

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

August 5, 2021

Jonah Goodman
Commissioner, ANC 4C10
4217 4th Street, N.W.
Washington, D.C. 20011

Re: Questions Concerning ANC Development Policy

Commissioner Goodman:

In a February 8, 2021 letter to Advisory Neighborhood Commission (“ANC”) 4C Commissioner Ulysses Campbell (attached here), we raised significant concerns about ANC guidelines for handling development matters that come before it. Citing the statutory ban on ANC solicitations without Council approval,¹ we explained that those guidelines “contemplate an unlawful solicitation of funds.” We also explained that “some language in the guidelines appears to be impermissibly mandatory,” regulating in a way that only bylaws can. In response, you asked us 6 follow-up questions. This letter addresses your questions.

Your first question is about the “impermissibly mandatory” part; your remaining 5 are about the “solicitation” part. In the interest of clarity, we will answer your question about the “impermissibly mandatory” language, then we will group your remaining questions together with more explanation of the solicitation ban.

I. Why can a policy not regulate ANC governance? And if it cannot, can ANC bylaws simply cross-reference the policy and require compliance with it?

A policy cannot regulate ANC governance because, except as the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”)² otherwise specifies, anything that actually governs the operations of an ANC is a bylaw and must be adopted and disseminated to the public as one. At the same time, a bylaw may cross-reference existing policies and require that they be followed.

¹ See D.C. Official Code § 1-309.10(l).

² Effective Oct. 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.*).

Section 14(d) of the ANC Act (D.C. Official Code § 1-309.11(d)) requires each ANC to “establish bylaws governing its operation and internal structure,”³ including “Commission responsibilities,” “[v]oting procedures,” “[t]he use of the Commission’s office and supplies,” and “[p]rocedures for receipt of, and action upon[,] constituent recommendations.”⁴ These bylaws must be consistent with the ANC Act and must be a public document.⁵ Moreover, whenever an ANC amends its bylaws, it must timely file “[a]n up-to-date copy of [the] Commission’s bylaws and all amendments thereto . . . with the Council and the Office of Advisory Neighborhood Commissions.”⁶

This language prevents an ANC from governing its internal operations and governing structure through means other than bylaws. That is because, “when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.” *Christensen v. Harris County*, 529 U.S. 576, 583 (2000); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (internal citations omitted from both). The only means by which the ANC Act empowers an ANC to govern its operations is through bylaws. If an ANC could govern its internal operations through other means, it could thereby sidestep the requirement to provide the Council and the Office of Advisory Neighborhood Commissions with an up-to-date copy of the rules that apply to those operations. At the same time, since the ANC Act gives ANCs broad power to govern their operations through bylaws, nothing prevents an ANC from adopting bylaws that cross-reference an existing policy and require that it be followed.⁷

II. Questions involving the solicitation ban

You have asked us 5 questions about how the ANC Act’s ban on soliciting or receiving funds without Council approval applies in a range of contexts. To answer these questions, we apply the ordinary rules for interpreting statutes. We read the solicitation ban “according to its terms,” *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020), giving “effect, if possible, to every clause and word.” *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 111 (2012). We also take into account the broader context of the ANC Act, since the “words of a statute must be read in their context and with a view to their place in the statutory scheme.” *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 809 (1989); *In Re Edmonds*, 96 A.3d 683, 687 (D.C. 2014).

Bearing these principles in mind, we start by laying out the language and context of the ban, then applying it to your questions.

³ D.C. Official Code § 1-309.11(d).

⁴ *Id.* § 1-309.11(d)(1)(B), (C), (H), and (I).

⁵ *Id.* § 1-309.11(d)(2).

⁶ *Id.* § 1-309.11(d)(3).

⁷ Whether an ANC bylaw can require compliance with future changes to a policy is a more difficult question, since, in that context, changes to the policy directly modify the governance of the ANC and are thus difficult to distinguish from actual bylaw changes. At the very least, if an ANC bylaw requires compliance with a certain policy, any changes to that policy should be communicated to the Council and the Office of Advisory Neighborhood Commissions just as direct bylaw changes are.

