

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

September 30, 2011

Fredericka Shaw
Office of the District Columbia Auditor
717- 14th Street, N.W., Suite 900
Washington, DC 20005

Re: Use of ANC Funds for Vermin Control Activity on Embassy Property

Dear Ms. Shaw:

As you requested in our recent phone conversation, I have considered the issues presented in the e-mails from Commissioner Lamar of ANC 2D regarding using ANC funds to engage in vermin control activities on embassy properties that appear to have been abandoned.¹ While I only have information from the two brief e-mail exchanges between Commissioner Lamar and your Office, it appears that what is proposed is the ANC using its funds to control the growth of vegetation on neighboring but unidentified embassy property, as well as to attempt control of any potential infestation of vermin from that property, without first obtaining any consent from whichever particular foreign mission is involved. As described, this cannot be accomplished by the ANC.

While the fact that embassy property is involved in this proposal adds complexity to ultimate resolution of the problems outlined by Commissioner Lamar, which I will address below, the ANC cannot engage in the described effort for the basic reason that the ANC proposes to enter and manipulate property that is not otherwise public space. Unlike the Council of the District of Columbia and the Executive Branch of the District government, ANCs possess no “police powers” to protect the health, safety or welfare of residents within a commission area. While such police powers do not allow even Executive agencies to enter private property at will for any perceived beneficial reason, these agencies are statutorily empowered at times to undertake action to abate conditions on private property that may be harmful to the public. The ANCs, in contrast, are primarily advisory bodies, albeit also a part of District government. While ANCs also have funds allocated to them by the Council for spending on public purposes within their

¹ This inquiry originally came to our Office from Lynard Barnum in an August 19, 2011 email asking for comment on emails from Commissioner Lamar on the subject. I understand Mr. Barnum subsequently retired, and you have renewed his inquiry.

commission area, this spending authority, which includes the grantmaking function, does not authorize an ANC to effect a trespass on private property.²

This conclusion could be different if consent were to be obtained from the foreign mission(s) at issue permitting the ANC to engage in this activity.³ The question would then become whether the activity the ANC proposes is a service that is otherwise provided by the District government. This is because we have previously instructed that ANC funds cannot be used to duplicate services provided by other District agencies. D.C. Official Code § 1-309.13(m)(1)(2011 Supp.); (Letter to Alan Roth, February 19, 2004); (Letter to David M. Catania, March 23, 2004).⁴

As suggested above, the District government does, in fact, possess authority to abate conditions on private property associated with potential rodent infestation. Under section 908 of the Rodent Control Act of 2000, Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172, D.C. Official Code § 8-2103.05 (2008 Repl.) (“Rodent Act”), it is unlawful for anyone to permit the accumulation of debris on

² Absent consent by the particular foreign mission to abatement activity on its grounds, District agency officials could not engage in this activity any more than an ANC could. Under Article 22 of the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227 (“Vienna Convention” or “Convention”), which the United States signed in 1972, the premises of a foreign mission “shall be inviolable.” *Id.* at 3237. The Convention further directs that “agents of the receiving State may not enter them, except with the consent of the head of the mission.” *Id.* Indeed, the “receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion. . . .” *Id.*

³ For purposes of this letter, I use the terms “embassy,” “chancery,” and “foreign mission” interchangeably, even though they are actually terms that have been defined with more precision concerning diplomatic premises and their staff in many of the authorities I cite here.

⁴ The law governing use of ANC funds is found in sections 16(l) and (m) of the Advisory Neighborhood Commissions Act of 1975, as added, effective June 27, 2000 (D.C. Law 13-135; D.C. Official Code § 1-309.13(l) and (m) (2011 Supp.)), which provides that:

(l) A Commission shall expend funds received through the annual allocation received pursuant to subsection (a) of this section, or other donated funds, for public purposes within the Commission area. . . . Expenditures may in the form of grants by the Commission for public purposes within the Commission area pursuant to subsection (m) of this section. . .

(m) A grant may not be awarded unless the grant is awarded pursuant to a vote of the Commission at a public meeting following the public presentation of the grant request. A Commission may approve grants only to organizations that are public in nature and benefit persons who reside or work within the Commission area. The services provided by the grantee organization must not be duplicative of any that are already performed by the District government.

