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IN REPLY REFER TO:

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April 28. 1988

Valerie Costelloe
3003 Van Ness street, N.W.
Washington, D.C. 20008

Re: Propriety of secret balloting by ANC Commissioners at public meeting

Dear Ms. Costelloe:

This is in reply to your March 30, 1988 letter in which you ask the question whether it was proper for the Commissioners of Advisory Neighborhood Commission (ANC) 3-F, at its March 28, 1988 public meeting, to appoint by secret ballot a person to fill a vacancy on the ANC.·

D.C. Code § 1-257(d) (1987) deals with the subject of filling an ANC vacancy occurring between elections. Under D.C. Code § 1-257(d)(5){C) (1987), n[t)he Advisory Neighborhood Commission shall appoint, after a public hearing and any other efforts designed to elicit the preference of the voters of the affected single-member district, by majority vote of the remaining members, an individual.•. to fill the vacancy at its next regular meeting." And D.C. Code § 1-262(g) (1987) states that "[e)ach Commission shall be subject to the provisions of [D.C. Code) § 1-1504(a)," which provides:

> All meetings (including hearings) of any department, agency, board, or commission of the District government, including meetings of the Council of the District of Columbia, at which official action of any kind is taken shall be open to the pUblic. No resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at such meeting.

The above-quoted language is part of § 742 of the District of Columbia Self-Government and Governmental Reorganization Act, effective December 24, 1973, Pub. Law 93-198, 87 Stat. 831 ("Self-Government Act"). It was offered as an amendment by Congressman Young of Florida. In accepting the proposed amendment, Congressman Charles Diggs stated:

> Mr. Chairman, the gentleman from Florida has provided us with a copy of his amendment. It is in essence the "Sunshine Amendment" named after the State from which the gentleman comes. We already have a "Sunshine" concept in the bill as it applies to the proceedings of the city council. This extends it to cover other agencies under the proposed locally elected government.

Vol. 3, Home Rule for The District of Columbia 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills, 2404 (1976).

since the District's "Sunshine" law was introduced by a Florida Congressman and since its wording closely followed Florida's "Sunshine" law, Florida case law is relevant to ascertaining the intent of Congress in including § 742{a) in the Self-Government Act. In Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974), the Supreme Court of Florida stated in pertinent part:

> One purpose of the government in the sunshine law was to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. [Emphasis added.]

The fact that in the instant case the secret balloting occurred during a public meeting does not serve to satisfy the requirements of D.C. Code § l-1504{a), because implicit in § 1-1504{a) is the notion that the public, and in particular those who attend public meetings, have a-right to know the position 'of each member of the decision-making body on each question decided. cf. Town of Palm Beach v. Gradison, Sliora. Moreover, secret balloting by ANC Commissioners appears to be inconsistent with D.C. Code § 1-262(b) (1987), which provides in pertinent part that "[t]he Commissions shall establish such mechanisms as will ensure the broadest dissemination of information with respect to the Commission meetings, positions and actions" (emphasis added).

Finally, it should be noted that the time-honored right of secrecy enjoyed by a private citizen voting in political elections has no applicability to publicly elected officials (such as ANC Commissioners) when they vote in their official capacities on public questions before them, including the public question of who is best qualified to fill an interim ANC vacancy. ANC Commissioners, like other pUblicly elected officials, are accountable to their electorates, and secret voting on any question that comes before them in their official capactities is incompatible with the principle of public accountability of pUblicly elected officials.

In sum, assuming the correctness of the facts stated in your letter, the secret ballot procedure used by ANC 3-F at its March 28, 1988 public meeting to fill a Commission vacancy violated the District's Sunshine law, D.C. Code § 1-1504(a), (1987). The secret ballot procedure employed had the legal effect of ANC 3-F's taking the appointment action at a meeting which was not "open to the public," as required by D.C. Code § 1-1504(a).-- Therefore, by the terms of D.C. Code § 1-1504(a), the appointment action taken by ANC 3-F on March 28, 1988 cannot be regarded as "effective."

Sincerely,

Margaret L. Blnes

Margaret L. Blnes
Deputy Corporation Counsel, D.C.
Legal Counsel Division

cc: Kendall Valentine
Chairman, ANC 3-F