GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

February 5, 2018

Stacey Lincoln
Commissioner
Advisory Neighborhood Commission 4A
7436 Georgia Avenue NW
Washington, DC 20012

Re: Questions Concerning Comprehensive Plan Amendments

Dear Commissioner Lincoln:

You asked this office for expedited advice concerning Comprehensive Plan amendments that were recently submitted to the Council.[1] Your ANC sent the Office of Planning comments on those proposed amendments, and your question is whether the Advisory Neighborhood Commissions Act of 1975 ("ANC Act")[2] required the Office of Planning to give those comments great weight before the amendments were submitted to the Council. The answer is no.

The great weight requirement flows from section 13 of the ANC Act.[3] Sections 13(b) and (c) require "the executive branch and any independent agency, board, or commission" to give ANCs and their Commissions 30 days' notice before the "formulation of any final policy decision or guideline" with respect to "comprehensive plans . . . affecting [the] Commission area."[4] If an

[1] Your request suggests that the Office of Planning submitted the amendments. Although the Office of Planning "initiated the process to amend the Comprehensive Plan," the amendments were transmitted to the Council by the Mayor. Letter from Mayor Muriel M. Bowser to the Hon. Phil Mendelson, Jan. 8, 2018, *available at* http://lims.dccouncil.us/Download/39567/B22-0663-Introduction.pdf (last visited Feb. 5, 2018) ("Today, I am transmitting to the Council of the District of Columbia" legislation "to approve [certain] text amendments to the Framework Element").

[2] Effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.*). We note that the ANC Act was recently amended by the Advisory Neighborhood Commissions Omnibus Amendment Act of 2016 ("Omnibus Act"), effective April 7, 2017 (D.C. Law 21-269), which was published in the D.C. Register on February 24, 2017 (64 DCR 2162; *see* https://www.dcregs.dc.gov/Common/NoticeDetail.aspx?NoticeId=62584). When this letter cites an ANC Act provision amended by the Omnibus Act, we will reference the relevant Omnibus Act provision.

[3] D.C. Official Code § 1-309.10 (as amended by section 2(e) of the Omnibus Act (64 DCR 2163)).

[4] *Id.* § 1-309.10(b) and (c) (as amended by section 2(e)(2) and (3) of the Omnibus Act (64 DCR 2163)).

affected Commission offers comments during that 30-day notice period, those comments must be given great weight.[5]

The ANC notice and great weight requirements do not apply when an agency, board, or commission seeks merely to recommend action. That is because a recommendation is not a "*final* policy decision or guideline," and mere recommendations do not "affect[]" an ANC area. We explained this point in a 2011 letter to Commissioner Yvonne Jefferson,[6] which I have attached to this letter. The question in that letter was whether District agency members of the Walter Reed Local Redevelopment Authority ("LRA") Committee were required to provide an ANC "an opportunity to comment on draft recommendations that a panel of the LRA will make."[7] We said no, because the Committee was only offering recommendations. We explained that the committee would not "make the final decision on the plan"; its recommendations were "subject to approval, or modification[,] by the Council," and the ultimate decision-maker would be the federal government.[8]

The same principle applies here. The proposed amendments to the Comprehensive Plan, like the recommendations discussed in our 2011 letter, are purely advisory. Like any proposed legislation, they are "subject to approval, or modification[,] by the Council." Accordingly, the ANC Act did not entitle ANCs to notice and great weight before these proposed amendments were submitted to the Council.[9]

If you have any questions, please contact Josh Turner, Assistant Attorney General, at 442-9834, or Janet M. Robins, Deputy Attorney General, Legal Counsel Division, at 724-5524.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

By: _____
JOSHUA TURNER
Assistant Attorney General
Legal Counsel Division

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[5] *Id.* § 1-309.10(d)(3)(A).

[6] Letter to Yvonne Jefferson, Chairperson, ANC 4B, Dec. 27, 2011.

[7] *Id.* at 1.

[8] *Id.* at 3.

[9] We note that the Commission will have ample opportunity to comment on the proposed modifications. For example, these proposed modifications will be considered in a March 20, 2018 public hearing. *See* Cmte. of the Whole, Notice of Public Hearing on Bill 22-66, the "Comprehensive Plan Amendment Act of 2018," *available at* http://lims.dccouncil.us/Download/39567/B22-0663-HearingNotice1.pdf (last visited Feb. 5, 2018).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

December 27, 2011

Ms. Yvonne Jefferson, Chairperson
ANC 4B
6856 Eastern Avenue, NW #314
Washington, DC 20012

Re: Letter Regarding Walter Reed Local Redevelopment Authority Recommendations

Dear Ms. Jefferson:

I write in response to your November 18, 2011 letter, which requests that I instruct whom you have described as District agency members of the Walter Reed Local Redevelopment Authority ("LRA"), to provide your ANC an opportunity to comment on draft recommendations that a panel of the LRA will make as to the potential land uses by the District of 67.5 acres at the former Walter Reed Army Medical Center ("WRAMC" or Walter Reed"). As you point out, this property is expected to become available to the city as a result of the closure of WRAMC by the federal government.[1] The District is not currently entitled to ownership of the land. The District will have to dissolve the Planning LRA and establish an Implementation LRA (which will have to be approved by the U.S. Department of Defense ("DOD") to make application for acquisition. Your letter indicates that you believe your Commission is entitled to have its comments on the recommendations of the planning panel of the LRA be given "great weight" within the meaning of D.C. Official Code § 1-309.10(a) – (d) (2011 Supp.).

For the reasons set forth below, I respectfully conclude that your request is premature. The re-use plan is not a final proposed action by the District until it is approved or modified by the D.C. Council acting in its capacity as the LRA. Even then, District approval of the reuse plan only qualifies the plan for submission to the U.S. Department of Housing and Urban Development ("HUD"), subject to modification by HUD. Even after HUD approval, the District's Office of Planning will be required to submit a "small area plan" to the Council for its approval.

