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IN REPLY REFER TO:
Prepared by:LCD:ABE
(AC-99-128)

April 14, 1999

Mr. Frank E. Jackson, II
Treasurer
ANC48
746 Kennedy Street, N.E.
Washington, D.C. 20011

Dear Mr. Jackson,

This responds to your March 16, 1999 letter to me, requesting advice about whether Advisory Neighborhood Commission ("ANC") 48 may prohibit members of the public or Commissioners from videotaping and/or audiotaping ANC meetings, either public meetings or executive session meetings. I have received similar requests for advice from the parties listed at the end of this letter.

CONCLUSION

ANC 48 may adopt a by-law regulating the use of audio and video recording devices at ANC public meetings. No court has yet decided whether the District's Open Meetings Law, found at section 742(a) of the Home Rule Act, effective December 24, 1973, 87 Stat. 831, D.C. Code § 1-1504(a) (the "Open Meetings Law"), permits the public to audiotape or videotape public meetings. However, based on court decisions under the Open Meetings Laws of other jurisdictions, a by-law that permits audio and videotaping with certain restrictions is more likely to be upheld by the courts than one that bans such recording altogether. (The Open Meetings Law cases are more restrictive than the First Amendment cases, which generally allow a blanket ban on recording.) In any case, the courts would likely strike down a ban on audio or videotaping of public meetings that was directed specifically at any individual. Any ban on audio or videotaping of public meetings directed solely at any individual or discrete group should be avoided because it raises additional Constitutional objections which would be difficult to overcome. As to executive sessions, since the District's Open Meetings Law does not apply, a total ban on recording is likely to be upheld. Thus, in the absence of any statutory clarification of a public right to record ANC meetings or public meetings generally, I recommend that ANC 48 establish non-discriminatory

regulations regarding the use of audio and video recording equipment at both public meetings and executive sessions, as an amendment to its by-laws.

BACKGROUND

The facts, as related by two ANC 48 Commissioners and one member of the public, are as follows. On February 25, 1999, ANC 48 held a public meeting at the 4th District Police headquarters. Mr. Paul Montague, a former ANC 48 Commissioner, attended the meeting as a member of the public. Mr. Montague attempted to videotape the meeting. A Commissioner objected to being videotaped and a discussion ensued wherein Mr. Montague insisted that he be allowed to videotape, and one or more Commissioners expressed their concern about the privacy of members of the public and the potential use of the tape after the meeting. Eventually Mr. Montague agreed that if a majority of the Commissioners objected to the videotaping, he would honor that decision. Mr. Montague did not, thereafter, videotape the meeting. Mr. Montague states that the ANC ruled at the same meeting that members of the news media are permitted to videotape ANC 48 meetings. Mr. Montague says he was told that the only way he could videotape the meetings was if he had written permission from each individual Commissioner. Subsequently, the Commander of the 4th District Police-headquarters, where meetings are currently being held, informed the ANC that no cameras are permitted inside the building.

The second question arose from an "Executive Committee" meeting of ANC 4B. An Executive Committee meeting is a non-public meeting of some or all ANC 48 Commissioners equivalent to an executive session at which no official action is taken. At that meeting, which was held at the home of one of the Commissioners, Commissioner Robert Richard attempted to audiotape the meeting. One or more of the Commissioners objected to Mr. Richard recording the meeting. The Commissioners offered Commissioner Richard the option of having his tape considered the "official record" of the ANC, which would mean surrendering the tape to the Secretary after the meeting to be duplicated and then returned to him. Commissioner Richard rejected that option. The Commissioners present then decided that Commissioner Richard should not be permitted to tape record the meeting, whereupon, Commissioner Richard left the meeting.

ANALYSIS

OPEN MEETINGS LAW

Section 14(g) of the Duties and Responsibilities of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976, D.C. Law 1-58, D.C. Code § 1-262(g), makes each ANC subject to the Open Meetings Law, which provides as follows:

"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."

D.C. Code § 1-1504(a). The Open Meetings Law does not apply to the Executive Committee meeting which Commissioner Richard attempted to tape record because it applies only to public meetings at which official action is taken. Therefore, under the Open Meetings Law, neither a member of the public nor an ANC Commissioner has a right to audiotape or videotape an executive session of an ANC. However, the Open Meetings Law does apply to the public meeting which Mr. Montague attempted to videotape.