A. Language and Context of the Ban

The solicitation ban comes from section 13(l) of the ANC Act (D.C. Official Code § 1-309.10(l)), which says that “[n]o Commission may solicit or receive funds unless specifically authorized to do so by the Council” – with the exception that “individual contributions of \$1,000 or less need not be approved by the Council.” This prohibition, first added to the ANC Act in 1975,⁸ has remained in place ever since, although the contribution threshold has evolved over time.⁹

Legislative history suggests that the Council was especially interested in preventing ANCs from supplementing their allotments by asking private or governmental third parties for money. Accordingly, the committee report for the legislation that introduced the ban groups it with a ban (no longer existing) on the “operation of programs,”¹⁰ just as, in the ANC Act, the solicitation ban sits side by side with a restriction on the ANC receiving funds without legislative authority.¹¹ But “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *DePierre v. United States*, 564 U.S. 70, 85 (2011) (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)). When the Council adopted the solicitation ban, it did not say merely that an ANC cannot solicit funds for itself; it said that an ANC cannot solicit funds at all – at least not without legislative authorization. Accordingly, in a 2005 letter to Commissioner Robert Vincent Brannum,¹² we explained that the solicitation ban “prohibits the act of soliciting funds regardless of the source or who is to receive the funds.”¹³ Along the same lines, we wrote last year that an ANC could not, when someone seeks the ANC’s support for a development project, “solicit a contribution” to either “the Housing Production Trust Fund or an affordable-housing nonprofit focused on Ward 4.”¹⁴ We said the same in a letter we issued in May of this year.¹⁵

Summing this all up, the rule is this: if an ANC wants to solicit funds from anyone for anyone, it needs Council authorization. With that rule in mind, we turn to your questions (grouping your fourth and fifth questions into one for the sake of efficiency).

⁸ See Duties and Responsibilities of the Advisory Neighborhood Commissions Act of 1975 (“Duties Act”), § 2, effective Mar. 26, 1976 (D.C. Law 1-58; 22 DCR 5454) (“No Commission may solicit or accept funds from a Federal or District government agency or private source except as may be specifically and previously authorized by resolution of the Council; provided that, receipt of contributions of one hundred dollars or less from a single contributor need not be approved by the Council”).

⁹ The contribution cap was originally \$100. See Duties Act § 2. It was later raised to \$400, then to the current cap of \$1,000. See Advisory Neighborhood Commission Amendment Act of 1990, § 3(c)(4), effective Mar. 6, 1991 (D.C. Law 8-203; 37 DCR 8420) (\$400 cap); Advisory Neighborhood Commissions Annual Contribution Amendment Act of 2001, § 2, effective Mar. 6, 2002 (D.C. Law 14-79; 48 DCR 11266) (\$1,000 cap).

¹⁰ See Special Comm. on Advisory Neighborhood Comm’ns Comm. Report No. 1 on Bill 1-193, Nov. 19, 1975, at 8 (on file).

¹¹ D.C. Official Code § 1-309.10(l).

¹² Letter to Comm’r Brannum, Aug. 17, 2005, available at <http://app.occ.dc.gov/documents/2005/20050817.pdf> (all internet sites last visited July 22, 2021).

¹³ *Id.* at 3.

¹⁴ Letter to Comm’r Campbell, Feb. 8, 2021, at 2 (attached).

¹⁵ See Letter to Comm’r Johnson, May 11, 2021, available at <https://oag.dc.gov/sites/default/files/2021-05/ANC-4C07-Letter-to-Chairperson-Johnson-re-Development-Policy-Requirements-.pdf>.

(1) If an applicant wants ANC support for zoning relief, does the ban bar an ANC from asking, as a condition of its support, that the applicant financially compensate a neighbor who would be negatively affected by the proposed relief?

Yes, unless the Council so authorizes. Asking an applicant to supply funds to a neighbor is a solicitation of funds for the neighbor.

We also note that the phrase “as a condition of its support” (here and elsewhere) can be somewhat misleading. If someone is seeking the ANC’s support for a project, Commissioners are free to convey to the applicant that they are disinclined to support the project unless certain conditions are satisfied. Even so, when an ANC votes on whether to support or oppose a project, each Commissioner is free to vote in a manner consistent with his or her best judgment.¹⁶

(2) If an applicant wants ANC support for zoning relief, does the ban bar an ANC from asking, as a condition of its support, that the applicant provide non-monetary support to an affected neighbor (such as repairs or improvements)?

No. Since non-monetary support is not “funds,” asking an applicant to provide non-monetary support to a neighbor is not solicitation of funds.

