

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

August 26, 2011

Vaughn Bennett
Commissioner, ANC 5B04
2100 New York Avenue, N.E.
Washington, D.C. 20002

Re: Proper Notice for ANC Meetings

Dear Commissioner Bennett:

This letter responds to your August 1, 2011 correspondence to Deputy Attorney General Wayne Witkowski asking whether you may challenge any or all official actions of ANC 5B from January 1, 2009 to the present, due to allegations that meetings of the Commission during the period were not properly noticed.¹

Specifically, after citing the requirement in D.C. Official Code § 1-309.11(c) (2011 Supp.) that prior notice of ANC meetings be provided to the public by two of four methods listed in that section, you allege that since January 1, 2009, ANC 5B “has not published notification of its meetings in any newspaper,” has not, with one exception, “posted written notice of meetings in at least 4 conspicuous places in **each** single member district [your emphasis],” nor has ANC 5B “approved any other manner of meeting notification.” Your allegations are based on your knowledge, information, and belief, including the seven months in which you have served as a commissioner on ANC 5B.

Before addressing your concerns, please note that the role of our Office as it respects ANCs is advisory only. *See* D.C. Official Code § 1-309.12(d)(3)(A) (2006 repl.). While we may seek additional information readily available concerning matters that are raised in requests made to our Office for guidance, we do not conduct formal investigations on ANC matters, nor do we render decisions in the same way as a court or an administrative agency otherwise vested with adjudicatory responsibility. Our interpretations of the laws governing ANCs are based on facts and documents presented to us. To the extent your letter is asking us to investigate whether meetings of ANC 5B were, in fact, not properly noticed, and then to potentially declare all ANC actions subsequently taken as invalid depending on our findings, it would be beyond the scope of our advisory role.

¹ In your email attaching the correspondence, however, you state that you are, in fact, challenging all official actions by this ANC for the subject period.

With respect to the notification by the ANC of its meetings, you have correctly identified the law outlining the requirements. Section 14(c) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976, as amended (D.C. Law 1-21; D.C. Official Code 1-309.11(c) (2011 Supp.)) (“ANC Act”) requires that notice of regular and emergency meetings must be given by the ANC to commissioners and residents of the commission area using at least two of four listed mechanisms that you have accurately copied in your letter, but which I reproduce here:

- 1) Posting of written notices in four conspicuous areas within each single member district;
- 2) Publication in a city or community newspaper;
- 3) Transmitting or distributing notice to a list of residents and other stakeholders in the community; and
- 4) In any other manner prescribed by the Commission.

D.C. Official Code § 1-309.11(c)(1) – (4) (2011 Supp.).

As noted above, you state that with one exception, method numbers 1, 2, and 4 above have not been fully utilized since January 1, 2009. I assume that by omitting number 3 from your list of notification methods that have not been used, you are indicating that ANC 5B has, in your view, provided notice of its meetings through transmittal or distribution of said notices to a list of commission residents, and other stakeholders in the community. If that is correct, I note that in referencing the absence of any other notification method approved by the Commission, you do not indicate whether you consulted the bylaws of ANC 5B. Each ANC must establish bylaws to govern its “operation and internal structure.” D.C. Official Code § 1-309.11(d) (2011 Supp.). While the decision on what method of meeting notification the ANC will use is not required to be a part of the bylaws, this document is a logical place for such a policy to be adopted. Thus, I recommend that you review the bylaws to determine if some other method utilized by ANC 5B to notice its meetings was previously approved, as that would constitute a second method of notice that could satisfy the ANC Act and the concerns you have raised if it were properly utilized.

