

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL



LEGAL COUNSEL DIVISION

August 19, 2008

Roger Moffatt  
Chair ANC 6D  
P.O. Box 71156  
Southwest Station  
Washington, D.C. 20024

Re: Request for Legal Advice Regarding the Agreement  
Between ANC 6D and the Corcoran Gallery of Art  
and Related Action by the Zoning Commission

Dear Chairman Moffatt:

This is in response to your June 26, 2008<sup>1</sup> letter to Acting Attorney General Peter Nickles in which you request, on behalf of Advisory Neighborhood Commission (“ANC”) 6D, that this Office respond to questions and provide advice concerning an agreement between ANC 6D and the Corcoran Gallery of Art (“Corcoran”) as regards to a planned unit development (“PUD”) of the Randall Junior High School Site (“Randall”) into a new campus for the Corcoran and a multi-family residential building (“Corcoran Agreement”), ANC 6D’s participation in a proceeding before the District of Columbia Zoning Commission on June 9, 2008 (“June 9<sup>th</sup> proceeding”) regarding the Corcoran’s request for a modification of the construction phasing for the PUD, and the effect of the Zoning Commission’s action at the June 9<sup>th</sup> proceeding on the terms of the Corcoran Agreement.

As background, on October 15, 2007, as chair, you signed the Corcoran Agreement on behalf of ANC 6D. Under the agreement, ANC 6D agreed to support the Corcoran’s efforts to obtain approval from governmental bodies for the proposed PUD for Randall, and the Corcoran agreed to provide certain benefits and amenities to ANC 6D residents. On March 21, 2008, the Zoning Commission, with the support of ANC 6D, issued an Order approving the Corcoran’s proposed PUD and its corresponding request for an amendment to the District of Columbia Zoning Map (“Zoning Order”). Subsequently, the Corcoran requested that the Zoning Commission approve a modification to the Zoning Order regarding the construction phasing of the PUD. ANC 6D provided written

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<sup>1</sup> Please be advised that while the letter is dated June 26, 2008, this Office did not receive a copy of the letter until July 17, 2008, and only received the attachments on August 14, 2008 when they were delivered by Commissioner David Sobelsohn.

comments to the Zoning Commission by letter dated June 3, 2008 opposing the Corcoran request. The modification request was considered and approved by the Commission on its consent calendar during a June 9<sup>th</sup> proceeding. The Commission has not yet issued a written order regarding this action.

In your letter, you ask five numbered questions. Only questions number one through three involve the application of statutory provisions governing the operation of ANCs. Pursuant to § 15(d)(3)(A) of the Advisory Neighborhood Commissions Act of 1975 (“ANC Act”), effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.12(d)(3)(A) (2006 Repl.), the Office of the Attorney General (“OAG”) is required to provide to ANCs “[l]egal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions.” This mandate does not require OAG to render advice to ANCs as to legal interpretations that do not directly involve the functions and operations of ANCs. And it is the general policy of OAG to confine its legal advice to ANCs to questions that relate to such functions and operations. (See Letter from Charles Ruff, Corporation Counsel, dated October 4, 1995.) Accordingly, we will respond to questions one through three that state as follows:

*1. When an ANC takes a position before the Zoning Commission, may that Commission--consistent with the requirement to give “great weight” to the views of the ANC--reject the ANC position without providing the ANC an opportunity to testify?*

Pursuant to Section 13(d)(3) of the ANC Act (D.C. Official Code § 1-309.10(d)(3) (2006 Repl.)), agencies during their deliberations on proposed governmental actions (covered by the Act) must give issues and concerns raised by ANCs “great weight”. This requirement allows the ANCs to submit comments to the deciding agencies, but does not guarantee them an opportunity to present oral testimony before an agency makes a decision. In this case, the Zoning Commission considered the Corcoran’s request for a modification of the Commission’s Order as an item on its consent calendar at its June 9<sup>th</sup> proceeding. As provided in the Section 3030 of Title 11 of the District of Columbia Municipal Regulations (“DCMR”), the Zoning Commission’s consent calendar is an expedited procedure by which it hears matters without a public hearing. Therefore, the consideration of the Corcoran’s request for modification did not include any opportunity for testimony.

Notwithstanding the process by which the modification was considered, the ANC was provided an opportunity to comment and its views must be given great weight. Under section 13(d)(3) of the ANC Act, the Zoning Commission is required to issue a decision in writing and include a “great weight” consideration of each of the ANC’s issues and concerns.

*Questions 2 and 3*

2. *Are agreements between developers and ANCs, in which the ANC agrees to support the developers' plans before the Zoning Commission, in exchange for which the developers agree to provide specified benefits to the residents of that ANC, legally enforceable?*
3. *If the answer to question #2 is "yes," is the [Corcoran Agreement] legally enforceable? If not, why not? If it is legally enforceable, who can bring an action to enforce that agreement, when would such an action be timely, and what judicial relief would be warranted?*

As noted above, OAG as a matter of policy does not provide legal advice on matters that do not directly affect the functions and operations of ANCs. Therefore, we cannot respond to specific questions as to the interpretation or the enforceability of the Corcoran Agreement. With that caveat, we note that ANC 6D is not a legal entity and does not have the legal capacity to enter into contracts. Its members may enter into contracts, however. Thus if authorized by the Commissioners (which appears to be the case here), the chair may sign a contract that can bind all of the Commissioners of the ANC 6D and their successors in their official capacities as Commissioners. And if the Corcoran agreement is supported by adequate consideration (which it appears to be) and would not contravene public policy (which it does not appear to do), the agreement would normally be enforceable in an appropriate court of law. Beyond this general advice, this Office cannot offer a predictive opinion as to the enforceability of the provisions of this particular agreement.

Further, you should be aware that with respect to the enforcement of agreements or contracts, the ANC does "not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts, provided that this limitation does not prohibit any Commissioner from bringing suit as a citizen." See Section 13(g) of the ANC Act (D.C. Official Code § 1-309.10(g)). The corollary to this limitation is that ANCs may not use their funds to finance litigation on behalf of individual Commissioners or other person or organizations. The expenditure of ANC funds for legal purposes is limited to "legal expenses ... for Commission representation before an

agency, board or commission of the District government ... “ Section 16(1)(2) of the ANC Act (D.C. Official Code § 1-309.13(1)(2)). Thus, any legal enforcement action regarding the Corcoran Agreement cannot be funded with ANC funds.

Sincerely,

PETER J. NICKLES  
Acting Attorney General

By: Sheila Kaplan  
SHEILA KAPLAN  
Assistant Attorney General  
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cc: Commissioner David Sobelsohn ANC 6D02