We explained this point in an August 10, 2018 letter to Commissioner René Bowser.¹⁷ There, the question was whether an ANC could solicit and accept donations for an ANC Fun Day. We explained that the ANC “cannot solicit funds for events like this one unless the Council has specifically” so authorized.¹⁸ We also explained, however, that the ban on soliciting “funds” (and related authority to accept donations of “funds”) is limited to money.¹⁹ The solicitation ban therefore does not apply when an ANC solicits something other than money.

We note, however – as we did in our 2021 letter to Commissioner Campbell – that even a solicitation of funds that is not barred by the solicitation ban must be conducted in a manner consistent with the Code of Conduct.²⁰ If you have a question about whether a particular solicitation, or type of solicitation, would be consistent with the Code of Conduct, you should contact the Board of Ethics and Government Accountability.

¹⁶ This is true even if a Community Benefit Agreement has been entered into. As we explained in a 2015 letter, nothing in the ANC Act authorizes ANCs or Commissioners to enter into agreements that bind Commissioners to vote in support of or opposition to a project. See 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>.

¹⁷ See Letter to Comm’r Bowser, Aug. 10, 2018, available at <https://oag.dc.gov/sites/default/files/2019-05/ANC-4D-August-10-18-Solicitations-and-Donations-for-ANC-Fun-Day.pdf>.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 2.

²⁰ See Letter to Comm’r Campbell, *supra*, at 3.

(3) Instead of soliciting donations, could an ANC itself support a third-party entity’s efforts to build or maintain affordable housing?

Yes, as long as doing so meets the other requirements of the ANC Act. Section 16 of the ANC Act (D.C. Official Code § 1-309.13) allows ANCs to expend funds “for public purposes within the Commission area or for the functioning of the ANC office,”²¹ including by issuing grants to third parties for projects aimed at benefiting the community.²² What you are proposing would be such a project. A grant for a project like this must serve a public purpose, which means it must “benefit[] the community as a whole” and not be “done for the primary purpose of benefitting a private entity.”²³ Such a grant must also follow the grant requirements outlined in section 16(m) of the ANC Act.²⁴

(4) If an applicant is seeking ANC support in the context of a Planned Unit Development (“PUD”), does the solicitation ban prohibit an ANC from seeking financial contributions to affordable housing projects, or tangible assets like a community room, in exchange for that support?

The solicitation ban prohibits an ANC from seeking financial contributions in exchange for its support of a PUD, but it does not forbid the ANC from seeking tangible assets like a community room, since tangible assets are not funds.

We start by offering background on PUDs, which are a type of zoning plan governed by the District’s Zoning Regulations (Title 11 of the DCMR). A PUD is a “plan for the development of residential, institutional, and commercial developments, industrial parks, urban renewal projects, or a combination of these, on a land of a minimum area in one (1) or more zones irrespective of restrictions imposed by the Zoning Regulations.”²⁵ PUDs exist in order to “provide for higher quality development through flexibility in building controls.”²⁶ PUD cases are “heard by the Zoning Commission and follow the contested case procedures” outlined elsewhere in the Zoning Regulations.²⁷ The Zoning Commission may “approve a PUD application with or without modifications,” and “may also set appropriate time limits for benefits conferred as part of a PUD approval.”²⁸ But a PUD may not be approved unless it is consistent with the Comprehensive Plan and other policies and programs related to the site, “[i]ncludes specific public benefits and project amenities” that are themselves consistent with the Plan and those policies and programs, and “[d]oes not result in unacceptable project impacts on the surrounding area or on the operation of city services and facilities.”²⁹

²¹ D.C. Official Code § 1-309.13(1)(1).

²² See D.C. Official Code § 1-309.13(m).

²³ *Id.* § 1-309.13(1)(1).

²⁴ See *id.* § 1-309.13(m).

²⁵ 11-B DCMR § 100.

²⁶ 11-X DCMR § 300.1.

²⁷ *Id.* § 300.3.

²⁸ *Id.* § 300.6 and 300.7.


²⁹ *Id.* § 304.4(a), (c), and (b).

