

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



Legal Counsel Division

August 16, 2004

Mr. Absalom Jordan  
Treasurer, ANC 8D  
4601 Martin Luther King Jr. Avenue, S.W.  
Washington, D.C. 20032

Re: Notice Requirements to ANCs, Interpretation of Statutory Definitions

Dear Commissioner Jordan:

This is in response to your request to this Office for legal advice, made by letter dated July 19, 2004 and three resubmitted letters, all dated March 2, 2003.<sup>1</sup> We have reviewed your submissions and respond as follows:

***First Letter - July 19, 2004 - Office of Planning, Notice to ANCs***

You request a legal interpretation concerning the statutory notice requirements to ANCs of proposed policies or decisions regarding planning which affect a Commission. More specifically, you ask whether the Office of Planning is exempt from providing such notice prior to communicating its position to District “zoning agencies.” You assert that the Office of Planning currently develops policies which have an impact on the ANCs, but does not provide notice before “formulation of the final policy or decision.”

Notice to ANCs of certain actions or proposed action by the District government is governed by sections 13(b) and (c) of the Advisory Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.)(collectively, the ANC Act). Subsection (b) states:

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<sup>1</sup> You also submitted a facsimile cover sheet directed to Darryl Gorman [Deputy Attorney General], dated August 2, 2004 to which you attach a July 1, 2004 letter from you to Denzil Noble, Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, and two letters in response from DCRA dated July 23, 2004. The fax cover sheet to us states only that you “supplied DCRA with a copy of the OCC ‘advice’ of May 31, 2001. The response from Mr. Clark does not reference the May 31, 2001 advisory.” Insofar as this does not appear to be a request for an interpretation from this Office, we will assume that you have provided these items to us for informational purposes only.

Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single member district affected by said actions, and to each affected Ward Councilmember, except where shorter notice on good cause made and published with the notice may be provided or in the case of an emergency and such notice shall be published in the District of Columbia Register. In cases in which the 30-day written notice requirement is not satisfied, notification of such proposed government action or actions to the Commissioner representing the affected single member district shall be made by mail. The Register shall be made available, without cost, to each Commission. A central record of all such notices shall be held by the Office of Advisory Neighborhood Commissions.

Notice of actions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation, must be given to each affected Commission area. *See* D.C. Official Code § 1-309.10 (a) and (b) (2004 Supp.). Notice must also be given to each affected Commission “before the award of any grant funds to a citizen organization or group, or before the formulation of any final policy decision or guideline with respect to grant applications, **comprehensive plans**, requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area, the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems.” *See* D.C. Official Code § 1-309.10(c)(1) (2004 Supp.). (Emphasis added.)

The District of Columbia Court of Appeals has interpreted the ANC notice provisions to require written notice of every proposed government decision affecting neighborhood planning and development for which a prior hearing is required by law, but the Court stopped short of categorically exempting notice in other matters for which a hearing was not required. *Kopff v. District of Columbia ABC Bd.*, 381 A.2d 1372, 1381 (D.C. 1977).<sup>2</sup> The Court focused on matters of significance to neighborhood planning and development as that which would require the statutory special notice. As a result, it is necessary to examine the functions of the Office of Planning to answer whether its impact on the ANC area is of sufficient significance to warrant the 30-day special notice.

The Office of Planning, headed by the Director of Planning, is an office within what is now called the Office of Planning and Economic Development of the Executive Office of the Mayor. It was established by Mayor’s Order 83-25 on January 3, 1983, with the purpose of assisting the Deputy Mayor for Planning and Economic Development and the Mayor in the performance of the planning functions of the District, as well as with preparation of the “Comprehensive Plan for the National Capital,” the “Downtown Plan,” neighborhood plans, and other plans for the physical and economic development of the city. Its functions include preparing, refining and implementing these different plans for

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<sup>2</sup> Though the ANC law has been amended since the issuance of the *Kopff* decision, we believe that the Court’s conclusions continue to be applicable to the issue of when notice is required.

the city; managing the collection of demographic and statistical information; and serving as a liaison for the District with other regional and federal agencies, task forces and committees. Significantly, it is also required to “[e]stablish and implement procedures for citizen participation in the planning process” (emphasis added), which we understand has resulted in meetings being open to public participation.

