

TO: Elizabeth White
Chair, National Capital Planning Commission

FROM: Anne R. Schuyler *ARS*
General Counsel

DATE: March 1, 2022

SUBJECT: Reason Why the National Capital Planning Commissioner Does Not Review and Act on Demolition Projects

You have asked for the reason behind NCPC's longstanding practice of declining to take an action on the demolition of structures even if demolition is referenced as part of an application for review of site and building improvements. The reason appears to be twofold: (1) a statutory emphasis in NCPC's enabling legislation on NCPC's control of development, meaning that which comes after demolition, through planning activities and project review; and (2) a corresponding absence in NCPC's enabling legislation of either express or implied demolition authority.

At the outset of NCPC's creation, and prior to passage of the 1952 National Capital Planning Act, NCPC played no role in the review of federal agency plans and projects. Its primary mission until 1952 was the acquisition of land for an integrated system of parks, parkland and parkways and preparation, development, and maintenance of a comprehensive plan for the National Capital and its environs.

The National Capital Planning Act (Act) of 1952, and subsequent amendments to it by the Home Rule Act in 1973 (largely addressing the bifurcation of planning responsibilities between NCPC and the Mayor of the District of Columbia) introduced the concept of and NCPC's authority for plan and project review. In so doing, the language of the Act placed great emphasis on controlling development in the form of anticipated building and site improvement projects and NCPC's role in controlling this development through planning and review of federal agency plans and projects.

Specifically, the Act's findings emphasize the need to control development; the Act's purpose references preparation of a comprehensive for "the physical development of the National Capital;" the Act's objectives are to enable federal agencies to plan for the development of their physical facility needs at the seat of government; and the Commission's primary duties, in addition to preparation of a Comprehensive Plan and the preparation of a Federal Capital Improvement Plan (FCIP) include serving as the central planning agency for federal agencies and fulfilling this role by reviewing federal agency plans and development projects. This later duty is the subject of a separate section of the Act which authorizes the Commission to review federal agency proposed projects before they develop construction plans. While the plan review function is primarily advisory outside the District of Columbia, within the District, the Commission also exercises zoning authority over federal projects and certain District projects within a defined area. When zoning authority is exercised, the Commission's authority extends to approval of a proposed project as is characteristic of zoning authority at the state and local level.

There is no express reference to demolition in the plan and project review section of the Act or anywhere else in the Act for that matter. Moreover, given the Act's emphasis on review of physical projects, meaning the development that comes after demolition, it is not possible to infer authority over demolition. Further, by analogy, at a local level, review of demolition is not part of a typical planning or zoning commission's role because demolition is usually treated as a code issue under the jurisdiction of a regulatory, permitting agency. This same approach is employed at the federal level to a certain extent where demolition is subject to self-review for code compliance (typically a model code) by the federal agency with jurisdiction over the federal property upon which demolition is contemplated, e.g., the General Services Administration (GSA), Federal agencies to whom GSA has delegated authority over their (the federal agency's) property, Military Departments of the Department of Defense (Army, Navy, Air Force), and the Smithsonian Institution (SI). This self-certification is undertaken because federal agencies are not subject to local building code compliance, although they can agree to so voluntarily as the National Park Service typically does, or they can consult informally with local officials without any obligation to comply as GSA does.

When the subject of proposed demolition is a federal property designated or eligible for designation on the National Register of Historic Properties, federal agencies subject to NHPA (e.g., GSA, federal agencies designated by GSA to manage their property, Military Departments, and the National Park Service) must conduct a Section 106 consultation relative to the proposed demolition. Thus, for the new Cyber Security and Infrastructure Security Administration (CISA) building on the St. Elizabeths' west campus (the campus is listed as a National Historic Landmark), a Section 106 consultation was conducted by GSA for the demolition of three historic buildings to make room for the CISA building. The Section 106 process evaluated various site alternatives and whether the demolitions could be avoided or minimized. In the end, the selected location for the CISA building was deemed best, although it did result in an adverse effect and the execution of a Memorandum of Agreement. However, when the CISA application came before the Commission for review, while information was presented regarding the buildings to be demolished, the Section 106 process, and the results of the section 106 process, the Commission's review and final recommendation pertained only to the CISA building and site improvements. There was no separate and distinct ruling or recommendation on the demolition issue.

Turning to SI, whose forthcoming information presentation triggered your question, SI proposes to demolish the southern portion of the National Air and Space Museum (NASM) that was previously used as a restaurant. Once the structure is demolished, SI proposes to construct a new structure to house the Bezos Learning Center. While the NASM is eligible for designation on the National Register, SI recently determine the restaurant structure is not eligible for listing, a decision opposed by Docomomo US. However, even if the former restaurant structure was eligible for listing, SI would not be required to conduct a Section 106 consultation. SI is not subject to NHPA's Section 106 consultation requirements except for those projects that require NCPC review and approval. However, because demolition projects are not subject to NCPC review and approval, the demolition of the prior restaurant structure will not be subject to Section 106 requirements. NCPC will review and approve the site and building design of the Bezos Learning Center and any Section 106 requirements will apply.

Finally, a quick review of FCIP submissions reveals demolition of structures has been included as part of the scope of seven proposed projects over the past five FCIP cycles. As with all other FCIP submissions, NCPC staff evaluated the projects' consistencies with policies in the Federal Elements of the *Comprehensive Plan for the National Capital*, NCPC-approved master plans for federal installations, NCPC-approved site and building plans, NCPC-adopted plans and policies, and other federal interests. The inclusion of a demolition project merited no special attention or comments.

cc: Marcel Acosta
Diane Sullivan
Matthew Flis