Our understanding is that, after an ANC is notified of a pending PUD,³⁰ the applicant for that PUD will often seek the ANC's support for it, and the ANC will often condition its support on the applicant's showing of public benefits the project will bring.³¹ This practice is consistent with the solicitation ban as long as the ANC does not ask the applicant to supply funds either to the ANC itself or to anyone else. Accordingly, the solicitation ban does not prevent an ANC from asking that a PUD include a tangible assets like community rooms since these are not funds. It does, however, prevent an ANC from asking that a PUD applicant provide financial support either to the ANC or to any third party unless approved by the Council.

We note that our analysis here only addresses what an ANC may do when an applicant asks for the ANC's support before PUD proceedings start.³² We offer no opinion on what an ANC may do in the course of those proceedings. If an ANC participates in PUD proceedings,³³ its conduct in those proceedings would fall primarily under the purview of the Zoning Commission.

Sincerely,

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Attorney General for the District of Columbia

By: 
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(AL-21-454)

³⁰ An affected ANC must be notified by both the Office of Zoning, *see* D.C. Official Code § 1-309.10(c)(4), and the PUD applicant. *See* 11-X DCMR § 308.7.

³¹ *See* D.C. Policy Institute, New Database of D.C. Planned Unit Developments (PUDS), <https://www.dcpolicycenter.org/publications/pud-database-2010-2018/> (referenced in your letter to us).

³² *See* 11-X DCMR § 308.2 (PUD application cannot be granted without a hearing).

³³ *See* 11-Z DCMR §§ 403.5(b) (ANC party status in contested cases) and 406 (describing the weight given to ANC reports).

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



**ATTORNEY GENERAL
KARL A. RACINE**

Legal Counsel Division

February 8, 2021

Ulysses E. Campbell
Commissioner, ANC 4C03
1427 Upshur Street, N.W.
Washington, D.C. 20011

Re: Lawfulness of ANC Development Guidelines

Commissioner Campbell:

In light of the significant role Advisory Neighborhood Commissions (“ANCs”) play in neighborhood development, your ANC has formulated guidelines for how it will approach development projects on which it is asked to comment. This includes guidelines for whether it will, as a party, oppose a project that requires review by the Zoning Commission. In our view, much of the policy is lawful, and can be implemented in a manner consistent with the ANC’s advisory role, but some aspects of it raise significant concerns.

The ANC’s Role in the Development Process

To determine whether the guidelines are lawful, we reviewed them against the background of the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”),¹ which describes and limits the ANC’s advisory role in the development process. In addition to the ANC’s general right to advise other components of the District government “with respect to all proposed matters of District government policy,”² ANCs play an especially significant role on development matters that fall under the purview of the Office of Zoning. That Office must give affected ANCs “notice of applications, public hearings, proposed actions, and actions on all zoning cases,”³ and

¹ Effective Oct. 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq.*). You have not asked us to review, and so we have not reviewed, the separate question of whether these guidelines are consistent with your ANC’s bylaws – a question that each ANC is ordinarily responsible for answering for itself.

² D.C. Official Code § 1-309.10(a); *see id.* § 1-309.10(c)(1) (requiring notice to affected ANCs “before the formulation of any final policy decision or guideline with respect to . . . requested or proposed zoning changes [or] variances”). We note that, under recent legislation from the Council, projected to become law on March 19, 2021, ANCs can anticipate additional support from the Office of Advisory Neighborhood Commissions in development matters. *See* Advisory Neighborhood Commissions Participation in Planning and Development Amendment Act of 2020, § 2(b)(3), transmitted to Congress on Feb. 1, 2021 (D.C. Act 23-611; 68 DCR 1371).

³ *Id.* § 1-309.10(c)(4).

if the ANC offers timely written recommendations, the Office must give great weight to the issues and concerns the ANC has raised.⁴ Zoning Commission rules also permit an ANC to register relevant issue and concerns by participating in a Zoning Commission matter as an objecting party.⁵

We note, at the same time, that an ANC's role in the development process is limited to this advisory function. An ANC does not have the power to regulate development projects, since, as the D.C. Court of Appeals noted in *Kopff v. Alcoholic Beverage Control Board*,⁶ "the role of the ANCs is advisory, as their very name suggests."⁷ They "do not have an enforcement responsibility – or authority."⁸ This means, for example, that an ANC lacks authority to "approve" or "disapprove" development proposals, or to enter into binding agreements with developers and property owners.⁹ Commissioners similarly cannot enter into agreements that dictate how they will vote on a matter before them.