In the letter to Mr. Roth cited above, we stated that, while the restriction on ANCs duplicating other District government services literally applied only to projects funded by ANC grants, it also applied to direct spending by an ANC, lest an ANC be able to circumvent the intent of the Council that appropriated money not be used twice for the same service. We stated it would be an “incongruous application” of the ANC statute to allow an ANC to do directly that which it could not do by grant.

their property, or to otherwise permit weeds or grass to grow to a height of eight inches or more, as these conditions constitute potential “harborage” of rodents. Certain preventative or corrective actions must also be undertaken by property owners if evidence of past or present rodent infestation is present, actions that include sealing rodent entryways. D.C. Official Code § 8-2103.05(b) (2008 Repl.). The Bureau of Rodent Control, established by the Rodent Act and placed within the Department of Health (“DOH”), can engage in abatement activity if, upon notification by the Mayor of violations, the owner does not correct the above conditions within a certain time frame, or if it is necessary to protect human health. D.C. Official Code § 8-2103.04(b) (2008 Repl.). In the event the District engages in the abatement, parties responsible for the conditions are liable for any costs incurred by the government.

Similarly, the District’s Housing Code, enforced by the District’s Department of Consumer and Regulatory Affairs (“DCRA”), requires the owner of any premises to maintain the property “free of any condition that may render the premises unhealthy or unsanitary for the. . . neighborhood or the community at large.” 14 DCMR § 800.08. Premises not so maintained are considered “public nuisance[s].” *Id.* at § 800.09. The Housing Code goes on to specifically prohibit weed growth in excess of 10 inches that is “untended,” or “harbors rodents and vermin or provides a refuge for snakes, rats or other rodents. . .” *Id.* at § 800.10a and d. If any of these provisions are violated, the Mayor is directed to give a Notice of Violation to the owner of the property in question. *Id.* at 800.14. If the owner fails to comply after receiving a second Notice of Violation, or if the condition presents an imminent danger to the health, safety or welfare of the occupant, the Mayor is authorized to summarily abate the nuisance. *Id.* at 800.16 and 800.17. If summary abatement is necessary, the Mayor can charge the owner by assessing a tax on the premises. However, unlike the Rodent Act mentioned above, the Housing Code expressly allows an owner to give written consent to the Mayor authorizing the removal of trash or the mowing of weeds or grass pursuant to the Notice of Violation, and it is unclear if that results in any fee or tax to the property owner.

In light of these statutory and regulatory regimes, it is likely that an ANC could not use its funds for vermin control activity that DCRA or DOH is authorized to perform in the District, as that would duplicate other District services. However, the ANC could engage in this activity, with consent of the effected mission(s), if there is some reason that those agencies are unable or unwilling to abate the conditions. (Letter to Stephen P. Belcher, March 5, 1992); (Letter to David M. Catania, March 23, 2004). Such a scenario is possible due to the unique oversight role of the United States Department of State (“State Department”) concerning foreign mission activity.

Under the Foreign Mission Act, approved August 24, 1982, Pub. L. 97-241, 96 Stat. 283, D.C. Official Code § 6-1301 *et seq.* (2008 Repl.) (“FMA”), an Office of Foreign Missions (“OFM”) was created within the State Department whose Director, if authorized by the Secretary of State (“Secretary”), would “[a]ssist agencies of federal, state, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled.” One of the purposes of the FMA was to ensure that the size and location of mission facilities, as well as the

permissible scope of their activity in the United States, would be subject to federal jurisdiction, in part to ensure that the treatment accorded these missions was determined after consideration by the Secretary of how United States missions were being treated abroad. D.C. Official Code § 6-1301 (2008 Repl.); *Embassy of the People's Republic of Benin v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 310, 314-15 (D.C. 1987). Thus, the FMA authorized the Secretary to provide benefits to missions operating in the United States, the term “benefits” being defined broadly, and required foreign missions to first obtain approval from the Secretary before acquiring or selling real property. D.C. Official Code §§ 6-1304 and 6-1305 (2008 Repl.).

The FMA also has a separate section concerning the “location, replacement, and expansion” of foreign missions in the District, given the District’s obvious attraction to embassies as the capital of the United States. D.C. Official Code § 6-1306 (2008 Repl.). This section was similarly the product of concerns raised in Congress that local officials, such as zoning and planning authorities, were not giving sufficient weight to the national government’s interest in foreign affairs when making decisions regarding foreign mission facilities. *People’s Republic of Benin, supra* at 315. Thus, the FMA established a separate set of criteria to be used in zoning and permit determinations concerning chancery locations, which included consideration of federal concerns and international obligations, and the FMA created a separate review process for these determinations that would take place before a separately composed Board of Zoning Adjustment, known as the FMA-BZA. D.C. Official Code § 6-1306(d) – (i) (2008 Repl.); *People’s Republic of Benin, supra* at 317.

