

4911 ASHBY STREET, NW
WASHINGTON, DC 20007

September 9, 2013

Mr. Lloyd Jordan, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200-S
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2013 SEP 11 PM 1:36

RE: BZA Case No. 18615, Appeal of ANC 3/4G

Dear Chairperson Jordan:

Recent actions taken by Advisory Neighborhood Commission ("ANC") 3/4G, regarding the development at 5333 Connecticut Avenue, may not have been valid. Three members of the ANC met privately with CMK DEV, LLC ("Cafritz"), the developer, and drew up an MOU that was subsequently approved by a 4-3-1 vote of the commission. The MOU (enclosed) represents a private agreement struck between Cafritz and three individuals and does not bind the ANC. Bringing the agreement forward to the full commission for approval does not give validity to an act that runs counter to the District's Sunshine Act.

The *Advisory Neighborhood Commissioner Handbook* addresses The District's Sunshine Law as follows:

The requirement for timely notice must be understood in the general context of governmental decision-making which is open and subject to public examination. The District has a strong "Sunshine" law to insure that its business is conducted openly. Indeed, the tradition of openness goes back to the Home Rule Charter itself which reads, in part:

Home Rule Charter, section 742:

"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, act, or other official action shall be effective unless taken, made, or enacted at such meeting."

This broad provision serves as the underpinning to all additional legal requirements for openness in government. The "Sunshine" law applies as well to the work of the Advisory Neighborhood Commissions themselves.

The ANC Handbook section covering the Sunshine Law is acknowledged in a letter to ANC 3D from the Office of the Attorney General ("OAG") regarding official action taken in a closed meeting (enclosed). The OAG cites the following:

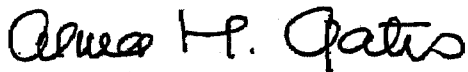
"The Sunshine Act applies to ANCs, both by its own terms and by the express language of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (DC Law 1-21; DC Official Code § 1-309.01 et seq.) (each... Commission shall be subject to the open meetings provisions of section 742(a) of the District of Columbia Home Rule Act") ("ANC Act").

In 2010, the Zoning Commission addressed exclusive agreements in Case No. 07-12, drawn up between residents of Berkeley Terrace and George Washington University and the university and St. Patrick's School. The Zoning Commission Order (Conditions of Law #5) states the following:

The Commission declines to adopt most of the conditions of approval proffered by the University in conjunction with its agreements reached with the residents of Berkeley Terrace and the St. Patrick's School, because those proposed conditions are beyond the purview of the Commission's jurisdiction in this proceeding.

As a former Advisory Neighborhood Commissioner, I feel it important to bring the private actions of ANC 3/4G Commissioners to the attention of the Board of Zoning Adjustment and ask that you deny adoption of the MOU.

Sincerely,



Alma H. Gates

Enclosures (2)

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



Legal Counsel Division

December 18, 2012

Mr. Thomas M. Smith
ANC Commissioner 3D-02
4601 Tilden Street N.W.
Washington, D.C. 20016

Re: Action Taken in Executive Session

Dear Commissioner Smith,

This responds to your December 3, 2012 letter to Attorney General Irvin B. Nathan seeking advice on whether ANC 3D may take official action in a closed meeting.

Your letter states that on July 11, 2012, the Commission held an executive session, and in that session, discussed the possibility of raising its Administrator's salary "from \$1250 to \$1650 per month." While still in executive session, the Commission voted to increase its Administrator's salary. The entire executive session (including the vote) was closed to the public, but the vote was noted in the meeting's minutes. You asked us whether the Commission's vote in executive session violated the open meetings requirements of the Advisory Neighborhood Commissions Act of 1975. We conclude that it did.

In 1973, Congress passed the District's first open meetings law (frequently referred to as the "Sunshine Act") as section 742 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 831; D.C. Official Code § 1-207.42) ("Home Rule Act"). The Sunshine Act applies to ANCs, both by its own terms and by the express language of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et. seq.*) ("each . . . Commission shall be subject to the open meetings provisions of section 742(a) of the District of Columbia Home Rule Act") ("ANC Act"). The Sunshine Act states that:

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 any official action of any kind is taken shall be open to the public. No resolution, rule, act, regulation, or any official act shall be effective unless taken, made, or enacted at such a meeting.

A vote to increase an administrator's salary is an official action. As we pointed out in a February 26, 1997 letter, "the determination to hire a staff employee and the terms of employment" is an official action because it is "substantive in nature and . . . requires the formal concurrence of a majority of the commissioners of an ANC." Accordingly, under the Sunshine Act, a vote that changes existing terms of employment by raising an employee's salary must take place in a meeting that is open to the public, not in an executive session.

