

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Corporation Counsel

Office of Government Operations
Legal Counsel Division



May 31, 2001

David J. Bardin
Chair
Advisory Neighborhood Commission 3F
P.O. Box 39290
Washington, D.C. 20016-9290

Re: Notice of raze permit

Dear Mr. Bardin:

This responds to your letter dated April 4, 2001 wherein you request advice regarding the requirement of notice to Advisory Neighborhood Commission (ANC) 3F of the application for a raze permit.

Background

On March 1, 2001, the Department of Consumer and Regulatory Affairs (DCRA) received an application for and issued a raze permit to the Jewish Primary Day School (JPDS) to raze a building located at 3031 Gates Road, N.W., within the boundaries of ANC 3F. The raze permit was issued pursuant to 12 DCMR § 107.2.4, and is referred to as an over the counter permit. The over the counter permit states on it, pursuant to 12 DCMR § 107.2.10, the restriction that no razing operations shall commence until a supplemental razing operations permit is obtained. You state that the ANC was not notified by DCRA of the application for a raze permit, however, you became aware of the raze permit on March 19, 2001 when someone mentioned it at an ANC meeting. A list of raze permits including the JPDS over the counter raze permit was published in the D.C. Register on April 6, 2001. ANC 3F, by letter dated April 17, 2001, forwarded to DCRA its recommendation that the JPDS raze permit be rescinded. The ANC seeks advice regarding whether DCRA is required to give notice to the ANC, with an opportunity for the ANC to make a recommendation, prior to issuing a raze permit. If so, the ANC asks whether having failed to notify the ANC, the raze permit issued to JPDS is null and void.

Analysis

The process for obtaining two permits prior to razing was created in November 1999 when the Construction Codes were amended by DCRA. Prior to November 1999, only one permit was issued in response to an application for a raze permit. The single permit process did not issue an over the counter permit, instead it issued only one permit after complete review of the

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application. The JPDS claims that the issuance of the over the counter raze permit vests the JPDS with the authority to raze the building, and that the issuance of the second permit is merely a ministerial action by DCRA. As support for its vesting argument, the JPDS cites a letter dated January 26, 2000 signed by Armando Lourenco, then-Administrator of the Building and Land Regulation Administration at DCRA, and an undated raze permit procedures fact sheet. The two-step permitting process was established by DCRA pursuant to its regulatory authority, *i.e.*, it is contained in the Construction Codes, which, contrary to the name, is not legislation but is merely a regulation. In fact, the language of the regulation found at 12 DCMR § 107 does not state that the over the counter permit vests the right to raze. It is DCRA's interpretation of the regulation that the over the counter permit vests the right to raze.

DCRA's interpretation that the over the counter permit immediately vests the holder with the right to raze a property is not reasonable because it directly conflicts with the provision of District law requiring notice of such permits to the ANCs and the giving of great weight to ANC recommendations.¹ The current ANC law provides in section 13(c)(3) of the Advisory Neighborhood Councils Act of 1975, effective October 10, 1975, D.C. Law 1-21, as added by the Advisory Neighborhood Commission Additional Notice Act of 1977, effective October 26, 1977, D.C. Law 2-30, D.C. Code § 1-261(c)(3), (ANC Notice Law) as amended, as follows:

The Department of Consumer and Regulatory Affairs shall ensure that each Advisory Neighborhood Commission is provided at least twice a month by first-class mail with a current list of applications for construction and demolition permits within the boundaries of that Advisory Neighborhood Commission.

Furthermore, section 13(d) of the ANC Notice Law provides:

(d)(1) Each Commission so notified pursuant to subsections (b) and (c) of this section of the proposed District government action or actions shall consider each such action or actions in a meeting with notice given in accordance with section 14(c) which is open to the public in accordance with section 14(g). The recommendation of the Commission, if any, shall be in writing and articulate the basis for its decision.

(2) At the close of business of the day after which the notice period concludes as provided in subsection (b) or (c) of this section, the affected District government entity may proceed to make its decision.

¹ This memorandum does not address other arguments against vesting that have been raised by the ANC and other interested parties.

(3)(A) The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity.

In light of the specific statutory requirement of notice to the ANC of applications for demolition permits and subsequent great weight for ANC recommendations, the argument that the issuance of the over the counter permit vests the right to raze is unconvincing. The JPDS argues that the notice provided to the ANCs under section 13(c)(3) is not equivalent to the notice provided to ANCs under the rest of section 13(c). Instead, JPDS asserts that it is merely an informational list provided to the ANC. JPDS bases its argument on the failure to use the term "notice" in paragraph (c)(3), the fact that the requirement of notice of such permits is separate from other notice requirements to ANCs, and the fact that no notice period is provided in paragraph (c)(3). JPDS also argues that the ANC statute does not provide for any action by the ANC in response to the list, *i.e.*, even if the ANC is entitled to notice, its recommendations should not be given great weight by DCRA under section 13(d).

