

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

June 13, 2016

William Spence Spencer
Commissioner
Advisory Neighborhood Commission 3D1
2825 49th St, N.W.
Washington, D.C. 20007

Re: Lawfulness of April 25, 2016 Special Meeting

Dear Commissioner Spencer:

On May 2, 2016, you sent us a letter asking us whether ANC 3D's April 25, 2016 special meeting and the matters considered at that meeting were in accordance with the provisions of ANC 3D's Bylaws. We also received a letter (attached) from ANC 3D Chairperson Tom Smith, which maintained that the special meeting and the matters considered therein were lawful. After carefully reviewing both letters, as well as the Bylaws themselves,¹ we conclude that the special meeting was not lawfully convened because the Chairperson convened it without any request from Commissioners or any petition from residents.

This question turns on the interpretation of two bylaws. The first, in Article IV, Section 7, subsection (A), states that:

The Chairperson shall serve as the convener of the Commission and shall chair the Commission meeting. In addition, the Chairperson shall have the power to call special meetings of the Commission.

The second relevant bylaw is contained in Article V, Section 3, subsection (B):

Special meetings of the Commission may be called by the Chairperson, by written request of (2) Commissioners or upon petition of (10) residents, 18 years of age or older, of the Commission area. No matter shall be considered at any special meeting except those stated in the request and notification. Regular meeting procedures shall be followed.²

¹ Your letter contained a copy of ANC 3D's Bylaws.

² As the bylaws are formatted, the first line of subsection (B) ends with the word "called," and after a full line space, the next line begins with the phrase "by the Chairperson." This formatting does not, however, appear to be by

According to both your letter and Chairperson Smith's response, the April 25, 2016 special meeting was called by the Chairperson without any written request from Commissioners or any petition by residents. Therefore, that meeting would only be lawful if Article IV of the ANC's bylaws allowed the Chairperson to call a special meeting unilaterally.

Answering this question requires us to interpret your ANC's Bylaws. Where an ANC's bylaws are ambiguous, it is the ANC's responsibility, not ours, to construe them, because "[e]ach society decides for itself the meaning of its bylaws."³ At the same time, "when the meaning [of those bylaws] is clear," the ANC "cannot change that meaning except by amending its bylaws."⁴ In the past, we have interpreted ANC bylaws if those bylaws are unambiguous. That is the case here. ANC 3D's Bylaws cannot reasonably be read to allow the Chairperson to call a special meeting unilaterally.⁵

We first examined, as your letter does, the critical Article V phrase "may be called by the Chairperson, by written request of (2) *Commissioners or upon* petition of (10) residents" (emphasis added). Read in isolation, there at least two ways one might read this phrase:

- There are three ways to call a special meeting: (1) by the Chairperson; (2) by written request of two Commissioners; and (3) by a residents' petition.
- The Chairperson must call a special meeting, and there are two ways to do that: (1) by written request of two Commissioners; or (2) by a residents' petition.

Ordinarily, a list of three items (such as three ways to call a special meeting) would feature a comma between items two and three (known as the "Oxford comma"), so if the phrases "by written request of [two] Commissioners" and "upon petition of [ten] residents" were items two and three of a three-item list, one would expect a comma between them. As your letter notes, no such comma is present. This punctuation point is not decisive, however, because not everyone uses the Oxford comma.⁶ Indeed, the Bylaws themselves sometimes use it and sometimes do not.⁷

design. We have identified other instances of similar formatting that appear to carry no substantive significance. *See, e.g.*, Bylaws Article 5, Section 10, Subsection (C).

³ Henry M. Robert III *et al.*, ROBERT'S RULES OF ORDER NEWLY REVISED ("Robert's Rules") 588 ln. 25 (11th ed. 2011). For reference, the term "ln" is a reference to the specific lines on which quoted language appears, and we use it because the pages in Robert's Rules come with line numbers. *See* Advisory Neighborhood Commissions Act of 1975 ("ANC Act"), § 14(e)(3), effective March 26, 1976 (D.C. Law 1-58; D.C. Official Code § 1-309.11(e)(3) (2012 Repl.)) ("Where not otherwise provided, the procedures of the Commission shall be governed by Robert's Rules of Order").

⁴ Robert's Rules, *supra* n.3, at 588 ln. 26-28.

⁵ Your letter also argued that the subject of the April 25, 2016 meeting was a "routine" matter, and *per* ANC 3D's bylaws, routine matters must be conducted in regular meetings, not special meetings. It is for the ANC, not this office, to determine whether this particular matter is part of the "routine official business of the Commission."

