GOVERNMENT OF THE DISTRICT OF COLUMBIA
Dupont Circle Advisory Neighborhood Commission 2B

May 31, 2017

Mr. Tommy Wells
Director
Department of Energy and Environment
1200 First Street NE
Washington, DC 20002
tommy.wells@dc.gov

Mr. Karl Racine
Attorney General
Office of the Attorney General
441 4th Street NW
Washington, DC 20001
Karl.Racine@dc.gov

RE: Illegal Closure of the Service Station at 2200 P Street NW

Dear Director Wells and Attorney General Racine:

At its regular meeting on May 10, 2017, the Dupont Circle Advisory Neighborhood Commission ("ANC 2B" or "Commission") considered the above-referenced matter. With 6 of 9 Commissioners in attendance, a quorum at a duly-noticed public meeting, the Commission approved the following resolution by a vote of (6-0-0):

WHEREAS, the service station at 2200 P Street NW closed on January 1, 2017 due to an order to vacate executed by Marx Realty on December 6, 2016 (Attachment A),

WHEREAS, the service station closed due to the action of Marx Realty and not the action of the service station operator, who has expressed a desire to continue operating,

WHEREAS, ANC 2B urges that any action be taken against Marx Realty rather than the service station operator,

WHEREAS, the service station closure did not receive the approval of the Gas Station Advisory Board,

WHEREAS, DC law prohibits full-service retail stations from being "discontinued,…structurally altered, modified, or otherwise converted into non-full service facility or into any other use" (DC Official Code 36-304.01),

WHEREAS, the service station closed in direct violation of DC law,

WHEREAS, Councilmember Jack Evans' Office requested a letter from the Attorney General to determine if the service station closure was in direct violation of DC law, and the letter determined that the closure of the service station was illegal (Attachment B),

WHEREAS, the letter identifies a civil infraction and $20,000 fine assessed by the Department of Energy and Environment are the legal recourse for the District of Columbia in enforcing this law.

THEREFORE, BE IT RESOLVED that ANC 2B requests that Marx Realty finds an operator to reopen the service station at 2200 P Street NW as a full-service retail station within 90 days.

BE IT FURTHER RESOLVED that if Marx Realty refuses to reopen the service station, ANC 2B requests the Department of Energy and Environment issues the civil infraction and fines Marx Realty $20,000.

BE IT FURTHER RESOLVED that ANC 2B urges that no entitlements are granted or permits are issued for any development at the site other than for the returning of the illegally-closed service station.

Commissioners Daniel Warwick (daniel.warwick@dupontcircleanc.net) and Nicole Mann (nicole.mann@dupontcircleanc.net) are the Commission's representatives in this matter.

ON BEHALF OF THE COMMISSION.

Sincerely,

Nicole Mann
Chair

MARX REALTY

MARX REALTY & IMPROVEMENT CO., INC.
708 Third Avenue, 21st Floor - New York, New York 10017-4146
Phone: 212-557-1400 | Fax: 212-983-4532
www.marxrealty.com www.merchantsnationalproperties.com

December 6, 2016

VIA OVERNIGHT DELIVERY, CERTIFIED MAIL,
RETURN RECEIPT REQUESTED &
ELECTRONIC MAIL: jbucaro@petromg.com
Petroleum Marketing Group, Inc.
2359 Research Court
Woodbridge, VA 22192
Attention: Jeff Bucaro

Re: *Lease Agreement, dated January 7, 1997, as assigned and amended by that certain Lease Amendment and Surrender Agreement dated July 31, 2013 (the "2013 Surrender Amendment") and as further amended by that certain Amendment to Lease Amendment and Surrender Agreement dated January 13, 2016, by and between P Street I, LLC, successor-in-interest to Service Station Management, Inc. ("Landlord") and Petroleum Marketing Group, Inc. ("PMG") and E&F Enterprises, LLC ("E&F"), (collectively, "Tenant") contended successor-in-interest to Mobil Oil Corporation (for purposes of this letter, hereinafter referred to as the "Tenant") (collectively, the "Lease")*
2200 P Street, N.W., Washington, DC (the "Premises")

Dear Tenant:

As you are aware, the current Expiration Date of the Lease is December 31, 2016. As such, Tenant is required to vacate and surrender possession of the Premises in the manner expressly required by the 2013 Surrender Agreement, as well as in accordance with the express terms and conditions of the Lease and applicable Laws by no later than close of business on the Expiration Date, subject to Section 6.3(A) of the Lease. To this end,

Please take notice that Section 6.3(B) of the Lease provides that "Tenant may enter the Premises for 30 days after the termination or expiration of this Lease to remove any of its property, including underground storage tanks and any associated lines, systems, piping and dispensing equipment, dealer supplied equipment, signage and trade fixtures. Any and/or all of the aforementioned equipment or personal property constructed, erected, installed or placed by Tenant on the Premises will not become part of the real estate, but will remain the property of Tenant, and **shall be removed from the Premises by Tenant within 30 days after the expiration or termination of this Lease**." (Emphasis supplied.)

