GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL
BRIAN L. SCHWALB

Legal Counsel Division

October 24, 2024

Bruce Sherman
Secretary, ANC 3G
5829 Nebraska Avenue NW
Washington, D.C. 20015

Re: Validity of ANC Memorandum of Understanding with the Maret School

Commissioner Sherman:

You asked for our opinion on the validity and enforceability of a Memorandum of Understanding ("MOU") between the Maret School and your Advisory Neighborhood Commission ("ANC"). In keeping with our ordinary approach to questions from an individual Commissioner, we have supplied informal email guidance. Your ANC has also received guidance, in the form of a letter, from the Office of Advisory Neighborhood Commissions ("OANC").[1] That guidance significantly, but not completely, overlaps with our previous guidance. It appears that there is now uncertainty not only about the validity and enforceability of the MOU, but also about which guidance an ANC should follow in the event of a difference of opinion between the Office of the Attorney General ("OAG") and OANC. For that reason, we find it appropriate to depart from our normal practice and to clarify both subjects in this formal letter, for the benefit of your ANC as well as others who may have similar questions.

Under the Advisory Neighborhood Commissions Act of 1975 ("ANC Act"),[2] the Office of Advisory Neighborhood Commissions ("OANC"), which supplies "technical, administrative, and financial reporting assistance" to ANCs,[3] is the "primary source of advice for Commissioners with respect to their official statutory responsibilities."[4] This includes advice that may require some degree of legal guidance. For example, OANC is charged with "[a]dvising Commissions on judicial and administrative decisions particularly affecting Commission duties or activities,"[5] and it coordinates with the Office of Open Government "to assist Commissions in fulfilling Freedom

[1] *See* Memorandum to ANC 3/4G, Sept. 10, 2024. Although your ANC is formally designated ANC 3G, it is sometimes referred to as ANC 3/4G since it straddles Wards 3 and 4. *See* https://anc.dc.gov/page/advisory-neighborhood-commission-3g.

[2] Effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.01 *et seq*.).

[3] D.C. Official Code § 1-309.15(a).

[4] *Id.* § 1-309.15(c)(11).

[5] *Id.* § 1-309.15(c)(13).

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of Information Act ("FOIA") requests."[6] At the same time, the ANC Act specifically directs the Office of the Attorney General to "provide legal interpretations of statutes concerning or affecting the Commissions, or of issues or concerns affecting the Commissions" upon the request of OANC or any ANC.[7] Further, the Attorney General is the District's chief law officer, imbued with "all powers afforded the Attorney General by the common and statutory law of the District."[8] When an ANC or Commissioner seeks our advice, we will strive to work with OANC to avoid divergent opinions, but that may not always be possible. To the extent of any conflict between OAG's and OANC's conclusions, however, the ANC or Commissioner should follow this Office's advice, unless or until a court rules differently.

With respect to the Maret MOU, our guidance overlaps significantly with OANC's. We do not see a conflict in result. Our conclusion, like OANC's, is that the Maret MOU is likely unenforceable. OANC reaches that conclusion based on concerns about specific MOU provisions. We reach that conclusion because the Maret MOU is, by its nature, a non-binding community benefit agreement. In our view, the advisory role that ANCs play under the ANC Act empowers them to advise on the District government's approval of community projects, to communicate with the companies engaging in those projects, and even to reach an understanding about those projects that they publicize in the form of a community benefit agreement. But ANCs are not regulators, *see Kopff v. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1376 (D.C. 1977), and nothing in the ANC Act or the Home Rule Act empowers them to directly or indirectly regulate projects in their communities, including through community benefit agreements. Accordingly, any community benefit agreements they enter, other than statutorily authorized settlement agreements, are non-binding and thus legally unenforceable pronouncements of intention. That principle applies here. The Maret MOU "is indicative of the ANC's issues and concerns,"[9] as the Board of Zoning Adjustment recently noted, and it memorializes Maret's intent to operate in a manner that addresses those issues and concerns. But it is not legally enforceable.

Sincerely,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

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[6] *Id.* § 1-309.15(c)(4).

[7] *Id.* § 1-309.12(d)(4).

[8] *Id.* § 1-301.81(a)(1). This Office, originally designated the Office of Corporation Counsel, was renamed the Office of the Attorney General in 2004. See Mayor's Order 2004-92, dated May 26, 2004.

[9] *See* Bd. of Zoning Adjustment, Decision and Order in App. No. 20643, at 31 (Apr. 12, 2023), *available at* https://app.dcoz.dc.gov/CaseReport/ViewExhibit.aspx?exhibitId=307774 ("declin[ing] to adopt the conditions recommended by the ANC").

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