⁶ *See* Lynne Truss, EATS, SHOOTS AND LEAVES 84 (Gotham Books 2004) ("There are people who embrace the Oxford comma and people who don't").

⁷ *Compare, e.g.*, Bylaws Art. II, Sec. 1 ("The Commission may advise the Council of the District of Columbia, the Mayor and each executive agency and all independent agencies, Boards and Commissions of the government of the

The more significant problem with reading this Article V phrase to allow the Chairperson to call a meeting without any request from Commissioners or residents, or allowing Commissioners or residents to call one without any involvement from the Chairperson, is that such a reading cannot be squared with the language of the provision. While this provision authorizes the Chairperson to *call* a special meeting, it states merely that the Commissioners may *request* a special meeting, and residents may *petition* for one. Moreover, this request from Commissioners or residents is an essential ingredient of a special meeting. Article V states that “[n]o matter shall be considered at any special meeting except those stated in *the request and notification*” (emphasis added). This language presupposes that a special meeting cannot be called unless someone requests one, which means that the Chairperson cannot call a special meeting unless there has been a request for one.

While Article V does not leave room for the Chairperson to unilaterally call a special meeting, the Chairperson’s letter suggests that the provision in Article IV that empowers the Chairperson to call a special meeting is a separate provision that independently gives the Chairperson that power. That reading, however, would violate fundamental principles of interpretation established by Robert’s Rules:

If the bylaws authorize certain things specifically, other things of the same class are thereby prohibited. There is a presumption that nothing has been placed in the bylaws without some reason for it. There can be no valid reason for authorizing certain things to be done without the authorization of the bylaws, unless the intent is to specify the things of the same class that may be done, all others being prohibited.⁸

Following these principles, we must presume that the procedural requirements in Article V have been placed in the Bylaws for a reason. But if Article IV really was a separate, independent grant of authority, and meant that the Chairperson could call a special meeting without following the procedural requirements of Article V, there would be no reason for Article V to establish those requirements because the Chairperson could always bypass them. The only plausible reading of the Article IV and Article V special-meeting provisions is that they are not separate; they work together. Article IV establishes the basic premise that the Chairperson may call special meetings and Article V fills in the details about how a special meeting may be called, what matters may be considered at a special meeting, and what meeting procedures a special meeting must observe. Accordingly, a Chairperson cannot rely on Article IV to avoid meeting the procedural requirements set forth in Article V, including the requirement to secure either a written request from two Commissioners or a written petition from ten residents.

The Chairperson’s letter suggests that the plain-language reading of Articles IV and V described above would, paradoxically, strengthen the Chairperson, because a Chairperson could always prevent a special meeting from being called by refusing to call one. While we appreciate the importance of maintaining effective checks and balances, that valuable policy does not empower

District”) (not using the Oxford comma) *with id.* Art. II, Sec. 3 (The ANC may “initiate its own proposals for neighborhood, District, regional, or federal government action”) (using the Oxford comma).

⁸ Robert’s Rules, *supra* n.3, at 589 ln. 33 – 590 ln. 5 (original italics omitted).


us to read into the bylaws language that is not there. Moreover, there is at least one prominent circumstance in which the Chairperson cannot refuse to call a special meeting. Echoing the ANC Act, Article IV, Section 6 of the ANC's Bylaws states (emphasis added) that a special Commission meeting to remove an officer "*shall* be called if at least one-half of the elected Commissioners request in writing that the Chairperson take such action."⁹

The Chairperson's letter also suggests that some special meetings have either been convened unilaterally by ANC 3D Chairpersons or have been convened by someone other than the Chairperson, and it maintains that our reading of the bylaws would automatically invalidate any actions taken in such a meeting. Even assuming that those past actions were taken under bylaw provisions similar to the present bylaws, it might be possible for the ANC to ratify some of those prior actions by a simple majority vote. We would be happy to address any questions you have on that point.

If you have any questions, please contact Josh Turner, Assistant Attorney General, at 442-9834, or Janet M. Robins, Deputy Attorney General, Legal Counsel Division, at 724-5524.

Sincerely,

KARL A. RACINE
Attorney General for the District of Columbia

By: 
JOSHUA TURNER
Assistant Attorney General
Legal Counsel Division

(AL-16-308)

⁹ See D.C. Official Code § 1-309.11(e)(2)(B) (2012 Repl.) (a "special meeting to remove an officer shall be called if at least one-half of the elected Commissioners request in writing that the Chairperson take such action").



GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADVISORY NEIGHBORHOOD COMMISSION 3D

PO Box 40486, Palisades Station

Washington, DC 20016

***PALISADES – KENT - SPRING VALLEY - WESLEY HEIGHTS - NEW MEXICO/CATHEDRAL –
THE AMERICAN UNIVERSITY - FOXHALL VILLAGE -BERKELEY***

May 5, 2016

The Honorable Karl Racine
Attorney General
District of Columbia
Office of the Attorney General
441 4th Street NW
Washington, D.C. 20001

Re: May 2 Request for Opinion Letter From ANC 3D Commissioners

Dear Attorney General Racine:

This is in response to a letter sent to your office on May 2, 2016 from ANC 3D Commissioners William Spence Spencer, Stephen K. Gardner, and Stuart Phillip Ross seeking an Opinion Letter on whether a special meeting convened by ANC 3D on April 25, 2016 was held in accordance with ANC 3D's By Laws. I am writing this letter to the Office of Attorney General (OAG) because the opinions cited in the May 2 letter, if they might prevail, would have the effect of expanding the authority of the ANC Chair beyond that anticipated in the relevant sections of the bylaws, and in so doing, disenfranchise ANC Commissioners and pose a danger to the ability of the ANC to meet its responsibilities under District statute.

The May 2 letter from Commissioners Spencer, Gardner, and Ross includes background information that is embellished, distorted, and mostly erroneous – but that is also largely irrelevant to the OAG's review of the issues.

At the heart of this matter is an interpretation of ANC 3D's By Laws as to whether the ANC 3D Chair had the authority to convene a special meeting of the ANC to consider an application for historic landmark status of the Palisades Playground and Field House.

Why Was The Special Meeting Convened?

The decision to convene a special meeting was prompted initially by an April 4 e-mail from Commissioner Gardner informing me that the application for historic designation of the

Palisades Playground and Field House was proving to be “extremely controversial” in the community. I followed up by reviewing the Palisades neighborhood list serve where I learned that Commissioners Gardner and Spencer had posted separate messages encouraging residents to attend the scheduled April 6 ANC meeting to express their views on the subject – both pro and con – and also outlining their positions in opposition to the application. (Until reviewing that post, I was not aware that any Commissioner had publicly opposed the application.)

Combined with an increased amount of email traffic to the ANC on the issue in the days leading up to the April 4 Gardner e-mail, I was concerned that the ANC’s April 6 agenda timeline and caseload might not provide adequate time for the ANC to hear from residents fully about the Palisades Playground and Field House application and to deliberate on the issue. I was also concerned that an extended discussion of the case at the April 6 meeting would push other agenda items until late into the evening and risk losing a quorum for those items, especially given that two Commissioners had indicated they would not be able to attend the April 6 meeting. Most of these other items required the ANC to take action on April 6 to meet agency deadlines for ANC recommendations. The Palisades Playground and Field House case was not as time sensitive because the agency hearing was not until April 28.

Although the April 6 agenda had been circulated for input and feedback to the Commissioners prior to it being finalized and publicly noticed, no Commissioner had indicated until April 4 that the Playground and Field House issue might prove to be so controversial as to require a significant block of time to hear residents’ views and for the ANC to deliberate.

After consulting with the ANC 3D Vice Chair (Commissioner Michael Gold), the Secretary (Commissioner Alma Gates), and two other Commissioners (Commissioners Nan Wells and Conrad DeWitte), I decided that the public interest would be best served if the ANC convened a special meeting to consider the issue later in the month. (Note: The Palisades Playground and Field House, which was the subject of the case, was located in the ANC Secretary’s Single Member District.) Consistent with the specific authority provided to the Chair under the ANC 3D By Laws, I informed all the Commissioners of the decision and provided them with a set of alternative meeting dates for a special meeting. It was at that point – only after the decision had been made to convene a special meeting – that Commissioner Spencer informed me that he would be leaving on April 7 for a business trip to Iraq and would not be returning until later in the month. Commissioner Spencer objected in the email to convening a special meeting on the basis that it would be too late to notify residents who were planning to attend the April 6 meeting. At no time did he question the authority of the Chair to convene a special meeting.

The special meeting was scheduled on a date (April 25) when the most Commissioners could attend; eight of nine Commissioners indicated they would attend a special meeting on April 25. Only Commissioner Spencer would be unable to attend. The meeting was publicly noticed; all efforts were made to inform the Palisades neighborhood that the issue would be taken up at the special meeting on April 25 instead of April 6. I made a commitment that any resident who attended the April 6 meeting and wanted to discuss the Palisades Playground and Field House issue would be able to do so. The Commission’s public outreach proved effective as no resident attended the April 6 meeting for purposes of discussing the Palisades Playground and Field House historic landmark designation application.

