

**TO:** Marcel Acosta  
Executive Director

**FROM:** Anne R. Schuyler  
General Counsel *ARS*

**DATE:** February 23, 2023

**SUBJECT:** The National Capital Planning Commission's Lack of Demolition Authority

## **I. BACKGROUND**

At the February 2, 2023 meeting of the National Capital Planning Commission (“NCPC” or “Commission”), the Commission reviewed the Joint Base Myer Henderson Hall (“JBMHH”) Master Plan submitted by the Army. JBMHH also includes Fort McNair in Washington, DC such that the Master Plan also includes provisions applicable to Fort McNair. While not referenced in the JBMHH Master Plan, a provision in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, that required the Army to demolish three Fort McNair residences listed on the National Register of Historic Places, was referenced in the Executive Directors Report (EDR). Commissioners and representatives from the historic preservation community expressed grave concerns about the demolition of the three residences and the broader implications for federal historic preservation.

During the discussion of the mandated demolition of the three houses, several Commissioners raised the issue of NCPC’s authority over demolition. I advised the Commission I had written a legal opinion (“Opinion”) on demolition for a different project at the request of the previous Chair, which concluded the Commission lacked jurisdiction over demolition, and I would share it with them.

By way of background, the original Opinion was developed in response to an Information Presentation by the Smithsonian Institution on the proposed demolition of a portion of the National Air and Space Museum. Originally used as a McDonalds restaurant, the section to be demolished was anticipated to be used as the site of the future Bezos Learning Center. At the time of the presentation to the Commission, only demolition was proposed. DOCOMOMO raised the issue of NCPC’s review of the demolition as a stand-alone activity to which NCPC staff advised NCPC lacked demolition authority. This response was based on longstanding practice. Because no written legal determination existed to substantiate the position, the then Chair asked me to investigate the matter, the result being the issuance of the Opinion.

Following the meeting on the JBMHH Master Plan in February, the Executive Director asked me to review the Opinion to determine if the legal reasoning and legal conclusion of the Opinion remained valid prior to distributing it to members of the Commission. I was also asked to undertake

additional research into the local District of Columbia (“District”) practice regarding demolition since both the District of Columbia Zoning Commission (DCZC) and NCPC received their zoning authority from the same enabling legislation.

Having carefully reviewed the Opinion and undertaken additional research to determine the role of the DCZC in demolition, I maintain the legal reasoning and conclusion of the Opinion to be correct and applicable in all cases not just the application upon which the Opinion was based.

This Addendum is organized into five sections as follows:

1. The Legal Rationale for the Opinion (revisited).
2. How the District and Federal Regulatory Processes Over Demolition Provide Safeguards to Protect Historic Properties.
3. What the Commission can and can’t do to address demolition in the context of an application for review of a Master Plan, an application for Site and Building Improvements in the District, and an application for Site and Building Improvements outside the District.
4. Congressional Action Related to the JBMHH Master Plan.
5. Conclusion

## **II. LEGAL RATIONALE FOR THE INITIAL OPINION**

### **A. The Language of the National Capital Planning Act Does Not Authorize Commission Regulation of Demolition.**

As noted in the Opinion, 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.

The Act’s findings emphasize the need to control development. The Act’s purpose references preparation of a comprehensive plan 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 facilities needs at the seat of government; and the Commission’s primary duties, include among others, 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 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.

Further, there is no express reference to demolition in the Act and the 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.

**B. The District of Columbia Zoning Commission Does Not Possess Demolition Authority and Demolition Permits are Issued by a District Regulatory Agency.**

The Opinion notes that at the local level, demolition is typically not part of a planning or zoning commission's responsibility because demolition is commonly a code compliance issue under the jurisdiction of a regulatory, permitting agency. Additional research confirmed this is the practice in the in the District. Jennifer Steingasser, Deputy Director for Development Review and Historic Preservation at the District Office of Planning confirmed that the DCZC does not exercise authority over demolition. Rather demolition is under the purview of the DC Department of Buildings (successor to portions of the regulatory activities exercised by the former Department of Consumer and Regulatory Affairs) (DCOB). DCOB is responsible for receiving applications and issuing permits for demolition on private land within the District.

