GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

LEGAL COUNSEL DIVISION

MEMORANDUM

TO: Melissa D. Williams
Assistant Attorney General
District Department of Transportation

FROM: Wayne C. Witkowski
Deputy Attorney General
Legal Counsel Division

DATE: April 14, 2010

SUBJECT: Rails and Overhead Wires for Streetcars
(AL-10-061)

This responds to your February 18, 2010 memorandum by which you seek advice concerning the authority of the District government to amend or to repeal legislation pertaining to rails and overhead wires for streetcars.

CONCLUSIONS

The Council has the legislative authority to either amend or repeal An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes (1888 Act) and An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and ninety, and for other purposes (1889 Act) (collectively, the Acts), which pertain to rails and wires for streetcars, since they are both local laws. Such statutory revisions would not violate section 602 (a) (3) of the District of Columbia Home Rule Act, (Home Rule Act), approved December 24, 1973, Pub. L. 93-198 (D.C. Official Code § 1-206.02 (a) (3)) (2006 Repl.), which prohibits local laws concerning the functions or property of the United States. However, the construction of overhead wires for a streetcar system would need to comply with other District law concerning height limitations for structures in the District of Columbia to avoid violating section 602 (a) (6) of the Home Rule Act, which prohibits local laws that permit the building of any structure within the District in excess of the height limitations in An Act to regulate the height of buildings in the District of Columbia (Height Act),[1] as they existed on December 24, 1973. Further, the construction of overhead wires would need to comply

[1] Approved June 1, 1910, 36 Stat. 452, D.C. Official Code § 6-601.01 *et seq.* (2008 Repl.).

with District zoning law and its implementing regulations, which interrelate with the Height Act and pursuant to which the law – either the Height Act or the zoning law – with the stricter height provision will prevail.

In addition, the Council's authority to amend the 1888 and 1889 Acts and the application of the Height Act are not dispositive of the questions concerning DDOT's construction of a rail system using overhead wires. If and when the District Department of Transportation (DDOT) seeks to install overhead wires, or the poles that support them, in areas under the control of either the Architect of the Capitol or the National Park Service, DDOT must secure the appropriate approvals from those entities. Also, DDOT must assess the impact of a relevant report from the National Capital Planning Commission (NCPC), including NCPC's recommendation that DDOT utilize technology that provides for at-grade electric capability rather than overhead wires, and respond to the report if DDOT disagrees with the recommendations set forth in it.

The conclusion in the May 12, 1995 Memorandum from the U.S. Department of Justice, Office of Legal Counsel (DOJ Memorandum) concerning the preemptive authority of the Secret Service regarding streets critical to the protection of the President does not preclude DDOT from proceeding with the proposed streetcar system. However, to avoid potential problems, DDOT should coordinate with the Secret Service to ensure that proposed streetcar routes do not involve streets that the Secret Service deems to be critical to the President's safety within the National Capital Service Area.

BACKGROUND

You state in your memorandum that in 2003 DDOT began to study the possibility of addressing current gaps in transit service in the District of Columbia and to consider the re-introduction of streetcar service. The streetcars would be powered by overhead catenary wires.[2] DDOT envisions a network with 37 miles of streetcar tracks consisting of eight street car lines to be constructed in three phases. Phase I consists of lines in Anacostia, Benning Road, and H Street, N.E. In 2009, DDOT began laying tracks for the Anacostia and H Street/Benning Road lines.

You seek advice regarding: 1) whether the Council has legislative authority to amend or repeal section 1 of the 1888 Act,[3] as well as the 1889 Act [4], as the Acts affect DDOT's

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[2] The Staff Recommendation Report of the National Capital Planning Commission (NCPC Report), to be discussed later in this memorandum, provides an additional description of the proposed streetcars as follows:

> The streetcars would not run in dedicated lanes but instead would share their lanes with other vehicles. Cantilevered arms on poles installed approximately every 45 feet would extend from the sidewalk curb across parking lanes in each direction and across more than half of the streetcar lanes. They would carry the wires that the streetcar trolleys of an overhead contact system would touch.

NCPC Report, pg. 5.