Please take notice that Section 6.3(B) of the Lease further provides that "All buildings…and all fixtures on the Premises on the date of expiration of this Lease…shall be surrendered by Tenant at the expiration or termination of this Lease as part of the real estate, in good repair and broom-clean condition…"

Please take further notice that Section 6 of the 2013 Surrender Agreement provides that "Tenant shall surrender possession of the Property in accordance with [the] Amendment and the Lease upon the expiration of the Term…without protest or delay."

Please take further notice that Section 4 of the 2013 Surrender Agreement provides in pertinent part that Tenant must "[close and cease] any and all parts of its business from the Property and [remove] its motor fuel dispensers and underground storage tanks from the Property, [vacate] the Premises in accordance with the Lease, and [file] with the Director of the District of Columbia Department of the Environment

("DOE") (with a copy to the Landlord), the Closure Assessment Report (the "CAR") required to be filed under DCMR, Chapter 6100 [and that] prior to the CAR being filed, Tenant shall also have removed its personal property, including its computers, printers, copy machines, leased equipment, all of its personalty in accordance with the terms of the Lease…"

Please take further notice that Section 4 of the 2013 Surrender Agreement further provides in pertinent part that "Tenant expressly acknowledges and agrees that the Property contains historic building exterior and façade element, components and fixtures and, thus, any and all light fixtures, clocks, windows, window frames, doors, and door frames must remain intact, untouched and unmoved."

Please take further notice that Section 13.1 of the Lease provides that "Tenant shall test the condition of the Premises for the presence of petroleum contamination, no later than 180 days before expiration of this Lease at the end of the term thereof or within 60 days after earlier termination of this Lease."

Should you have any questions or comments, please contact the undersigned at (212) 557-1400, or electronic mail at Glen.R@marxrealty.com.

Very truly yours,

Glen Rosenberg, Esq.
Vice President, General Counsel
P Street I, LLC
By: Marx Realty & Improvement Co., Inc., its Agent

cc: VIA OVERNIGHT DELIVERY, CERTIFIED MAIL,
RETURN RECEIPT REQUESTED &
ELECTRONIC MAIL: parvizhanachi@yahoo.com & petehanachi@verizon.net
E&F Enterprises, LLC
2200 P Street, N.W.
Washington, D.C. 20037
Attention: Mr. Parvin (Pete) Houtan, Operator

VIA OVERNIGHT DELIVERY, CERTIFIED MAIL,
RETURN RECEIPT REQUESTED &
ELECTRONIC MAIL: saschwager@lerchearly.com
Stuart A. Schwager, Esq.
Lerch, Early & Brewer, Chartered
3 Bethesda Metro Center, Suite 460
Bethesda, Maryland 20814

Jeffrey Leiter (via electronic mail: jll@leitercramer.com)

Jag Shah
Jose Arce
Jack Kraus
Phoebe Starr
Toni Ng

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

May 5, 2017

The Honorable Jack Evans
Council of the District of Columbia
1350 Pennsylvania Avenue N.W., Suite 106
Washington, D.C. 20004

Re: Questions Concerning the District's Retail Station Conversion Ban

Dear Councilmember Evans:

You asked my office to analyze a District law that prohibits full-service retail stations from being "discontinued, . . . structurally altered, modified, or otherwise converted into a nonfull service facility or into any other use."[1] That law requires anyone seeking an exemption from its prohibition to petition the Gas Station Advisory Board.[2] Because no members have been appointed to the Board for 11 years, owners and operators of service stations have no way to obtain an exemption from these restrictions. In light of this fact, and the fact that one District service station has recently gone out of business without obtaining an exemption, you asked us to address several questions about the law. Those questions and our brief conclusions are below. They are followed by a more detailed explanation of our conclusions.

Question 1: Does the Board's composition violate the separation of powers?

Response: *Yes, it violates separation of powers principles because the Board includes a Council appointee even though the Board exercises executive power.*

Question 2: What is the District's legal recourse if a retail service station is being unlawfully converted, and which agency determines whether a retail station operator is violating the law?