Although Commissioner Spencer continued to express his displeasure at the April 6 meeting that he would be unable to attend the special meeting, no objection to convening the special meeting was made. No Commissioner raised the Palisades Playground and Field House issue for discussion at the April 6 meeting. Likewise, no objection was made that the Chair did not have the authority under the By Laws to convene a special meeting.

In fact, the issue of the Chair's authority to convene a special meeting was not raised until a Point of Order was made by Commissioner Gardner at the beginning of the April 25 public meeting.

The April 25 special meeting included approximately two hours of discussion by residents and the Commissioners about the issues related to the case. Although some residents and Commissioners may have been unhappy with the Commission's narrow 4-3 vote in support of the application for historic designation of the Palisades Playground and Field House, no resident or Commissioner could reasonably complain that they did not have the opportunity to express their views on the subject. This validated the decision to convene the special meeting.

Established practices were followed when convening the April 25 special meeting.

The April 25 Special Meeting was not the first special meeting ever convened by ANC 3D. Since 2011 (the beginning date for records on the ANC's web site), ANC 3D has had six special meetings, including the April 25 special meeting. (Additional special meetings were held prior to 2011, but require more research effort to include in this letter.) Five of the six special meetings convened since 2011 were convened by the Chair:

- February 7, 2011 to consider a Campus Plan zoning issue;
- April 25, 2011 to consider a Campus Plan zoning issue;
- December 18, 2014 to consider the hiring of a new ANC Administrator;
- April 9, 2015 to consider a case related to historic designation; and
- April 25, 2016 to consider a case related to historic designation.

A sixth special meeting was convened August 1, 2013 at the written request of two Commissioners, in accordance with Article V. Section 3B of the ANC's By Laws, when the Chair at that time (Commissioner Penny Pagano) refused to include the matter of interest as part of the agenda of a regular meeting or to convene a special meeting to consider the issue (a sewer system rehabilitation project).

(The bylaws interpretation advanced by Commissioners Spencer, Gardner, and Ross would have precluded convening the August 1, 2013 special meeting.)

Commissioners Spencer and Gardner, who joined the Commission beginning in January 2015, did not object to the April 9, 2015 Special Meeting convened by the Chair or question the authority of the Chair under the By Laws to convene such a meeting. Commissioner Ross, who has served on the ANC for approximately nine years, has never objected or challenged the

authority of the Chair to convene a special meeting during his tenure on the Commission – until now.

Why is the April 25, 2016 special meeting unlike other special meetings convened by ANC 3D?

The letter from Commissioners Spencer, Gardner, and Ross is illustrative pointing to the Commissioners’ opposition to the application for historic designation of the Palisades Playground and Field House – a view that – when the final vote was taken by ANC 3D – was not shared by the majority of the ANC.

The Commissioners’ letter manufactures a conspiracy of circumstances to suggest scheduling a special meeting was an attempt to predetermine the outcome of action taken by ANC 3D. The Commissioners allege that the outcome of the ANC’s action would have been different if the special meeting was not convened. Yet, they also acknowledge in their letter that only four of nine Commissioners had taken a public position on the case in advance of the decision to convene a special meeting – the three of them in opposition to the application and one Commissioner (Commissioner Gates) in support. This left five of the nine Commissioners, including the ANC Chair, undecided at the time the decision was made to convene a special meeting – more than enough potential votes for the three Commissioners and the public to influence.

In making a Point of Order at the April 25 meeting challenging the authority of the Chair to convene a special meeting (and now subsequently seeking an Opinion from the OAG), the three Commissioners have taken a position that (1) misinterprets the clear intent of the By Laws as reflected in the history of the ANC’s practices over many years to achieve their objectives; (2) is intended to disrupt the ability of the ANC to meet its responsibilities to the public, as outlined in DC statute; and (3) seeks to thwart the will of the ANC’s majority.

The intent of the By Laws is very clear.

Article IV. Section 7 of the ANC By Laws outlines the duties of the chair and is very clear in stating the following:

“The Chairperson shall serve as the convener of the Commission and shall chair the Commission meetings. In addition, the Chairperson shall have the power to call special meetings of the Commission.”

However, Commissioners Spencer, Gardner, and Ross have resorted to an exercise in specious legal acrobatics and grammar contortion – that have no basis in fact, past practice, or logic – to argue that Article V. Section 3 B. imposes a requirement that the Chairperson first obtain “written request of (2) Commissioners” before convening a special meeting. They argue that – absent such a limit – the ANC would “invite abuse and manipulation.”

