

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

July 22, 2015

Commissioner Ronald Austin
Chairperson, ANC 4B06
6120 North Dakota Avenue, N.W.
Washington, D.C. 20011

Re: Voluntary ANC Agreements

Dear Commissioner Austin:

This letter responds to your June 30, 2015 letter to Attorney General Karl A. Racine, in which you inquired about the validity of certain voluntary agreements between a local institution and either an Advisory Neighborhood Commission (ANC²) or an individual ANC Commissioner. In follow-up telephone conversations, you and Gottlieb Simon¹ explained that an individual Commissioner will sometimes enter into a signed agreement with a local institution, such as a medical institution or a group home. In some instances, the ANC will later vote to express its support for the agreement. In your letter, you provided two examples of voluntary agreements, one with Renal Advantage, Inc., and one with “the group home located at 121 Tuckerman St, NE.” Based on this letter’s conclusion that ANCs are not authorized to enter into enforceable agreements that are outside of the operations of ANCs, the agreements you have described are not enforceable.

By way of background, an ANC is a statutory creation and is limited to the authority provided to it by statute.² ANCs have limited authority to maintain their own offices,³ to initiate or fund projects for public purposes in the neighborhood area,⁴ and to advise District government agencies about local concerns.⁵ ANCs do not have the authority to initiate a legal action in the

¹ Gottlieb Simon is the Executive Director for the Office of Advisory Neighborhood Commissions.

² See Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.* (2012 Repl. and 2014 Supp.)); District of Columbia Home Rule Act, § 738, approved December 24, 1973 (87 Stat. 824; D.C. Official Code § 1-207.38 (2012 Repl.)).

³ See D.C. Official Code § 1-309.13(1) (2012 Repl.).

⁴ See *id.*

⁵ See *id.* § 1-309.10.

District of Columbia courts.⁶ As the D.C Court of Appeals explained in *Kopff v. Alcoholic Beverage Control Board*,⁷ “the role of the ANCs is ‘advisory,’ as their very name suggests; they do not have an enforcement responsibility or authority.”⁸

Question 1

You asked us whether “agreements of the kind I have discussed here” are “legal, binding and enforceable if concluded between the Commission as a voting body and an institution,” or “between a single-member district commissioner and an institution.”

The answer is that these types of agreements, whether with individual single-member district Commissioners or with the ANC itself, are not enforceable. Nothing in the ANC statute authorizes either ANCs or individual Commissioners to enter into enforceable agreements of this type.⁹


Question 2

You also asked us whether an ANC may “conclude a valid, binding and enforceable agreement with a “group home” or group residence.” Based on our answer to Question 1, the answer is no.

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

(AL-15-438)

⁶ See D.C. Official Code § 1-309.10(g) (2012 Repl.) (“The Commission shall not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts”).

⁷ 381 A.2d 1372 (1978).

⁸ *Id.* at 1376.

⁹ Two of our prior letters erroneously suggest the opposite. In an October 13, 1995 letter to Tony Robinson, and an August 19, 2008 letter to ANC 6D Chairman Roger Moffatt (both attached), we suggested that one or more Commissioners *could* enter into a binding agreement of this type with a third party if authorized by their ANC and if the agreement included promises from both the Commissioners and that third party.

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

JUDICIARY SQUARE

441 FOURTH ST. N.W.

WASHINGTON, D. C. 20001



IN REPLY REFER TO:

(AL-95-531)

L&O:LNG:lng

October 13, 1995

Tony Robinson
Executive Assistant/Chief of Staff
Office of Councilmember Kevin P. Chavous
John A. Wilson Building, Room 108
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Proposed agreement between ANC 7-B and the House of Ruth regarding the use of the premises 2910-2916 Pennsylvania Avenue, S.E., as a child development center

Dear Mr. Robinson:

This is in response to your October 2, 1995 memorandum to Leo Gorman of this Office in which you seek advice concerning a proposed agreement between Advisory Neighborhood Commission (ANC) 7-B, on behalf of itself and the Dupont Park, Randle Highlands, Hillcrest, and Penn-Branch communities in Ward 7 (all, including ANC 7-B, collectively referred to as the "community"), and the House of Ruth, a District of Columbia non-profit corporation.