[3] Approved July 18, 1888, 25 Stat. 323, ch. 676, D.C. Official Code § 34-1901.01 (2001).

plans to construct a streetcar system; 2) the application, if any, of section 602 (a) (3) of the Home Rule Act to any such amendments to the Acts; 3) the application of the Height Act [5] to the installation of poles and overhead wires as required by section 602 (a) (6) of the Home Rule Act; 4) the effect of the NCPC Report on DDOT's plans for the construction of a streetcar system; and 5) the impact of the DOJ Memorandum on DDOT's streetcar project plans.

Our response and analysis follows. [6]

DISCUSSION

I. The 1888 Act

The relevant portion of the 1888 Act provides:

> [t]he Mayor of the District of Columbia shall not permit or authorize any additional telegraph, telephone, electric lighting or *other wires* to be erected or maintained on or over any of the streets or avenues of the City of Washington [7]; provided, that the Mayor of the District may, under such reasonable conditions as he may prescribe, authorize the wires of any electric light company existing on July 18, 1888, and then operating in the District of Columbia, to be laid under any street, alley, highway, footway or sidewalk in the District, whenever in his judgment the public interest may require the exercise of such authority, such privileges as may be granted hereunder to be revocable at the will of Congress without compensation and no such authority to be exercised

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[4] Approved March 2, 1889, Fiftieth Congress, Sess. II, chap. 370. This does not appear to be codified in the D.C. Official Code.

[5] Approved June 1, 1918, 36 Stat. 452, D.C. Official Code § 6-601.05 (2008 Repl.).

[6] To better respond to some of these issues, the Legal Counsel Division, Office of the Attorney General (OAG) consulted with Alan Bergstein, Chief, Land Use and Public Works Section, Commercial Division, OAG, who is the OAG expert on land use issues.

[7] In An Act Changing the name of Georgetown, in the District of Columbia, and for other purposes, approved February 11, 1895, R.S., D.C. § 94, 28 Stat. 650, ch. 79, D.C. Official Code § 1-107 (2006 Repl.), Congress defined the "City of Washington" as:

> [t]hat portion of the District included within the limits of the City of Washington, as existed on the 21st day of February, 1871, and all that part of the District of Columbia embraced within the bounds and constituting on February 11, 1895, the City of Georgetown (as referred to in the Acts of Congress approved February 21, 1871, 16 Stat. 419, ch. 62, and June 20, 1874, 18 Stat. 116, ch. 337) shall be known as and shall constitute the City of Washington, the federal capital;....

This statute abolished the title and existence of Georgetown as a separate and independent city by law.

after the termination of the 50th Congress.[8]

(Emphasis added.) The 1888 Act was part of an appropriations act enacted by Congress for the District of Columbia. Pursuant to Article I, §8, Cl. 17, of the United States Constitution, Congress has always had, and continues to have, plenary legislative authority over the District government. *See, Brizill v. District of Columbia Bd. of Elections and Ethics*, 911 A.2d 1212, 1213 (D.C. 2006). Congress's legislative authority over the District is reiterated in section 601 of the Home Rule Act. (D.C. Official Code § 1-206.01) (2006 Repl.). In 1888 (and 1889) Congress operated as both the state legislature as well as the national legislature for the District of Columbia.[9] Further, Congress has always had, and continues to have, the authority to make appropriations for the District government.[10]

The appropriations language in the 1888 Act reads as if it is intended to be permanent in nature, because the language regarding streetcars bears no direct relationship to the appropriations act in which it appears.[11] This conclusion is further bolstered by the fact that the language was subsequently codified. However, even if the appropriations language is construed to be permanent, that fact alone does not abrogate the Council's general legislative authority in section 404 of the congressionally-enacted Home Rule Act (D.C. Official Code § 1-204.04) (2006 Repl.). The only limitations on the Council's legislative authority are found in section 602 of the Home Rule Act (D.C. Official Code § 1-206.02) (2006 Repl.).

In this case, you ask whether an amendment to the 1888 Act by the Council to permit overhead wires for the streetcars would constitute an act amending or repealing "any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District" in violation of section 602 (a) (3) of the Home Rule Act, or "any act....which permits the building of any structure within the District of Columbia in excess of the height limitations contained in section 5 of the Height Act [D.C. Official Code § 6-601.05 (2008 Repl.)], and in effect on December 24, 1973" in violation of section 602 (a) (6) of the Home Rule Act.

