GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Legal Counsel Division

MEMORANDUM

To: **Kenneth B. Campbell**
General Counsel
Department of Health

From: **Wayne C. Witkowski**
Deputy Corporation Counsel
Legal Counsel Division

Date: **April 23, 2004**

Subject: **Legal Advice Regarding Whether D.C. Official Code §§ 1-207.38(d) and 1-309.10(c)(1) Require Special Notice of Issuance of Asbestos Abatement Permits**
(AL-04-236)

This responds to your request of April 8, 2004, in which you request legal advice concerning whether D.C. Official Code §§ 1-207.38(d) and 1-309.10(c)(1) (2001) require special notice be given to Advisory Neighborhood Commissions (ANCs) of the issuance of asbestos abatement permits. You advise that such permits do not require a hearing or any formal approval process, other than providing proof of licensure as an asbestos abatement business, before they are issued. On April 1, 2004, Rudolf L. Schreiber, Sr., Attorney Advisor, drafted a memorandum on this subject, which subsequently was provided to this Office. For the reasons that follow, we agree with Mr. Schreiber's conclusion that special notice is not required.

The two subject notice provisions concerning ANCs are codified at D.C. Official Code §§ 1-207.38(d) and 1-309.10(c)(1) (2001). The first, § 1-207.38(d) (2001)[1], states:

> (d) In the manner provided by act of the Council, in addition to any other notice required by law, timely notices shall be given to each Advisory Neighborhood Commission of requested or proposed zoning changes, variances, public improvements, licenses, or **permits of significance to**

[1] Section 738(d) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 777.

> **neighborhood planning and development within its neighborhood commission area** for its review, comment, and recommendation.

The second notice provision is set forth at § 1-309.10(c)(1) (2001)[2] and provides, in pertinent part:

> (c)(1) Proposed District government actions covered by this part shall include . . . actions of the Council of the District of Columbia, the executive branch . . . boards, and commissions. . . [E]ach agency, board and commission shall . . . before the formulation of any final policy decision or guideline with respect to . . . permits affecting said Commission area . . . provide to each affected Commission notice of the proposed action as required by subsection (b) of this section.

The subsection (b) notice referred to above, commonly referred to as "special notice," is set forth in D.C. Official Code § 1-309.10(b), which states pertinently:

> (b) 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 . . .

The District of Columbia Court of Appeals interpreted these provisions as a matter of first impression in *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372 (D.C. 1977), a case involving the issuance of a liquor license to a D.C. restaurant. There, members of the ANC sought review of a decision by the District of Columbia Alcoholic Beverage Control Board ("Board") to issue the license alleging *inter alia* that the ANC did not receive the 30 day "special notice" of a rescheduled hearing on the application. The Court of Appeals broached the notice issue first by review of § 1-309.10(c)(1), which it concluded did not limit "special notice" to legislative-type matters (the statute states "policy decision[s] or guideline[s]"), as this Office had previously opined. *Kopff* at 1381. Neither, was the Court willing to interpret the statute so expansively as to include all items listed in § 1-309.10(c)(1) (i.e., permits, licenses, variances, zoning changes, etc.) as automatically requiring "special notice." *Id.* Instead, the Court focused on § 1-207.38(d), which it viewed as a limitation on when such special notice would be required. *Id.* It concluded that § 1-207.38(d) mandated such notice only where the action taken was one of "significance." *Id.* The Court, not wishing to create an inflexible standard for what would be considered significant, reversed the Board's ruling and held that "[a]t a minimum . . . every proposed governmental decision affecting neighborhood planning and development . . . for which a prior hearing is required by law is sufficiently significant to require written notice, pursuant to [§ 1-309.10(b)], to the affected ANC or ANCs." *Id.*

[2] Section 13(c)(1) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Duties and Responsibilities of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976, D.C. Law 1-58.

This somewhat expansive view of the notice requirements, however, was narrowed considerably by subsequent decisions. In *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 342-43 (D.C. 1988), *cert. denied*, 489 U.S. 1082 (1989), the Court rejected a due process argument that notice to the ANC was inadequate in a building permit matter, ruling that "ANCs are political subdivisions of the District of Columbia government and therefore do not receive due process protections under the Constitution against actions of the District of Columbia. The Court held that a general list of construction applications sent to the ANC, while not a "model of clarity," nonetheless satisfied the statutory notice requirements. *Id.*

Similarly, in *Neighbors on Upton St. v. District of Columbia Bd. Of Zoning Adjustment*, 697 A.2d 3 (D.C. 1997), the Court refused to extend the ANC special notice provisions to a supplemental submission in a zoning appeal matter. There, a music school, seeking a special exception from the Board of Zoning Adjustment for the non-conforming use of a structure in a residential area, was asked to revise and resubmit its traffic plan. The school did so, and the BZA granted the special exception soon thereafter. The appellant argued that the ANC had not been given special notice of the resubmission prior to the BZA granting the exception. In rejecting the appellant's notice argument, the Court stated: "[§ 1-309.10(b)] cannot reasonably be read as imposing a requirement on the BZA to allow an ANC (or anyone else) thirty days to respond to a supplemental submission in a zoning appeal." *Id.* at 10.

Finally, in 1993, the Court of Appeals addressed whether ANCs were entitled to special notice in a Public Service Commission rate increase case in *Office of the People's Counsel of the District of Columbia v. Public Service Commission of the District of Columbia*, 630 A.2d 692 (D.C. 1993). There, proponents of a special notice requirement argued that the rate increase hearing was an adjudicatory matter and, therefore, under *Kopff*, should trigger the special notice provision. The Court disagreed and, narrowly construing § 1-309.10(c)(1) (formerly § 1-261), concluded that even where adjudicatory proceedings are required, "ANCs are not entitled to special notice of an adjudicative proceeding unless the proceeding concerns a matter specifically listed in [§ 1-309.10(c)(1)]." *Id.* at 697. An application for or consideration of electric utility rate increases was not one of the listed items, and therefore special notice was not required.

Here, of course, there is no adjudicatory proceeding involved in the issuance of a permit for asbestos abatement. The approval process for an asbestos abatement permit merely requires: 1) proof of licensure pursuant to the Asbestos Licensing and Control Act of 1990, effective May 1, 1990, D.C. Law 8-116, as amended by the Asbestos Licensing and Control Act of 1990 Amendment Act of 1993, effective October 15, 1993, D.C. Law 10-37, D.C. Official Code 8-111.01 *et seq.* (2001); and 2) evidence of having completed a course of instruction on asbestos abatement accredited by the Environmental Protection Agency.[3] To be sure, the Court of Appeals left open the possibility in *Kopff* that there may still be matters of significance that require special notice even in the absence of

[3] 20 DCMR § 800.3.

required adjudicatory hearings.[4] Given, however, the direction of the Court in *Peoples Counsel of the District of Columbia* as well as the other cases discussed above, it appears unlikely that the Court would extend the special notice provision to a non-adjudicatory permit application process of the type here, which, even if deemed "significant" does not involve any "neighborhood planning and development," as in § 1-207.38(d). As a practical matter, there would be no benefit to the ANC if it were to receive special notice insofar as the requirements for obtaining a permit contain no discretionary elements. Accordingly, we conclude that no special notice is required to ANCs prior to issuance of an asbestos abatement permit pursuant to 20 DCMR 800.3.

WCW/dps

[4] The Court's *dicta* in *Kopff* is helpful: "While it is difficult to conceive of many matters, not requiring a hearing, which would be sufficiently significant to neighborhood planning and development to warrant special notice to an ANC, we do not wish categorically to exclude all such cases." *Id.* at 1381.