GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
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Washington, D.C. 20015

Re: ANC Authority to Enter Voluntary Agreements

Commissioner Gore:

In some instances, an Advisory Neighborhood Commission ("ANC") will enter an agreement with a private party, not for the functioning of the ANC office,[1] but to articulate how the private party will operate in the community. These agreements are often known, and we will describe them here, as "community benefit agreements." Your ANC asked us four questions about these agreements:

(1) Can an ANC enter an agreement with a developer over conditions for the design, construction, and operation of a project within the ANC?

(2) If the ANC entered such an agreement but lacked the authority to do, is the agreement void *ab initio* or only voidable?

(3) If the agreement is valid, is it enforceable by the ANC, and if not, who may enforce it?

(4) May the ANC delegate decision-making authority to a task force created under such an agreement?

This letter responds to your request, in keeping with this Office's statutory function of "provid[ing] legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions."[2] In our view, the Home Rule Act and ANC Act do not authorize an ANC to enter an agreement with a developer over conditions for the design, construction, and

[1] *See* D.C. Official Code § 1-309.13(l)(1).

[2] *Id.* § 1-309.12(d)(4). This function, one of the "powers afforded the Attorney General by the common and statutory law of the District," is part of this Office's "charge and conduct of all law business" of the District. *Id.* § 1-301.81(a)(1).

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operation of a project within the ANC, outside the context of an administratively enforced settlement agreement. A community benefit agreement outside that context might be treated as void, although that determination would probably be made on a case-by-case basis. Moreover, although a permissible community benefit agreement can incorporate a task force that both the ANC and the developer participate in, the ANC cannot delegate any decision-making authority to that task force.

We start with background on the relevant law. An ANC's authority to act, including its authority to enter into agreements with third parties, is defined by the District of Columbia Home Rule Act ("Home Rule Act")[3] and the Advisory Neighborhood Commissions Act of 1975 ("ANC Act").[4] We interpret the grants of authority in these statutes using the ordinary rules of statutory interpretation. We read these statutes "according to [their] 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) (internal citation omitted). We interpret them as one "harmonious whole," *In re Edmonds*, 96 A.3d 683, 687 (D.C. 2014), and read their provisions "in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989).

As a "creature of statute," an ANC "has only those powers given to it by statute."[5] Under the Home Rule Act and the ANC Act, ANCs are advisory entities. The Home Rule Act provides that each ANC:

(1) "[m]ay advise the District government on matters of public policy including decisions regarding planning, streets, recreation, social services programs, health, safety, and sanitation" in its commission area that are "of significance to neighborhood planning and development";[6]

(2) may "employ staff and expend, for public purposes within its neighborhood commission area, public funds and other funds donated to it";[7] and

(3) "[s]hall have other such powers and duties as may be provided by" the Council.[8]

Through the ANC Act, the Council charged ANCs with "consider[ing]" certain proposed District government actions, including actions on zoning cases, and providing its "recommendations . . ., if any" to the relevant government entity.[9] Nothing in either act, however, explicitly or even implicitly authorizes ANCs to enter community benefit agreements with entities in their

[3] Approved December 24, 1973 (87 Stat. 777; D.C. Official Code § 1-201.01 *et seq*.).

[4] Effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq*.).

[5] Letter to Comm'r Campbell, May 17, 2022, at 2, *available at* https://tinyurl.com/5n927k64 (quoting *Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n*, 378 A.2d 1085, 1089 (D.C. 1977)); *see also* Letter to Comm'r Austin, July 22, 2015, at 1, *available at* https://tinyurl.com/4chvbywv (making the same point). These letters and others our Office has issued are available from https://oag.dc.gov/about-oag/laws-and-legal-opinions/legal-advice-ancs.

[6] D.C. Official Code § 1-207.38(c)(1) and (d).

[7] *Id.* § 1-207.38(c)(2).

[8] D.C. Official Code § 1-207.38(c)(3).

[9] *Id.* § 1-309.10(d)(1).

neighborhood, which means they lack the authority to do so.[10] Rather, both the Home Rule Act and the ANC Act authorize ANCs to advise the District government, not private parties, on proposed District policy. Moreover, a community benefit agreement that purports to be binding is contrary to the statutory nature of ANCs. As advisory entities, ANCs "do not have an enforcement responsibility – or authority." *Kopff v. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376 (D.C. 1977). For example, they cannot "initiate a legal action in the courts of the District of Columbia or in the federal courts."[11] Nothing in the Home Rule Act or the ANC Act gives an ANC any authority to control development projects or other matters in its neighborhood area, either directly through regulation or indirectly by binding agreement.[12] This is why, in 2015, we explained that, as a general rule, a community benefit agreement between an ANC and a local institution is unenforceable.[13]

