

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL**



**Legal Counsel Division**

September 29, 2010

Carolyn Steptoe  
Commissioner, ANC 5A07  
1322 Irving Street, N.E.  
Washington, D.C. 20017

**Re: August 9, 2010 ANC Vote of Support for Removal of Tree on  
Public Space by the District's Department of Transportation (DDOT)**

Dear Ms. Steptoe:

This letter responds to your email inquiry, which our Office received on September 10, 2010, concerning DDOT's decision at present not to remove a tree on public space within ANC 5A, despite the ANC's vote of support for the removal.

In your request, you explain that a homeowner residing at 2014 Monroe Street, N.E. recently sought help from the full body of ANC 5A regarding a tree on public space that she believes is healthy, but whose roots are causing damage to her property. The homeowner received correspondence from DDOT's Urban Forestry Administration ("UFA") on June 12, 2009, indicating that if DDOT received a letter from the ANC agreeing with the removal, the UFA could proceed with that plan. Your email request also attached correspondence from the Council of the District of Columbia's Director of Constituent Services, describing the tree's roots as having elevated the sidewalk, and intruded into the homeowner's yard. You advise that an emergency meeting of the ANC was convened on Saturday, August 7, 2010, by 5 commissioners, and then another emergency meeting was held on August 9, 2010 with 7 commissioners present. The ANC unanimously voted at the subsequent meeting to support the removal of the tree. You have asked whether the ANC has further options to ensure that DDOT adheres to what you believe is its previously stated instruction to the homeowner that it would remove the tree once the ANC issues a letter of support.

For the reasons set forth below, we conclude that, despite the unfortunate confusion over the role of the ANC in the constituent homeowner's service request, the law does not afford the ANC any further options to assist this homeowner.

Apart from certain zoning regulations in the city, the preservation and/or removal of trees in the District of Columbia is principally governed by the Urban Forest Preservation Act of 2002, effective June 12, 2003, (D.C. Law 14-309; D.C. Official Code § 8-651.01 *et seq.*) (“UFPA” or “Act”). The UFPA, as its title indicates, was enacted to preserve the District’s urban forest, which the Council described as one of the city’s “great natural resources.” D.C. Official Code § 8-651.01(a) (2008 Repl.). Notably, the Council made specific legislative findings while enacting the UFPA, including that:

(b) A healthy, vibrant urban forest provides numerous environmental benefits, including:

- (1) Heat island effect mitigation and reduced energy use;
- (2) Better air quality and reduced water pollution; and
- (3) Quieter and more beautiful neighborhoods.

D.C. Official Code § 8-651.01(b) (2008 Repl.). In light of these findings, the UFPA established an Urban Forest Preservation Program and directed the Mayor to administer the program through promulgation of standards and regulations governing the protection of trees. The UFPA itself, however, focused on preservation of what it called “Special Tree[s],” defined as a tree with a circumference of 55 inches or more, measured at a height of 4 and ½ feet. D.C. Official Code § 8-651.02(1) and (3) (2008 Repl.). The UFPA makes it unlawful “for any person or nongovernmental entity, without a Special Tree removal permit issued by the Mayor, to Top, cut down, remove, girdle, break or destroy any Special Tree.” D.C. Official Code § 8-651.04(a) (2008 Repl.).<sup>1</sup>

The Council did recognize that some trees could pose dangers to individuals or property if unhealthy, and the UFPA made clear that nothing in the Act would prevent removal of what it called “Hazardous Trees.” D.C. Official Code § 8-651.06(a) (2008 Repl.).<sup>2</sup> Indeed, removal of such dangerous trees is expected, whether by the homeowner if the tree is on their property or the public parking area, or by the District. D.C. Official Code § 8-651.06(b) – (d) (2008 Repl.). Thus, in order to obtain a permit to remove or

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<sup>1</sup> The UFPA also amended the District’s criminal code to make it unlawful for any person to “willfully top, cut down, remove, girdle, break, wound, destroy, or in any manner injure any vine, bush, shrub, or tree not owned by that person.” D.C. Official Code § 22-3310 (2010 Supp.). Penalties for a violation are higher if the tree in question has circumference that is 55 inches or greater. D.C. Official Code § 22-3310(1) (2010 Supp.).

<sup>2</sup> The Council defined a “Hazardous Tree” as:

[A] tree that, in the opinion of a certified arborist, is defective, diseased, dying or dead and should be removed; poses a high risk of failure or fracture with the potential to cause injury to people or damage to property and should be removed; or is causing damage to property or structures that cannot be mitigated in any manner other than removal of the tree. . .

D.C. Official Code § 8-651.02(3) (2008 Repl.). The law gives the Mayor the authority to determine that a tree is not hazardous. *Id.*

otherwise damage a Special Tree, one requirement is that the tree be shown to be hazardous, as defined by the UFPA. D.C. Official Code § 8-651.04(b)(1) (2008 Repl.). However, in keeping with the Act's preservation rationale, the applicant seeking the permit must either pay into the Tree Fund, separately established by the UFPA,<sup>3</sup> an amount equal to \$35 per inch of the tree that is affected, or pledge to plant a quantity of saplings that will equal or exceed the circumference of the Special Tree in question.