The proposed agreement relates to the House of Ruth's operation of the premises 2910-2916 Pennsylvania Avenue, S.E. as a child development center to be called "Kidspace." One of the "whereas" recitals in the proposed agreement states that the House of Ruth has been issued a certificate of occupancy, dated August 30, 1995, by the D.C. Department of Consumer and Regulatory Affairs (DCRA) to use these premises as a child development center with a maximum occupancy of sixty children from two through five years of age. Another recital states that in the future the House of Ruth intends to apply to DCRA for a modification of its certificate of occupancy so that it would be authorized to provide services to infants and toddlers. Still further recitals state: (1) that the community supports the House of Ruth's "efforts to establish a quality child development center" at this location "with certain limitations and restrictions on the use of the [p]roperty," and (2) that the House of Ruth is willing "to adhere to the limitations and restrictions set forth herein to minimize any potential adverse impact upon the neighborhood."

The "whereas" recitals are followed by declarations in which the community would agree: (1) to organize an advisory group that is representative of all the organizations that make up the community, and (2) to "support the House of Ruth's future efforts to expand Kidspace to include infants and toddlers." For its part, the House of Ruth would agree: (1) to limit the use of the property to a child development center for sixty children and related necessary functions; (2) to appoint one or more liaison persons to serve as the designated contact with the community; and (3) to meet with the community's advisory group on an agreed-upon schedule to discuss issues of mutual interest. The final declaration states that the "individual ANC Commissioners and their successors, on behalf of or to vindicate the rights of the ANCs and other members of the community, may enforce this Agreement in a court of law."

At the outset, it should be noted that ANC 7-B, as such, is not a legal entity. Therefore, ANC 7-B, as a commission, does not have the legal capacity to enter into contracts. Its members may enter into contracts, however. Thus, if authorized by the commissioners of ANC 7-B, the chairperson or other commissioner of the ANC may sign a contract that can bind all the commissioners of ANC 7-B and their successors in their official capacities as commissioners. And if the proposed agreement is supported by adequate consideration (which it appears to be) and would not contravene public policy (which for the most part it would not appear to do), the agreement would normally be enforceable in an appropriate court of law.¹ Beyond this general advice, this Office cannot, with the following exception, offer a predictive opinion as to the enforce-

¹ In connection with the enforcement of contracts, it is relevant to note that an ANC does "not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts, provided that this limitation does not apply to or prohibit any Commissioner from bringing suit as a citizen." Section 13(g) of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-261(g) (1992). The corollary to this limitation is that ANCs may not use their funds to finance litigation on behalf of individual commissioners or other persons or organizations. The expenditure of ANC funds for legal purposes is limited to "legal expenses...for commission representation before an agency, board, or commission of the District government...." Section 16(1) of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-264(1) (1992). If an ANC wishes to have litigation initiated on behalf of its commissioners in their official capacities or if such commissioners are named as defendants in a suit arising out of the performance or non-performance of their official duties, they normally request legal representation by this Office.

ability of the provisions of this particular proposed agreement.²

"It is a general doctrine that contracts injuriously affecting public or government service are invalid. Inasmuch as the efficiency of that service is a matter of vital concern to the public, agreements tending to injure such service are regarded as being contrary to public policy." 17A Am. Jur. 2d Contracts § 282 (1991). As publicly elected officials of the District government, ANC commissioners have the general duty to represent the interests of their single-member district constituents on public matters that come before them for decision as ANC commissioners. In order to carry out this duty, ANC commissioners must be free to exercise their best judgment as to where the public interest lies in matters that come before them for official action. For ANC commissioners to agree by contract to vote in a certain way on a matter that may present itself for decision in the future is to restrict that freedom of decision that ANC commissioners must maintain as publicly elected government officials. Declaration No. 5 of the proposed agreement states: "The community agrees to support the House of Ruth's future efforts to expand Kidspace to include infants and toddlers." To the extent that this language would purport to bind the commissioners of ANC 7-B to vote in a certain way in a matter that may in the future come before them for official action, such language is contrary to public policy for the reasons stated above, and therefore would be unenforceable in a court of law.