Response: *The District's primary legal recourse is a $20,000 fine. The Department of Energy and Environment ("DOEE") is responsible for determining initially whether a station owner or operator has violated the conversion ban. If DOEE issues a civil infraction, the Office of Administrative Hearings adjudicates any challenge to the infraction. It does not appear that*

[1] D.C. Official Code § 36-304.01(b) (2012 Repl. and 2016 Supp.).

[2] *Id.* § 36-304.01(d)(2).

the Department of Consumer and Regulatory Affairs ("DCRA") has authority to take action to stop an owner of the property from converting it to a new use.

Question 3: Does the current lack of a Board exempt a retail station operator from complying with the law?

Response: *No. The lack of a Board does not exempt an owner or operator from complying with the ban, but DOEE has the discretion to decide whether it will take legal action against a station owner or operator.*

Question 4: How can these concerns be addressed?

Response: *There are two ways to address the concerns we identify. First, the concerns related to the absence of a Board can be addressed through Executive appointments to the Board. Second, the separation of powers concerns this letter identifies, as well as any policy or legal concerns regarding the breadth of the ban, can be addressed through remedial legislation.*

I. Background

The Gas Station Advisory Board, as modified by 2014 omnibus legislation,[3] is to consist of five voting members. Four are to be Mayoral appointees and one is to be appointed by the Council.[4] The Board's primary function is to recommend whether the Mayor should exempt a full service retail gas station operator from two significant restrictions (collectively referred to as the "conversion ban"). The first restriction is a ban on discontinuing a full service retail station, altering a full service retail station, or converting a full service retail station to a different use:

> No retail service station which is operated as a full service retail service station on or after April 19, 1977, may be discontinued, nor may be structurally altered, modified, or otherwise converted, irrespective of the type or magnitude of the alteration, modification, or conversion, including, but not limited to, any alteration, modification, or conversion which has the effect of merely obstructing access to an existing garage, service bay, work area, or other similar enclosed area by any motor vehicle which was previously accommodated, into a nonfull service facility or into any other use.[5]

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[3] *See* New Columbia Statehood Initiative and Omnibus Boards and Commissions Amendment Act of 2014 ("Omnibus Act"), § 211, effective May 2, 2015 (D.C. Law 20-271; 62 DCR 6651).

[4] D.C. Official Code § 36-304.01(e)(2) (2012 Repl. and 2016 Supp.). By contrast, prior to the Omnibus Act, all members of the Board were appointed by the Mayor. *See id.* § 36-304.01(e)(1) (2012 Repl.) ("Within 30 days of March 1, 2000, the *Mayor shall appoint* a Gas Station Advisory Board to make recommendations on petitions for exemptions") (emphasis added).

[5] *Id.* § 36-304.01(b) (2012 Repl. and 2016 Supp.).

The second, corollary, restriction applies specifically to the operator of one of these stations:

> No person who is an operator of any full service retail service station on or after April 19, 1977, including any person who is a subsequent operator of any such retail service station, or who, in any manner, controls the operation of any such retail service station, shall substantially reduce the number, types, quantity, or quality of the repair, maintenance, and other services, including the retail sale of motor fuels, petroleum products, and automotive products, previously offered. Such operators shall maintain the retail service station's existing garages, service bays, work areas, and similar areas in a fully operational condition and reasonably equipped to perform repair, maintenance, and service work on motor vehicles, including the provision of a qualified individual or individuals who is or are capable of performing repair, maintenance, and service work on motor vehicles during a reasonable number of hours per day and of days per week.[6]

The conversion ban means, in part, that an owner or operator of a full service retail station is prohibited from going out of business and shutting the station down. The statute allows exemptions from this ban, but not for the purpose of shutting down a full-service station altogether. To the contrary, anyone seeking an exemption from the ban must certify that he or she will improve station lighting, improve customer accessibility to gasoline dispensers, and improve customer conveniences.[7] Moreover, anyone seeking an exemption would need to follow a three-step process:

(1) **Petition:** The distributor and retail dealer for the station must petition the Board for an exemption, and their petition must document why the conversion is necessary.[8] A property owner who is not a distributor or retailer has no right to file a petition.

(2) **Board Review**: Based on the petition, the Board may recommend that the Mayor grant an exemption, but only if the Board finds that (a) "[t]he operator of the station is experiencing extreme financial hardship"; and (b) [a]nother full service retail station exists within one mile of the station which provides equivalent service facilities."[9] The financial hardship facing the owner of the property, as opposed to the station operator, is not an issue the Board need consider.

