

Government of the District of Columbia



Office of Advisory Neighborhood Commissions
1350 Pennsylvania Avenue, NW
Suite 11
Washington, DC 20004
(202) 727-9945

MEMORANDUM

TO: ANC 3/4G
FR: Denise Wiktor, General Counsel
DT: September 10, 2024
RE: Maret School MOU and Accompanying Jurisdictional and Contractual Issues

This issue originally came to the Office of Advisory Neighborhood Commissions (OANC) as a request to interpret the meaning of “best practices” as used in a Memorandum of Understanding (MOU) Advisory Neighborhood Commission (ANC) 3/4 G entered into with the Maret School (“Maret”). Two Commissioners, at the same time, separately contacted the Office of the Attorney General (OAG) and, later, a third Commissioner sent requests¹. The OAG issued advice via e-mails stating that ANCs do not have the right to enter into MOUs because they are unenforceable unless they are incorporated into a BZA opinion. The OANC makes every effort not to duplicate efforts by the OAG when it is known to be occurring. Notwithstanding, to avoid confusion, the OANC was compelled to respond.

The opinion shopping and subsequent OAG advice have brought into question additional issues. These include:

- The respective authorities of the OAG and OANC;
- The ability of ANCs to enter into Agreements, MOUs, and contracts; and
- Repercussions of unilaterally voiding an MOU entered into by an ANC.

As discussed below, our analysis of the identified issues concludes that:

- The OANC has the authority to issue legal advice relevant to the ANCs’ (hereafter also Commissions or ANCs) statutory duties because it is the primary source for this advice, as directed in the D.C. Official Code;
- The OANC's authority includes providing advice on whether or not ANCs generally have the authority to enter into MOUs, within limits, and on whether there are potential repercussions for an ANC if it unilaterally declares an MOU void;
- ANCs are permitted to enter into contracts, Community Benefit Agreements (CBAs), and MOUs, within limits;

¹ The multiple e-mails to both the OANC and the OAG have been problematic, as each agency has somewhat different information provided by the Commissioners.

- The MOU in question is problematic in that it delegates its authority in violation of the D.C. Official Code and, without authority, delegates the task of amendment to the Board of Zoning Adjustment (BZA). Lacking a severability clause, it brings the entire MOU into question; and
- Curing the MOU may be possible if the BZA were to agree to re-open the record and accept an amended agreement. On this final point, the OANC defers to the BZA counsel for guidance.

Authority of the Office of Advisory Neighborhood Commissions to Give Legal Advice

Advisory Neighborhood Commissions were created in Section 738 of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act)², which was implemented in D.C. Official Code § 1-309.15 and which came into being in 1976. The OANC was statutorily created in 2001³ within the legislative branch of the District of Columbia government.

In addition, D.C. Official Code § 1-309.15(c)(11), which was added in 2017, provides that:

The duties of the OANC shall include. . . [s]erving as the primary source of advice for Commissioners with respect to their official statutory responsibilities.

In the same section, D.C. Official Code § 1-309.15(c)(13), which was also added in 2017, provides that one of the OANC duties is:

Advising Commissions on judicial and administrative decisions particularly affecting Commission duties or activities and seeking advice from the Office of the Attorney General for the District of Columbia on behalf of Commissions, where necessary and appropriate.

Another section of the statute, which was originally enacted in 1991⁴, prior to the two sections referenced above, currently provides:

The Office of the Attorney General for the District of Columbia shall provide legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions. These interpretations may be requested directly by any Commission⁵ or by the OANC.⁶

² Implemented with the *Advisory Neighborhood Councils Act of 1975*, [Oct. 10, 1975, D.C. Law 1-21](#), D.C. Official Code § 1-309 *et seq.*

³ See *Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000*, enacted June 27, 2000, D.C. Law 13-135, § 3(e), 47 DCR 2741.

⁴ In 1991, when this portion of D.C. Official Code 1-309.12(d)(4) was enacted, it used “the Corporation Counsel”. The *Advisory Neighborhood Commissions Omnibus Amendment Act of 2016* (D.C. Law 21-269) changed “Corporation Counsel” to “OAG.”