However, in enacting the FMA, Congress remained sensitive to state and local interests that might be implicated by foreign mission activity. The FMA expressly states that the non-District provisions of the FMA were not to be construed as preempting any state or municipal law or government authority regarding “zoning, land use, health, safety or welfare.” D.C. Official Code § 6-1308 (2008 Repl.). With respect to the provision dealing exclusively with the District, the FMA states that laws governing the location, replacement and expansion of real property in the District are to apply to chanceries unless inconsistent with the FMA. D.C. Official Code § 6-1306 (j) (2008 Repl.). The FMA also directs that “[t]he Secretary shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States.” D.C. Official Code § 6-1306(g) (2008 Repl.).⁵

As a result, it appears that many of the District’s laws and regulations governing municipal matters also apply to the foreign missions located here unless otherwise affected by the FMA, or the Secretary’s implementation of that law.⁶ The complication,

⁵ The FMA also requires that zoning and permitting decisions for the location or expansion of chancery facilities include the consideration of the District’s municipal interest, as determined by the Mayor, as well as historic preservation concerns. D.C. Official Code § 6-1306(d) (2008 Repl.).

⁶ I note the District’s law as to the registering of vacant properties and payment of related fees expressly does not apply to buildings owned by a foreign government or its instrumentalities. D.C. Official Code § 42-3131.06 (2010 Repl.).

however, is in enforcement of such laws. As stated above, the Vienna Convention prevents officials here from entering onto mission property without consent of the mission. In addition, apart from the immunity given to diplomatic agents from various laws or compulsory actions by a host state, the Convention also exempts the head of the foreign mission “from all national, regional, or municipal dues and taxes in respect of the premises of the mission. . . other than such as represent payment for specific services rendered.” Vienna Convention, Article 23.⁷ District agencies could not therefore go onto mission property uninvited to abate nuisances, let alone tax the mission for the costs.

In light of these limitations, I have learned that the method used recently by DCRA to handle a nuisance condition arising on foreign mission property was to seek voluntary compliance through the Office of Foreign Missions in the State Department. Indeed, while I have not researched the practice of other agencies, I suspect this has been a consistent method used by the District government regarding such concerns. The District’s Office of the Secretary has established an Office of Protocol and International Affairs (“OPIA”) to facilitate communications among the State Department, the diplomatic community, and government agencies, and this is the channel used by DCRA to resolve the problematic condition.

The above referenced abatement, however, was done by the particular foreign mission involved, not DCRA, and therefore it is unclear if there will be circumstances where District agencies would actually enter mission property to service the premises with the consent of the mission. I therefore cannot say whether an ANC would be duplicating DCRA services were it to enter into an arrangement with the particular chancery at issue for the activity proposed.⁸

To summarize, this ANC cannot act unilaterally to cut weeds or control potential vermin on embassy property. At best, it would need the consent of the mission, and there would need to be confirmation that DCRA would not otherwise perform this activity. Thus, the ANC should first contact the OPIA in the Office of the Secretary, which I suspect would then contact OFM in the State Department. In and of itself, this may resolve the ANC concerns as it could lead to the mission abating the problem on its own. I understand that there is a belief that the mission is not currently occupied. Thus, if there is consent by the foreign government for non-mission personnel to abate the condition, the ANC would have to first determine that DCRA would not undertake the activity, given the mission’s consent to their entry on the property. Only if DCRA would not act could the ANC use its funds as proposed, with the mission’s consent to the ANC’s entry on its property.

I hope this is helpful.

⁷ Indeed, this conundrum between application of laws and their enforcement was previously confronted by our Office as it concerned parking tickets. We have previously advised that the District could issue tickets for parking violations by diplomatic vehicles, but could not then boot these vehicles for non-payment given a specific immunity granted in the Convention from “requisition, attachment or execution” of the “means of transport by the mission.” Vienna Convention, Art. 22.

⁸ I note that DOH has indicated that it relies on DCRA activities to implement the Rodent Act of 2000.

Sincerely,

IRVIN B. NATHAN
Attorney General

By: 

Jason Lederstein
Assistant Attorney General
Legal Counsel Division

(AL-11-474)

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