Analysis of the Guidelines

Most of the language in the guidelines you sent us conforms to these principles. Overall, the guidelines describe themselves as principles that Commissioners are invited to consider when judging whether the ANC should offer comments supporting or opposing a project. They urge Commissioners not to support a particular project unless that project will benefit the community in various ways. All of this is permissible. Two aspects of the guidelines, however, raise concerns.

First, the guidelines contemplate an unlawful solicitation of funds. The guidelines provide that the ANC will be disinclined to support a zoning variance that will not include low-income or fixed-income housing, family housing, or affordable housing unless the requestor is willing to make a significant contribution to either the Housing Production Trust Fund or an affordable-housing nonprofit focused on Ward 4. This language can reasonably be construed to mean that the ANC would solicit a contribution to the Trust Fund or a nonprofit from anyone seeking its support. Any such solicitation would be unlawful. The ANC Act states that "[n]o Commission may solicit . . . funds unless specifically authorized to do so by the Council,"¹⁰ and we have previously explained that this ban "prohibits the act of soliciting funds regardless of the source or who is to receive the funds."¹¹ Since the Council has not authorized any ANC to solicit funds for

⁴ *See id.* § 1-309.10(d).

⁵ *See* 11-Z DCMR § 403.5(b) (granting automatic party status to "[t]he ANC within which the property that is the subject of the application is located").

⁶ 381 A.2d 1372 (D.C. 1977).

⁷ *Id.* at 1376 (internal quotation marks omitted).

⁸ *Id.*

⁹ *See* Letter to ANC 4B Comm'r Austin, July 22, 2015, available at <https://oag.dc.gov/sites/default/files/2021-02/ANC-4B-Voluntary%20ANC%20Agreements.pdf> (all internet sites last visited Feb. 4, 2021).

¹⁰ D.C. Official Code § 1-309.10(l).

¹¹ Letter to ANC 5C Comm'r Brannum, Aug. 17, 2005, at 3, available at <http://app.occ.dc.gov/documents/2005/20050817.pdf>.

the Trust Fund or a nonprofit entity, your ANC cannot do so.¹² Moreover, even if the Council were to authorize solicitations like these, they would need to be conducted in a manner consistent with the District's Code of Conduct, which applies to ANC Commissioners.¹³

You asked what this ban on solicitations would mean for donations already made, donations already solicited, or donation requests that remain pending. We have identified no reason to believe that a donation made in response to a solicitation banned by the ANC Act would thereby be invalid. We also note that, under the ANC Act, an individual Commissioner is not "liable for action taken as an elected representative of a single-member district."¹⁴ There is nonetheless a risk of litigation against the ANC or the District, brought by an entity that would not have donated funds but for the need to secure ANC support for a project. There is no D.C. Court of Appeals case law applying this solicitation ban, so it is not clear what the result of such litigation would be. As for any pending donation requests, those should be swiftly rescinded, and the ANC should make clear that the ANC's decision to lend support or opposition to projects will in no way be based on whether or to what extent an applicant for ANC support contributes funds to any District or private entity.

Second, some language in the guidelines appears to be impermissibly mandatory. For example, page 4 of the guideline document states that "[w]hether or not the ANC supports the project[,] they *shall require*" certain "additional improvements for all development projects that come before the Commission" (emphasis added). An ANC has the authority to set requirements that any presentation for a project seeking ANC support must satisfy, but only by adopting bylaws to that effect.¹⁵ Similarly, some of the language in the guidelines refers to "approving" a project proposal. Unless this language is intended to refer merely to an ANC's decision whether to support a project, this language exceeds the ANC's authority.

Sincerely,

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Attorney General for the District of Columbia

By: *Joshua A. Turner*
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(AL-21-154)

¹² We note that this prohibition is somewhat similar to one that applies in the context of settlement agreements approved and enforced by the Alcoholic Beverage Control Board. These agreements cannot contain "[s]tatements or requirements that the applicant or existing licensee" will "[p]rovide money, special considerations, or other money to the community." D.C. Official Code § 25-446.02(4)(A).

¹³ See *id.* § 1-1161.01(7) (listing the various ethics rules that apply to ANC Commissioners, including Chapter 18 of Title 6B of the District of Columbia Municipal Regulations).

¹⁴ *Id.* § 1-309.11(d-1).

¹⁵ See *id.* § 1-309.11(d).