As a result of these features, we conclude that the Office of Planning is not exempt from providing the special 30-day notice to affected ANCs where its actions will affect the ANC area in a significant manner. We base our decision on several factors: 1) The Mayor’s Order which establishes the Office of Planning expressly lists among its functions the preparation, refinement and implementation of the Comprehensive Plan, which is expressly listed in the ANC statute as one of those items for which special notice is required<sup>3</sup>; and 2) the Office of Planning is required to establish and implement procedures for citizen participation in the planning process. As in *Kopff* we believe that the requirement for public participation signals the significance of proposed activity by the Office of Planning and its impact on the community. As a result, at the very least, an ANC should be provided with special notice whenever the Office of Planning opens itself to public participation on a given matter and that subject matter will affect the ANC area.<sup>4</sup>

### ***Second Letter - March 2, 2003 - Notice of Hearing, Department of Housing and Community Development***

Your next request also involves the special 30-day statutory notice requirements of section 13 of the ANC Act. D.C. Official Code § 1-309.10 *et seq.* You state that the Department of Housing and Community Development (DHCD) provided notice of a hearing to the general public, but not to the ANC, for comments on a document entitled the “Draft Consolidated Plan for the District of Columbia Fiscal Year 2004 Action Plan” (Consolidated Plan). You ask: 1) whether the Consolidated Plan is subject to review and comment by ANC-8D; 2) whether DHCD was required to provide notice to ANC-8D of the proposed plan; and 3) if such notice is required, at what point does the 30-day notice period commence?

Though you have not provided us with a copy of the Consolidated Plan, we have reviewed a version from DHCD’s website dated March 27, 2003 – around the time of your letter – which we assume to be the document you reference. The Consolidated Plan is described as an “Action Plan of the Department of Housing and Community

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<sup>3</sup> That subsection provides in pertinent part: “In addition to those notices required in subsection (a) of this section, each agency, board and commission shall . . . before the formulation of any final policy decision or guideline with respect to . . . **comprehensive plans** . . . provide to each affected Commission notice of the proposed action . . .” Section 13(c)(1) of the Advisory Neighborhood Commissions Act, D.C. Official Code § 1-309.10(c)(1).

<sup>4</sup> With regard to your question concerning whether special notice is required prior to formulation of a “final policy or decision,” where the Office of Planning presents a “decision” to “the zoning agencies,” we do not have enough information to give a definitive answer. Again the answer would depend upon the significance of the proposed action to an affected Commission, which significance might be indicated if the “zoning agency” was required to hold public hearings or otherwise open up the process to public participation prior to taking the action.

Development,” and was prepared for submission to the U.S. Department of Housing and Urban Development as part of the District’s application for federal housing funds. It presents a strategy for achieving three primary goals: 1) to provide decent housing; 2) to provide a suitable living environment; and 3) to expand economic opportunities, principally for low – and moderate-income persons. *See Consolidated Plan* at 1. Among other matters, the Consolidated Plan identifies available resources, presents a demographic and economic profile of the District, sets goals and describes programs, and proposes funding initiatives which include the geographic distribution of funding and identifying neighborhood revitalization strategy areas. *Consolidated Plan* at (i).