² Your memorandum does not make clear the nature of the other community organizations, *i.e.*, "the Dupont Park, Randle Highlands, Hillcrest, and Penn-Branch communities in Ward 7." Are these communities incorporated neighborhood associations? If so, an agreement of this nature should be signed by an authorized representative of each such association after being authorized to do so on behalf of the association. It is doubtful that the chairperson of ANC 7-B can, with his signature alone, legally bind such community associations.

Where the issuance of a license or permit is involved, the terms of an agreement between an ANC and a license or permit applicant may in some cases be appropriately incorporated in the order of the issuing District government agency as a condition of the granting of the license or permit. In such a case, enforcement of the terms of such an agreement would fall to the District government agency, which could revoke or suspend the license or permit if the holder failed to comply with one or more of the conditions upon which the license or permit was issued.

Sincerely,

Charles F.C. Ruff

by:

Karen L. Cooper

Karen L. Cooper, Chief
Legislation & Opinions Section
Legal Counsel Division

cc: The Honorable Harold Brazil
Chairman
Committee on Government Operations
Council of the District of Columbia

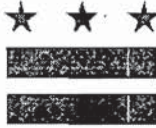
Lavonna Johnson
Director
Office of Constituent Services

Ayo Bryant
Director
Office of Diversity and Special Services

Russell A. Smith
D.C. Auditor

Willard C. Poteat
Chairperson, ANC 7-B.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



LEGAL COUNSEL DIVISION

August 19, 2008

Roger Moffatt
Chair ANC 6D
P.O. Box 71156
Southwest Station
Washington, D.C. 20024

Re: Request for Legal Advice Regarding the Agreement
Between ANC 6D and the Corcoran Gallery of Art
and Related Action by the Zoning Commission

Dear Chairman Moffatt:

This is in response to your June 26, 2008¹ letter to Acting Attorney General Peter Nickles in which you request, on behalf of Advisory Neighborhood Commission ("ANC") 6D, that this Office respond to questions and provide advice concerning an agreement between ANC 6D and the Corcoran Gallery of Art ("Corcoran") as regards to a planned unit development ("PUD") of the Randall Junior High School Site ("Randall") into a new campus for the Corcoran and a multi-family residential building ("Corcoran Agreement"), ANC 6D's participation in a proceeding before the District of Columbia Zoning Commission on June 9, 2008 ("June 9th proceeding") regarding the Corcoran's request for a modification of the construction phasing for the PUD, and the effect of the Zoning Commission's action at the June 9th proceeding on the terms of the Corcoran Agreement.

As background, on October 15, 2007, as chair, you signed the Corcoran Agreement on behalf of ANC 6D. Under the agreement, ANC 6D agreed to support the Corcoran's efforts to obtain approval from governmental bodies for the proposed PUD for Randall, and the Corcoran agreed to provide certain benefits and amenities to ANC 6D residents. On March 21, 2008, the Zoning Commission, with the support of ANC 6D, issued an Order approving the Corcoran's proposed PUD and its corresponding request for an amendment to the District of Columbia Zoning Map ("Zoning Order"). Subsequently, the Corcoran requested that the Zoning Commission approve a modification to the Zoning Order regarding the construction phasing of the PUD. ANC 6D provided written

¹ Please be advised that while the letter is dated June 26, 2008, this Office did not receive a copy of the letter until July 17, 2008, and only received the attachments on August 14, 2008 when they were delivered by Commissioner David Sobelsohn.

comments to the Zoning Commission by letter dated June 3, 2008 opposing the Corcoran request. The modification request was considered and approved by the Commission on its consent calendar during a June 9th proceeding. The Commission has not yet issued a written order regarding this action.