However, the Sunshine Act is not the only open meetings law that applies to ANCs. Section 11(g) of the ANC Act, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000 (D.C. Law 13-135; D.C. Official Code 1-309.11(g)) ("ANC Reform Act"), states that "[n]o [Commission] meeting may be closed to the public unless personnel or legal matters are discussed." Previously, ANC meetings that did not involve official action could be closed. That is no longer the case; any meeting that does not involve discussion of personnel or legal matters cannot be closed, regardless of whether any official action is taken.

Your letter contends, and the responses to your letter confirm, that some have read the ANC Reform Act to limit the scope of the Sunshine Act's requirement that official action be public. They maintain that in a closed meeting where a Commission discusses personnel or legal matters, the Commission may also vote on those matters.

As we advised in a May 27, 2011 letter, the text and the legislative history of the ANC Reform Act show that its purpose was to expand, not limit, public access to ANC business. As page 9 of the *Report of the Committee on Local and Regional Affairs on Bill 13-468, the "Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000"* (Council of the District of Columbia, January 11, 2000) ("*Catania Committee Report*") states:

[D.C. Official Code § 1-309.11(g)] is amended by adding language that prohibits the exclusion of the public from meetings at which no legal or personnel matters are to be discussed. Oftentimes, residents are prevented from participating in Commission meetings. This provision, it is thought, will ensure public access and participation. Six new paragraphs were [also] added which enumerate categories of information that are to be made available to the public... These provisions were added to facilitate the general public in monitoring the activities of their respective ANC's.

This is the only material from the legislative history which speaks to the Council's intent in amending subsection 11(g). It strongly suggests that the Council was not satisfied with the open-meetings provisions in the Home Rule Act, and that it sought to expand those provisions in order to enhance "public access and participation" in ANC meetings.

The Council's chosen wording of subsection 11(g) is also instructive, since "the intent of a lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983). Had the Council chosen to say that a meeting may be closed to the public if personnel or legal matters are discussed, this would suggest that the Council's principal aim was to shield certain meetings from public access, and it might lend

credence to an argument that the Council wanted to limit the existing open meetings law. That is not, however, the wording that the Council chose. They said instead that a meeting may *not* be closed to the public *unless* legal or personnel matters are discussed. Here, the focus is on greater openness; the (new) general rule is that ANC meetings cannot be closed to the public, and meetings where personnel or legal matters are discussed are an exception to that new rule.

The Council's aim was not to permit meetings to be closed that had not been closed before; it was to open meetings that previously did not have to be opened to the public. Neither the text nor the legislative history of the ANC Act supports the claim that an ANC may now take official action in a closed meeting. Any meetings where official action is taken must still be open; so, too, must any meetings where no official action is taken but legal or personnel matters are not discussed. Only a meeting that involves legal or personnel matters *and* does not involve taking official action may be closed.

After we received your letter, we also received a letter and memorandum from Commission Stu Ross, Chairperson for Commission 3D. Accordingly, we will briefly address the concerns that Chairperson Ross raises.

The letter from Chairperson Ross contends that section 14(g)(4) of the ANC Act (D.C. Official Code § 1-30.11(g)(4)), which requires that all documents not related to personnel and legal matters be made available to the public, "suggests that an ANC's executive session does contemplate that it may act on [personnel] matters[,] as protection is afforded any documents generated in that session." However, this conclusion does not follow from the text; the fact that documents not related to personnel and legal matters must be disclosed does not necessarily mean that all documents which *are* related to personnel and legal matters can be kept confidential. Indeed, the ANC Act states precisely the opposite; section 14(g)(5) requires that "the minutes of *all* Commission meetings" must be made available to the public (emphasis added). So, too, *per* section 14(g)(2), must all "final decisions of the Commission, including concurring and dissenting opinions" be made publicly available.

Chairperson Ross' letter also discusses the practical ramifications of requiring that all Commission actions be taken in a session that is open to the public. He suggests, for instance, that if the Commission retains legal counsel to provide it with advice on a sensitive matter, taking a vote in an open session might destroy attorney-client confidentiality. Without wading too far into hypothetical situations, we do not believe that permitting votes in executive sessions would allay his concerns. Regardless of whether a vote is taken in executive session, any final decision the Commission reached in that session would have to be made available to the public, as would the minutes of that session. Voting in executive session, rather than in an open meeting, would have no apparent effect on any attorney-client privilege the Commission may hold.