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[6] *Id.* § 36-304.01(c). The provision contains an exception that is not pertinent to our analysis.

[7] *Id.* § 36-304.01(d)(2)(A).

[8] *See id.* § 36-304.01(d)(1)- (3) (describing the required contents of a petition).

[9] *Id.* § 36-304.01(d)(3)(A)(i) and (ii).

(3) **Mayoral Review**: If the Board recommends that the Mayor grant an exemption, the Mayor has 60 days to decide whether he or she is "in agreement with the Board."[10] If the Mayor makes no determination within 60 days, the petition is deemed approved.[11]

A station owner or operator that has not been exempted from these restrictions, and that "converts or causes the conversion of the retail service station," is "guilty of a civil infraction, subject to a penalty of $20,000, and the license to operate the retail service station shall be suspended or revoked until" the station complies with the law.[12] The law does not appear to impose any similar penalty on a property owner that does not actually own or operate a retail station. Nonetheless, the Mayor is required to notify the Board "of any building or construction permit filed by or on behalf of an owner or operator of a full service retail station."[13] Although the Board plays a pivotal role in the exemption process, no one has been appointed to the Board in 11 years.[14] Accordingly, the Board has been dormant, and there has been no way for retail station owners or operators to petition the Board even for an exemption to the ban that would allow them to operate a more limited service station.[15]

II. Analysis

A. The Board's Composition Violates the Separation of Powers

While our local courts have not addressed whether a Council appointee may serve on a board that carries out executive functions, the Court of Appeals has stated that "the same general principles should govern the exercise of such power in the District Charter as are applicable to the three branches of government at the federal level."[16] Applying this principle, just as an agent of Congress may not exercise federal executive power, an agent of the Council may not exercise local executive power.

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[10] *Id.* § 36-304.01(d)(1)(c) and (4).

[11] *Id.* § 36-304.01(d)(4).

[12] *Id.* § 36-304.01(g)(2). The Mayor "may adjust the fine by rulemaking." *Id.*

[13] *Id.* § 36-304.01(j).

[14] *See* Committee of the Whole, "Report on Bill 20-71, 'New Columbia Statehood Initiative and Omnibus Boards and Commissions Reform Amendment Act of 2014'" ("2014 Committee Report"), at 7, Oct. 7, 2014, *available at* http://lims.dccouncil.us/Download/29227/B20-0071-CommitteeReport1.pdf (last visited Jan. 24, 2017) ("no appointments have been made [to the Board] since 2006").

[15] It is our understanding that one or more stations have been allowed to convert in this period after the Council passed legislation permitting them to do so. *See, e.g.,* Gas Station Advisory Board Emergency Amendment Act of 2016, § 2(c), effective July 20, 2016 (D.C. Act 21-448; 63 DCR 9813) (expired Oct. 18, 2016) (exempting from the conversion ban any "retail service station for which an application was on file with the Zoning Commission between May 2, 2015, and August 1, 2015").

[16] *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992).

The District's separation of powers, like the separation of powers established in the U.S. Constitution, precludes the Council from appointing people to bodies that exercise executive power.[17] In *Springer v. Philippine Islands*,[18] the Supreme Court held that the government of the Philippine Islands – which "follow[ed] the rule established by the American constitutions, both state and federal" by "divid[ing] the government into three separate departments"[19] – could not empower legislators to manage government property.[20] It explained that "public agents" that are "charged with the exercise of executive functions" are "beyond the appointing power of the legislature"[21] because legislative power is "the authority to make laws, but not to enforce them or to appoint the agents charged with such enforcement."[22] Similarly, in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*,[23] the Court held that Congress could not vest a nine-member body made up of its own members with the power to veto the actions of an executive board, regardless of whether this nine-member body's actions were considered executive or legislative.[24] In particular, the Court explained that "[i]f the power [exercised by this body] is executive, the Constitution does not permit an agent of Congress to exercise it."[25]

The Board exercises executive power. While the Board's function is to recommend whether to grant an exemption, the Mayor may grant an exemption *only* if the Board recommends that one be granted. Moreover, if the Board recommends an exemption and the Mayor takes no action, the Board's recommendation controls. The Board therefore has more than a mere advisory role; it exercises executive power in deciding whether the Mayor has the option to grant an exemption. Accordingly, none of the Board's five members may be appointed by the Council. Because the Board's statute allows the Council to appoint one of the Board's members, that provision of the statute violates the separation of powers established in the Home Rule Act. This violation of the Home Rule Act does not, however, prevent the Board from being constituted, as discussed more fully in section II.D, below.