It is hard to argue in support of NCPC authority over demolition when, as noted, above, its counterpart at the local level – DCZC -- lacks jurisdiction over demolition. Further, the DCZC derives its authority from the same enabling legislation as that from which NCPC derives its zoning authority. Given this shared authority, it stands to reason the two entities would have comparable authority.

**C. Planning/Zoning and Demolition Permitting is Bifurcated Within the Federal Government But There is No Single Regulatory Permitting Agency.**

At the federal level, there is no single regulatory agency that exercises authority and issues permits for construction or demolition and other code related issues. Specifically, while NCPC serves as the central federal planning agency for the federal Government in the District (and its environs as that term is defined in the Planning Act) and exercises zoning authority over projects on federal land in the District, federal agencies regulate code compliance including demolition (and construction) of their own facilities. This self-certification results because, as noted, there is no overarching federal permitting agency and federal agencies are not subject to local building code compliance. Federal agencies can agree to submit to local permitting requirements voluntarily or they can consult informally with local officials without any obligation to comply. Generally, self-regulation extends to the General Services Administration (GSA); federal agencies to whom GSA has delegated authority to manage and oversee their own property; and the Department of Defense (DOD) and the Military Departments (Army, Navy, Air Force). These entities, or consultants retained by them, self-review and self-certify for code compliance, to include demolition, using a generally accepted model code for guidance.

## **II. DISTRICT AND FEDERAL GOVERNMENT SAFEGUARDS TO PROTECT HISTORIC PROPERTIES**

### **A. District Laws and Regulations Provide Safeguards to Protect of Historic Structures From Demolition.**

As explained by Ms. Steingasser, and as set forth in the District of Columbia Municipal Regulations (DCMR), there are safeguards to protect against razing a building (razing within the context of DCMR means complete destruction vs. demolition which means removal of internal and/or external elements only) listed on or eligible for listing on the District of Columbia Inventory of Historic Sites. Specifically, public notice of permit applications to raze a building is provided to Advisory Neighborhood Commissions (ANC) and the property is posted to allow the ANC and citizens to seek information and consider historic preservation concerns about the buildings and structures proposed to be razed. The Historic Preservation Office (HPO) receives notice of, and reviews all raze applications as a safeguard against razing historic properties by accident or razing buildings without compliance with the D.C. Historic Landmark and Historic District Protection Act (“DC Act”).

If a raze application includes a building listed on or eligible for listing on the District of Columbia Inventory of Historic Sites, the HPO reviews the application according to the procedures outlined in the DC Act. Typically, the HPO submits the raze permit application to the Historic Preservation Review Board (HPRB) for review, and if the HPRB recommends against issuance of the permit, the applicant can appeal this decision to the Mayor’s Agent.

An application to raze a building covered by the D.C. Act may be acted upon in one of the following ways. If the razing of the building has been authorized by the Mayor’s Agent, the HPO signs off on the raze permit. If the building does not contribute to the character of an historic district (a non-contributing building), the HPO signs off on the permit because the DC Act allows razing of non-contributing buildings. If there is a pending historic landmark application for the property, or if one is filed in response to the raze permit application, the property is protected for a mandated period (90 days) to allow the HPRB time to determine whether the property meets the landmark designation criteria. Under this circumstance, the HPO holds the raze application until the HPRB issues a decision. If the HPRB denies the nomination, and an appeal to the Mayor’s Agent overturns the HPRB decision, the HPO signs off on the raze application. If HPRB designates the landmark, the HPRB considers the raze application as required by the DC Act.

### **B. Federal Laws and Regulations Provide Safeguards Applicable to Demolition of Historic Structures.**

Continuing the discussion of similarities between the local and federal processes applicable to demolition, as is true in the District process for regulating razing, safeguards exist in the federal demolition process to protect historic resources. As noted in the Opinion, when the subject of proposed demolition is a federal building designated or eligible for designation on the Federal Register of Historic Places (“Federal Register”), the federal agency proposing the demolition must conduct a Section 106 consultation as required by the National Historic Preservation Act (NHPA). The Section 106 process provides the appropriate process to consider the demolition of a historic

or potentially historic structure, whether as a stand-alone undertaking or in conjunction with proposed development.