Chairperson Ross raises an additional concern in the memorandum that was attached to his letter. He finds it puzzling that the ANC Act would allow ANC members to discuss certain confidential matters in executive session but not be able to act on them there. However, this is not a new development. The 1975 ANC Act's original open meetings provisions provided simply that "each Commission shall be subject to the provisions of section 742(a) of the District of

Columbia Self-Government and Governmental Reorganization Act.” An ANC could therefore discuss any matter it wanted in closed session, but it could only take action in an open session. If an ANC wished to discuss and vote on a sensitive matter without compromising sensitive discussions on the matter, they would have to do precisely what ANC 3D was required to do here: discuss the matter in executive session, then vote on it in an open meeting. The Council’s objective in requiring this may well have been to ensure that when Commissioners moved from discussion to action by voting on a matter and thereby committing the ANC (and, possibly, some of its resources) to a certain course of action or policy position, they did so in full view of those whom they represent. The text and legislative history of the 2000 ANC Reform Act make clear that is still the Council’s intent.

We hope this information has been helpful to you. If you have any questions, please do not hesitate to contact this office.

Sincerely,

IRVIN B. NATHAN
Attorney General for the District of Columbia

By: 
Joshua Turner
Assistant Attorney General
Legal Counsel Division

(AL-12-961)

cc: Gottlieb Simon
Executive Director
Office of Advisory Neighborhood Commissions

Stu Ross
Chair
ANC 3D

Fredericka Shaw
Office of the D.C. Auditor

MEMORANDUM OF UNDERSTANDING

WHEREAS CMK DEV, LLC ("Cafritz") owns the property at 5333 Connecticut, N.W., in the District of Columbia between Military Road and Kanawha Street ("5333 Connecticut") and seeks to build a multi-family residential building ("the Building") with approximately 261 dwelling units on the property;

WHEREAS Cafritz prepared designs for the proposed Building and in 2012 applied for the necessary permits from agencies of the District of Columbia based on its belief that the proposed Building could be built "as of right" under the zoning rules and regulations of the District of Columbia;

WHEREAS, a number of the residents near 5333 Connecticut objected to some aspects of the proposed design of the Building and formed a coalition (the "5333 Coalition") opposing issuance of the permits and contending that the proposed design did not conform to the zoning rules and regulations of the District of Columbia and that permits could not be lawfully issued "as of right";

WHEREAS the Chevy Chase Advisory Neighborhood Commission 3/4G for the District of Columbia (the "ANC") also raised concerns about whether some aspects of the proposed design conformed to applicable zoning rules and regulations and whether permits could be issued "as of right";

WHEREAS Cafritz made presentations on its proposed design and construction plans at a public meeting on January 23, 2013, and at an ANC meeting on April 8, 2013;

WHEREAS the ANC and the 5333 Coalition had multiple meetings with Vincent Gray, the Mayor of the District of Columbia, with Mary Cheh, Council Member for Ward 3, and with various officials from the agencies that review permit applications for 5333 Connecticut;

WHEREAS the ANC, the 5333 Coalition, and Cafritz met on multiple occasions during 2013 to discuss the proposed design and construction plans in an effort to resolve differences;

WHEREAS the relevant agencies of the District of Columbia approved various permits authorizing Cafritz to begin construction of the proposed Building at 5333 Connecticut;

WHEREAS the ANC and the 5333 Coalition have filed appeals with the Board of Zoning Adjustments of the District of Columbia ("BZA") and with the Office of Administrative Hearings ("OAH") from the grant of permits for construction of the proposed Building at 5333 Connecticut;

WHEREAS the ANC believes that it is in the best interests of the Chevy Chase community and the District of Columbia as a whole to resolve differences about the design of the proposed Building on terms that will provide substantial benefits to the community while permitting the project to proceed on a lawful basis; and

WHEREAS Cafritz is willing to make certain changes to the proposed design, construction, and operation of the Building for the benefit of the community; and WHEREAS the

ANC and Cafritz have agreed on a package of changes to the Building's design, construction, and operation in order to provide significant benefits to the Chevy Chase community and the District of Columbia as a whole,

THEREFORE, the ANC and Cafritz agree to the following terms in this MEMORANDUM OF UNDERSTANDING that will be binding on both parties:

1. Cafritz agrees to a major redesign of the Building compared with the design that was presented at the community meeting on January 23, 2013, and that was the basis for the 2012 permit applications, including reduction in the glass surface area, increase in the amount of masonry, additional setbacks, nominally less square footage, and two fewer residential units, all as depicted in the concept drawings that Cafritz provided to the ANC at meetings on June 14, 2013, and July 19, 2013.
2. Cafritz agrees to lower the height of the Building by approximately two feet relative to the design that was presented at the community meeting on January 23, 2013 and was the basis for the 2012 permit applications.
3. Cafritz will propose and the ANC will support an application to provide a circular driveway from Connecticut Avenue that will provide a pick-up and drop-off point so as to reduce traffic on Kanawha Street and Military Road and that will also avoid removal of an additional major tree on Connecticut Avenue.
4. Cafritz agrees to provide approximately 40 additional parking spaces for tenants and visitors above the approximately 174 parking spaces included in the design that was presented at the community meeting on January 23, 2013, and that was the basis for the 2012 permit applications;
5. Cafritz agrees that it will request that the District of Columbia Department of Transportation ("DDOT") restrict the ability of tenants of the Building at 5333 Connecticut to obtain Residential Parking Permits and that Cafritz will make reasonable best efforts to obtain DDOT agreement to exempt Inclusionary Zoning tenants from this restriction.
6. Cafritz agrees to install additional landscaping beyond that included in the design that was presented at the community meeting on January 23, 2013, and that was the basis for the 2012 permit applications, including (a) the options that were presented in a June 27 meeting with the ANC and the 5333 Coalition and (b) reasonable best efforts to potentially preserve additional trees on Military Road, as presented at a July 14 meeting with Cafritz's landscape architect (with advice from its arborist) and the most affected members of the 5333 Coalition and information included in a revised proposed landscape plan that Cafritz's landscape architect provided on August 12, 2013.
7. In order to benefit the Building's tenants and to reduce vehicular traffic in the neighborhood, Cafritz agrees that it will offer to make available up to two parking spaces for a car share company (e.g., Zipcar) and will offer to provide for the

installation of a Capital Bike Share station, but Cafritz shall have no obligations if, after a reasonable effort, either (a) Cafritz reasonably determines that security, logistical, or locational considerations make the car share or Capital Bike Share station impractical, or (b) its offer is not accepted by the car share company or by Capital Bike Share. Cafritz shall further have no obligation with regard to car share or bike share facilities that are not located at 5333 Connecticut Avenue (including the associated public space).

8. Cafritz agrees to institute traffic controls and signage, as requested and advised by the DDOT, so that traffic entering and exiting the building will not use the narrow alley that runs from behind the Building to Chevy Chase Parkway, including physical construction of a raised "pork chop" traffic control device to impede a right-hand turn from the Building's garage.
9. Cafritz agrees to move the exhaust fan for the below-ground parking vent approximately 30 feet to the north relative to the concept design that was presented at the community meeting on January 23, 2013, and that was the basis for the 2012 permit application and to reconfirm with the District of Columbia Department of the Environment that the exhaust will meet all applicable standards.
10. Cafritz agrees to include built-in shades and directed lighting designed to reduce light emanating from the Building at night and to make reasonable effort to encourage tenants to use the built-in shades.
11. Cafritz agrees to implement the specific site-generated traffic controls during construction that were approved by DDOT and presented to the ANC on April 8, 2013.
12. Cafritz agrees to include the following sustainability features in the Building:
 - a. Green roof technology with planters, green garage roof, and other rooftop areas;
 - b. Storm water management, including slowing runoff of storm water;
 - c. Plantings that use less water for irrigation;
 - d. Use as many energy star appliances as possible;
 - e. High efficiency HVAC systems;
 - f. Separate metering of all heating, air conditioning, electricity, and hot water to encourage tenants' conservation;
 - g. Adhesives and paints to have minimum or no volatile organic chemicals;
 - h. Energy efficient light fixtures;

- i. Provision of separate chutes for trash and for recyclables on each tenanted floor;
 - j. Use of local and recycled materials wherever possible;
 - k. Sorted construction debris when readily achievable;
 - l. Low-flow plumbing fixtures; and
 - m. More efficient unit layouts with less wasted space and lower energy usage.
13. The ANC agrees to withdraw as a party to any appeals to the BZA or the Office of Administrative Hearings relating to the permits for the Building as of the effective date of this MEMORANDUM OF UNDERSTANDING, and the ANC will not challenge future permits or zoning for the Building so long as construction pursuant to those permits or zoning is undertaken in accordance with the provisions of this MEMORANDUM OF UNDERSTANDING.
14. The ANC agrees to represent to the BZA that, while the ANC would have preferred to have been involved earlier in the design and review process – despite assertions by Cafritz, the Zoning Administrator, and the District of Columbia Department of Consumer and Regulatory Affairs that the Building application was technically a “matter-of-right” process – given the conditions as they exist now, the proposed design, construction, and operation of the Building under the terms of this MEMORANDUM OF UNDERSTANDING will provide significant benefits to the Chevy Chase community and the District of Columbia as a whole.
15. The ANC agrees that, while any resident has the right to pursue whatever remedies that may be available to them, the ANC will continue to encourage all of the parties to reach an agreement that includes the terms of this MEMORANDUM OF UNDERSTANDING and to avoid unproductive litigation.

Effective: August 28, 2013

Jim McCarthy
Chair, Chevy Chase ANC (3G)

Calvin Cafritz
CMK DEV, LLC

Facsimile Cover Sheet

TO: Clifford Moy

FROM: Alma Gates (202/338-2218)

DATE: September 11, 2013

RE: BZA Case No. 18615, Appeal of ANC 3/4G

PAGES: 11, Including Cover Sheet

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