

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
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February 22, 2018

Holmes Whalen
Commissioner
Advisory Neighborhood Commission 3D
5131 Yuma Street NW
Washington, DC 20016

Alma H. Gates
Commissioner
Advisory Neighborhood Commission 3D
4911 Ashby Street NW
Washington, DC 20016

Re: Second Request for Advisory Opinion re Special Meeting

Commissioners Whalen and Gates:

You asked us for further explanation of this office's conclusion, expressed in a January 10, 2018 letter to Chairperson Stephen K. Gardner,¹ that ANC 3D's Bylaws do not require the ANC Chairperson to call a special meeting when two Commissioners or ten residents request one.² This letter supplies that explanation.

Ordinarily, our office does not interpret an ANC's bylaws. That responsibility belongs primarily to the relevant ANC,³ and internal disagreements about ANC bylaws should ordinarily be resolved through internal ANC deliberation. As explained in a November 10, 2016 letter ("2016 letter"), when the answer to a legal question presented to us hinges on what an ANC's bylaws

¹ This letter is available at <https://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/ANC%20Letter%20to%20Chairperson%20Gardner%20re%20Special%20Meetings--1-10-18.pdf> (last visited Jan. 24, 2018).

² We interpret your request as a request for clarification rather than reconsideration, particularly since none of the analysis in your letter identifies any ground for a conclusion that the Chairperson must call a special meeting whenever two Commissioners so request.

³ See Henry M. Robert III *et al.*, ROBERT'S RULES OF ORDER NEWLY REVISED ("Robert's Rules") 588 In. 25 (11th ed. 2011) ("[e]ach society decides for itself the meaning of its bylaws"); D.C. Official Code § 1-309.11(e)(3) ("Where not otherwise provided, the procedures of the Commission shall be governed by Robert's Rules of Order").

mean, we will not decide that question unless the bylaws unambiguously resolve it.⁴ In the 2016 letter, OAG considered whether the Chairperson of ANC 3D could call a special meeting without a request from two Commissioners or a petition from ten residents,⁵ and concluded that the answer to that question depended on which of two reasonable Bylaw interpretations was right,⁶ which meant that the question was “for ANC3D, not this office,” to decide.⁷ OAG also recommended “that the Commission consider amending [the Bylaws] to avoid unnecessary uncertainty.”⁸

The January 10, 2018 letter you have asked us to clarify built on the 2016 letter. Our January 10 letter considered both of the reasonable interpretations described in the 2016 letter and concluded that, under either interpretation, a request from two Commissioners plainly does not obligate the Chairperson to call a special meeting.⁹

The applicable Bylaw provision is Article V, Section 3(B), which states that:

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

As the 2016 letter explained, one possible reading of this language is that only the Chairperson may call a special meeting, but he or she cannot call one without a “written request of two (2) Commissioners” or a “petition of ten (10) residents.”¹⁰ Another possible reading is that a special meeting “may be called” by the Chairperson, but alternatively “may be called” by request of two Commissioners or petition of ten residents.¹¹ Under either reading, the Bylaws are clear that a special meeting “*may* be called” by the Chairperson. To say that the Chairperson “may” call a special meeting if requested is to say that the Chairperson has the discretion to choose to call one or not. As the Supreme Court observed just two years ago, the statement that a person “may” (as opposed to “shall”) do something “implies discretion,” not duty.¹² The D.C. Circuit explained this principle in *Anglers Conservation Network v. Pritzker*:

⁴ See Letter from Karl Racine, Attorney General, to Advisory Neighborhood Commission 3D Commissioners, Nov. 10, 2016, at 2-3, *available at* <https://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/to%20anc3d%20re%20bylaws%2011-10-16.pdf> (last visited Jan. 5, 2018).

⁵ See *id.* at 1.

⁶ See *id.* at 2-3.

⁷ *Id.*

⁸ *Id.* at 3.

⁹ Letter to Chairperson Stephen K. Gardner, *supra*, at 1-2.

¹⁰ 2016 Letter, *supra*, at 2.

¹¹ *Id.*

¹² *Kingdomware Techs. v. United States*, 136 S. Ct. 1969, 1977 (2016); see *Martin v. Franklin Capital Corp.*, 546 U.S., 546 U.S. 132, 136 (2005) (“the word ‘may’ clearly connotes discretion”) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994)).

The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive. Ordinarily, legislation using “shall” indicates a mandatory duty while a statute using “may” grants discretion.¹³

Your ANC’s Bylaws follow this rule, as Article III, section 5 of the Bylaws illustrates. The mandatory part of that section uses the word “shall.” If a Commissioner is involved in organizations with business before the Commission, “he or she *shall* notify the Commission of this involvement and disclose his or her role in the matter” (emphasis added). The discretionary part of that section, on the other hand, uses the word “may.” A Commissioner “*may* voluntarily recuse himself or herself to avoid an actual or perceived conflict of interest, but recusal will not be required except in cases involving a direct financial interest” (emphasis added).

You ask what recourse fellow Commissioners would have if the Chairperson declines to call a special meeting. It depends on which Bylaws interpretation your ANC adopts. If the ANC concludes that only the Chairperson may call a special meeting, Commissioners’ only recourse would be to remove the Chairperson. If it concludes that a special meeting may be called by Commissioner or resident request, however, Commissioners are free to call a special meeting themselves.¹⁴

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,

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By: 
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¹³ 809 F.3d 664, 671 (D.C. Cir. 2016) (emphasis in original) (internal citations omitted); see COUNCIL OF THE DIST. OF COLUMBIA: LEGISLATIVE DRAFTING MANUAL (2015 ed.), at 75, available at [http://dccouncil.us/files/user_uploads/event_testimony/Legislative%20Drafting%20Manual%20-%202015%20Edition\(1\).pdf](http://dccouncil.us/files/user_uploads/event_testimony/Legislative%20Drafting%20Manual%20-%202015%20Edition(1).pdf) (last visited Jan. 24, 2018) (In legislation, “shall” should be used “to express a duty, obligation, or requirement,” and “may” should be used “to express a power, privilege, or right”)

¹⁴ You also ask how a meeting called by Commissioner request, or resident petition, would work. Like any other ANC meeting, it would need to be noticed and convened in a manner consistent with the Bylaws and the ANC statute. For example, the meeting could not take place unless a majority of the Commission attended and any necessary ANC officers were present. See D.C. Official Code § 1-309.11(b)(1) (Commission cannot take official action without a majority present); *id.* § 1-309.11(e)(1) (describing officer roles). The Chairperson, or in the Chair’s absence the Vice-Chairperson, would serve as the convener and chair the meeting. See *id.* § 1-309.11(e)(1). Logistical concerns about how such a meeting would operate may inform how the ANC interprets its Bylaws, and should be raised and discussed within the ANC.