

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

May 6, 2011

Stephen A. Whatley
Commissioner, ANC 4A
7600 Georgia Avenue, Suite 404
Washington, DC 20012

**Re: ANC 4A Grant of \$3,000 Toward Payment on Crew Boat
Purchase**

Dear Commissioner Whatley:

This letter responds to your request of April 6, 2011, for an opinion on whether the above action by ANC 4A was permitted under the law governing ANC grants.

As part of your request, you provided the grant application submitted by the Woodrow Wilson High School Crew Boosters (Wilson Crew) on March 24, 2011, seeking \$3,000 from ANC 4A toward the purchase of a new "4+" crew boat costing \$19,098, including finance charges. The boat is described in the application as a smaller type boat or "shell" that would have four rowers and a coxswain. The boat was purchased from an organization in Connecticut named "Vespoli," which is described as a leading manufacturer of racing shells.

The application explains that Wilson Crew is a non-profit charitable organization that exists to support a crew team based at the District's Wilson Senior High School. It is entirely "self-funded," i.e. it receives no financial support from the District of Columbia Public Schools (DCPS). Wilson Crew has an operating budget of approximately \$140,000 per year and engages in substantial fundraising activities in conjunction with collecting dues to support its mission. As a result of Wilson Crew's efforts, the school system has been able to field a crew team that is open to all DCPS high school students, which at any time consists of 40 to 60 rowers.

The grant application by Wilson Crew further explains that the team has had good success racing 4+ shells, but had not purchased a new boat in 10 years. Thus, it decided to sell two older boats in its fleet to assist in purchasing the new Vespoli boat for the Spring 2011 season. These sales netted \$5,000. Wilson Crew explained that it had hoped to fund the remaining portion of the cost of the Vespoli 4+ through ANC grants, together with its own resources. By the time of the grant application, ANC 3E and ANC 3G had

approved grants of \$3,000 and \$2,000, respectively. An application was pending with ANC 3F for a \$3,000 grant, and it was expected that Wilson Crew would submit requests to ANC 3D for \$3,000, as well as a request for an additional \$1,000 from ANC 3G.

After speaking with you about the grant, I received more information about the request through a number of calls and emails from commissioners and other interested individuals, including Karen Howard, the Co-President of Wilson Crew who signed the grant application. While this information proved quite helpful and will be referenced below, I did not receive a consistent figure as to how many high school students from ANC 4A are actually on the crew team, which is based outside the ANC 4A boundary. It appears the number of students is approximately four to five. However, it was explained to me that Wilson High School is the neighborhood school for ANC 4A students, and because the Vespoli 4+ is expected to last roughly 20 years, it is anticipated that many ANC 4A students will benefit from the new crew boat for years to come, along with their families and other ANC 4A residents who attend crew races in support of the team. Ms. Howard also indicated that Wilson Crew's fundraising activity is very successful within ANC 4A, evidencing support in the Commission area for the crew team.

With respect to the timing of the grant request to ANC 4A in relation to the purchase of the crew boat, it appears Wilson Crew obtained the boat from Vespoli not long after the new year in preparation for the 2011 Spring Season. Evidently, Wilson Crew had begun their fundraising campaign well in advance during the fall of 2010, which was expected to include the grant applications to the various ANCs. Ms. Howard suggests that Wilson Crew was unable to get on the schedule of ANC 4A for consideration for several months.¹ As Wilson Crew was able to put a down payment on the cost of the crew boat, and obtain financing for the remainder from Vespoli, a decision was made to move forward with the purchase before ANC 4A received and considered the grant request, in part to comply with the requirement that Wilson Crew report back to ANC 3G within 60 days of its use of the grant monies.²

I understand that ANC 4A approved the grant request to Wilson Crew on or about April 5, 2011. As you discussed with Gottlieb Simon, Executive Director of the Office of Advisory Neighborhood Commissions, as well with Lynard Barnum in the Office of the D.C. Auditor, one issue arising from this grant concerns whether it is prohibited as providing money to a project that has already been completed (as opposed to one that is prospective), which our Office previously determined cannot be funded under the law

¹ As noted above, the Wilson Crew application is dated March 24, 2011. I assume there were informal discussions well before this submission that indicated to Wilson Crew that the Commission would not be able to consider the application at an earlier time.

