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March 11, 1992

The Honorable James E. Nathanson
Chairman
Committee on Government Operations
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Board of Elections and Ethics declaration
of vacancy in an Advisory Neighborhood
Commission single-member district

Dear Chairman Nathanson:

This is in reply to your December 24, 1991 letter in which you seek my opinion on two questions of law relating to the declaration of a vacancy in an Advisory Neighborhood Commission (ANC) single-member district by the District of Columbia Board of Elections and Ethics.

1. Declaration of Vacancy by D.C. Board of Elections and Ethics

Your first question is as follows:

[I]f the D.C. Board of Elections learns that a Commissioner has moved from the city and, therefore, is no longer eligible to vote in the District of Columbia, must the Board nevertheless wait for the appropriate ANC to declare the Commissioner's seat vacant?

In your letter you note that § 6(a) (1) (A) of the Advisory Neighborhood Councils Act of 1975 (the act), D.C. Code § 1-256(a) (1) (A) (1987), provides that "[n]o person shall be a member of an Advisory Neighborhood Commission unless he... [i]s a registered qualified elector actually residing in the single-member district from which he was elected." You also note that § 8(f) (2) of the act, D.C. Code § 1-257(f) (2) (1987 and 1991 supp.), "clearly states that when a vacancy occurs and no resignation letter has been sent to the Board, then the ANC must petition the Board to declare the vacancy." Also relevant to your inquiry are §§ 8(e) and 8(f) (1) of the act. Section 8(e),

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D.C. Code § 1-257(e) (1987), provides that "[a]ny member of an Advisory Neighborhood Commission who ceases to reside in the single-member district from which he or she is elected shall be considered to have resigned, and the office shall be declared vacant." And § 8(f) (1), D.C. Code § 1-257(f) (1) (1991 supp.), provides in pertinent part that an ANC Commissioner who resigns "shall submit a copy of the letter of resignation to... [t]he Board of Elections and Ethics.... The...Board of Elections and Ethics shall then declare the vacancy."

For the following reasons, it is my opinion that, in the absence of a letter of resignation from an ANC Commissioner, the Board of Elections and Ethics does not have the authority, sub sponte, to declare that Commissioner's single-member district seat vacant, but rather must await the submission to it of a vacancy petition in the form of a resolution adopted by the ANC in which the vacancy has occurred.

In § 8(f) of the act, D.C. Code § 1-257(f) (1987 and 1991 Supp.), the Council has enacted a comprehensive procedural scheme for determining the existence of a vacancy in an ANC single-member district in a case in which there is no letter of resignation from the Commissioner in question. The process begins with the consideration and adoption of a resolution at a public meeting of the ANC, proceeds to the Board of Elections and Ethics for a determination as to the validity of this ANC resolution, and provides for expedited judicial review in the District of Columbia Court of Appeals. At each of these stages, § 8(f) provides an opportunity to persons with standing to challenge the assertion or determination that a vacancy exists.

As you are aware, the Council recently amended § 8(f) of the act. In § 3(b) of the Advisory Neighborhood Commission Amendment Act of 1990, effective March 6, 1991, D.C. Law 8-203, the Council amended paragraph (2) of § 8(f) by adding the following language applicable to the adoption of a vacancy resolution by an ANC:

The resolution shall be considered by the Commission at a public meeting of the commission. Prior to the meeting, the commission shall make a good faith effort to notify, in writing, the Commissioner who is the subject of the resolution. Notice of the meeting shall be sent to the Commissioner no later than 20 days prior to the meeting by certified mail, return receipt requested, and shall provide that the Commissioner shall have an opportunity to rebut the alleged vacancy.

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In the October 25, 1990 Report of the Committee on Government Operations on Bill 8-626, "Advisory Neighborhood Commission Act of 1990," Committee Chairperson Betty Ann Kane stated the following in regard to this amendment: "This [amendment] addresses a concern on the part of several Commissioners whose positions have been declared vacant without their prior notification and without having had an opportunity to rebut the allegations against them." Id., p. 5.

Thus, in the absence of a letter of resignation from a Commissioner, the Council has established a procedural scheme containing safeguards intended to reduce to a minimum the possibility that an ANC Commissioner may be mistakenly or otherwise wrongfully deprived of the office to which he or she has been elected by the voters. It would defeat the stated purpose of the Council in amending § 8(f) (2) of the act to allow a third procedure (other than a letter of resignation or a commission resolution) for the removal of Commission members without those safeguards.

The rule of law applicable to your inquiry is that where the legislature has established a specific procedural scheme for the determination and review of a particular question, that procedural scheme is deemed to exclude the use of unspecified alternative procedural schemes. See Whitney Bank v. New Orleans Bank, 379 U.S. 411, 419-420 (1965). Since § 8(f) sets forth such a procedural scheme and no other has been specified, the procedures set forth in § 8(f) must be followed in the determination of a vacancy in an ANC single-member district, in the absence of a letter of resignation from the Commissioner in question.¹

¹ The conclusion that, in the absence of a letter of resignation, the Board of Elections and Ethics does not have the authority sua sponte to declare an ANC single-member district seat vacant is buttressed by the fact that the qualifications for ANC office (including the residency qualification) are referenced in paragraph (2) of § 8(f) of the act. Under the last sentence of § 8(f) (2), D.C. Code § 1-257(f) (2) (1991 Supp.), the ANC is required to send a vacancy resolution to the Board of Elections and Ethics, the Council, and the Mayor. The ANC is also required to send the vacancy resolution to the "Commissioner" who is the sUBject of the resolution "whenever the vacancy is due to removal or failure to continue the qualifications for office under section 6(a) of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Code, sec. 1-256(a))." See 31 OCR 3953-3954; emphasis added.

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2. Disqualification for Failure to Report Address Change

Your second question is stated as follows:

[I]f an ANC commissioner moves within his or her SMD but fails to inform the Board, then technically his or her voter registration becomes invalid. When the Board learns this - say, through its biennial mail canvass - does it then have the authority to declare an ANC seat vacant? If yes, would this apply to any office holder?

For the reasons stated in the answer to your first question, the answer to the first part of your second question is that the Board of Elections and Ethics does not have such authority.

In closing, I note that the effect of a voter's unreported change of residence on the right of the voter to remain on the voter roll maintained by the Board of Elections and Ethics was the subject of very recent Council legislation. See the voter Roll Maintenance Emergency Act of 1992, D.C. Act 9-129, effective January 9, 1992. Identical permanent legislation was approved by the Mayor on January 3, 1992, and is presently before Congress for a 30-day period of congressional review. See D.C. Act 9-127, 39 DCR 311-317, January 17, 1992. These acts provide, inter alia, that a voter who changes his or her address, but fails to notify the Board of Elections and Ethics in a timely manner, may correct this failure on election day, by filing, at the polling place serving the voter's current residence, a change-of-address request form provided by the Board. If, upon such filing, the person adequately establishes his or her identity and place of residence, the person must be permitted to vote.

Sincerely,



John Payton
Corporation Counsel

cc: William H. Lewis, Esq.
General Counsel
Board of Elections and Ethics

Warren Graves
Director
Office of Constituent Services