In your letter, you ask five numbered questions. Only questions number one through three involve the application of statutory provisions governing the operation of ANCs. Pursuant to § 15(d)(3)(A) of the Advisory Neighborhood Commissions Act of 1975 ("ANC Act"), effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.12(d)(3)(A) (2006 Repl.), the Office of the Attorney General ("OAG") is required to provide to ANCs "[l]egal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions." This mandate does not require OAG to render advice to ANCs as to legal interpretations that do not directly involve the functions and operations of ANCs. And it is the general policy of OAG to confine its legal advice to ANCs to questions that relate to such functions and operations. (See Letter from Charles Ruff, Corporation Counsel, dated October 4, 1995.) Accordingly, we will respond to questions one through three that state as follows:

1. When an ANC takes a position before the Zoning Commission, may that Commission--consistent with the requirement to give "great weight" to the views of the ANC--reject the ANC position without providing the ANC an opportunity to testify?

Pursuant to Section 13(d)(3) of the ANC Act (D.C. Official Code § 1-309.10(d)(3) (2006 Repl.)), agencies during their deliberations on proposed governmental actions (covered by the Act) must give issues and concerns raised by ANCs "great weight". This requirement allows the ANCs to submit comments to the deciding agencies, but does not guarantee them an opportunity to present oral testimony before an agency makes a decision. In this case, the Zoning Commission considered the Corcoran's request for a modification of the Commission's Order as an item on its consent calendar at its June 9th proceeding. As provided in the Section 3030 of Title 11 of the District of Columbia Municipal Regulations ("DCMR"), the Zoning Commission's consent calendar is an expedited procedure by which it hears matters without a public hearing. Therefore, the consideration of the Corcoran's request for modification did not include any opportunity for testimony.

Notwithstanding the process by which the modification was considered, the ANC was provided an opportunity to comment and its views must be given great weight. Under section 13(d)(3) of the ANC Act, the Zoning Commission is required to issue a decision in writing and include a "great weight" consideration of each of the ANC's issues and concerns.

Questions 2 and 3

2. *Are agreements between developers and ANCs, in which the ANC agrees to support the developers' plans before the Zoning Commission, in exchange for which the developers agree to provide specified benefits to the residents of that ANC, legally enforceable?*
3. *If the answer to question #2 is "yes," is the [Corcoran Agreement] legally enforceable? If not, why not? If it is legally enforceable, who can bring an action to enforce that agreement, when would such an action be timely, and what judicial relief would be warranted?*

As noted above, OAG as a matter of policy does not provide legal advice on matters that do not directly affect the functions and operations of ANCs. Therefore, we cannot respond to specific questions as to the interpretation or the enforceability of the Corcoran Agreement. With that caveat, we note that ANC 6D is not a legal entity and does not have the legal capacity to enter into contracts. Its members may enter into contracts, however. Thus if authorized by the Commissioners (which appears to be the case here), the chair may sign a contract that can bind all of the Commissioners of the ANC 6D and their successors in their official capacities as Commissioners. And if the Corcoran agreement is supported by adequate consideration (which it appears to be) and would not contravene public policy (which it does not appear to do), the agreement would normally be enforceable in an appropriate court of law. Beyond this general advice, this Office cannot offer a predictive opinion as to the enforceability of the provisions of this particular agreement.

Further, you should be aware that with respect to the enforcement of agreements or contracts, the ANC does "not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts, provided that this limitation does not prohibit any Commissioner from bringing suit as a citizen." See Section 13(g) of the ANC Act (D.C. Official Code § 1-309.10(g)). The corollary to this limitation is that ANCs may not use their funds to finance litigation on behalf of individual Commissioners or other person or organizations. The expenditure of ANC funds for legal purposes is limited to "legal expenses ... for Commission representation before an

agency, board or commission of the District government ... “ Section 16(l)(2) of the ANC Act (D.C. Official Code § 1-309.13(l)(2)). Thus, any legal enforcement action regarding the Corcoran Agreement cannot be funded with ANC funds.

Sincerely,

PETER J. NICKLES
Acting Attorney General

By: *Sheila Kaplan*
SHEILA KAPLAN
Assistant Attorney General
Legal Counsel Division

cc: Commissioner David Sobelsohn ANC 6D02