No court has determined whether the District's Open Meetings Law permits the public to record or videotape public meetings. Two courts have held that the plain language of similar Open Meetings Laws do not provide any right to the public to record or videotape public meetings; they only provide a right to attend public meetings. See Thompson v. City of Clio, 765 F. Supp. 1066 (N.D. Ala. 1991); Davidson v. Common Council of White Plains, 244 N.Y.S.2d 385 (1963). However, several states have interpreted similar Open Meetings Laws as permitting the recording of public meetings by the public. See Belcher v. Mansi, 569 F. Supp. 379 (D.R.1. 1983)(right to attend under Open Meetings Law demands that taping of public meetings be permitted, but certain restrictions may be lawfully imposed); Sudol v. Borough of North Arlington, 348 A.2d 216 (N.J. 1975)(taping permitted based on statement of policy in the law as to right of public to be fully informed); Peloquin v. Arsenault, 616 N.Y.S.2d 716 (1994)(blanket prohibition of **video** or audio recording is not permissible in face of virtual presumption of openness, but reasonable restrictions may be imposed); Mitchell v. Board of Educ. of the Garden City Union Free School Dist., 493 N.Y.S.2d 826 (1985)(action barring unobtrusive audio recording devices is inconsistent with goal of fully informed citizenry); State v. Ystuenta, 418 N.Y.S.2d 508 (1979)(taping permitted based on a statement of public policy of right of public to be fully informed contained in the law); Spratt v. Rickey, 1998 Ohio.App. LEXIS 1207 (OH 1998)(remanding for the trial court's decision the question whether a village ordinance prescribing procedures for recording village council meetings violates the Ohio Public Meetings Law, but noting that the ordinance implies that the village council seeks to meet free from public scrutiny that occurs from recording a meeting).

In most of these cases, the courts permitted the public to audiotape or videotape public meetings in spite of reasons offered by the public body in favor of a blanket prohibition on recordings, such as: 1) recording is a distraction, is obtrusive, or otherwise disturbs or disrupts the meeting; 2) members of the public have a privacy interest in their comments made at a public meeting; 3) recordings can be edited, altered, or used out of context; and 4) the public body's duty to prepare minutes precludes the use of other methods of recordation. At the same time, in nearly every case the courts have permitted the public body to place limitations on the recording of public meetings. The Belcher Court outlined the reasonable restrictions that generally may be lawfully imposed: 1) restrictions to preserve orderly conduct of a meeting by controlling noise levels, spatial requirements, and visibility (so as not to interfere with the orderly conduct of business and the rights of those present to see, hear, and

participate in the proceedings); 2) restrictions to safeguard public facilities against damage by use of equipment (for example, to the electrical system of the building where the meeting is held); and 3) restrictions to require fair payment for the use of electricity or other services provided by the body to facilitate the recording (although the public body is not required to provide any such services). Belcher, 569 F.Supp. at 384.

While it is impossible to predict with certainty how the District's courts would interpret the District's Open Meetings Law, the trend seems to be to interpret such statutes as permitting the recording of public meetings in the absence of plain language in the statute to the contrary, and as permitting the public body to implement reasonable restrictions on recording. Consequently, I recommend that ANC 48 permit a member of the public, like Mr. Montague, to audiotape or videotape its public meetings, subject to any reasonable restrictions it may select of the kind described above.