Under the NHPA, and regulations promulgated by the Advisory Council on Historic Preservation (ACHP), demolition of a federal building by a federal agency constitutes an undertaking because the demolition is federally funded and requires approval by the federal agency. The demolition undertaking may be coupled with a second undertaking, namely construction of a new building once the demolition is complete.

The Opinion cites as an example of a combined demolition/new construction application the construction of the new Cyber Security and Infrastructure Security Administration (CISA) building on St. Elizabeth's West Campus. The campus is listed as a National Historic Landmark. As noted in the Opinion, the Section 106 process evaluated various site alternatives for the CISA building to determine whether the demolition of three historic buildings could be avoided. At the conclusion of the Section 106 consultation process, the selected location for the CISA building was deemed best even though it did result in adverse impacts on historic resources.

However, NCPC's treatment of the CISA application is revealing because while the EDR included information on the buildings to be demolished, the Section 106 process, and the results of the Section 106 process, review of the EDR reveals the Commission's review and recommendations only pertained to the CISA building and site improvements. There were no recommendations or findings relative to the demolition.

### **III. THE COMMISSION HAS LIMITED ABILITY TO ADDRESS DEMOLITION IN A MASTER PLAN APPLICATION AND SITE AND BUILDING IMPROVEMENT APPLICATIONS OUTSIDE THE DISTRICT OF COLUMBIA, BUT IT MUST REFRAIN FROM OFFERING RECOMMENDATIONS, FINDINGS AND NOTES WHEN IT TAKES ACTION ON SITE AND BUILDING IMPROVEMENT APPLICATIONS FOR PROJECTS WITHIN THE DISTRICT**

#### **A. Master Plans for Installations located Both Within and Outside the District.**

An installation Master Plan ("Master Plan" or "Plan") is a blueprint for future development of the installation, and it is a precursor to submission of individual Site and Building Improvement applications for projects depicted in the Plan. The Commission's review of installation Master Plans is an iterative process. Typically, an applicant submits a concept and/or draft plan to the Commission for review and comments to ensure the applicant's plan is on the right track before it gets too far along in the planning process. Thereafter, the applicant will submit its Master Plan to the Commission for review in final form.

The Commission exercises advisory authority over installation Master Plans both within the District and outside the District in the environs. Thus, the action exercised by the Commission is "approval of comments" on the Master Plan vs. outright approval of the Plan. This means the Commission does not have a Section 106 obligation (or a National Environmental Policy Act or NEPA obligation), but the applicant does because it is using federal funds to derive the Plan, and it ultimately will approve and adopt the Master Plan for further use. At the time an applicant

submits a draft Master Plan to the Commission, the Section 106 process is not likely to be very far along. Further at final review, the Section 106 process is usually not complete, and in fact continues on post Commission review to address specific building projects.

If a Master Plan submitted to the Commission for draft or final review contains a provision calling for the demolition of historic structures to accommodate new development, the Commission's ability to formally comment on the Plan is limited due to the Commission's lack of authority over demolition. However, at the draft and final stage, the Commission can include an advisory comment on the demolition to the effect of, "We encourage the applicant to reconsider the demolition of historic buildings or structures." The Commission's comment on demolition falls into the category of no harm, no foul since the applicant is under no compulsion to comply with the comment. Finally, the Commission cannot offer comments tantamount to denying the Master Plan based on a proposed demolition because of its lack of authority over the matter.

### **B. The Commission Cannot Include Recommendations, Findings or Notes When It Acts on Site and Building Improvement Applications for Projects Within the District.**

In the District, the Commission approves Site and Building Improvement applications submitted by federal agencies and District agencies within the central area. The applicant's approval of the undertaking (proposed construction) triggers the Section 106 process for the applicant, and because the Commission is approving the undertaking, it too has a Section 106 obligation. The Section 106 consultation is likely to be in its early stages at the time of concept review, but it should be well on its way by preliminary review, and it must be completed before the Commission can take final action. The Section 106 process is the final arbiter of whether demolition of historic buildings is permissible, and the Commission as a participant in the process (typically a consulting party for federal applications and lead for District applications) is bound by the decision of the Section 106 consultation process.