⁵ The statute states interpretations may be requested by Commissions, not individual Commissioners. Requests from Commissions as opposed to individual Commissioners is also in keeping with draft OAG policy that was provided to the OANC.

⁶ D.C. Official Code § 1-309.12(d)(4), effective April 7, 2017, D.C. Law 21-269, § 2(g), 64 DCR 2162.

In 1991, when the above portion of D.C. Official Code § 1-309.12 was originally enacted, the OAG did not exist, nor did the OANC. The sole place an ANC sought advice at the time was the then-Office of the Corporation Counsel. Therefore, since the language of this subsection of D.C. Official Code § 1-309.12 and of §§ 1-309.15(c)(11) and (13) were added after both OAG and the OANC came into existence, and since they clearly delineate each agency's respective authority with respect to advising ANCs, this supports the premise that the Council knew what it was doing by amending these particular Code subsections in 2017; and, that it explicitly intended for the OANC to provide all advice to ANCs regarding their statutory responsibilities, including legal advice. This is reinforced by the fact that the Council updated the language in D.C. Official Code § 1-309.12(d)(4) to "OAG" at the same time as adding sections 1-309.15(c)(11) and (13).

In interpreting a statute, "[n]ormally, the plain language and ordinary meaning of a statute control."⁷ One gives "effect to the plain meaning of a statute when the language is unambiguous and does not produce an absurd result."⁸ The plain meaning of the statute here is that the OANC is the primary source of advice to Commissioners with respect to their official statutory duties. It is important to note that there is no restriction on the type of advice to be given. One "may look to the legislative history to ensure that our interpretation is consistent with legislative intent."⁹

The OAG has argued in the past against interpreting the plain meaning of the statute because, in the legislative drafting process, the word "legal" before "advice" was removed. Yet, there is no explanation given for the removal in the Committee Report regarding this legislation cited by the OAG¹⁰ and, therefore, the legislative history provides no insight into the rationale. Thus, one must interpret the plain language of the statute, which does not restrict the interpretation of what advice the OANC may give, except that it is limited to their "official statutory responsibilities."

It must be noted that the removal of "legal" expands the statutory authority of the OANC. The removal of the word "legal" does not grant authority to the OAG – more accurately, it provides that the OANC must now perform those duties. In the case at hand, the ANC is a statutory party to the zoning case and, as part of their statutory responsibilities in that case, the ANC, like many other ANCs, executed an agreement with another party. Therefore, it is within the authority of the OANC to advise ANC 3/4G on this matter.

In Fiscal Year 2023, a General Counsel FTE was added to the OANC budget. The Council Committee, in creating the position, stated:

To assist in addressing legal matters that may arise and to assist Commissioners with FOIA compliance, the Committee has identified resources to support the hiring of a new General Counsel for the Office of Advisory Neighborhood Commissions. *The Committee recommends that the Office hire its new General Counsel as soon as possible after funding becomes available and communicate with all ANCs to inform them of the types of advice and resources this new position can provide them.*¹¹ (Emphasis in original)

⁷ *Bruce v. United States*, 305 A.3d 381, 396 (D.C. 2023).

⁸ *In re Macklin*, 286 A.3d 547, 553 (D.C. 2022).

⁹ *Sharps v. United States*, 246 A.3d 1141, 1149 (D.C. 2021).

¹⁰ *Committee on Facilities and Procurement, Committee Report*, Bill 23-245.

¹¹ *Committee on Government Operations and Facilities, Fiscal Year 2023 Budget Report*. April 20, 2022, p. 53.

Therefore, it is clear that the Council recommended establishing the General Counsel position at OANC in order for that individual to opine on a wide spectrum of advice, from “FOIA compliance” to “other legal matters.”