FIRST AMENDMENT

The issue of the recording of public meetings has never been decided by the U.S. Supreme Court or the U.S. Court of Appeals for the D.C. Circuit, but the First Amendment implications have been considered by other courts. These courts have generally held that there is no First Amendment right to **televis**e public meetings, *see e.g. Whiteland Woods, L.P. v. Township of West Whiteland*, 1997 U.S. Dist. LEXIS 16313 (ED. P. 1997), or to otherwise record public meetings, *see, Sigma Delta Chi v. Speaker*, 310 A.2d 156 (Md. 1973); *Educational Broad. Corp. v. Ronan*, 328 N.Y.S.2d 107 (1972). Indeed, both the U.S. Senate and the U.S. House of Representatives ban videotaping, and that fact has been cited as **additional** precedent for other bodies to adopt similar bans in the absence of **open** meeting requirements. *See Johnson v. Adams*, 629 F. Supp. 1563 (ED. Tex. 1986). Furthermore, these courts have held that a ban on recording a public meeting is "not considered a prior restraint on speech because the ban does not seek to prevent publication of a message or freedom of expression. *See Dean v. Guste*, 414 So.2d 862 (La. Ct. App. 1982), citing *CBS v. Lieberman*, 439 F. Supp. 862 (ED. 11.1976); *Sigma Delta Chi v. Speaker*, 310 A.2d 156 (Md. 1973). It follows that there **also** is no First Amendment right to record an **executive committee** meeting. *See, e.g., Dean v. Guste*, 414 So.2d 862 (La. Ct. App. 1982).

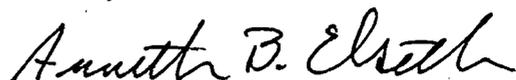
However, a minority of courts have acknowledged that the right to record a public meeting is akin to a right of access or right to gather or receive information, therefore such actions "touch upon" the First Amendment right to free speech. *See Blackston v. State of Alabama*, 30 F.3d 117 (11th Cir. 1994); *Whiteland Woods, L.P. v. Township of West Whiteland*, 1997 U.S. Dist. LEXIS 16313 (ED. P. 1997); *Thompson v. City of Clio*, 765 F. Supp. 1066 (M.D. Ala. 1991). *Cf. Nevens v. City of Chino*, 233 Cal. App. 2d 775 (1965) (the First Amendment is only indirectly affected by ban on videotaping). Therefore, **under** these decisions, a content-neutral ban on taping is permissible only if it is reasonable, supported by a significant or substantial government interest and does not unreasonably limit alternative avenues of communication. *See Whiteland Woods*, 1997 U.S. Dist. LEXIS 16313; *Thompson*, 765 F. Supp. 1066. Under these authorities,

restrictions which would be permissible under the First Amendment include reasonable regulations relating to: 1) number and type of cameras permitted; 2) position of cameras; 3) the activity and location of the operator; 4) position or limitation on lighting; 5) rules for interrupting recording upon request if the matter being discussed, although public, might be embarrassing or humiliating to an individual if replayed at a later date; and 6) other items necessary to maintain order in the chamber and to prevent unnecessary intrusion into the proceedings. Maurice River Township Bd. of Educ. v. Maurice River Township Teachers Assoc., 475 A.2d 59, 61-62 (N.J. Super. 1984). Accordingly, while a minority view, these decisions support my recommendation under the District's Open Meetings Law that - subject to any reasonable restrictions ANC 4B may wish to adopt - a member of the public be allowed to audiotape or videotape public meetings.

In this case, Mr. Montague alleges that he was not permitted to videotape but that members of the news media were permitted to tape. Clearly, members of the press have no greater rights under the First Amendment than members of the public. See Dean v. Guste, 414 SO.2d 862,865 (La. Ct. App. 1982). Such a viewpoint specific, content-based ban on taping probably would be invalid under the First Amendment unless it was necessary to serve a compelling state interest and narrowly drawn to achieve that end. See Blackston v. State of Alabama, 30 F.3d 117 (11th Cir. 1994); Belcher v. Mansi, 569 F. Supp. 379, 384 (D.R.1. 1983)(once the right to videotape is granted by the Open Meetings Law, it must comply with the First Amendment.); Thompson v. City of Clio, 765 F. Supp. 1066, 1072 (M.D. Ala. 1991). A viewpoint specific regulation or ban on recording also raises the potential for violation of the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution. See Belcher v. Mansi, 569 F. Supp. 379, 384 (D.R.1. 1983).

If you have any additional questions with regard to this issue, or if **you** would like me to review any proposed by-law language prior to its adoption, please do not hesitate to contact me at 727-3400.

Sincerely,



Annette B. Elseth
Assistant Corporation Counsel
Legal Counsel Division

cc: The Honorable David Catania
Chairman, Committee on Local and Regional Affairs
Council of the District of Columbia

The Honorable Charlene Drew Jarvis
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