² Ms. Howard provided the one-page financing document from Vespoli, outlining the terms and conditions of the Wilson Crew purchase. The document indicates that Vespoli required a \$4,000 down payment to accept an order. Its standard finance terms included 24 monthly payments at an Annual Percentage Rate (APR) of 8.9%, which automatically defaults to 11.95% if a payment is more than 30 days past due. In addition, Vespoli required that insurance be carried for the full invoice value for the entire finance term, a certificate of which needed to be provided before release of the boat. The insurance was to name Vespoli as the "first loss payee." I have been informed by Ms. Howard that Wilson Crew did not end up having to purchase insurance.

regarding ANC grants. In addition, there is a question as to whether there is sufficient benefit to the members of the ANC 4A community from the crew boat purchase, which is also a required determination for the ANC in awarding funds.

CONCLUSIONS

The timing of the grant in relation to Wilson Crew having already obtained the boat on the agreed financing terms makes it an impermissible award of funds to a completed project. Indeed, given Wilson Crew's obligation of its own credit to the balance of the boat's purchase price that is not covered by other ANC grants, a grant by ANC 4A now would only have the effect of enhancing Wilson Crew's credit standing – not help it buy and acquire the boat which it has already done. Had the funds been awarded prospectively, however, the boat project held the promise of providing sufficient benefit to the ANC 4A community so as to be permitted, although this is also a close question. The question of the boat's benefits to ANC 4A is addressed despite our conclusion that it cannot be funded retroactively so as to provide guidance for future grant applications that may arise from Wilson Crew.

DISCUSSION

The law governing use of ANC funds is found in sections 16(l) and (m) of the Advisory Neighborhood Commissions Act of 1975, as amended, effective June 27, 2000 (D.C. Law § 13-135; D.C. Official Code § 1-309.13(l) and (m)(2010 Supp.)) ("Act"), which provides that:

- (l) A Commission shall expend funds received through the annual allocation. . . or other donated funds, for public purposes within the Commission area. . . . Expenditures may be in the form of grants by the Commission for public purposes within the Commission area pursuant to subsection (m) of this section. . .
- (m) (1) A grant may not be awarded unless the grant is awarded pursuant to a vote of the Commission at a public meeting following the public presentation of the grant request. A Commission may approve grants only to organizations that are public in nature and benefit persons who reside or work within the Commission area. The services provided by the grantee organization must not be duplicative of any that are already performed by the District government. (2) An applicant for a grant must submit an application in writing to the commission. The application shall contain:
 - (A) A description of the proposed project for which the grant is requested;
 - (B) A statement of expected public benefits; and
 - (C) The total cost of the proposed project, including other sources of funding, if any.
- (3) Within 60 days following the issuance of a grant, the grant recipient shall forward to the Commission a statement as to the use of the

funds consistent with the grant application, complete with receipts which support the expenditures.

Thus, ANC funds, whether directly spent or provided by grant, may only be for public purposes that benefit members of the ANC community at issue. ANC funds cannot simply be provided to an individual, and they may not be used to provide services already performed by the District government. In addition, while not stated in the Act, because ANC funds are appropriated by Congress, we adhere to the prohibition in federal appropriations law against using public funds purely for entertainment.³ Finally, the Act's requirement that a grantee describe the "proposed" project and its "expected" benefits clearly signal the Council's intent that ANC grants only be given prospectively to fund projects that are not yet completed. (Letter to Deborah K. Nichols, July 12, 2007.)

As we have stated previously in our advice letters, determining whether a proposed project benefits enough persons within a commission area to be considered as having a public purpose is always a difficult question in light of the subjective analysis required. (Letter to Sinclair Skinner, February 20, 2004.) Indeed, our office has resisted use of a mathematical formula in our review, requiring only that a "significant number" of persons residing or working in the commission area receive a benefit from proposed ANC expenditures. (Letter to Chairperson Mary Treadwell, *et al.*, March 25, 1997.)

Thus, our Office previously found a proposed ANC grant to the Edward C. Mazique Parent Child Development Center to fund a scholarship that would be awarded to only one child as one that would fail the public purpose test. *Id.* However, we have previously approved of a grant to the A.P. Shaw United Methodist Church Recreation Department to purchase sporting equipment pursuant to its sponsorship of a youth football team, provided the equipment was not given to the players, but instead was kept for future use. (Letter to Otis H. Troupe, December 28, 1992); *see also* (Letter to Sandra "S.S." Seegars, June 25, 2004) (approving of a "Gospel Skate Night" project without requiring a specific number of attendees).