Article V. Section 7 imposes no limits on the ability of the Chair to convene a special meeting. However, no meeting can take place in the absence of a quorum. The quorum requirement in

Robert's Rules has the effect of preventing the type of "abuse and manipulation" that the Commissioners reference in their letter. If a majority of Commissioners believe that a special meeting is the product of "abuse and manipulation," they can simply choose not to attend. There is no more powerful check on the authority of the Chair.

Article V, Section 3B has been written carefully and judiciously to protect the Commission against the abusive and heavy-handed tactics of a Chair. The three Commissioners' interpretation of the provision would significantly alter such existing checks and balances within the ANC. Article V, Section 3B outlines three ways for a special meeting to be convened: (1) the Chair can convene a special meeting; (2) two Commissioners can submit a written request to convene a special meeting; and (3) a special meeting can be convened at the request of 10 residents in the ANC area.

By making it possible for a minority of Commissioners to convene a special meeting without the support or involvement of the Chair, the By Laws provide a check on the authority of the Chair and enable Commissioners to bring forward issues when the Chair refuses. In fact, this provision was used by ANC 3D Commissioners in August 2013 when the Chair refused to take up an item of interest to members of the Commission. This provision ensures that all Commissioners can fully participate in the business of the ANC and bring forward issues to the Commission for action.

Commissioners Spencer, Gardner, and Ross simply ignore how significant this provision is to ensure that no Commissioner is disenfranchised. Instead, they would place even more authority in the Chair and enhance the ability of a Chair to function as a gatekeeper on the issues to be considered by the full ANC – all seemingly for the purpose of invalidating a meeting that produced an outcome with which they disagreed. The right of Commissioners to convene a special meeting without regard to the authority of the Chair is important and should not be so cavalierly dismissed, especially when past practice has demonstrated its effectiveness as a check on the authority of the Chair.

The By Laws are equally clear in stating that a special meeting is limited to the agenda items either posted in the public "notification" of the special meeting or in the "request" for a special meeting made by two Commissioners or the ten residents. To suggest that this language in Article V, Section 3B of the ANC's By Laws conveys a limit on the Chair's authority to convene a special meeting is simply inconsistent with the clear language outlined in Article IV, Section 7 and the long-standing history and past practices of the ANC.

The three Commissioners also suggest in their letter that the special meeting was not appropriate because the business of the special meeting was "routine" and that "routine" matters can only be conducted at regular meetings of the Commission. There is simply no basis in fact or reason for this argument and it seems to reflect a fundamental lack of understanding of how an ANC operates and a failure to appreciate the volume of work required of an ANC and its elected Commissioners.

The ANC is required each January to approve a list of meeting dates for the year. However, the ANC is not restricted by DC statute or the ANC 3D By Laws from holding additional meetings

should the case load require it. There is nothing to prevent the ANC from convening additional meetings whether they are labeled as “additional” meetings or “special” meetings. Neither the By Laws nor statute makes a distinction between what is “routine” business to be taken up only at “routine” meetings and what business may be taken up at a special meeting. Given the broad mandate outlined in statute for ANCs, any action taken up by a Commission becomes, in effect, the “routine” business of the ANC. In short, Commissioners Spencer, Gardner, and Ross are relying on distinctions that have no basis in statute, the bylaws, or common sense and reflect a fundamental and stunning lack of understanding of ANC case management.

In a recent Opinion issued by the OAG in response to a request from Commissioner Gardner concerning the ANC 3D By Laws (related to the ANC’s authority to disband Committees), the OAG indicated that the ANC was in the position to interpret its By Laws even when those bylaws were considered ambiguous. In this case, the By Laws are not ambiguous. The special meeting provisions have proven over time to be effective and clear, but, in this case, inconvenient for Commissioners whose views on a case before the ANC were not in agreement with the majority.

Taken collectively, the arguments advanced by the three Commissioners in their letter requesting an Opinion from the OAG do not suggest that the ANC’s By Laws are inconsistent and in need of a third-party to interpret their meaning. Rather, their arguments showcase how Commissioners Spencer, Gardner, and Ross are choosing to misinterpret and misrepresent the clear intent of the By Laws to achieve other objectives tied to their views of the Palisades Playground and Field House historic designation case and their failure to win a majority of support from their colleagues on the ANC for their position in opposition to the application for historic designation.

Please feel free to contact me for any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Tom Smith".

