

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



**ATTORNEY GENERAL
KARL A. RACINE**

Legal Counsel Division

February 2, 2022

Commissioner Colleen Costello
Commissioner Prita Piekara
ANC 5B

Re: Conflicts of Interest

Dear Commissioners Costello and Piekara:

Your Advisory Neighborhood Commissions (“ANC”) is preparing to vote on a proposed community benefit agreement between the ANC and a private third party.¹ You asked whether the validity of a vote by your Advisory Neighborhood Commission (“ANC”) could be in jeopardy if one of the Commissioners voting on the agreement had a conflict of interest that, under the District’s ethics statute, precluded the Commissioner from voting on it. It could, but only in limited circumstances.

We start with background. Although Advisory Neighborhood Commissioners serve without compensation,² and thus are not District employees,³ they are subject to the District’s ethics statute: the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011.⁴ That act, along with the District’s broader Code of Conduct, applies to:

¹ We note that, outside of any administrative proceeding, these community benefit agreements are strictly non-binding. *See, e.g.*, Letter to Comm’r Austin, July 22, 2015, available at <https://oag.dc.gov/sites/default/files/2021-02/ANC-4B-Voluntary%20ANC%20Agreements.pdf> (all websites last visited February 2, 2022).

² *See* D.C. Official Code § 1-309.13(o) (“Except for out of pocket expenses approved by the Commission, Commissioners shall not be compensated for personal services rendered on behalf of the Commission”).

³ Letter to Comm’r Turner, December 9, 2016, at 2, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-1-B-December-9-2016-Questions-Concerning-Notice-Business-Office-Space.pdf> (“Under the District’s merit personnel statute, Commissioners are not considered employees because they are uncompensated”) (citations omitted); Letter to Comm’r Ray, December 30, 1994, at 1, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-2-B-December-30-1994-Conflict-of-Interest.pdf> (“service as an ANC commissioner is not considered employment with the District government”).

⁴ Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*); *see* Letter to Comm’r Williams, November 21, 1996, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-6-A-November-21-1996-Conflict-of-Interest.pdf> (analyzing conflict-of-interest requirements under prior ethics law); Letter to Comm’r Ray, *supra* (same).

all employees and public officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions, but excluding the courts.⁵

The Code of Conduct, which is enforced by the Board of Ethics and Government Accountability (“BEGA”),⁶ includes the conflict-of-interest prohibitions in the District of Columbia Government Comprehensive Merit Personnel Act of 1978.⁷ A Commissioner, as a public official of the District government,⁸ may not “engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.”⁹ If any Commissioner has a question about whether voting on a particular matter would involve a conflict of interest, or would otherwise violate the District’s ethics laws, they should contact BEGA.¹⁰

If a Commissioner votes on a matter despite a conflict of interest, an array of statutory penalties may apply depending on the seriousness of the violation.¹¹ It is likely, however, that this Commissioner’s vote will not invalidate the overall vote of the ANC. That single Commissioner’s vote does not constitute any violation of law by the ANC itself. Nor does it invalidate the individual votes of the Commissioner’s colleagues, since voting alongside a conflicted Commissioner does not, in and of itself, violate any law. Accordingly, unless the conflicted Commissioner casts the tiebreaking vote, or the conduct of the Commissioner or others calls into question the fairness of the vote itself,¹² the ANC’s action would be valid despite the Commissioner’s own ethics violation.

This conclusion aligns with our previous advice. When we have found an ANC’s action to be invalid, it has been because the ANC itself acted unlawfully. For example, in 2017, we concluded that a censure resolution was not validly adopted because the ANC voted to adopt it even though the Commissioner had not received the fair process the law required.¹³ We observed in 2007, as we have in the past, that, if an ANC takes official action in a meeting for

⁵ D.C. Official Code § 1-1162.01a.

⁶ *See id.* § 1-1162.02.

⁷ Effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-618.02). *See* D.C. Official Code § 1-1161.01(7)(B) (Code of Conduct includes this provision).

⁸ *See* D.C. Official Code § 1-603.01(14A)(E) (the term “public official” includes Advisory Neighborhood Commissioners).

⁹ *Id.* § 1-618.02.

¹⁰ *See* <https://bega.dc.gov/service/ethics-advice>.

¹¹ *See* D.C. Official Code § 1-1162.21 (penalties for ethics violations).

¹² *See id.* § 1-618.01(a) (Each public official must “refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government”); *see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018) (disparaging comments by a single commissioner, unobjected to by other commissioners, “cast doubt on the fairness and impartiality of the Commission’s adjudication of Philips’ case”).

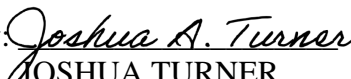
¹³ *See, e.g.,* Letter to Comm’r Delle Donne, November 29, 2017, *available at* <https://oag.dc.gov/sites/default/files/2018-02/ANC-2-B-November-30-2017-September-13-Censure-Resolution.pdf>.

which proper notice was not given, that action is invalid.¹⁴ And in 2003, we advised that an ANC election unlawfully conducted by secret ballot had to be redone.¹⁵ But we have never advised that a vote impermissibly cast by a single Commissioner automatically invalidates the votes of that Commissioner's colleagues. We know of no support for such a proposition in the ANC Act, Robert's Rules, or your ANC's bylaws. Nor are we aware of any advisory opinion from BEGA reaching that conclusion in the ethics context.

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

Sincerely,

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By: 
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(AL-22-172)

¹⁴ See Letter to Comm'r Ray, February 12, 2007, at 2, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-1A-07-February-12-2007-Notice-of-Requirements.pdf> (citing an earlier letter); Letter to Comm'r Kemp, January 28, 2004, at 2, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-8-C-January-28-2004-Notice-of-Meeting-Check-Writing-and-Bonding.pdf> ("any action taken when notice is not proper[] is invalid"); Letter to Comm'r Stevens-Harris (undated) at 2, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-6-A-March-7-2003-Validity-of-Meeting-Held-January-2-2003.pdf> ("The effect of an unlawful meeting is to render null and void any official action taken at such meeting").

¹⁵ Letter to Ms. Beverly W. Goode, March 7, 2003, at 2, available at <https://oag.dc.gov/sites/default/files/2018-02/ANC-7-C-March-7-2003-Election-of-Officers-by-Secret-Ballot.pdf>.