If the benefit of the new crew boat at issue were to redound only to the four or five students currently on the crew team, we would be compelled to find the grant unlawful as benefitting too few persons within a commission area numbering thousands of residents, no matter how constructive the activity for those youth, and even if the amount expended were in rough proportion to the proportional representation of ANC 4A students on the team. However, it is reasonable to assume, based on my communications with interested

³ For example, we previously disapproved of a grant from ANC 6C to allow 400 children from a low-income housing complex in the District to participate in an outing to the Six Flags of America theme park, despite its laudable family-centered purpose. (Letter to Deborah Nichols, August 9, 2006). However, we have declined a highly literal interpretation of the term "entertainment" in reviewing ANC grants or spending, and we thus have approved of ANC spending for participatory sporting or recreational activity for children, as that is thought to provide enrichment for the community beyond temporary amusement. Wilson Crew emphasizes in its grant application that crew activity takes hard work and timely attendance at early morning practices. Crew teaches self-discipline, teamwork and responsibility. Participation on the crew team therefore should not be viewed as mere entertainment.

parties, that there will likely be at least this many students on the crew team every year, particularly as Wilson is a neighborhood school for ANC 4A.⁴ Moreover, the families of these students undoubtedly would benefit from their children's participation on a competitive crew team, and it can be assumed that at least some members of the ANC 4A community will also find enrichment from attending crew events that involve commission area students. All of these factors would be expected to continue during the life of the new crew boat at issue.

As a result, the crew boat appears more similar in nature to the football equipment referenced above, than to a scholarship that provides a one-time benefit to a very small number of students awarded the funds. I stress that this represents a very liberal view of the facts provided, as the number of expected beneficiaries is clearly uncertain without more data.

Notwithstanding the benefits of the crew boat, however, Wilson Crew's purchase of the shell prior to consideration by ANC 4A of its grant request makes it a completed project, rather than a prospective one that can be funded by an ANC grant under the Act. The concern about ANC grant monies being awarded after-the-fact was addressed by our Office in 2007 in review of a proposed action by an ANC to reimburse an organization for unanticipated cost overruns it experienced in completing a project for which it had previously received money by the ANC. We noted the clear intent from the Act's language that grants be awarded prospectively, and stated that "[t]o conclude otherwise, would, for instance, permit a requesting organization to apply for an ANC grant for a long-since completed and paid-for project even when years have passed and ANC support was never contemplated in the first instance." (Letter to Deborah K. Nichols, July 12, 2007.) We approved of the ANC action only because it could be considered as an amended grant request due to error in calculating the original grant amount that was needed. *Id.* Thus, reimbursement-type grants are clearly prohibited as against the plain language of the Act.

The circumstances surrounding purchase of the crew boat certainly have differences from the reimbursement scenario. While Wilson Crew is in possession of the boat after forwarding money to Vespoli, the grant application states that only \$9,000 has been paid toward a balance of just over \$19,000. Wilson Crew is openly seeking the grant monies from ANC 4A to pay down this balance, not to reimburse itself for the outlay of cash already expended. In that sense, one might argue that the project is not yet completed, and may be funded by ANC 4A to help finalize the sale.

However, in the budget Wilson Crew attached to its grant application, it states that if it is unable to fully fund the purchase of the shell from the ANCs who have not yet granted funds, it will pay down the balance gradually using general Wilson Crew funds, albeit with interest accruing over this time. Moreover, I note that in the unlikely event Wilson Crew were to become delinquent, the financing agreement with Vespoli indicates the only remedy it has is monetary, whether by imposing late fees or an increased APR, not

⁴ I had requested data on prior years concerning this issue from Ms. Howard, but had not yet received the information at the time of this writing.

repossession of the boat. From this information alone, nothing ANC 4A were to award to Wilson Crew therefore will assist it in acquiring the boat. That has already occurred.

In a subsequent email by Ms. Howard to our Office, there is a suggestion that Wilson Crew would consider selling the new boat to pay Vespoli if needed, or to have it repossessed, as it would not consider ever being in default to the company with which they have a long standing relationship. However, it is stated again that other sources of funding may be obtained to pay the balance. While there is every reason to believe that Wilson Crew will consider liquidating or relinquishing the boat if it is unable to pay the balance, the grant application was clear in indicating that Wilson Crew anticipates drawing from its own resources as necessary, and this continues to be an option stated by Ms. Howard. This is, of course, expected as Wilson Crew's obvious skill in self-funding its operations for 25 years implies that it would never have obligated itself for the full price of the shell unless it could cover the amount should sought-after grant funds not materialize.