Thomas M. Smith
Chair, ANC 3D

cc: Joshua Turner
Gottlieb Simon



GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADVISORY NEIGHBORHOOD COMMISSION 3D

PO Box 40486, Palisades Station

Washington, DC 20016

***PALISADES – KENT - SPRING VALLEY - WESLEY HEIGHTS - NEW MEXICO/CATHEDRAL –
THE AMERICAN UNIVERSITY - FOXHALL VILLAGE -BERKELEY***

May 5, 2016

The Honorable Karl Racine
Attorney General
District of Columbia
Office of the Attorney General
441 4th Street NW
Washington, D.C. 20001

Re: May 2 Request for Opinion Letter From ANC 3D Commissioners

Dear Attorney General Racine:

This is in response to a letter sent to your office on May 2, 2016 from ANC 3D Commissioners William Spence Spencer, Stephen K. Gardner, and Stuart Phillip Ross seeking an Opinion Letter on whether a special meeting convened by ANC 3D on April 25, 2016 was held in accordance with ANC 3D's By Laws. I am writing this letter to the Office of Attorney General (OAG) because the opinions cited in the May 2 letter, if they might prevail, would have the effect of expanding the authority of the ANC Chair beyond that anticipated in the relevant sections of the bylaws, and in so doing, disenfranchise ANC Commissioners and pose a danger to the ability of the ANC to meet its responsibilities under District statute.

The May 2 letter from Commissioners Spencer, Gardner, and Ross includes background information that is embellished, distorted, and mostly erroneous – but that is also largely irrelevant to the OAG's review of the issues.

At the heart of this matter is an interpretation of ANC 3D's By Laws as to whether the ANC 3D Chair had the authority to convene a special meeting of the ANC to consider an application for historic landmark status of the Palisades Playground and Field House.

Why Was The Special Meeting Convened?

The decision to convene a special meeting was prompted initially by an April 4 e-mail from Commissioner Gardner informing me that the application for historic designation of the

Palisades Playground and Field House was proving to be “extremely controversial” in the community. I followed up by reviewing the Palisades neighborhood list serve where I learned that Commissioners Gardner and Spencer had posted separate messages encouraging residents to attend the scheduled April 6 ANC meeting to express their views on the subject – both pro and con – and also outlining their positions in opposition to the application. (Until reviewing that post, I was not aware that any Commissioner had publicly opposed the application.)

Combined with an increased amount of email traffic to the ANC on the issue in the days leading up to the April 4 Gardner e-mail, I was concerned that the ANC’s April 6 agenda timeline and caseload might not provide adequate time for the ANC to hear from residents fully about the Palisades Playground and Field House application and to deliberate on the issue. I was also concerned that an extended discussion of the case at the April 6 meeting would push other agenda items until late into the evening and risk losing a quorum for those items, especially given that two Commissioners had indicated they would not be able to attend the April 6 meeting. Most of these other items required the ANC to take action on April 6 to meet agency deadlines for ANC recommendations. The Palisades Playground and Field House case was not as time sensitive because the agency hearing was not until April 28.

Although the April 6 agenda had been circulated for input and feedback to the Commissioners prior to it being finalized and publicly noticed, no Commissioner had indicated until April 4 that the Playground and Field House issue might prove to be so controversial as to require a significant block of time to hear residents’ views and for the ANC to deliberate.

After consulting with the ANC 3D Vice Chair (Commissioner Michael Gold), the Secretary (Commissioner Alma Gates), and two other Commissioners (Commissioners Nan Wells and Conrad DeWitte), I decided that the public interest would be best served if the ANC convened a special meeting to consider the issue later in the month. (Note: The Palisades Playground and Field House, which was the subject of the case, was located in the ANC Secretary’s Single Member District.) Consistent with the specific authority provided to the Chair under the ANC 3D By Laws, I informed all the Commissioners of the decision and provided them with a set of alternative meeting dates for a special meeting. It was at that point – only after the decision had been made to convene a special meeting – that Commissioner Spencer informed me that he would be leaving on April 7 for a business trip to Iraq and would not be returning until later in the month. Commissioner Spencer objected in the email to convening a special meeting on the basis that it would be too late to notify residents who were planning to attend the April 6 meeting. At no time did he question the authority of the Chair to convene a special meeting.

The special meeting was scheduled on a date (April 25) when the most Commissioners could attend; eight of nine Commissioners indicated they would attend a special meeting on April 25. Only Commissioner Spencer would be unable to attend. The meeting was publicly noticed; all efforts were made to inform the Palisades neighborhood that the issue would be taken up at the special meeting on April 25 instead of April 6. I made a commitment that any resident who attended the April 6 meeting and wanted to discuss the Palisades Playground and Field House issue would be able to do so. The Commission’s public outreach proved effective as no resident attended the April 6 meeting for purposes of discussing the Palisades Playground and Field House historic landmark designation application.