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[8] The language, but not the substance, of this statute was changed after the enactment of the Home Rule Act to make the terminology consistent with the structural changes in the District government.

[9] *See, Newspapers, Inc. et al. v. Metropolitan Police Department, et al.*, 546 A.2d 990, 995 (D.C. 1988).

[10] *See*, section 603 of the Home Rule Act (D.C. Official Code § 1-206.03 (a)) (2006 Repl.).

[11] Notwithstanding a general disfavor against the enactment of positive law through the appropriations process, Congress does have authority to enact such legislation and is deemed to have done so when there is a clear indication of intent in that regard. In Letter Opinion B-288511 (August 22, 2001), the U.S. Comptroller General, construing the issue of permanent law in the context of an appropriations act stated, "[i]f Congress includes a provision that bears no direct relationship to the appropriations act in which it appears, we view that as an indication of permanence".

A. Section 602 (a) (3) of the Home Rule Act

Section 602 (a) (3) of the Home Rule Act (D.C. Official Code § 1-206.02 (3)) (2006 Repl.) limits the Council's legislative authority by providing that the Council shall not "enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District".

In *District of Columbia v. the Greater Washington Central Labor Council, AFL-CIO, et al.*, 442 A.2d 110 (D.C. 1982), the court had occasion to interpret section 602 (a) (3) of the Home Rule Act in the context of the District's Workers' Compensation Act of 1979 (Workers Compensation Act), effective July 1, 1980, D.C. Law 3-77, D.C. Official Code § 32-1501 *et seq.* (2001), which created local law providing an administrative scheme for compensation claims in private sector employment that had previously been administered by the federal government. The court held that the Workers' Compensation Act did not violate section 602 (a) (3) of the Home Rule Act:

> Although the Self-Government Act does not define the term "functions of the United States" as used in § [1-206.02 (a) (3)], it reasonably may be surmised from the language "which is not restricted in its application exclusively in or to the District..." that Congress intended in § [1-206.02 (a) (3)] to withhold from local officials the authority to affect or control decisions made by federal officials in administering federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia. We are not persuaded that Congress intended that performance of a local function by federal officials prior to the Self-Government Act would transform the function into a "function of the United States" for purposes of § 1-206.02 (a) (3).
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> The legislative history further suggests that the language was inserted to safeguard the operations of the federal government on the national level:
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> > The functions reserved to the federal level would be those related to federal operations in the District and to property held and used by the Federal Government for conduct of its administrative, judicial, and legislative operations; and for the monuments pertaining to the nation's past. The functions would include physical planning of these federal areas, construction and maintenance of federal buildings, and administration of federal park areas....[House Comm. on the District of Columbia, 93rd Cong., 2d Sess., D.C. Executive Branch Proposal for Home Rule Organic Act 182 (Comm. Print 1973).]

> Thus, what Congress sought to protect by inserting this limitation was the integrity of the federal domain as it relates to administration of federal legislation having national implications.[12]

Id. at 116. It is true that many of the streets in the City of Washington are titled in the name of the federal government.[13] However, the titling of the streets in the name of the federal government does not mean that the Council has no authority to regulate the use of these streets. In the latter part of the Nineteenth Century, in section 2 of An Act for the government of the District of Columbia, and for other purposes, approved June 20, 1874, R.S., D.C. § 247, 18 Stat. 116, ch. 337, D.C. Official Code § 9-101.02 (2008 Repl.), Congress gave the District of Columbia Board of Commissioners "charge and care of, and the exclusive jurisdiction over, all the public roads and bridges, except such as belong to and are under the care of the United States, and except such as may be otherwise specially provided for by Congress". Furthermore, section 201 of the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983, D.C. Law 4-201, D.C. Official Code § 9-202.01 (2008 Repl.), authorizes the Mayor to close all or part of any street or alley which is determined by the Council to be unnecessary for street or alley purposes, upon approval of a resolution submitted by the Mayor to the Council for the Mayor's review.