As a result, the more persuasive description of the circumstances here is that the primary effect of the grant monies from ANC 4A to Wilson Crew now will quite likely be, in reality, to enhance Wilson Crew's credit standing and possibly to free up its resources for other Wilson Crew endeavors – not to buy and to acquire the boat, which it has already done. The problem that results is that enhancing Wilson Crew's credit is not a public benefit for the ANC 4A area. Furthermore, while other matters that Wilson Crew may then be free to pursue may be entirely worthwhile, ANC 4A will then be funding matters without the opportunity for review and voting at a public meeting by the ANC, as required by the Act.⁵

Indeed, the requirement that the electorate in a commission area be apprised of all proposed grants to be made by the commission was a concern of the drafters for both the original grant provisions in the Act that were enacted in 1990,⁶ and the modifications made through the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code § 1-309.11(m) (2006 Repl.) (“ANC Reform Act”). The ANC Reform Act was evidently in part the result of concerns raised about financial and management practices of the ANCs that appear to have caused the U.S. Congress to withhold funding of ANCs for

⁵ It is true that one could argue that this freeing up of resources also exists in the case where prospective projects are proposed by organizations that are otherwise able to self-fund the particular endeavor. However, in that instance, there is an indisputably more direct nexus between the grant and the project when awarded before it is completed. The best way to ensure that ANC monies are going to a project thoroughly vetted by a commission and its members is a bright-line demarcation that the Council chose in requiring that projects be prospective only.

⁶ The grant provisions were originally enacted through section 3(f) of the Advisory Neighborhood Commission Act of 1990, effective December 28, 1990, D.C. Law 8-203, 37 DCR 8430. In pertinent part, that law stated that “[a] Commission shall adopt guidelines for the consideration and award of grants that shall include a provision that requires the proposed grantee to present the request for a grant at a public meeting of the Commission. A grant may not be awarded unless the grant is awarded pursuant to a vote of the Commission at a public meeting.” *Id.*

Fiscal Year 1999 pending reforms. *Report of the Committee on Local and Regional Affairs on Bill 13-468, the "Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000"* at 2 (Council of the District of Columbia, January 11, 2000) ("*Committee Report*"). Moreover, in bills leading to passage of the ANC Reform Act, there were proposals to repeal the grant-making ability of the ANCs, which various commissioners supported in their testimony. *Committee Report*, pp. 20, 23, and 26. The grant authority was of course retained, including the requirement that grants may only be awarded at a public meeting following the grantee's presentation of the request, but the Council reworked the provisions to add the current requirements that grant applications include information about the proposed project, and that grantee organizations report back in 60 days as to the use of the funds consistent with the grant application. D.C. Official Code §1-309.13(m) (2010 Supp.). In commenting on the proposed changes, the *Committee Report* stated that "[t]his provision addresses concerns raised about grants. It restricts the purposes for which they may be given and explicitly requires accountability by the Commissioners at public meetings." *Committee Report*, p. 11.

ANC grants that – as here – would primarily enhance the credit of the grantee, have the effect of not producing a public benefit in the commission area, at worst, and at best, facilitating funding of new items that have not gone through the rigor of the grant application and review process mandated by the Council. It is true that there may be circumstances where a grant for loan repayment like this one has strong linkage to the underlying project that was funded by a loan from an outside source. Nevertheless, the Council drew a dividing line of time that works to ensure that all ANC monies are properly considered by the public and specifically used to benefit a commission area. To preserve this intent, the ANCs cannot grant money for projects that, like this one, have been completed.⁷

I note that this will also have the effect of maximizing the opportunity for ANCs to choose beneficial projects that otherwise might not be timely undertaken without scarce ANC funds. This appears also to be an intent behind the Council's allowing grants only for prospective projects, given the additional requirement the Council adopted for grant applications to disclose other sources of funding for a proposed project. D.C. Official Code § 1-309.13(m)(2)(C) (2010 Supp.).

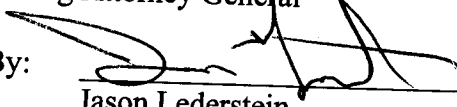
I hope this letter is helpful. If you have additional questions, please feel to free to contact our Office.

⁷ I note that, notwithstanding the extended analysis above, this conclusion might have been reached under a straightforward interpretation of the plain language of the Act, which nowhere suggests that the "projects" meant to be eligible for ANC monies include loan repayment.

Sincerely,

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By:


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(AL-11-174)

cc: Gottlieb Simon, Office of Advisory Neighborhood Commissions
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