One must not read one section of the statute “in isolation, but together with other related provisions,” and derive their meaning “not from the reading of a single sentence or section, but from consideration of the entire enactment against the backdrop of its policies and objectives.”¹² And, once again, in 1991, when D.C. Official Code § 1-309.12 was initially enacted, since the OAG and the OANC did not exist, the sole place an ANC sought advice was the then-Office of the Corporation Counsel. The amendments in § 1-309.15 were therefore subsequently added to place the OANC on equal footing with all other District entities with agency-specific general counsels, at which point the Office of the Attorney General had already been created. Due to the separation of the OAG from the Executive at this time, a number of agencies had their own general counsels. It is common knowledge that agency general counsels serve as a primary source for their agencies on the matters before their agency and rely on the OAG for expertise on other matters. Similarly, here, the OANC is the primary source of advice on the statutory duties of the Commissioners, both legal and non-legal, and the OANC relies on the OAG or agency counsel only for matters within their purview or specialized knowledge.

Advisory Neighborhood Commissions’ Ability to Enter into Agreements

Advisory Neighborhood Commissions enter into many forms of agreements. Currently, Commissions are parties to contracts, leases, employment agreements, Voluntary Agreements, and MOUs. Advisory Neighborhood Commissions are exempt from the Procurement Practices Reform Act of 2010,¹³ which would have otherwise restricted their ability to enter contracts.

To operate in accordance with their statute, ANCs directly procure equipment for their ANCs and enter into a variety of contracts and agreements for services such as Zoom, cell phones, IT services, personnel services, office leases, post office boxes, Mail Chimp, and legal and expert services. As part of their representation of their constituents, ANCs also enter into Voluntary Agreements in ABCA cases, MOUs, and CBAs.¹⁴

The OAG has opined in a 2023 letter that ANCs do not have the ability to enter into an MOU-type of CBA absent specific statutory authority.¹⁵ Coincidentally, this letter was issued after the D.C. Council mandated that the OANC keep a database of all CBAs entered into by ANCs. While not specifically authorizing such agreements, it is a statutory recognition that such agreements exist and, in the view of the Council, they are obviously part of an effort to assist

¹² *O'Rourke v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 46 A.3d 378, 384 (D.C. 2012).

¹³ D.C. Official Code § 2-351.05(c)(6). Prior to the exemption, the OAG advised ANCs that in order to contract, they must go through the Office of Contracting and Procurement (OCP) unless OCP delegated that authority to them and allowed them to contract directly. See also, *Letter to Jonda McFarlane*, August 19, 1999, found at <https://oag.dc.gov/sites/default/files/2018-02/ANC-2-E-August-19-1999-Contract-Employee-for-Administrative-Services.pdf>.

¹⁴ ANCs’ ability to enter into CBAs was acknowledged by reference when the Council listed one of the duties of the OANC as “[m]aintaining a publicly accessible database of all community benefit agreements negotiated by Commissions and concluded after October 1, 2022.” D.C. Official § 1-309.15(c)(20).

¹⁵ See, *Letter to Commissioner Gore Re Authority to Enter Voluntary Agreements*, February 17, 2023 found at <https://oag.dc.gov/sites/default/files/2023-02/ANC-34G-Letter-to-Commissioner-Gore-Re-Authority-to-Enter-Voluntary-Agreements-.pdf>.

ANCs in creating more such agreements. This subsection was added as part of Bill 23-245, the “Advisory Neighborhood Commissions Participation in Planning and Development Amendment Act of 2020.” The Committee Report to that bill states, in part:

Finally, to address the lack of transparency and record-keeping for Commission community benefit agreements, the Committee Print requires the Office of Advisory Neighborhood Commissions to maintain a publicly accessible database of all community benefit agreements negotiated by Commissions concluded after the effective date of the legislation. The Committee anticipates that this will be accomplished through a new page on the website of the Office of Advisory Neighborhood Commissions that maintains an updated list of these agreements by Commission, with links to the documents themselves.¹⁶

The Committee Report further states that:

The Committee also agrees that existing Commission agreements are not always followed, and therefore the Committee Print incorporates a provision in the Committee Print to require these benefit agreements to be compiled and publicly available to *improve enforcement* going forward.¹⁷ (emphasis added)

As previously noted, the Council authorized an FTE attorney position in Fiscal Year 2023 to implement the “Advisory Neighborhood Commissions Participation in Planning Amendment Act.” This Act requires the OANC “to advise Commissioners on issues including zoning, planning, design, development, and negotiations related to PUDs.”¹⁸

Moreover, ANCs are elected to represent their communities and there are multiple sections in the D.C. Official Code that treat the ANCs as the voice of the community. Importantly, the D.C. Court of Appeals has explicitly recognized ANCs as representatives of the affected community.¹⁹ Execution of an MOU is in furtherance of that representation.