While not controlling as precedent, the U.S. District Court for the District of Columbia provided additional insight into the meaning of section 602 (a) (3) of the Home Rule Act with respect to jurisdiction over the streets of the District of Columbia in *Techworld Development Corp., et al. v. D.C. Preservation League, et al.*, 648 F. Supp. 106 (D.D.C. 1986), *dismissed per curiam, Techworld Development Corp., et al. v. D.C. Preservation League, et al.*, 1987 U.S. App. LEXIS 18346 (1987).[14] There, the court considered whether the Council had authority to close District streets even if the federal government held title to the streets. The court noted the overall desire of Congress to rid itself of performing the day-to-day legislative tasks for the District by passing the Home Rule Act, stating:

> They [original proprietors] must also have contemplated that a municipal corporation must soon be created to manage the concerns, and police, and

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[12] See also *D.C. Government Organization: Hearings on Self-Determination for the District of Columbia*, Part 2, 93d Cong., 1st Sess. 52 (1973) (statement of John Nevius, former Chairman of the District of Columbia City Council):

> For the purposes of identifying these federal functions, we are speaking basically of three things: First, the function regarding Federal buildings and properties; second, the conduct of Federal business – and there you get into the whole complicated matter of Federal functions versus local functions or Federal interests versus local interests, admittedly not easy to distinguish – and third, the function of international relations and matters concerning the diplomatic corps.

[13] *See, e.g., Van Ness v. City of Washington*, 29 U.S. 232, 284 (1830), and *Carr, et al. v. District of Columbia, et al.*, 543 F.2d 917, 921 n.10 (D.C. Cir. 1976).

[14] The case was ultimately dismissed because intervening legislation and a settlement agreement made the case moot.

> public interests of the city; and that such a corporation would and ought to possess the ordinary powers for municipal purposes which are usually confined to such corporate bodies. Among these are certainly the authority to widen or alter streets...
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> Authority over the streets of the city is a paradigmatic municipal function; the sort of function one should expect a municipality to have.
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> As Senator Eagleton stated:
> I believe it is not in the interest of this body, nor is it in the interest of the citizens of the United States we are elected to represent, or even of the citizens of the District of Columbia, that the time of the United States Senate be spent preparing, holding hearings, considering and debating matters that are purely local in nature....

Id. at 111-13. If the District can close and dispose of a street titled to the federal government, it is reasonable to conclude that it may regulate the installation of overhead wires for street cars on those streets. Thus, I conclude that local legislation authorizing the construction of overhead wires for the conduct of a streetcar system would not, with one exception, violate section 602 (a) (3) of the Home Rule Act.

The one exception to the general authority of the District government to exercise jurisdiction over the streets of the District of Columbia concerns those streets that are under the jurisdiction of the Architect of the Capitol or the National Park Service. The Architect of the Capitol has exclusive jurisdiction over the Capitol Grounds, which are described in section 1 of An Act To define the area of the United States Capitol Grounds, to regulate the use thereof, and for other purposes (Capitol Grounds Act), approved July 31, 1946, 60 Stat. 718, ch.707, D.C. Official Code § 10-503.11 (2008 Repl.).[15] However, even pursuant to section 1 of the Capitol Grounds Act, the Mayor is responsible for the maintenance and improvement of certain streets designated in the Capitol Grounds Act. Furthermore, pursuant to section 1 of the Capitol Grounds Act, the Mayor is permitted to enter any part of the Capitol Grounds for the purpose of repairing or maintaining or, subject to the approval of the Architect of the Capitol, constructing or altering any utility service of the District government.

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[15] That statute provides, in part, that the United States Capitol Grounds are comprised of:

> all squares, reservations, streets, roadways, walks, and other areas as defined on a map entitled "Map showing areas comprising United States Capitol Grounds", dated June 25, 1946, approved by the Architect of the Capitol and recorded in the Office of the Surveyor of the District of Columbia in Book 127, Page 8, including all additions added thereto by law subsequent to June 25, 1946, and the jurisdiction and control over the United States Capitol Grounds, vested prior to July 31, 1946 by law in the Architect of the Capitol is extended to the entire area of the United States Capitol Grounds....

With respect to the jurisdiction of the National Park Service over streets in the District of Columbia, D.C. Official Code § 10-138 (2008 Repl.) provides:

> [t]he application of the rules and regulations prescribed prior to March 4, 1909, or that may be thereafter prescribed by the Director of the National Park Service, under the authority granted by §§ 6-404, 10-104, 10-106, 10-123, 10-129, and 10-137, for the government and proper care of all public grounds placed by that act under the charge and control of the said Director of the National Park Service, is hereby extended to cover the sidewalks around the public grounds and the carriageways of such streets as lie between and separate the said public grounds.