Further review of the Consolidated Plan reveals that DHCD went to great lengths to solicit and encourage citizen participation in formulating the Consolidated Plan including holding at least four public hearings, the times and places of which were promoted in such media as the Washington Post, the Afro-American, El Tiempo, The Blade and the D.C. Register. *Consolidated Plan* at 80. More importantly, DHCD mailed nearly 1000 hearing notices to “**Advisory Neighborhood Commissioners**, civic association officers, and officials of community based organizations, churches, and other interested parties.” *Id.*

Upon review of the Consolidated Plan, we conclude that the special 30-day notice to ANCs is appropriate. The Consolidated Plan appears tantamount to a “comprehensive plan” insofar as it seeks to address all of the District’s housing programs for which the District hopes to receive federal funds for a given year. Moreover, there can be no question as to the significance to the community insofar as the plan seeks specifically to identify neighborhoods for revitalization which would possibly result in the receipt of federal funds. Certainly, DHCD believed the preparation of the Consolidated Plan was significant enough to warrant public participation as demonstrated by the great lengths it went to not only to hold multiple public hearings, but to promote those hearings through the media and by direct mail. It would be counterintuitive to suggest that an ANC is afforded any less notice than the public at large where the agency believed public participation to be appropriate. For these reasons, we conclude that the Consolidated Plan is an appropriate subject upon which an ANC may comment and that the special 30-day notice period of the ANC Act should apply.

With regard to your question concerning when the 30-day notice period would have commenced for consideration of the Consolidated Plan, we look to the ANC Act which states “[a]t the close of business of the day after which the notice period concludes . . . the affected District government entity may proceed to make its decision.” D.C. Official Code § 1-309.10(d)(2). It would appear, therefore, that the 30-day period would begin to run at the time the notice is received. This, of course, begs the question of when the notice should have been received. Fortunately, the Consolidated Plan contains a “Chronology of Events,” which shows that public hearings were held on November 12, 13, and 19, 2002; that a draft of the Consolidated Plan was prepared on February 13, 2003; and, that a public hearing on the draft plan was held on March 13, 2003 prior to forwarding it to the Mayor on March 27, 2003. *Consolidated Plan* at 81. Though we have no information to confirm when or whether notice was actually sent to the affected ANCs, in our view, notice should have been provided not later than within 14 days after the publication date of the draft Consolidated Plan on February 13, 2003. This would

have provided the ANCs 30 days to review the draft plan prior to the Mayor's submission to the Council on March 27, 2003.

***Third Letter - March 2, 2003 - Service Area Coordinators, Access to District Government Officials, Access to Documents***

You next ask for clarification of section 15 of the ANC Act, D.C. Official Code § 1-309.12(c) (2004 Supp.), which states that “[t]he Mayor shall appoint a service area coordinator for each ward who shall act as the chairperson of the service area committee in that ward and shall coordinate all District government services at the ward level to residents of the ward.” You ask us to define the term “coordinate,” as used in that subsection. Insofar as your request is in the abstract, we have no reason to believe the term “coordinate” means anything more or less than its common usage and understanding would otherwise suggest. That is, “to bring into proper order or relation; harmonize; adjust.” WEBSTERS NEW WORLD DICTIONARY 325 (College ed. 1962). Moreover, the term “coordinate,” as used in that subsection, would appear to be clarified farther down where the role of the service area coordinator is more clearly delineated: “The service area coordinators and managers shall work closely with the Commissions in their service area ward and shall provide them with any technical assistance necessary to the performance of their duties and responsibilities.” D.C. Official Code § 1-309.12(c) (2004 Supp.).

You also ask this Office to clarify section 13 of the ANC Act, D.C. Official Code § 1-309.10(i)(1) (2004 Supp.), which states: “Each Commission shall have access to District government officials and to all District government official documents and public data pursuant to § 2-531 *et seq.* that are material to the exercise of its development of recommendations to the District government.” Specifically, you ask for a definition of the term “government official” and whether the term “access” means that a commission or commissioner is entitled to have a meeting with a chosen government official. Again, we have no reason to assign any definition beyond those terms’ common usage and understanding. Without any definitional or limiting language in the statute itself, the term “government official” might be read expansively to mean any employee of the government. The same is true for the term “access,” which appears to be intended to promote communication between the ANCs and the District government. Such communication could take many forms including face-to-face meetings, telephone access, correspondence, etc. Again, the statute does not specify the manner in which “access” may be accomplished and without such specific language, we do not believe it would be wise for us to set a fast and rigid rule that ANC Commissioners are entitled to one-on-one meetings with any government official of their choosing, especially when other methods of meaningful communication remain available. We think it is the better course to leave the manner of such access to the discretion of the specific government official (or the official’s supervising agency) with whom an audience is sought.