The OAG has opined that the MOU with Maret is void because it is not incorporated into the BZA order.²⁰ This is different than the advice that was given to the same ANC a year before, when the OAG advised:

In our view, the Home Rule Act and ANC Act do not authorize an ANC to enter an agreement with a developer over conditions for the design, construction, and settlement agreement. A community benefit agreement outside that context might be treated as void,

¹⁶ See, *District of Columbia Committee Report, Bill 23-245*, p. 5, November 9 2020 found at https://lims.dccouncil.gov/downloads/LIMS/42225/Committee_Report/B23-0245-Committee_Report2.pdf?Id=113476.

¹⁷ *Id.*

¹⁸ D.C. Official Code § 1-309.15(c)(17). See also *Committee on Government Operations and Facilities, Fiscal Year 2023 Budget Report*. April 20, 2022, p. 53.

¹⁹ See *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376–77 (D.C. 1977). See also D.C. Official Code §§ 1-309.10(a), (b), (c)(1)(A), (c)(2)(A), (c)(3), (c)(4) and 1-309.11(c)(3).

²⁰ E-mail from Megan Browder OAG to Michael Zeldin ANC3G04 (July 26, 2024, 12:17 p.m. EST)

although that determination *would probably be made on a case-by-case basis*. (Emphasis added)²¹

Unlike Voluntary Agreements in matters before the Alcohol Beverage and Cannabis Administration (ABCA), where the entire agreement is directly incorporated in the Board Order, the Board of Zoning Adjustment does not incorporate the entire CBA into their orders. However, in the instant case, the BZA order and the Court of Appeals decision upholding that order both reference the MOU.²² The Court of Appeals relied on the existence of the MOU to support part of its conclusions,²³ noting that:

The Advisory Neighborhood Commission (“ANC”) adopted a resolution in support of Maret’s application, also subject to various conditions, and entered into a memorandum of understanding with Maret that reflected Maret’s agreement to implement those conditions.²⁴

Enforceability

Circling back to many e-mails received by the OANC from both the OAG and Commissioners on this matter, there appears to be a conflation of the issue of enforceability versus voidability. Aside from the argument addressed above about the authority of an ANC to enter into an MOU, it is further argued that because an ANC “cannot enforce” an MOU that is not incorporated into a zoning order, it is void. Setting aside the argument that ANCs do not have the capacity to enter into an MOU, if one looks at the elements of a valid contract, they are met. “The essential elements of a valid contract are competent parties, lawful subject matter, legal consideration, mutuality of assent, and mutuality of obligation.”²⁵ Those elements are plainly met here. The question therefore is, how then is the MOU not valid on its face.

Contract enforcement and regulatory compliance enforcement are two different creatures. The OANC would agree with the OAG²⁶ that ANCs have no regulatory enforcement abilities but would disagree that ANCs essentially cannot enforce contracts. This would call into question all the types of contracts that ANCs are statutorily required to enter into. How those contracts would be enforced is very dependent on each contract and the requirements therein, while being mindful of the ANCs’ inability to initiate court action. Accordingly, this explains the OAG’s advice that a determination would be made on a case-by-case basis.

The argument that the ANC has no enforcement ability is based upon the fact that the MOU is not fully incorporated into the BZA Order. Further, D.C. Official Code § 1.309.10(g) states:

²¹ *Letter to Commissioner Gore re Authority to Enter Voluntary Agreements*, February 13, 2023 at p.2, found at <https://oag.dc.gov/sites/default/files/2023-02/ANC-34G-Letter-to-Commissioner-Gore-Re-Authority-to-Enter-Voluntary-Agreements-.pdf>.