Thus, notwithstanding the Council's legislative authority, if and when DDOT seeks to install overhead wires (or rails), or the poles that support them, in areas under the control of either the Architect of the Capitol or the National Park Service, DDOT will need to secure the appropriate approvals from those entities.

B. Section 602 (a) (6) of the Home Rule Act

Section 602 (a) (6) of the Home Rule Act (D.C. Official Code § 1-206.02 (a) (6)) (2006 Repl.) also limits the Council's legislative authority, stating that the Council shall not "enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in section 5 of the [Height Act], and in effect on December 24, 1973." In general, the Height Act controls the height of buildings and designated other structures in the District.

An Act Providing for the zoning of the District of Columbia and the regulation of the location, height, bulk, and uses of buildings and other structures and of the uses of land in the District of Columbia, and for other purposes, (Zoning Act of 1938), approved June 20, 1938, 52 Stat.797, ch. 534, D.C. Official Code § 6-641.01 *et seq.* (2008 Repl.), is also relevant to your inquiry.

Section 1 of the Zoning Act provides, in relevant part:

> [t]o promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission … is hereby empowered, in accordance with the conditions and procedures specified in thus act, to regulate the location, *height*, bulk, number of stories and size of *buildings and other structures*…or other purposes; and for the purpose of such regulation said Commission *may divide the District of Columbia into districts or zones* of such number, shape, and area as said Zoning Commission may determine, and *within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance, and uses of buildings and structures* and the uses of land….

(Emphasis added.) Furthermore, section 10 (a) of the Zoning Act of 1938 (D.C. Official Code § 6-641.09 (a)) (2008 Repl.) provides, in relevant part:

> It shall be unlawful to *erect, construct*, convert, or alter any building or *structure or part thereof* within the District of Columbia without obtaining a building permit from the Inspector of Buildings, and said Inspector *shall not issue any permit for the erection, construction, reconstruction, conversion, or alteration of any building or structure, or any part thereof, unless the plans of and for the proposed erection*, construction, reconstruction, conversion, or alteration *fully conform to the provisions of this act and of the regulations* adopted under said act.

(Emphasis added.)[16] 11 DCMR § 199.1 of the Zoning Act of 1938 regulations defines a structure as:

> anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls. The term structure does not include mechanical equipment, but shall include the supports for mechanical equipment.

Furthermore, 11 DCMR §§ 400 and 770, which regulate the height of buildings or structures in residential and commercial districts, respectively, provide height limitations for any poles or the overhead wires to which they would be attached. For example, 11 DCMR § 400.1 provides that for certain residential districts, and 11 DCMR § 770.1 provides that for certain commercial districts, structure heights may not exceed three stories. Therefore, the project designers for DDOT would need to ensure that the poles and overhead wires, assuming that DDOT uses overhead wires, do not exceed the height limitations in the Zoning Act and its implementing regulations.

The interrelationship of the Height Act and the zoning regulations was confirmed by the Board of Zoning Adjustment (BZA) in Appeal No. 17109 of Kalorama Citizens Association (November 8, 2005). The case concerned a penthouse and railing that exceeded the height limit. There the BZA stated, "[t]he Board concludes that it has jurisdiction over all height and set back aspects of the appeal because the Height Act is incorporated throughout the Zoning Regulations...."

The BZA proceeded to cite 11 DCMR § 2510.1 which states, "[i]n addition to any controls established in this title, all building or other structures shall comply with the

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[16] Section 7 of the District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, effective March 16, 1985, as added by the District of Columbia Comprehensive Plan Amendments Act of 1989, effective May 23, 1990, D.C. Law 8-129, D.C. Official Code § 1-306.07 (2009 Supp.), sets forth exceptions pursuant to which the District government is exempt from the zoning laws.