The UFPA specifically provides a role for the ANC when the government seeks to remove a tree on public space that does not pose the dangers found in a hazardous tree.<sup>4</sup> D.C. Official Code § 8-651.05(a) (2008 Repl.). In that instance, the Director of DDOT is required to give the affected ANC at least 15 days written notice, which is to include the reason for the proposed tree removal. *Id.*

This office has been advised by DDOT that the tree in question is in fact a Special Tree. In addition, we have learned from DDOT that the UFA representative who investigated the homeowner's request for removal, does not view the tree as hazardous based on currently available information. While it is our understanding that the homeowner and the UFA employee have discussed using expertise from the Department of Consumer and Regulatory Affairs to further investigate the effect of the tree on the homeowner's property, the present determination by DDOT not to remove the tree should be viewed as an exercise of the Mayor's exclusive authority under D.C. Official Code § 8-651.02(3) (2008 Repl.) to determine whether a tree is hazardous.

In addition, we conclude that the decision by the Mayor not to remove the tree, as determined through DDOT and UFA, would not require formal notice to the ANC prior to its becoming final, and would therefore not trigger the statutory requirement that DDOT give "great weight" to the ANC perspective on the disposition of the tree. As you suggest in your email, the ANCs in the District are valued representatives of their community. Section 738 of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 777 (D.C. Official Code § 1-207.38 (2001)), established the Advisory Neighborhood Commissions, and directed that they be given "timely notice of requested or proposed zoning changes, variances, public improvements, licenses or permits of significance to neighborhood planning and development within [their] neighborhood commission area. . . ." D.C. Official Code § 1-207.38(d) (2001).

The D.C. Council implemented the Home Rule Act's notice provisions for ANCs in section 2 of the Duties and Responsibilities of the Advisory Neighborhood Commissions Act of 1975, effective March 1976, (D.C. Law § 1-58; D.C. Official Code § 1-309.10 (2001)). The Council provided for ANC's to receive special 30-day notice prior to proposed governmental actions that in large part mirrored those listed in the Home Rule

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<sup>3</sup> The Tree Fund established by the UFPA is a fund separate from the District's General Fund that is made up of donations, fees, and penalties collected pursuant to the UFPA. The Fund is to be used to plant trees, and to provide income-contingent subsidies to assist residents with the cost of removing hazardous trees. D.C. Official Code § 8-651.07 (2008 Repl.).

<sup>4</sup> The UFPA does not prohibit the government from removing Special Trees, or any trees for that matter, although as stated above, it does task the Mayor with developing an Urban Forest Preservation Program.

Act cited above. D.C. Official Code §1-309.10(c)(1) (2001). When this prior, special notice is required to be given to the ANC, the Council further directed that the government entity involved give “great weight” to the recommendations of the ANC on the proposed governmental action, provided the ANC recommendations are timely, in writing, and articulate the basis for its decision. D.C. Official Code § 1-309.10(d)(1) and (3)(A) (2001).

The D.C. Court of Appeals subsequently interpreted the notice language enacted by the Council as intended to implement the near identical language adopted by Congress in the Home Rule Act, which it emphasized was directed at governmental actions that are “of significance to neighborhood planning and development within its neighborhood commission area.” *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1380-81 (D.C. 1977). Thus, the Court instructs that the ANC “is not necessarily entitled to special thirty-day notice of every neighborhood matter listed in [D.C. Official Code § 1-309.10(c)(1)],” but rather only those matters that have the requisite significance to neighborhood planning and development. *Kopff, supra* at 1381. The Court went on to suggest that the primary indicator of significance to the neighborhood is when the law requires a hearing prior to the agency decision on the proposed governmental action. *Id.*

In the case of the homeowner’s situation in ANC 5A, the current decision by DDOT and UFA *not* to remove the tree and thereby maintain the *status quo*, simply does not have the significance to neighborhood development and planning that would attend a decision to cut down a mature tree. While neighboring homeowners may be interested as to the outcome of the UFA investigation into whether the tree abutting 2014 Monroe Street, N.E., is hazardous, the *status quo* affects a limited number of residents, when contrasted with the effects of removing an otherwise healthy tree, whose benefits to the entire community were illuminated by the legislative findings of the Council when they enacted the Urban Forest Preservation Act. Indeed, the Council specifically directed in the UFPA that notice be given to the applicable ANC *prior to removal* of an otherwise healthy tree in the neighborhood. In contrast, the UFPA does not require notice to the ANC when the Mayor determines that a tree is not hazardous, and no hearing requirement exists before that determination is made. The Council clearly intended that the ANC be consulted only when a tree was to be removed, in keeping with the preservation goal of the Act.

Consequently, the vote of the ANC on August 9, 2010 in support of the tree’s removal by DDOT would not be entitled to “great weight” by the agency.<sup>5</sup> However, even were the ANC’s position to be entitled to such consideration, the “great weight” requirement does not mean that the agency must follow the ANC determination. The agency would instead be required to note, in writing, the ANC position on the tree’s disposition, explicitly reference the ANC’s concerns and issues in articulating why the ANC conclusion is not persuasive, and state why it has decided that the tree will not be removed. D.C. Code §1-

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<sup>5</sup>Please note that even if the ANC’s perspective on the decision not to remove the tree in question were required to be given “great weight” pursuant to D.C. Code § 1-309.10(d)(3)(A), this only applies to ANC recommendations that are in writing, articulate the basis of its decision, are the result of an open meeting, and that are provided within 30 days of being notified of the agency’s proposed action.