There is, however, one notable exception. In some administrative proceedings before a District agency, the ANC may enter a community benefit agreement that is essentially (and might be called) a settlement agreement. In that situation, assuming the agreement otherwise conforms to applicable law, the agreement is binding and is enforceable by the relevant agency. The sole example we are aware of is an alcoholic beverage licensing protest. In that protest, the "applicant and any protestant" (which may include an ANC)[14] may "negotiate a settlement and enter into a written settlement agreement setting forth the terms of the settlement."[15] If the Alcoholic Beverage Control Board approves the settlement, the Board will "incorporate the text of the settlement agreement in its order and the settlement agreement shall be enforceable by the Board."[16] A second, slightly different, example of this is zoning proceedings. ANCs have the authority to participate as parties in zoning proceedings, *see Bannum, Inc. v. Bd. of Zoning Adjustment*, 894 A.2d 423, 429-430 (D.C. 2006), although no statute expressly authorizes them to enter settlement agreements in those proceedings. There, the terms that an ANC and private party agree to are binding only to the extent that they are incorporated into the agency's own order.[17]

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[10] We note, at the same time, that an ANC does still have broad authority to comment on a license or permit matter affecting neighborhood planning and development. *See id.* § 1-309.10. So, for example, nothing prevents an ANC from adopting a resolution reflecting public commitments a developer has made in connection with such a matter.

[11] *Id.* § 1-309.10(g).

[12] *See, e.g.,* Letter to Comm'r Kensek, October 25, 2022, at 2, *available at* https://tinyurl.com/5823u2ts (noting that "ANCs are not regulatory bodies"); Letter to Comm'r Campbell, May 17, 2022, at 3 (same).

[13] Letter to Comm'r Austin, July 22, 2015, at 2; *see* Letter to Comm'r Goodman, August 5, 2021, at 4 n.16, *available at* https://tinyurl.com/3er83eef (echoing this point).

We note that D.C. Official Code § 10-801(b-1)(5)(A)(ii), which your ANC points to in its written request for our analysis, does not affect our reasoning. That provision says the Mayor must, when seeking to dispose of real property, divulge to the Council "[a]ny community benefits agreement between the developer and the relevant community, if any." This provision is not a grant of authority; it is a disclosure provision. It thus does not grant an ANC any authority to enter into binding agreements with entities in the community.

[14] *See id*. § 25-601(a)(4) (An ANC may protest "the issuance or renewal of a license, the approval of a substantial change in the nature of operation as determined by the Board under § 25-404, or the transfer of a license to a new location").

[15] *Id.* § 25-446(a). The same is true of an applicant and "any person who would otherwise have standing to protest an application pursuant to § 25-601." *Id.* § 25-446(a-1).

[16] *Id.* § 25-446(c).

[17] *See* 11-Y DCMR § 604 (describing the requirements for issuance of a final order in a Board of Zoning Adjustment matter).

Whether a community benefit agreement that is not incorporated into an agency order would be treated by courts as void or voidable likely requires a case-by-case determination. This is the approach the D.C. Court of Appeals took in *District of Columbia v. Brookstowne Community Development Co.*, 987 A.2d 442 (D.C. 2010). There, the Court dealt with a contract that it concluded the District government had no power to enter into, and the question was whether the contract was void or voidable. *See id.* at 449. The Court answered that the contract was "void *ab initio*" (*i.e.*, void from the outset), because "the agency lacked the capacity to enter into" it. *Id.* at 450. But there was still a question as to whether the District government could disavow the contract under the circumstances. *See id.* at 449. The Court held that it could, but its conclusion was based significantly on the facts of the case, including what the District knew, what the contracting entity knew, and how the public interest factored in. *See id.* at 449-450. A court would likely weigh considerations like these in any case where a community benefit agreement faces legal challenge.

Even when an ANC has entered a binding community benefit agreement and creates a task force in keeping with the terms of that agreement, the ANC cannot delegate any of its authority to that entity, since the ANC Act prohibits ANCs from "delegat[ing] official decision-making authority to any committee or task force."[18] An ANC-created task force also cannot exercise any powers that the ANC itself does not possess, such as the power to impose fines, since a government entity cannot delegate authority it does not have.[19] Accordingly, while nothing prevents such a task force from monitoring compliance with the terms of an agreement and reporting any breaches, the task force cannot (just as the ANC itself cannot) take measures to enforce it.

Sincerely,

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(AL-23-152)

[18] *Id.* § 1-309.11(f-1).

[19] *See, e.g.*, *Bank of Am., N.A. v. Dist. of Columbia*, 80 A.3d 650, 674 (D.C. 2013) (explaining, in the contracting context, that "a government representative cannot delegate to another actual authority that he or she does not possess").