If you are correct that proper notice was not given for meetings of your Commission, we have previously advised that in such circumstances, any meetings held are not public meetings, and therefore no official action may validly be taken by the ANC. (Letter to Dorothy Miller, April 17, 1996.) Our letter to Ms. Miller relied in part on D.C. Official Code § 1-309.11(g) (2011 Supp.), which incorporates the District’s first open meetings law, known as the “Sunshine Act,” into the requirements for ANC operations. The Sunshine Act, enacted by Congress through section 742 of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 831, D.C. Official Code § 1-207.42 (2006 Repl.), states, in pertinent part, that “[a]ll meetings (including hearings) of any. . . commission of the District government. . . at which official action of any kind is taken shall be open to the public. No resolution, rule, act,

regulation, or any other official action shall be effective unless taken, made, or enacted at such meeting.”²

In a subsequent letter to Ms. Miller, we reiterated that any purported action taken at a meeting not properly noticed under the ANC Act was not legally valid. (Letter to Dorothy Miller, September 24, 1996.)³ We further advised that to invalidate “official actions” taken at such meetings, one could seek a “judicial declaration” to that effect in a court of competent jurisdiction. *Id.*; see also Letter to Larry J. Thorpe, Jr., March 1994 (injunctive relief may be sought from court for ANC to conduct statutorily mandated annual election of officers); Letter to Leroy J. Thorpe, Jr., July 15, 1997 (injunctive relief option also available to compel commissioners to provide statutorily required equal access to commission offices); Letter to Marshall Williams, July 14, 1997 (suggesting injunctive relief possible to compel commissioner to turn over financial records or documents).

Of course, any one bringing a court action in this regard must have the requisite standing to seek relief, such as a commissioner of the ANC acting individually, or a resident of the commission area. See D.C. Official Code § 1-309.10(g) (2011 Supp.); *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1376-77 (D.C. 1977). Assuming you have the standing to seek relief for the period preceding your service as a commissioner, you therefore may challenge the validity of purported official actions of ANC 5B that were taken at meetings for which proper notice under the ANC Act was not provided.

However, the period in question encompasses approximately two and one-half years. It is likely that government agencies and other parties have relied upon many actions taken by the commission during that time in their own undertakings. For example, grant monies awarded to organizations may have long been spent by the grantees for various public purposes in the commission area following their approval by the commission during one of its meetings. It may be impossible and/or inequitable for a court to seek to “undo” all that flowed from reliance on seemingly official commission actions.

Indeed, courts have wrestled with this question in a somewhat analogous circumstance involving the consequences that flow from finding a statute previously enacted by a legislative body to be unconstitutional. It has been stated that:

. . . The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered

² The Council has since gone further and required all meetings of ANCs to be open to the public unless personnel or legal matters are discussed. D.C. Official Code § 1-309.11(g) (2011 Supp.). In addition, the Council has recently passed the Open Meetings Amendment Act of 2010, effective March 31, 2011, D.C. Law 18-350, 58 DCR 734, although ANCs as a whole were expressly excluded from its mandates.

³ See also D.C. Official Code § 1-309.10(d) (2011 Supp.) (great weight to be given by District agencies to ANC recommendations arising from commission meetings with notice given in accordance with section 1-309.11(g)); D.C. Official Code § 1-309.13(m)(1) (2011 Supp.) (grants may not be awarded by ANC unless pursuant to a vote of the commission at a public meeting following public presentation of grant request).

in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

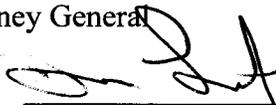
Wagshal v. Selig, 403 A.2d 338, 341 (D.C. 1979) (quoting the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940)).

Your letter does not identify any official actions of ANC 5B that would be included in your challenge. As a result, even if you are correct in your allegations that ANC 5B has not properly noticed its meetings since January 2009, we offer no opinion on the likely result from any court challenge that seeks to invalidate actions already relied upon by the public. You may wish to consider whether the most efficient use of your and ANC 5B's resources on this matter would be to instead ensure that all meetings henceforth are properly noticed.

I hope that this information has been helpful to you.

Sincerely,

IRVIN B. NATHAN
Attorney General

By: 

Jason Lederstein
Assistant Attorney General
Legal Counsel Division

(AL-11-384)

cc: Gottlieb Simon, Executive Director
Office of Advisory Neighborhood Commissions