to Commissioner Griffis that they could "agree to disagree" was that they could proceed with the hearing without resolving their difference of opinion regarding the applicability of the law of estoppel to the facts of the case.

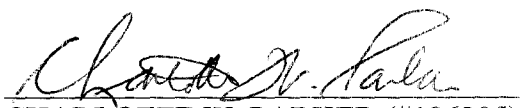
Finally, Bannum describes Commissioner Hood's production of "a letter from Councilman Orange to the Bureau of Prisons regarding Bannum's use of the subject property" as a demonstration of Commissioner "Hood's personal and devious attempts to attack Bannum." Motion 4. Bannum states that prior to the April 22, 2003 hearing, "[n]o one else on the Board had ever seen the letter, nor had it previously been addressed by any of the parties in their papers." *Id.* But the fact that Councilmember Orange had written to the federal Bureau of Prisons was *already* part of the record of the case. In a January 13, 2003 letter to the Director of DCRA – a copy of which was filed in this case on April 14, 2003 as Exhibit 5 to the "ANC5B Document List" – Councilmember Orange stated that he had "written letters to the Federal Bureau of Prisons stating my opposition" to Bannum's facility. If Commissioner Hood had a copy of one of these letters, it was entirely proper for him to bring the document to the attention of the other Board members and the parties so that the record could include all of the documents that might be considered by the Board.

Conclusion

For the reasons stated above, Bannum's Verified Motion for Recusal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2003, copies of the foregoing Opposition and the attached Proposed Decision and Order were faxed and mailed, first-class postage prepaid, to:

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PROPOSED DECISION AND ORDER

Intervenor Bannum, Inc. ("Bannum") has moved for recusal of Board member Anthony J. Hood in this appeal. The parties having briefed the motion, and the Board having been advised by its counsel, the Board determines that Bannum's allegations are too vague to establish that recusal is necessary in order to "insulate the administrative process and its decision makers from prejudice and bias." *Morrison v. District of Columbia Bd. of Zoning Adjustment*, 422 A.2d 347, 349 (D.C. 1980). Moreover, much of Bannum's argument focuses on alleged bias that is "traceable" to "participation in the case" and, therefore, is not a basis for recusal.

It is therefore **ORDERED** that Appellant's motion be, and hereby is, **DENIED.**

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.