

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CORPORATION COUNSEL**



Corporation Counsel

March 23, 2004

The Honorable David Catania
Chairperson, Committee on Public Services
Council of the District of Columbia
1350 Pennsylvania Ave., N.W., Room 110
Washington, D.C. 20004

Re: Use of ANC Funds to Hire Traffic Safety Engineer

Dear Councilmember Catania:

We are in receipt of your letter dated March 3, 2004 in which you ask this Office to reconsider a legal opinion issued by this Office to Chairperson Alan Roth, Advisory Neighborhood Commission 1C, on February 19, 2004. That opinion addressed the issue whether ANC Funds could be used to hire a traffic safety engineer to advise the ANC on redesign options for the intersection of 18th Street and Columbia Road, N.W.

We previously concluded that such an expenditure would be duplicative of a service already provided by the District government and therefore improper. Your letter seeks to have us change our longstanding interpretation of ANC law as it applies to duplicating city services. We respectfully decline to do so. However, after further analysis and for the reasons that follow, we are prepared to revisit our previous decision and conclude that under these very narrow circumstances, the hiring of a traffic engineer for the ANC's own use is permissible.

Our earlier analysis began with the expenditure provisions of the ANC statute found at sections 16(l)(1) and (m)(1) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §§ 1-309.13(l)(1) and (m)(1) (2003 Supp.) (collectively, "ANC Act"). Those provisions permit an ANC to expend funds in two ways: either as a direct expenditure (§ 1-309.13(l)(1)) or as a grant to a public organization (§ 1-309.13(m)(1)). In either instance, the expenditure must be for a public purpose within the commission area. There is no disagreement that the proposed expenditure would be for a public purpose, as stated in our initial letter. Our disagreement concerns the applicability of a provision that appears at the end of § 1-309.13(m)(1) that conditions an expenditure to a grantee organization upon the anticipated services not being duplicative of any already performed by the city.

Admittedly, this provision does not appear in the direct expenditure authorization in § 1-309(I)(1).

Notwithstanding, we have historically viewed this duplicative services prohibition as applying both to expenditures made directly and those made as a grant to a qualifying organization. *See* Letter to Angela Christophe, ANC 4C, October 30, 2000 (attached hereto); *see also* Letter to Crystal Lynch, ANC 1A, August 7, 1996 (attached hereto). Our reasons for doing so are consistent with standard tenets of statutory construction and interpretation, which include consideration of the following: 1) the ANC Act as a whole, its underlying policy and other District statutes that either disfavor or outright prohibit expenditures for duplicative government services¹; 2) the ANC law prior to amendment, which made no distinction between direct expenditures and grants for purposes of the prohibition on funding duplicative services (*see* D.C. Code § 1-261(k) (1981 ed.)); 3) the absence of any indication in the legislative record that the Council intended, when it amended the ANC law, to create a special exception for direct expenditures that would permit duplication of services; and, 4) the incongruous result that would occur should an ANC be able to circumvent the duplicative services prohibition by making an expenditure directly rather than through a grant.

In our opinion the last of these factors is of particular import. Were our interpretation different, it might be argued that ANC funds could be expended on other city services, without limitation. What would prevent an ANC, for instance, from voting funds to provide water and sewer service, road maintenance, law enforcement or trash collection? In light of the legislative history and policy of the District government, we do not believe this to be the result the Council intended. If we are incorrect and the Council wishes to amend the ANC Act, it should do so perhaps by adding a sentence at the end of § 1-309.13(m)(1), that the prohibition on providing duplicative services does not apply to direct expenditures made by the ANC.

You next point out, as the author of these expenditure provisions, that you never intended the statute to preclude expenditures for services the city “might provide” but rather to “prevent wasteful expenditures that would merely duplicate services that agencies are providing.”² We agree with that interpretation, but with the following caveat: Before

¹ *See* D.C. Official Code § 1-315.01(3) (2001) (declaring that the policy of the District government shall be *inter alia* to eliminate overlapping and duplication of effort in any government reorganization); *see also* D.C. Official Code § 9-905(a)(13) (stating that the District of Columbia Regional Airports Authority may enter into exclusive or limited contracts when necessary to *inter alia* “avoid duplication of services . . .”); D.C. Official Code § 2-1209.05(c) (services available for Business and Economic Development that are “available elsewhere shall not be duplicated.”); D.C. Official Code § 1-309.13 (permitting an ANC Commissioner to expend funds on training only when such training is not available from government sources); D.C. Official Code § 34-1253.02 (prohibiting the Public Access Corporation’s use and management of public access channels from duplicating programming or services that the District may provide on government channels); D.C. Official Code § 26-735(c) (Commissioner of the Department of Banking and Financial Institutions may enter into cooperative agreements with any other state bank regulators “in order to prevent duplication of regulatory functions.”); D.C. Official Code § 1-207.31(a) (provision of services by employees of the District of Columbia government and the United States government intended to “prevent duplication and to promote efficiency and economy . . .”).