Although Commissioner Spencer continued to express his displeasure at the April 6 meeting that he would be unable to attend the special meeting, no objection to convening the special meeting was made. No Commissioner raised the Palisades Playground and Field House issue for discussion at the April 6 meeting. Likewise, no objection was made that the Chair did not have the authority under the By Laws to convene a special meeting.

In fact, the issue of the Chair's authority to convene a special meeting was not raised until a Point of Order was made by Commissioner Gardner at the beginning of the April 25 public meeting.

The April 25 special meeting included approximately two hours of discussion by residents and the Commissioners about the issues related to the case. Although some residents and Commissioners may have been unhappy with the Commission's narrow 4-3 vote in support of the application for historic designation of the Palisades Playground and Field House, no resident or Commissioner could reasonably complain that they did not have the opportunity to express their views on the subject. This validated the decision to convene the special meeting.

Established practices were followed when convening the April 25 special meeting.

The April 25 Special Meeting was not the first special meeting ever convened by ANC 3D. Since 2011 (the beginning date for records on the ANC's web site), ANC 3D has had six special meetings, including the April 25 special meeting. (Additional special meetings were held prior to 2011, but require more research effort to include in this letter.) Five of the six special meetings convened since 2011 were convened by the Chair:

- February 7, 2011 to consider a Campus Plan zoning issue;
- April 25, 2011 to consider a Campus Plan zoning issue;
- December 18, 2014 to consider the hiring of a new ANC Administrator;
- April 9, 2015 to consider a case related to historic designation; and
- April 25, 2016 to consider a case related to historic designation.

A sixth special meeting was convened August 1, 2013 at the written request of two Commissioners, in accordance with Article V. Section 3B of the ANC's By Laws, when the Chair at that time (Commissioner Penny Pagano) refused to include the matter of interest as part of the agenda of a regular meeting or to convene a special meeting to consider the issue (a sewer system rehabilitation project).

(The bylaws interpretation advanced by Commissioners Spencer, Gardner, and Ross would have precluded convening the August 1, 2013 special meeting.)

Commissioners Spencer and Gardner, who joined the Commission beginning in January 2015, did not object to the April 9, 2015 Special Meeting convened by the Chair or question the authority of the Chair under the By Laws to convene such a meeting. Commissioner Ross, who has served on the ANC for approximately nine years, has never objected or challenged the

authority of the Chair to convene a special meeting during his tenure on the Commission – until now.

Why is the April 25, 2016 special meeting unlike other special meetings convened by ANC 3D?

The letter from Commissioners Spencer, Gardner, and Ross is illustrative pointing to the Commissioners’ opposition to the application for historic designation of the Palisades Playground and Field House – a view that – when the final vote was taken by ANC 3D – was not shared by the majority of the ANC.

The Commissioners’ letter manufactures a conspiracy of circumstances to suggest scheduling a special meeting was an attempt to predetermine the outcome of action taken by ANC 3D. The Commissioners allege that the outcome of the ANC’s action would have been different if the special meeting was not convened. Yet, they also acknowledge in their letter that only four of nine Commissioners had taken a public position on the case in advance of the decision to convene a special meeting – the three of them in opposition to the application and one Commissioner (Commissioner Gates) in support. This left five of the nine Commissioners, including the ANC Chair, undecided at the time the decision was made to convene a special meeting – more than enough potential votes for the three Commissioners and the public to influence.

In making a Point of Order at the April 25 meeting challenging the authority of the Chair to convene a special meeting (and now subsequently seeking an Opinion from the OAG), the three Commissioners have taken a position that (1) misinterprets the clear intent of the By Laws as reflected in the history of the ANC’s practices over many years to achieve their objectives; (2) is intended to disrupt the ability of the ANC to meet its responsibilities to the public, as outlined in DC statute; and (3) seeks to thwart the will of the ANC’s majority.

The intent of the By Laws is very clear.

Article IV. Section 7 of the ANC By Laws outlines the duties of the chair and is very clear in stating the following:

“The Chairperson shall serve as the convener of the Commission and shall chair the Commission meetings. In addition, the Chairperson shall have the power to call special meetings of the Commission.”

However, Commissioners Spencer, Gardner, and Ross have resorted to an exercise in specious legal acrobatics and grammar contortion – that have no basis in fact, past practice, or logic – to argue that Article V. Section 3 B. imposes a requirement that the Chairperson first obtain “written request of (2) Commissioners” before convening a special meeting. They argue that – absent such a limit – the ANC would “invite abuse and manipulation.”