²² See *BZA Case No. 20643* and *Friends of the Field v. D.C. Board of Zoning Adjustment*, No.23-AA-0660, slip op. (D.C. Court of Appeals Aug. 29, 2024).

²³ *Id.* at 14-15.

²⁴ *Id.* at p. 4.

²⁵ *Ponder v. Chase Home Fin., LLC*, 865 F. Supp. 2d 13, 18 (D.D.C. 2012).

²⁶ *Letter to Commissioner Gore re Authority to Enter Voluntary Agreements*, February 13, 2023 at p.3 found at <https://oag.dc.gov/sites/default/files/2023-02/ANC-34G-Letter-to-Commissioner-Gore-Re-Authority-to-Enter-Voluntary-Agreements-.pdf>

“[t]he Commission shall not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts...” The OAG also opines that ANC’s are essentially advisory bodies, not enforcement entities, citing *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*²⁷ Yet, the *Kopff* decision goes on to state in the next sentence:

Our conclusion, however, does not mean that the ANC’s’ right to advise cannot be protected. To the contrary, we hold that ANC area residents (including ANC Commissioners as individual citizens) have standing to initiate legal action to assert the rights of the ANC itself. We recognize this legal standing of ANC area residents because they satisfy the threshold requirements: injury in fact and assertion of an injury arguably within the “zone of interests” sought to be protected or regulated by the statute in question.²⁸

Using the standard in *Kopff*, aggrieved residents or Commissioners as individuals could initiate litigation to enforce the MOU. There are also other ways to achieve contract compliance of an Agreement that does not involve direct litigation. Parts of the MOU have been incorporated into the Zoning Order, therefore, enforcement via zoning mechanisms for those parts is an option.

Mediation is also an option. Incorporating a binding mediation clause into an MOU or CBA would resolve the compliance issue for ANC’s. Notwithstanding this, it must be carefully crafted so as not to interfere with potential enforcement requests through zoning enforcement mechanisms. Another mechanism an ANC could use to “enforce” an MOU or CBA would be to withhold future support in the event the project went to the BZA for an extension, renewal or modification.

With respect to the MOU at hand, Clause 6 of the MOU, entitled “Dispute Resolution”, is an impermissible delegation of authority by the ANC to a task force, which is prohibited by D.C. Official Code § 1-309.11(f-1): “A Commission shall not delegate official decision-making authority to any committee or task force.”

Clause 6 of the MOU also includes a structure for fines making it more like regulatory enforcement, which ANC’s cannot do. The OAG has stated that ANC’s “do not have authority to regulate (including by fines), proposed matters affecting their neighborhood area.”²⁹

Further, Clause 7A of the MOU states that it “may not be altered or amended except by a BZA order.” Had the BZA incorporated the agreement in full into an order, then it would have self-required an order to alter it. Neither party to the MOU had the authority to bind the BZA in this manner.

The result is that there is no way to alter or amend the order. The MOU does not have a standard severability clause. Such a clause usually states that if any section of the MOU is found to be invalid, the rest of the MOU would not be affected. The lack of a severability clause brings into question the entire MOU.

²⁷ *Id.*

²⁸ *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376–77 (D.C. 1977).

²⁹ E-mail from Joshua Turner, OAG, to ANC 3G Commissioners (July 30, 2024, 1:00:45 p.m. EST).

There may also be consequences of the ANC unilaterally declaring the MOU void. As the OAG noted in its formal opinion to this ANC in 2023, as previously stated, this would be done on a “case by case basis”³⁰, presumably by a court. If Maret were to attempt to enforce the MOU, there would be two potential outcomes, either a declaration that the agreement was void or that the agreement would be enforced.

A potential outcome to a declaration that the MOU is void due to the capacity of an ANC to enter into such a contract is that Maret could seek recompense for the attorneys’ fees incurred in negotiating a contract that the ANC did not have the capacity to enter into in the first place. In

the informal e-mails advising the ANC that the MOU is void, the OAG did not take a position as to whether the OAG would represent the ANC should there be legal ramifications to a unilateral voiding of the contract by the ANC. The 2023 advice from the OAG stated both that the ANC did not have the authority to enter into an MOU but, that if it did, it would be on a case-by-case basis as to whether it was void. This was irresolute advice, such that any ANC would be hesitant to follow the same.