² Though your insight as the author as to the intent of this statute is helpful, such extrinsic information cannot be the basis of a formal statutory interpretation. *See* 2A NORMAN J. SINGER, SUTHERLAND

expending ANC funds on what would otherwise be a duplicative service, there should be some showing made by the ANC that an agency charged by statute with providing a particular service has either refused to provide or is incapable of providing, such service.

Indeed, on several occasions this Office has permitted expenditures where such a showing has been made. *See* Letter to Deborah K. Nichols, D.C. Auditor, September 17, 1999 (permitting ANC to expend funds for the care and maintenance of trees where the Department of Public Works had no funds in its budget to do so) (attached hereto); *see also* Letter to Crystal Lynch, ANC 1A, August 7, 1996 (permitting ANC to expend funds for bulk trash removal where such city-provided services had been discontinued). By contrast, and as pointed out in our February 19, 2004 letter to Mr. Roth, we were provided no information that the Department of Transportation (DOT) – the agency responsible for street design³ – refused to conduct a traffic study of the subject intersection or inordinately delayed in conducting such a study after being requested to prepare one. All we were told was that after several ANC requests “DOT to date has failed to present plans that address [the ANC’s] pedestrian and bicycle safety concerns.” *See* Letter to Alan Roth, ANC 1C, February 17, 2004. With only this scant information, it appeared to us that the ANC had either grown impatient with DOT, or simply did not like the results of a study that had previously been prepared. Regardless, without more detailed information, we could not conclude that the agency had refused or was incapable of conducting a traffic study.

As a result, we take this opportunity to reassert our conclusion that ANC funds may not be expended for city-provided services without some showing that the city either will not or cannot timely provide such services.

Notwithstanding, there is another issue that bears closer examination – whether the traffic study is really a service to the community at all. In a previous opinion, this Office opined on the use of ANC funds to hire an urban planner consultant in light of the duplicative services prohibition. *See* Letter to Angela Christophe, ANC 4C, October 30, 2000. There we stated: “It is unclear whether the preparation of a neighborhood plan by the ANC would be considered the provision of a ‘service’ triggering the duplication of services analysis, since the neighborhood plan would be for the ANC’s own use and not a service it is providing to residents.”⁴

The circumstances at issue here are very similar. The ANC Chairperson, Alan Roth, has made it clear in both oral and written communications to this Office that the traffic engineer would be hired as an expert consultant to the ANC to advise the ANC regarding pedestrian and bicycle safety design options. The results of the engineer’s study might then be used by the ANC to formulate a position or to persuade DOT of alternatives for redesigning the intersection. As we alluded to in the *Christophe* letter, this type of expert consultation is a service (if at all) **to the ANC directly** rather than to the community at

STATUTORY CONSTRUCTION § 48:12 (6th ed. 2000). This important rule protects the integrity of the legislative process.

³ *See* section 5 of the Department of Transportation Establishment Act of 2002, effective May 21, 2002, D.C. Law 14-137, D.C. Official Code § 50-921.04 (2003 Supp.)

⁴ We advised the ANC to contact the appropriate agency to determine whether there was a “neighborhood planning services” program in place that the ANC might use.

large.⁵ The distinction is important. Unlike for instance, duplicative trash collection or other such services to the community, the hiring of a professional consultant appears closer to that of hiring an attorney to represent the ANC before an agency, board or commission of the District government – an expenditure expressly permitted by the ANC Act notwithstanding the more general legal services available to the ANCs by the Office of Corporation Counsel. *See* D.C. Official Code §§ 1-309.13(l)(2) and 1-309.12(d)(3)(A) (2003 Supp.).⁶ It is noteworthy that the Council did not seek to have the Office of Corporation Counsel fill such a representative role for the ANCs, perhaps because of the potential conflict that could develop. Similarly, a DOT engineer – a city agency employee – might have different design priorities for the intersection compared with an ANC-hired traffic engineer, who presumably would represent the interests and concerns of the ANC itself acting in furtherance of its advisory role. Though both ultimately would seek to have the best interests of the citizenry served, it is possible that the two would have a different focus and arrive at a different result. Consequently, the likelihood that work would be repeated is remote, as is the potential for wasteful spending – a cornerstone of the duplicative services prohibition.

Though we are not prepared to find that expenditures by an ANC for services directly to the community are exempt from the duplicative services prohibition, we are inclined to reconsider our previous opinion and conclude that the expenditure of funds to hire a professional traffic engineer to advise the ANC, under the circumstances described, is permissible. We so advise ANC 1C, Chairperson Alan Roth, by copy of this letter.

Sincerely,

/S/

ROBERT J. SPAGNOLETTI
Corporation Counsel

RJS/dps

Enclosures

cc: Alan Roth – Chairperson, ANC 1C

(AL-04-110)

⁵ This would not alter the public purpose analysis for direct ANC expenditures insofar as a traffic study could be considered of benefit to the entire ANC community should the ANC's efforts ultimately lead to a safer, more functional intersection.

⁶ We note that there is no direct prohibition in the ANC Act regarding the hiring of consultants.