Article V. Section 7 imposes no limits on the ability of the Chair to convene a special meeting. However, no meeting can take place in the absence of a quorum. The quorum requirement in

Robert's Rules has the effect of preventing the type of "abuse and manipulation" that the Commissioners reference in their letter. If a majority of Commissioners believe that a special meeting is the product of "abuse and manipulation," they can simply choose not to attend. There is no more powerful check on the authority of the Chair.

Article V, Section 3B has been written carefully and judiciously to protect the Commission against the abusive and heavy-handed tactics of a Chair. The three Commissioners' interpretation of the provision would significantly alter such existing checks and balances within the ANC. Article V, Section 3B outlines three ways for a special meeting to be convened: (1) the Chair can convene a special meeting; (2) two Commissioners can submit a written request to convene a special meeting; and (3) a special meeting can be convened at the request of 10 residents in the ANC area.

By making it possible for a minority of Commissioners to convene a special meeting without the support or involvement of the Chair, the By Laws provide a check on the authority of the Chair and enable Commissioners to bring forward issues when the Chair refuses. In fact, this provision was used by ANC 3D Commissioners in August 2013 when the Chair refused to take up an item of interest to members of the Commission. This provision ensures that all Commissioners can fully participate in the business of the ANC and bring forward issues to the Commission for action.

Commissioners Spencer, Gardner, and Ross simply ignore how significant this provision is to ensure that no Commissioner is disenfranchised. Instead, they would place even more authority in the Chair and enhance the ability of a Chair to function as a gatekeeper on the issues to be considered by the full ANC – all seemingly for the purpose of invalidating a meeting that produced an outcome with which they disagreed. The right of Commissioners to convene a special meeting without regard to the authority of the Chair is important and should not be so cavalierly dismissed, especially when past practice has demonstrated its effectiveness as a check on the authority of the Chair.

The By Laws are equally clear in stating that a special meeting is limited to the agenda items either posted in the public "notification" of the special meeting or in the "request" for a special meeting made by two Commissioners or the ten residents. To suggest that this language in Article V, Section 3B of the ANC's By Laws conveys a limit on the Chair's authority to convene a special meeting is simply inconsistent with the clear language outlined in Article IV, Section 7 and the long-standing history and past practices of the ANC.

The three Commissioners also suggest in their letter that the special meeting was not appropriate because the business of the special meeting was "routine" and that "routine" matters can only be conducted at regular meetings of the Commission. There is simply no basis in fact or reason for this argument and it seems to reflect a fundamental lack of understanding of how an ANC operates and a failure to appreciate the volume of work required of an ANC and its elected Commissioners.

The ANC is required each January to approve a list of meeting dates for the year. However, the ANC is not restricted by DC statute or the ANC 3D By Laws from holding additional meetings

should the case load require it. There is nothing to prevent the ANC from convening additional meetings whether they are labeled as “additional” meetings or “special” meetings. Neither the By Laws nor statute makes a distinction between what is “routine” business to be taken up only at “routine” meetings and what business may be taken up at a special meeting. Given the broad mandate outlined in statute for ANCs, any action taken up by a Commission becomes, in effect, the “routine” business of the ANC. In short, Commissioners Spencer, Gardner, and Ross are relying on distinctions that have no basis in statute, the bylaws, or common sense and reflect a fundamental and stunning lack of understanding of ANC case management.

In a recent Opinion issued by the OAG in response to a request from Commissioner Gardner concerning the ANC 3D By Laws (related to the ANC’s authority to disband Committees), the OAG indicated that the ANC was in the position to interpret its By Laws even when those bylaws were considered ambiguous. In this case, the By Laws are not ambiguous. The special meeting provisions have proven over time to be effective and clear, but, in this case, inconvenient for Commissioners whose views on a case before the ANC were not in agreement with the majority.

Taken collectively, the arguments advanced by the three Commissioners in their letter requesting an Opinion from the OAG do not suggest that the ANC’s By Laws are inconsistent and in need of a third-party to interpret their meaning. Rather, their arguments showcase how Commissioners Spencer, Gardner, and Ross are choosing to misinterpret and misrepresent the clear intent of the By Laws to achieve other objectives tied to their views of the Palisades Playground and Field House historic designation case and their failure to win a majority of support from their colleagues on the ANC for their position in opposition to the application for historic designation.

Please feel free to contact me for any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Tom Smith".

Thomas M. Smith
Chair, ANC 3D

cc: Joshua Turner
Gottlieb Simon