## Memorandum

Government of the **District** of Columbia

TO: Theodore Pochter Office: Corporation Counsel Chief, Policy and Planning Office of Policy, Planning and Evaluation Department of Recreation and Parks

FROM: Leo N. Gorman, Chief Regulatory Affairs Section Legal Counsel Division

Date: JUly 21, 1994

SUBJECT: Was ANC 2-B entitled to notice prior to the adoption of an emergency rule prescribing user fees for the Francis Swimming Pool at 25th and N Streets, N.W.?

This is in response to your July 20, 1994 oral request for the advice of this Office on the question of whether Advisory Neighborhood Commission (ANC) 2-B was entitled to notice prior to the adoption by the Director of the Department of Recreation and Parks (Director) of an emergency rule prescribing user fees for the Francis Swimming Pool located at 25th and N Streets, N.W.

On June 29, 1994, the Director adopted, on an emergency basis, an amendment to 19 DCMR § 716.5 prescribing user fees to be charged for the use of the recently renovated Francis Swimming Pool. A notice of emergency and proposed rUlemaking regarding this rule was published in the <u>D.C. Register</u> on July 15, 1994, at 41 DCR 4728. In a letter, dated July 15, 1994, to Council Chairman David A. Clarke, ANC 2-B chairman Russell Gamble, on behalf of that ANC, asks Chairman Clarke "to take emergency legislative action to order the D.C. Department of Recreation and Parks to rescind the admission fee (user fee) unilaterally imposed at Francis Pool without <u>notice to</u>, or comment from, the <u>ANC</u> as required by the <u>D.C.Administrative Procedures [sic] Act and the ANC statute...." (Emphasis added.)</u>

Under section 738(d) of the of the Self-Government Act, D.C. Code § 1-251(d) (1992), "timely notice shall be given to each Advisory Neighborhood Commission of requested or proposed zoning changes, variances, pUblic improvements, licenses or permits of significance to neighborhood planning and development within its neighborhood commission area for its review, comment and recommendation." Subsection (a) of § 13 of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-261(a) (1992), provides in pertinent part that each ANC may advise:

each executive agency... of the government of the District of Columbia with respect to all proposed matters of District government policy including decisions regarding... recreation...which affect that Commission area. For the purposes of this act, proposed actions of District government policy shall be the same as those for which prior notice of proposed rUlemaking is required pursuant to 1-1506(a) ....

In commenting on this last sentence of § 13(a), the Corporation Counsel opined: "Thus, every District agency must provide to each affected ANC 30 days written notice of any proposed action considered to be rulemaking, pursuant to sec. 13(a) of D.C. Law I-S8••••" 2 Op.C.C.D•C• 290 (1978)•

Subsection (b) of § 13, D.C. Code § 1-261(b), provides in pertinent part that:

Thirty days written notice of such District government actions or proposed actions shall be given by mail to each Commission affected by said actions, <u>except...in the</u> <u>case of an emergency and such notice shall be published</u> <u>in the District of Columbia Register. The Register shall</u> <u>be made available, without cost to each Commission.</u> [Emphasis added.]

The underscored portion of subsection (b) makes clear that the 30day prior notice requirement does not apply to action taken by an agency on an emergency basis.! Thus, as in the instant situation, the Director may adopt a rule on an emergency basis without giving the ANCs any prior notice. The Director must promptly cause a notice of the adoption of the emergency rule to be pUblished in the D.C. Register, and this pUblication serves as notice to the ANCs.<sup>2</sup> Here, as noted above, the Director caused to be pUblished in the D.C. Register a notice of emergency and proposed rulemaking. The affected ANC or ANCs will then have at least 30 days during which to submit recommendations to the Director concerning whether the proposed rule should or should not be adopted as a final rule. See also D.C. Code § 1-1506(c) (1992), the emergency rUlemaking provision of the D.C. Administrative Procedure Act.

In sum, the assertion by ANC 2-B that the Director's emergency rule regarding user fees at Francis Swimming Pool violated the ANC statute and the D.C. Administrative Procedure Act because ANC 2-B was not given prior notice is without merit.

LNG

Under the D.C. Administrative Procedure Act, an emergency rule may not remain in effect "longer than 120 days after the date of its adoption." D.C. Code § 1-1506(c) (1992).

<sup>&</sup>lt;sup>2</sup> On May 26, 1977, this Office issued an opinion ruling that, generally speaking, publication of a document, such as a notice of emergency and proposed rUlemaking, in the <u>D.C. Register</u> meets the notice requirements of section 13(b) of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-261(b) (1992). <u>See</u> 2 Ope C.C.D.C. 48 (1977).