[Height Act]…." The BZA also cited what it called the *Howard University* decision (BZA Appeal No. 15568 (October 21, 1991)), in which it stated that the "height of buildings in the District of Columbia is governed by both the 11 DCR Zoning Regulations and the [Height Act]. When determining the allowable height of a structure, the more restrictive of the two laws must apply."[17]

Overhead streetcar wires fall within this definition of structure, since the wires would, in some way, be connected to permanent poles located on the ground. Therefore, section 602 (a) (6) of the Home Rule Act would be implicated in the construction of overhead streetcar wires and DDOT would therefore need to comply with the requirements of the Zoning Act of 1938, and its implementing regulations, and the Height Act, with the stricter provisions controlling regarding the construction of any such wires. Since section 492 of the Home Rule Act (D.C. Official Code § 6-621.01 (e)) (2008 Repl.) gives the Zoning Commission exclusive authority with respect to zoning, only the Zoning Commission can change zoning regulations. *See alsoTenley and Cleveland Park Emergency Committee, et al. v. District of Columbia Board of Zoning Adjustment, et al.*, 550 A.2d 331, 340 (D.C. 1988).

II. The 1889 Act

The relevant portion of the 1889 Act provides:

> …[a]ny company authorized by law to run cars propelled by horses within the District of Columbia is hereby authorized to substitute for horses electric power by storage or independent electrical batteries or underground wire, or underground cables moved by steam power, on the whole or any portion of its roadway, with authority to purchase and use any terminal grounds and facilities necessary for the purpose; and any such street railway company electing to substitute such power on any part of its tracks or road-beds on the streets of the District of Columbia shall, before doing so, cause such parts of its road-beds to be laid with a flat grooved rail and made level with the surface of the streets upon each side of said tracks or road-beds, so that no obstruction shall be presented to vehicles passing over said tracks…. *Provided further, That after the passage of this act no other rail than that herein mentioned shall be laid by any street railway company in the streets of Washington and Georgetown,* and all companies granted franchises or extensions by the Fiftieth Congress shall have extension of one year's time within which to lay their tracks….

(Emphasis added.)

A. Section 602 (a) (3) of the Home Rule Act

As was the case with the 1888 Act, the language in the 1899 Act appears to be permanent in nature. However, as was the case with the 1888 Act, the permanent nature of the

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[17] *Kalorama*, pg. 10, footnote 1.

appropriations language does not, by itself, preclude the Council from amending the language or enacting other legislation to modify or repeal the language in the 1889 Act.

The same reasoning, set forth above, with respect to the effect of section 602 (a) (3) of the Home Rule Act is applicable to the 1889 Act – namely, that the Council has general authority to amend the 1889 Act to permit the construction of rails in District streets, subject only to a requirement, on a case-by-case basis, for District officials to obtain approvals for such construction in any streets under the jurisdiction of the Architect of the Capitol or the National Park Service. Therefore, as was the case with the 1888 Act, the construction of rails for the conduct of a streetcar system in general would not violate section 602 (a) (3) of the Home Rule Act.

B. Section 602 (a) (6) of the Home Rule Act

While the rails themselves are not implicated by section 602 (a) (6) of the Home Rule Act, DDOT's proposal currently requires that overhead wires be used with the rails. Therefore, to the extent that the rails are part of the system in which overhead wires are used, the above analysis concerning the District government's jurisdiction over the streets in the District of Columbia with respect to the 1888 Act is equally applicable to the 1889 Act. In summary, like the 1888 Act, the 1889 Act is local law and may be amended, or repealed, as appropriate, by the Council in order to accommodate the laying of rails for DDOT's streetcar project, subject to the requirements of the Zoning Act of 1938, and its implementing regulations, and the Height Act with respect to any poles and overhead wires used for the streetcars..

III. Role and authority of the NCPC

The NCPC is the central federal planning agency for the federal government in the National Capital. It is created to preserve the historical and national features of the National Capital, except for the United States Capitol Buildings and Grounds under the authority of the Architect of the Capitol.[18]

DDOT submitted final site and building plans for the reconstruction of the street and sidewalks of H Street, N.E. between 3rd and 14th Streets, N.E. to NCPC, as required by 40 U.S.C. § 8722 (b) (1). With respect to NCPC's role and authority, that statute provides:

> To ensure the comprehensive planning and orderly development of the National Capital, a federal or District of Columbia agency, before preparing construction plans the agency originates for proposed developments and projects or before making a commitment to acquire land, to be paid for at least in part from federal or District amounts, shall advise and consult with the Commission as the agency prepares plans and programs in preliminary and successive stages that affect the

[18] See, 40 U.S.C. § 8711 and D.C. Official Code § 2-1002 (2007 Repl.). Similarly, the Mayor is the central planning agency for the government of the District of Columbia. *See,* section 423 of the Home Rule Act, D.C. Official Code § 1-204.23 (2006 Repl.); 40 U.S.C. § 8712.

