National Capital Planning Commission

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TO: The Commission

FROM: Anne R. Schuyler
General Counsel

DATE: February 23, 2023

SUBJECT: Legal Opinion and Addendum Regarding NCPC's Lack of Demolition Authority

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In response to the discussion at the February 2, 2023 Commission meeting, attached is a legal opinion ("Opinion") I prepared in March of 2022 regarding NCPC's lack of authority over demolition. I have also prepared and included an Addendum to the March Opinion (Addendum) issued on February 22, 2023.

I. Background

At the February 2, 2023 Commission Meeting, during the review of the Joint Base Myer Henderson Hall (JBMHH) Master Plan (Master Plan), several Commissioners and speakers expressed concerns about the demolition of Quarters 4, 13, and 15 at Fort McNair as required by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA). The Army explained during the meeting that while they originally requested funding for the renovation of these Quarters in the FY 2022 NDAA, Congress changed the request from renovation to demolition funds after seeing the proposed cost of the renovation. The Executive Director's Report (EDR) for the concept Master Plan noted the NDAA language and made the point that NCPC does not have authority to override congressional legislation, nor does it have authority over demolition.

During the Commission meeting, several Commissioners expressed concerns regarding the legal conclusion that NCPC does not have authority over demolition. I responded with the legal rationale, citing the Opinion I wrote in March of 2022 (at the request of the previous Chair) regarding the demolition of the restaurant addition to the Smithsonian Air and Space Museum ahead of the anticipated Bezos Learning Center project. Staff presented the restaurant demolition as an information presentation to the Commission, noting that the Commission does not have authority over the demolition and that any future design would be brought to the Commission for review. The was no discussion among the Commissioners regarding NCPC's lack of authority to review the demolition at the time.

In response to the concerns raised at the most recent Commission meeting on the JBMHH Master Plan, I indicated I would share the March 2022 Opinion with the Commission. Prior to doing so, NCPC's Executive Director asked me to review the Opinion to determine if the legal reasoning and legal conclusion of the Opinion remained valid. 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 derive their zoning authority from the same enabling legislation.

The requested review is complete, and I have issued the Addendum to the March 22 legal opinion. The Addendum confirms the legal reasoning and legal conclusion of the Opinion.

II. Legal Documents Attached to this Memorandum Applicable to the Demolition Issue

Under cover of this memorandum, I am attaching the following documents:

1. The original Opinion on NCPC's Demolition Authority dated March 1, 2022 requested by the then Acting Chair

   This opinion makes the following points:

   a. The language of the National Capital Planning Act does not explicitly or by inference authorize the Commission to regulate demolition.
   b. Demolition is typically not part of a local planning or zoning commission's responsibility because demolition is commonly a code compliance issue under the jurisdiction of a regulatory, permitting agency. The same approach applies at the federal level although there is no central federal permitting agency. Instead, federal agencies, or consultants retained by them, self-certify their own buildings.
   c. When the demolition pertains to a historic building on federal property within the District, a Section 106 consultation is required. The outcome of the consultation determines what will happen to the historic structures.
   d. The New Cyber Security and Infrastructure Security Administration (CISA) application was cited as an example of how the Commission typically addresses the demolition component of an application, noting that the Commission's review and final recommendation pertained only to the proposed CISA Site and Building Improvements.

2. An Addendum to the Original Opinion dated February 2, 2023, Which Confirms the Legal Conclusion of the Original Opinion.

   The Addendum makes the following points:

   a. It revisits the language of the National Capital Planning Act and reaffirms the conclusion that there is no express or implied Commission authority over demolition.
   b. It confirms that at both the District and federal government levels, authority for demolition does not reside with either the District of Columbia Zoning Commission (DCZC) or NCPC when NCPC exercises its zoning authority. Instead, at the District level, the District of Columbia Office of Buildings, a regulatory agency, regulates demolition or razing as the term is used in DC Municipal Regulations, and at the federal level, individual agencies self-certify their buildings for code compliance.
   c. It outlines the safeguards at both the District and federal government levels that are employed to protect designated historic structures from demolition. In the District there is a defined process for raze permits that includes referral to the District's Historic Officer to ensure compliance with the DC Historic Landmark and Historic District Protection Act.

At the federal level, when an application includes demolition of historic building in a proposed project within the District, both the applicant and the Commission must conduct a Section 106 consultation process as mandated by the National Historic Preservation Act. The results of the Section 106 are the final determinant of whether the historic building(s) can be demolished and what mitigations measures must be employed if demolition is found to be acceptable.

d. The Addendum also addresses what the Commission can and cannot do when it reviews applications that include a proposal to demolish a historic building or buildings. When the Commission exercises advisory authority, it can include a forma; comment addressed to the demolition at each stage of review. Advisory authority applies to all Master Plans and application for Site and Building Improvements for installations located outside the District. When the Commission exercises approval authority, which is applicable to federal projects in the District and District projects within the central area, the Commission can discuss the demolition issue at the meeting, but it cannot issue any recommendations, findings, or notes on the issue as part of its decision.
e. Finally, the Addendum notes that the JBMHH Master Plan application was an anomaly because Congress eclipsed the Section 106 process and ordered the buildings to be demolished. Under the circumstances there was nothing the Commission could do but accept the demolition even if it possessed demolition authority.

The Commission's Secretary will be in touch with each of you to set up one or more meetings to discuss the Opinion and the Addendum. At those meetings, I will be happy to answer all questions raised.