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[17] *See* 3 Op. Corp. Counsel 471, 474 (1978) ("The power of the Chief Executive to appoint his subordinate officers is one of the most essential elements of the executive power") (citing Supreme Court precedent); S. REP. NO. 93-219, at 7 (1973), *reprinted in* 1 Committee on the Dist. of Columbia, Legislative History of D.C. Self-Government and Government Reorganization Act, at 283 (1974) (proposed Home Rule Act "confers on [the Mayor] the usual administrative powers and duties, including the power to appoint personnel in the executive branch of the city government and to remove such personnel in accordance with applicable laws and regulations").

[18] 277 U.S. 189 (1928).

[19] *Id.* at 201.

[20] *See id.* at 209.

[21] *Id.* at 203.

[22] *Id.* at 209.

[23] 501 U.S. 252 (1991).

[24] *See id.* at 255 (describing the nine-member body).

[25] *Id.* at 276.

B. The Law Provides the District Only One Express Legal Recourse: Imposition of a Fine, and DOEE is Responsible for Determining Initially Whether an Owner or Operator Has Violated the Ban

A station owner or operator that violates the ban has committed a civil infraction and is "subject to a penalty of $20,000" and a suspension of the owner's or operator's license to operate the station.[26] The authority to enforce that civil infraction, and therefore to make the initial determination of whether an owner or operator has violated the conversion ban, rests with DOEE. District law assigned that enforcement responsibility to the "Office of Energy or successor agency,"[27] and because the Office of Energy has been incorporated into DOEE, DOEE has inherited that enforcement authority.[28] While the Board has the authority to evaluate petitions for an exemption, it has no authority under the statute or implementing regulations[29] to decide whether an enforcement action should proceed. Any civil infraction imposed by DOEE can be appealed to, and subsequently adjudicated by, the Office of Administrative Hearings.[30]

We considered whether DCRA would have the authority to deny a permit for the alteration, closure, or dismantling of a station in violation of the ban. In our view, it would not. Section 8a of the Construction Codes Approval and Amendments Act of 1986[31] identifies the specific circumstances under which a building permit may be denied, which are:

- violation of the Construction Code or zoning regulations;
- five or more stop-work orders in any 12-month period; or
- prior revocation of a building permit or certificate of occupancy.

Failure to comply with the conversion ban is not a violation of the Construction Code or zoning regulations because it is not part of the zoning regulations or the Construction Code. Failure to comply with the ban would not, therefore, justify denial of a building permit. Moreover, the regulations concerning building permits allow a permit to be denied for any violation of "pertinent laws," but they make clear that only the Construction Codes (not other provisions, such as the conversion ban) would be considered "pertinent laws."[32]

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[26] D.C. Official Code § 36-304.01(g)(2) (2012 Repl. and 2016 Supp.).

[27] *See id.* § 36-304.01(i) ("[t]he Office of Energy or successor agency, unless the Mayor shall direct otherwise, shall be the agency charged with [administrative] civil enforcement of" the conversion ban).

[28] *See* District Department of the Environment Establishment Act of 2005, § 106(1), effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.06(1) (2012 Repl.)) ("[a]n Energy Management and Air Quality Control Division, including the Office of Energy, to implement and administer clean air programs and initiatives, to administer programs to assist nonprofit, residential, commercial, industrial, and governmental consumers in becoming more energy efficient, and to be responsible for identifying and analyzing energy issues facing the District and its residents").

[29] *See* 1 DCMR Ch. 22 ("Gas Station Advisory Board Rules and Procedures").

[30] *See* D.C. Official Code § 36-304.01(i) (2012 Repl. and 2016 Supp.).

[31] Effective October 18, 2005 (D.C. Law 16-24; D.C. Official Code § 6-1407.01 (2012 Repl.)).

[32] *See* 12-A DCMR § 105.3.1 (A code official that rejects a permit application based on failure to comply with "pertinent laws" must "state the reasons for the rejection in writing, citing specific sections of the *Construction*

C. The Lack of a Board Does Not Exempt an Owner or Operator From Complying With the Ban

The statute offers station owners and operators a process for seeking an exemption from the ban. It is unlikely that the Council would have intended for the ban to operate without any process for obtaining an exemption. When the Council first created the Board in 1979, it recognized that "some full-service stations may face financial peril if not permitted to convert."[33] A station owner or operator could therefore argue that the conversion ban operates only when there is a Board that can hear requests for exemptions because the Council intended to guarantee owners and operators a way to seek exemptions from the ban, regardless of whether any owner or operator was actually granted an exemption. Thus, they could argue that the ban would not apply if owners and operators had no way to seek an exemption.