> plan and development of the National Capital. After receiving the plans, maps, and data, the Commission promptly shall make a preliminary report and recommendation to the agency. If the agency, after considering the report and recommendations of the Commission, does not agree, it shall advise the Commission and provide the reasons why it does not agree. The Commission then shall submit a final report. After consultation and suitable consideration of the views of the Commission, the agency may proceed to take action in accordance with its legal responsibilities and authority.

The NCPC Report Abstract summarizes the DDOT proposal as follows:

> The proposal includes reconstruction of the street and reconstruction of sidewalks and pedestrian amenities and safety and accessibility features that meet the Department's standards. The proposal also includes the laying of tracks for a future streetcar line in eastbound and westbound lanes of H Street while the street is being reconstructed, to avoid future construction disruption. While the current submission does not include the installation of poles to carry wires for an overhead contact system, it includes below-grade foundations for their future installation.... The staff recommends that DDOT, in collaboration with the Commission and others, continue to evaluate the range of streetcar propulsion technologies, especially since there are new technologies that don't use an overhead contact system. The Commission supports the development and expansion of transit services in the District. The staff's recommended approval of the proposed H Street improvement does not connote approval of a streetcar line that would use an overhead contact system.[19]

The NCPC Report clearly states that "the Commission does not support the implementation of a streetcar system that would use an overhead contact system on streets within the L'Enfant [C]ity and Georgetown".[20] The NCPC Report also states that H Street, N.E. is included within the L'Enfant City.[21]

The NCPC Report goes on to state that electric streetcars were introduced in the City of Washington before the end of the Nineteenth Century, at which time the City of Washington was one of only two cities in the United States that used the then-new practice of placing trolley wires underground. Accordingly, the NCPC advised DDOT against developing a streetcar system powered by overhead contact wires with related infrastructure for any part of the streetcar system within the L'Enfant City and Georgetown area, because the use of overhead wires would affect "viewsheds" that have been protected from overhead elements since Washington was developed. The NCPC Report further states that negative impacts on the viewsheds have been avoided and

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[19] NCPC Report, pg. 1.

[20] NCPC Report, pg. 2.

[21] NCPC Report, pg. 6.

prohibited for over a century. NCPC therefore concludes that the use of overhead wires for streetcars would "contradict mutually shared planning guidance to protect right-of-way viewsheds within the L'Enfant City that are also stated in the federal and District elements of the District's Comprehensive Plan, the District of Columbia Inventory of Historic Sites, and the National Register of Historic Places". Further, the NCPC Report cites the 1889 Act, and other federal statutes from the 1880s through the turn of the century, as continuing the prohibition against overhead wires. Finally, the NCPC notes that technology is now available to provide electricity for streetcars through a surface line where the center rail is electrified only as the streetcar passes over it thus removing concerns about public access to an electrified at-grade rail.[22]

In summary, the NCPC recommends that, as required by the controlling law, DDOT continue discussions with NCPC and other agencies to secure compliance with relevant federal law, including the Acts and the National Environmental Protection Act, and with policies such as the federal elements of the Comprehensive Plan and the Historic Plan of Washington, D.C. As a legal matter, there is no statute requiring DDOT to comply with the recommendations of the NCPC. Under the plain reading of 40 U.S.C. § 8722 (b) (1), quoted above, if DDOT does not agree with NCPC's recommendations DDOT must explain its reasons for disagreeing, the NCPC will issue a final report, and DDOT may then proceed with its plans after consultation with NCPC and consideration of its views. This Office has not found any document that provides more detail regarding the content or structure of DDOT's report to NCPC.

IV. Impact of DOJ Opinion Regarding the Secret Service

In 1995 the Department of Justice (DOJ) responded to the Secretary of the Treasury (Treasury) regarding the latter's authority to close certain streets surrounding the White House to better enable the Secret Service (which is under the jurisdiction of Treasury) to protect the President of the United States. The Secret Service's authority to protect the President and the White House are derived principally from two statutory sources – 18 U.S.C. § 3056 (a) (1) and (2),[23] and 3 U.S.C. § 202.[24]

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[22] NCPC Report, pg. 7.