[1] As you may be aware, the District's potential acquisition of this property is pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, approved November 5, 1990, Pub. L 101-510; 104 Stat. 1819 ("BRAC Act"), which provides opportunities for communities to take advantage of surplus property on military installations approved for closure by an independent federal commission. For this to occur, the applicable state or local government must form a Local Redevelopment Authority that will ultimately submit a plan for use of the base property to the Secretaries of Defense and Department of Housing and Urban Development for approval. The District of Columbia has been recognized as the LRA for the WRAMC property.

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As you know, the ability of ANCs to comment on certain proposed District government actions, and to have their views be subsequently accorded "great weight" by the District, was provided through sections 13(a) through (d) of the Advisory Neighborhood Commissions Act of 1975, effective March 1976, (D.C. Law §1-58; D.C. Official Code §1-309.10(a) – (d) (2011 Supp.)) ("ANC Act"). The principal provision potentially applicable here is D.C. Official Code § 1-309.10(c)(1) (2011 Supp.), which lists the above referenced governmental decisions subject to ANC comment as those decisions that are "with respect to grant applications, comprehensive plans, requested or proposed zoning changes, variances, public improvements, licenses or permits affecting said Commission area, the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems."[2] I note that case law interpreting § 1-309.10(c)(1) requires that for these decisions to qualify as those to which the ANC may have an opportunity to weigh in, they must be "of significance to neighborhood planning and development within [the] neighborhood commission area." *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1381 (D.C. 1977).

In addition, § 1-309.10(c)(1) expressly limits the decisions that may be subject to ANC comment as those that are proposed as "final," albeit, of course, subject to modification if ANC recommendations persuade the District in one direction or another. Further, the Council expressly included itself as one of the District government entities whose actions may be subject to the ANC Act.

As an initial matter, I agree that the District's future proposed acquisition and subsequent use of approximately 67.5 acres of land and buildings on the Walter Reed site will likely have a significant effect on development in your Commission's neighborhoods. I am also inclined to assume, for purposes of this letter, that the re-use plan ultimately submitted to the federal government as to how the District envisions its redevelopment of this site, could fit within one or more of the categories of decisions listed in § 1-309.10(c)(1).[3]

However, the draft document that will arise from the current efforts by the LRA Committee are, as you indicate, only recommendations, and it is the LRA Committee, not the LRA itself, that

[2] Although D.C. Official Code § 1-309.10(a) also lists various governmental matters on which ANC recommendations would be given great weight, the D.C. Court of Appeals has limited these matters, as they concern the Executive Branch, to only those expressed in rulemaking pursuant to D.C. Official Code 2-505(a). *Office of the People's Counsel v. Public Service Commission*, 630 A.2d 692, 694-695 (D.C. 1993). The recommendations as to the re-use plan, as well as the ultimate re-use plan itself, does not constitute executive rulemaking.

[3] However, there is notable ambiguity as to whether the re-use plan has the requisite finality in terms of its impact on the surrounding community. Although the plan may outline the intended uses by the District of the buildings and open space on the Walter Reed site, it is my understanding that substantial details as to the character of the site will occur through subsequent stages of implementation, such as small area planning and zoning matters. I read the ANC Act's requirement of finality to apply not only in identifying which entity of the District will be subject to providing ANC recommendations "great weight," but also to the substance of the decision itself. Were it otherwise, virtually all workings of a District agency could potentially be subject to the ANC Act in its planning or deliberations, which cannot be what the Council intended.

contains the representatives of District agencies that you reference. When WRAMC was first slated for closure by the federal government, Mayor Williams issued Mayor's Order 2006-21, dated February 15, 2006 ("Order") to detail the process the District would use to acquire surplus property on the Walter Reed site in compliance with the BRAC Act. The Order, therefore, first designated the District of Columbia government as the LRA, which, as I noted above, has been recognized by the Secretary of Defense. Further, the Order created an LRA Committee made up of 13 voting delegates that included relevant District agencies, and five private citizens, who were given the authority to make final recommendations as to the development or redevelopment of the relevant portions of the WRAMC. Under ¶ IV.d of the Order, the findings and recommendations of this Committee were to be submitted to the Mayor and Council for implementation. Under the BRAC Act, it is the LRA that must file the re-use plan, and since the LRA in this instance is the District of Columbia government, the Order and the BRAC Act necessitate that the Council be the last substantive stop on the local level for crafting the re-use plan.

Consequently, your request that ANC comments on the LRA Committee recommendations for the Walter Reed re-use plan be given great weight is premature. The LRA Committee does not make the final decision on the plan. It is subject to approval, or modification by the Council, and as I referenced above, the Council expressly has made itself subject to the ANC Act. Thus, it is when the Council takes up the recommended re-use plan that affected ANCs may weigh in, provided the re-use plan itself constitutes one of the final decisions listed in 1-309.10(c)(1).[4] Indeed, as noted, while the Council will make the decision on the recommendation by D.C., the final decision is reserved for the federal government.

How the Council chooses to address the ANC Act as it considers the recommended re-use plan is subject to its discretion. In my view, the ANC should address its concern to the Council at the appropriate time.

Sincerely,

Irvin B. Nathan
Attorney General
for the District of Columbia

cc: Eric Jenkins, Director, Walter Reed Local Redevelopment Authority
David Zvenyach, General Counsel to the Council of the District of Columbia

[4] In this regard, I note that while § 1-309.10(a) is not applicable to executive actions that are not rulemaking, it is applicable to the Council, again, through the express wording the Council used in that provision making itself subject to the ANC Act.