Based on our review of the controlling statutory text and its history, this argument is unpersuasive. The ban's language is unconditional; any owner or operator that lacks an exemption cannot convert a full-service retail station to a different use, and an owner or operator cannot discontinue a full-service retail service station at all. The ban does not distinguish between an owner or operator that has not been able to petition a vacant Board and an owner or operator that simply failed to persuade either the Board or the Mayor to grant an exemption. Nor, unlike the original version of the conversion ban, does the conversion ban statute give the Mayor any deadline for filling positions on the Board.[34] Instead, it leaves the timing for appointment of Board members to the Mayor's discretion. If the conversion ban operated only when the Board was capable of hearing an operator's or owner's petition, the ban would be ineffective any time the Board lacked a quorum. This would be contrary to the purpose of the conversion ban, both at the time it was originally enacted and when it was revised in 2014, to ensure that District consumers have access to sufficient gas station facilities.[35] Thus, the ban continues to operate regardless of whether the Board has any members.

Nonetheless, ordinary principles of enforcement discretion apply. Just as a federal agency's "decision not to prosecute or enforce" in a particular matter is "generally committed to [the] agency's absolute discretion" unless Congress "limit[s] [the] agency's exercise of enforcement

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Codes") (emphasis in original).

[33] *See* Cmte. on Public Servs. and Consumer Affairs, "Committee Comments – Bill 3-152, 'Moratorium on Retail Service Station Conversions Act of 1979,'" at 4, July 10, 1979 (on file).

[34] *Compare* Moratorium on Retail Service Station Conversions Act of 1979, § 2(c)(4), effective December 29, 1979 (D.C. Law 3-44; 26 DCR 2096) (requiring the Mayor to appoint Board members within 30 days of the act's effective date) *with* New Columbia Statehood Initiative and Omnibus Boards and Commissions Reform Amendment Act of 2014, § 211(b), effective May 2, 2015 (D.C. Law 20-271; 62 DCR 6652) (omitting any such requirement).

[35] *See* Cmte. on Transp. and the Environ., "Bill 3-152, the 'Moratorium on Retail Service Station Conversions Act of 1979'" ("1979 Committee Report"), at 6, July 17, 1979 (on file) (conversion ban is designed to "protect the needs of the driving public"); 2014 Committee Report, *supra* n.13, at 7 (affirming the Council's "longstanding intent to preserve as many full service stations as possible, subject only to economic hardship").

power,"[36] DOEE has discretion to consider factors such as the equities of each case, and the risk of a legal challenge to any enforcement action, when determining whether to pursue enforcement action in a particular matter.

D. Possible Solutions

There are two primary ways to resolve the concerns set forth above. First, the concerns stemming from the absence of Board members can be addressed by appointing members to the Board. Although the presence of a Council appointee on the Board violates the Home Rule Act, that Home Rule Act violation does not prevent other members from being appointed to the Board. Individual provisions of laws adopted by the Council are severable unless the Council expressly states otherwise,[37] and nothing in the conversion ban statute suggests that a violation of the Home Rule Act by one provision of the statute would invalidate the remainder. Therefore, the Mayor could appoint four members to the Board, and the four-member Board could review the petition of any owner or operator seeking an exemption from the conversion ban, and could make its recommendations to the Mayor. Second, the separation of powers concerns that we have identified, as well as any policy or legal concerns that may stem from the scope of the ban or the application of the ban in the absence of a Board, can be addressed through short-term or long-term remedial legislation. For example, the Council could adopt legislation that modifies the composition of the Board so that all members are appointed by the Mayor, that eliminates the Board and allows the Mayor to directly evaluate petitions for exemption, that holds property owners responsible for their role in facilitating conversions, or that allows gas station owners to go out of business if they so desire.

Please let us know if you have any additional concerns.

Sincerely,

Karl A. Racine
Attorney General for the District of Columbia

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[36] *Heckler v. Chaney*, 470 U.S. 821, 831, 833 (1985).

[37] *See* D.C. Official Code § 45-201(a) (2012 Repl.) (general rule of severability for Council acts); *PHH Corp., Inc. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 39 (D.C. Cir. 2016) (remedy for unconstitutional composition of federal Consumer Financial Protection Bureau was to make the Bureau's Director removable at will).