[23] 18 U.S.C. § 3056 (a) (1) and (2) provides, in pertinent part:

> [u]nder the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect....
>
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice-President-elect [and]
> (2) The immediate families of those individuals listed in paragraph (1).

[24] 3 U.S.C. § 202 grants the United States Secret Service Uniformed Division the authority to perform duties prescribed by the Secretary of the Treasury to protect the White House and any building in which Presidential offices are located.

The DOJ Memorandum concluded that the Secret Service has the statutory authority to close the streets surrounding the White House. In so concluding, the DOJ distinguished the holding in *Techworld*, *supra*, with respect to the National Capital Service Area [25] stating:

> Here, unlike the situation in *Techworld*, Congress has delegated by statute to the Secret Service the indisputably federal function of protecting the President. In this context, we believe that [D.C. Official Code § 1-206.02 (3)] establishes that the Council may not assert its authority where doing so would interfere with the Secret Service's ability to carry out its congressionally-mandated function of protecting the President.
>
> Second, the streets slated for closing are located within the National Capital Service Area, a geographic area comprising many of our national governmental buildings and monuments, the White House, the National Mall and other areas, over which Congress in the Home Rule Act reserved some federal administrative authority. Section 739 of the Home Rule Act, (codified at 40 U.S.C. § 136), established the National Capital Service Area. It also established the position of a presidentially-appointed National Capital Service Director within the Executive Office of the President and charged that office with assuring "that there is provided…adequate police protection and maintenance of streets and highways" within the National Capital Service Area. 40 U.S.C. § 136 (b).
>
> ….While the language and legislative history of the [National Capital Service Area] provision do not suggest that the District of Columbia has no jurisdiction over the National Capital Service Area, they do suggest that Congress considered the federal government's interest in areas within the National Capital Service Area to be greater and more important than its interest in areas outside the National Capital Service Area. We believe this reservation of federal governmental interest further supports the Secret Service's authority to take unilateral action in closing streets within the National Capital Service Area in an effort to protect the President.[26]

The reasoning and conclusion in the DOJ Memorandum regarding the preemptive authority of the Secret Service regarding streets involved in the protection of the President does not, by itself, preclude DDOT from proceeding with the proposed streetcar system. However, for those streets 1) over which DDOT has jurisdiction, 2) on which DDOT proposes to build a streetcar system, 3) which are located within the National Capital Service Area, and 4) which are deemed by the Secret Service as affecting the safety of the President, DDOT should give consideration to the conclusions in the DOJ

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[25] 40 U.S.C. § 8501 defines the National Capital Service Area and its specific boundaries.

[26] DOJ Memorandum, pg. 7.

Memorandum and seek the concurrence of the Secret Service.[27] For those streets under the jurisdiction of the National Park Service (NPS), it will be up to the NPS to decide whether it must consult with the Secret Service before granting DDOT permission to install a streetcar system.

Should you have questions regarding this memorandum, please contact either Pollie H. Goff, Senior Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5524.

WCW/phg

[27] A previous Attorney General for the District of Columbia approved of the conclusion reached in a September 13, 2004 memorandum (2004 memorandum), prepared by another division within the Office of the Attorney General, D.C., finding that the DOJ memorandum regarding the authority of the Secret Service to *permanently* close streets was incorrect, because the DOJ Memorandum principally relied on the provisions of 18 U.S.C. § 1752 (a) (1). The latter makes it unlawful for any person "willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." However, while the DOJ Memorandum discusses 18 U.S.C. § 1752 (a) (1), it does so only in the context of providing insight into the congressional intent behind the more directly-related statutes concerning the broader authority of the Secret Service set forth in 18 U.S.C. § 3506 and 3 U.S.C. § 202, as discussed above. Without attempting to decide whether the Secret Service has authority to close District streets, I recommend that DDOT seek the concurrence of the Secret Service for those streets that will be affected by the streetcar project. It may be that none of the involved streets will be of concern to the Secret Service, thus mooting the need to reach a definitive conclusion regarding its street closing authority.