If the applicant chooses to treat demolition as a stand-alone project in the District, because the Commission lacks authority over demolition, the applicant is not required to apply to the Commission. But, if the applicant contemplates demolition and construction of a new building simultaneously in the District, it must submit an application for Commission review and approval in successive stages. Throughout the iterative stages of review, while the Commissioners may verbally comment and express opinions regarding the demolition, when it acts on the application at any stage, the Commission cannot include any formal recommendations, findings, or notes addressing demolition. This is a result of the combined lack of authority over demolition, and because the Section 106 consultation process is the authorized process to consider demolition of historic structures.

### **C. The Commission Can Include Comments Regarding Demolition When It Acts on Applications for Site and Building Improvements Outside the District.**

In the areas of the National Capital Region outside the District, the Commission exercises advisory authority over Site and Building Improvement applications. This means it approves comments on the project rather than approving the project outright. Thus, if the application includes both a demolition and construction component, the Commission must treat the application like it does an application for Master Plan Review. This means the Commission can offer a comment on demolition at any stage of review, but it cannot deny the application because the project includes the proposed demolition of historic resources. Note that in this situation, the Applicant will have a Section 106 obligation (and NEPA obligation as well) because it will be using federal funds for the project, and it will be approving the project. NCPC highly encourages applicants to have both its NEPA and Section 106 obligations complete before final submission of a final application for Site and Building Improvements. However, if this is not possible, staff advises applicants that they will need to return to the Commission if there are any changes to the project resulting from completion of these processes. NCPC, however will not have a Section 106 or NEPA obligation, because no such obligation exists when the Commission acts in an advisory capacity.

### **D. The EDR Should Not Address Demolition Other Than to Include a Factual Statement in the Project Description and to Describe the Section 106 Consultation Process and Its Conclusions.**

The restrictions upon the Commission's actions noted above raise the question of whether the EDR should address demolition when demolition is part of a Master Plan application, an application for Site and Building Improvements for projects in the District, and Site and Building Improvement applications outside the District. The answer to this question is no with two exceptions. The first exception is inclusion of a factual statement in the description of the project that the applicant intends to demolish a historic building or buildings and the reason why. The second exception is inclusion of a discussion of the Section 106 process and its conclusions regarding the demolition of historic buildings. Aside from these limited exceptions, discussion of demolition in the EDR with a demolition component is superfluous because the Commission lacks authority over it. I note that this approach comports with the treatment of demolition in the EDR for the CISA application discussed above. I also note that in its verbal discussions, Commission can always discuss and comment on the demolition issue, notwithstanding its lack of authority, but the form of its action, e.g., advisory or approval, determines what the Commission can and cannot say in its formal action.

## **IV. CONGRESSIONAL ACTION RELATED TO THE JBMHH MASTER PLAN**

The JBMHH Master Plan was an anomaly in that Congress had already decided the demolition issue, and a congressional enactment was signed by the President making the demolition a legal requirement. Much to the Commission's concern, this foreclosed the Section 106 Consultation process. However, as federal attorneys will say on behalf of their clients, "When Congress directs, we shall obey." Thus, the Army had no choice but to comply.

Even if the Commission possessed authority over demolition, it would have been foreclosed from exercising this authority with regards to the three historic houses on Fort McNair. Moreover, regardless of whether the Commission did or did not possess demolition authority, the Commission lacked the authority to direct the Army to protest the demolition decision with its congressional appropriators. The Commission has no purview over a federal agency's appropriation process. A federal agency's dealings with its appropriators are a matter of concern only to the agency and the Office of Management and Budget (OMB), and the Army would need permission from OMB to approach Congress to discuss a legislative issue.

## **V. CONCLUSION**

Having scrutinized the original Opinion; researched and determined the role the DCZC plays in demolition (none); and the requirements for obtaining a raze permit in the District, I maintain the legal conclusion and reasoning of the Opinion is correct, namely that the Commission lacks authority over demolition.

cc: Diane Sullivan  
Julia Koster  
Matthew Flis  
Jamie Herr