Best Practices

Finally, addressing the original question, there is the issue of what “best practices” as used in the MOU means. Section 1 of the MOU, entitled “Compliance with Plans/Material Approved by the BZA”, contains several relevant paragraphs:

a. Maret shall construct the Athletic Facilities Project in conformance with all plans and materials approved by the BZA in BZA Application No. 20643 ... including the location, specifications, and design of the multi-purpose athletic field, baseball diamond, bullpens, batting cages, raingardens, parking spaces, trash collection receptacles, scoreboard, goal posts, fences, sidewalks, storage sheds, protective netting, bleachers, shot clocks, retaining walls, and stormwater management facilities. Maret shall obtain all relevant D.C. agency permits and clearances in a timely manner and conform to all permit conditions.

h. The turf field shall use natural-based infill such as engineered wood particles, "SafeShell," or similar products rather than rubber-based products and shall be installed in conformity with best practices regarding permeability and hydrology impacts. Non-playing field areas shall, to the extent reasonably possible, use natural grass and/or vegetation. Maret shall not use crumb rubber infill, which the District Department of General Services no longer permits for District-owned fields. Maret shall observe "best practices" regarding the composition and installation of the field, including consideration of chemical and bacterial factors.

When reading an agreement or contract, one reads it as a whole so as not to make any section of it meaningless.³¹ When interpreting a contract, we “strive to give reasonable effect to all its parts and eschew an interpretation that would render part of it meaningless or incompatible with the

³⁰ *Letter to Commissioner Gore re Authority to Enter Voluntary Agreements*, February 13, 2023, at p.3.

³¹See *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 620 (D.C. Cir. 2023).

contract as a whole.”³² One cannot look at the clause containing best practices without looking at the rest of the contract, especially those portions in the same section. Section 1a of the MOU commits Maret to building the field and surrounding structures in accordance with the plans submitted to the BZA. Those plans, as noted in the BZA Order and the Court of Appeals opinion, specifically state that artificial turf will be used.

Clause 1h states that Maret will use the “best practices” related to the composition and installation of the field. There is no one definition of “best practices.” In looking at the caselaw, it varies from industry to industry. *Black’s Law Dictionary* defines this as “[a]

description of such a mode of proceeding or performing prepared so that other people or companies may learn and follow it as a set of guidelines or rules.”³³ The composition of the

material is covered in Clause 1a, as the composition was part of the plans submitted to the BZA and are approved as part of its order. Those plans include artificial turf. The only item left to best practices is the installation of the turf itself.

For these reasons, it is unreasonable to interpret the MOU as requiring natural or grass turf. This is an area agreed upon with the OAG, as stated in one of its e-mails, that “even if it had binding effect, the MOU states that Maret agrees to construct the project ‘in conformance with all plans and materials approved by the BZA.’ ¶1.a. Those plans include artificial turf.”³⁴

In conclusion, MOUs can be entered into by ANC’s with certain constraints. This MOU cannot be read to require natural turf instead of what is in the plans submitted to the BZA, which was artificial turf. However, this particular MOU has sections that exceed an ANC’s authority, which very well may void the entire MOU. Due to a defect in drafting, this MOU cannot be amended or changed and is lacking a severability clause. The OANC would normally say such defects could be cured with a new MOU, removing the problematic sections and paragraphs. This advice is difficult here since the MOU has been referenced in both the BZA and court orders. It possibly could be amended if the BZA record were re-opened and an amended or new MOU filed with the BZA. However, the OANC would defer to BZA counsel on that matter.

cc: Kent Boese, Director
Office of Advisory Neighborhood Commissions

³² *Id.*

³³ *Black’s Law Dictionary* (12th ed. 2024).

³⁴ E-mail from Megan Browder to Commissioner Zeldin (July 26, 2024, 11:53 a.m. EST).