Contrary to JPDS' argument, it is clear that notice to ANCs under section 13(c)(3) is the same as all other notices to ANCs under section 13(c) and that an ANC recommendation in response to such notice is entitled to great weight. In Shiflett v. District of Columbia Board of Appeals and Review, 431 A.2d 9 (D.C. 1981) the court held that the language of paragraph (c)(3), providing for notification of construction permits, places such permits in the category of "permits of significance" under paragraph (c)(1). Therefore, the court held that notices under paragraph (c)(3) are equivalent to other notices to ANCs under subsection (c). Furthermore, the history of the provision reveals that the placement of the demolition permit application notice requirement in a separate paragraph of subsection (c) does not support JPDS' argument. In a 1976 opinion, this Office concluded that paragraph (c)(1), then designated as simply subsection (c), did not include such permits.² In response the Council passed the ANC Notice Law, which redesignated the original subsection (c) as paragraph (c)(1) and added paragraphs (c)(2) and (c)(3) to specifically require certain notices to ANCs, including notice of construction and demolition permits. A short time later the court in Kopff v. District of Columbia ABC Board, 381 A.2d 1372 (D.C. 1977) held that the Corporation Counsel's opinion was flawed. If the Council had waited for the Court to speak before changing the statute, there would have been no separate paragraphs enacted. As to the argument that providing the list to the ANCs could not have been intended to be notice because the ANC Notice Law requires distribution of a list twice monthly instead of requiring individual notices of each application, the statute is just as susceptible to an alternative interpretation that less frequent notice was a policy concession to DCRA, *i.e.*, without the ability to do a twice-monthly list, DCRA would have to mail out individualized notices of each permit application, a burden the Council apparently did not deem necessary. Notice by list, however, is no less notice under the law than individualized notice. As to the argument that no great weight applies to the ANCs' recommendations regarding raze permits, JPDS cites no

² See 1 Op. CCDC 236 (1976).

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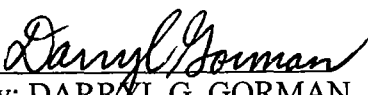
supporting authority. In fact, the plain language of section 13(d) applies the great weight requirement to section 13(c) and does not limit that applicability to paragraph (c)(1). After review of the arguments and the law, I conclude that notice to ANCs of construction and demolition permits under paragraph (c)(3) is treated identically to notices under paragraph (c)(1), and that such notice includes a 30-day notice period and entitlement to great weight for recommendations made by ANCs. Since the ANC is entitled to notice of the application for a raze permit and its recommendation is entitled to great weight under District law, DCRA may not impliedly amend the ANC Notice Law either by a regulation, or an interpretation of a regulation, that abrogates the right to notice and great weight by vesting the right to raze at the over the counter permit stage.

In answer to your specific questions, I conclude that DCRA was required to give notice to the ANC of the JPDS raze permit application³, the ANC is entitled to make a recommendation on the application, and that recommendation is required to be given great weight by DCRA. I do not conclude, however, that the over the counter permit in this case is null and void. I conclude, instead, that the over the counter permit does not vest any right to raze the property; therefore, the ANC may make a recommendation regarding the application, and that recommendation, if timely made, must be given great weight prior to the issuance of the second raze operations permit.⁴

If you have any further questions with regard to this issue, please contact Annette Elseth, Assistant Corporation Counsel, Legal Counsel Division, at 724-5537, or me at 724-5493.

Sincerely,

ROBERT R. RIGSBY
Corporation Counsel


By: DARRYL G. GORMAN
Senior Deputy Corporation Counsel for
Government Operations

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(AL-01-238)

³ While clearly the ANC did not receive the statutory notice from DCRA by first class mail to which it was entitled, there is evidence that the ANC received actual notice in this case, which may be considered adequate under Shiflett to begin the running of the notice period.

⁴ The ANC is entitled to make a recommendation to DCRA anytime before the final decision is made by DCRA on the raze operations permit. However, DCRA may take final action on the raze operations permit any time after the ANC notice period of 30 days expires.

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cc: David Clark
Acting Director
DCRA

Theresa Lewis
Acting Administrator
Building and Land Regulation Administration
DCRA