With regard to your question concerning which “government documents” may be withheld and how a Commission meets the requirement of showing that such documents are necessary to make recommendations to the District government, we refer you to D.C. Official Code § 2-531 *et seq.* (2001), which comprise the Freedom of Information Act (FOIA) provisions of the District of Columbia. We interpret § 1-309.10(i)(1) to mean not

only that the FOIA provisions apply to ANCs, but that an ANC's ability to obtain documents is further limited by the necessity that they be "material" to the development of its recommendations. It would follow, therefore, that the materiality of such documents would be decided – as would the FOIA request itself – by the public body to which the FOIA request was made. Where denials of such requests result, the ANC would have available to it the procedures for appeal. D.C. Official Code § 2-537 *et seq.* (2004 Supp.).<sup>5</sup>

***Fourth Letter - March 2, 2003 – Metropolitan Police Department General Orders and Rulemaking Authority***

In your last letter you ask five separate questions, all regarding the Metropolitan Police Department (MPD) and its authority to promulgate rules regulations, policies and procedures. These include: 1) whether the Chief is exempt from promulgating rules, "as defined by Sec. 502 of Title 2 of the D.C. Official Code," for administering laws applicable to the operations and conduct of the [MPD] and its members; 2) whether the "General Orders of the MPD are within the definition of a 'rule' and subject to the publication requirements of the [Administrative Procedure Act]"; 3) "By what authority can the Chief promulgate 'rules' which are classified as secret or confidential and therefore, not available for public review or publication as provided in the APA"; 4) whether the Mayor has adopted procedures pursuant to D.C. Official Code § 2-505(b) or if such responsibility has been delegated to the Chief of the MPD; and 5) whether the Council is required to have the approval of or concurrence of the Mayor in adopting rules and regulations for the MPD.

We do not believe these questions, as presented, constitute proper requests for statutory interpretation by this Office, and therefore decline to provide substantive responses at this time. The obligation of this Office to comply with ANC requests for interpretation of statutes is found in D.C. Official Code § 1-309.12(d)(3) (2004 Supp.), which provides:

The Mayor shall provide assistance to the Commissions in the following areas: (A) Legal interpretations of statutes ***concerning or affecting*** the Commissions, or of ***issues or concerns affecting the Commissions***. These interpretations are to be obtained from the [Office of the Attorney General for the District of Columbia] and may be requested directly by any ***Commission***. (Emphasis added.)

You have not established that the issues you present concern or affect the Commission – a threshold requirement for action by this Office. You neither state nor, after a thorough reading of your letter, imply any direct impact upon an ANC as you did in your letters concerning the ANC special notice requirements. Inquiry letters should clearly state not only the specific request, but how the subject matter concerns or affects the ANC. In most cases, this is likely to involve some impending action by a District government

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<sup>5</sup> These procedures, however, likely would be limited to administrative appeals only and not include the right to proceed to Superior Court, as an ANC is expressly precluded under the ANC Act from initiating legal action in either Superior or U.S. District Court. D.C. Official Code § 1-309.10(g) (2004 Supp.).

entity or some dispute that has arisen within the ANC, rather than just a general matter of interest to the ANC. We also wish to point out that requests for statutory interpretation should come from the Commission as a whole, rather than from a single Commissioner, unless of course the Commissioner is acting on behalf of the entire Commission.<sup>6</sup>

Sincerely,

ROBERT J. SPAGNOLETTI  
Attorney General

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RJS/dps

(AL-O4-417, AL-O4-418, AL-O4-419, AL-O4-420; AL-O4-513)

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<sup>6</sup> Though we do not always treat this as a hard and fast requirement, limited resources and a marked increase in the number of requests for interpretation may cause us to do so in the future.