

# Strong Foundations:

How Statehood Would Advance Land Use and  
Real Estate Development in Washington, DC

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**Ellen McCarthy**

**June 2022**

**★ Statehood  
= Research DC**

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## **About the Author**

Ellen McCarthy serves on the faculty of the Georgetown University Masters Program in Urban & Regional Planning and is principal at the Urban Partnership, LLC. With over 40 years of professional experience focused on the practice of land use, zoning, neighborhood planning, and historic preservation, McCarthy is widely recognized for her expertise in reconciling public and private values in urban revitalization. From 2000-2007, she served in the District of Columbia Office of Planning, first as deputy director for Development Review and subsequently as director. Under her leadership, the District of Columbia approved its first new Comprehensive Plan since the original plan prepared in 1984, and the zoning framework to guide the revitalization of the Anacostia Waterfront was developed and adopted.

## Overview

Private and public sector developers in the District of Columbia face unique hurdles due to federal preemptions of what would be local decisions in any other jurisdiction. These include federal oversight on local projects, restrictions on the District's ability to implement routine streetscape improvements, limitations on the height of buildings, and many more. Such federal control holds back the promise and potential of the nation's capital.

Often, the additional layer of federal "oversight" adds thousands of dollars of delays and extra design costs, obstacles that would be unheard of in St. Louis or Tampa or Phoenix or any other city or town in the United States with representation in Congress. Of course, that is the nub of the problem: Washington, DC does not have voting representation in Congress, because it is not a state—yet.

It is useful to step back and take a look at the current situation. The District of Columbia has evolved into something quite different from the federal enclave envisioned by the drafters of the Constitution. Far from being predominantly a cluster of federal government offices with some limited residential and commercial buildings, it is the center of a large and growing metropolis of more than 6 million people. Federal employment is less than a third of the city's workforce, and the city population is close to 700,000.

Yet regulations and restrictions that may have seemed appropriate in the time of Jefferson and L'Enfant add unnecessary complications to the process of developing the buildings to house the growing population, establish facilities and infrastructure for its businesses and residents, and provide for the economic development necessary to assure a high quality of life for its residents and a strong business climate for its employers.

This paper looks at the impact of the additional level of federal governance on the process of development in the District. It focuses on five major areas:

- The limitation on the height of new construction of projects on privately owned land across the city;
- Delays and costs imposed by federal review processes on private and public sector development projects;
- Limitations on improvements to parks and federally owned public spaces;
- Delays and intrusion on the local Comprehensive Plan creation and amendment process; and
- The federal role in the local zoning process.

The paper looks at each of these in turn. The Appendix provides a more detailed description of the various federal bodies with control over development in the District. Also noted are some miscellaneous aspects of lack of local control that adversely affect the District and its economic base.

# Federal Regulations and Legislation that Adversely Affect DC Land Use

## An Act to Regulate the Height of Buildings of 1910

Probably the best-known example of federal restrictions on DC home rule is one of the most obvious—the congressionally imposed limit on the height of buildings throughout the city. Dating from 1910 and before, the height limit was initially related to fire safety and structural integrity, but in this era of sophisticated fire-suppression technology and modern construction methods, it is clearly no longer required for those purposes.

The Act restricts the height of buildings not only on federal land or adjacent to the Monumental Core, but also on structures across the entire city. Generally, the Act limits building heights by the width of the street on which they are located, with a maximum of 90 feet in residentially zoned areas and 130 feet in commercial areas (except for a short stretch along Pennsylvania Avenue in Downtown, where structures may stretch to 160 feet). A slight relaxation of the requirements was adopted by Congress in 2014, permitting “habitable use” in penthouses above those limits, but the impact of that amendment has been quite limited.

Proponents of retaining the federal limitations point to the light and open character of the city as the reason to retain the Act. However, ironically, lifting the height limit could allow for more vitality, light and air. The current limits force developers to maximize the bulk of the building to make buildings economically feasible—thus the much-maligned “K Street box”. The developer is forced to utilize every square inch possible under the permitted height, since there is no possibility of going higher and tapering into a slenderer configuration. Allowing for greater height would make it possible for buildings to step back from the street, permitting more sunlight to reach the ground level and providing for more graceful buildings.

The well-documented adverse impacts of the 1910 Act include:

- Limiting the value of sites in Downtown and other areas suitable for higher-density development;
- Reducing the intensity of workers and residents in those areas, minimizing both street vitality and the market for retail;
- Suppressing the property tax base;
- Reducing options for increasing housing affordability;
- Impeding the use of new sustainability technology by reducing the economic viability of greater floor to floor heights; and
- Putting pressure on neighborhoods surrounding the central business district to be converted to commercial uses because of the inability to provide more commercial density within established commercial cores when office demand is high.

It is difficult to imagine any city or state in the Union agreeing to let Congress impose a limitation on the buildings constructed within its boundaries. The Height Act results in anomalies that are especially evident in an area like Friendship Heights. On the Maryland side of the Western Avenue boundary with the District, office and residential buildings may reach heights approaching 180 feet, but just across the street, no matter how well-designed, no building can be taller than 130 feet. Yet there are no federal buildings or views of any national significance within miles and the high levels of transit accessibility would permit more intense development with little impact on the street infrastructure.

Statehood would allow the District to remove the height straitjacket on the areas outside the Monumental Core, since it would be difficult for Congress to justify interfering with state land use controls in areas that have no direct impact on the federal interest. Eliminating the 1910 Act would not necessarily result in unbridled density, just that additional density and height could be channeled to where they make the most sense.

## **Intrusive Oversight Requirements: Federal Review for Projects on Private Land**

In most jurisdictions, design review of private development proposals is undertaken by municipal bodies. Some cities, like Seattle, have established design review commissions, who weigh in with professional design opinions as part of the jurisdiction's project approval process. In most locations, however, the zoning commission or planning commission reviews the design as part of the process of considering permission for zoning flexibility, or for projects that are not matter of right.<sup>1</sup>

**US Commission of Fine Arts.** In the District, however, proposed projects which are located within a short distance of the National Mall, Rock Creek Park, the Potomac Waterfront, the National Zoo, and several other federal lands, or even on streets leading from some of these (see appendix for more detail on boundaries) must be submitted to the Commission of Fine Arts (CFA) for review. The CFA dates from the turn of the 20th Century, based on an outmoded concept of the grand, neo-classical City Beautiful movement.

The District has no role in the selection of CFA Commissioners, who are presidential appointees, and who typically do not even live in the area. The Commission only meets 10 times a year, and development applications must generally be submitted separately for concept approval and, if the concept is approved, then again with more detailed designs, for permit approval.



Figure 1. The proposed hotel that was rejected three times by the CFA is barely visible on the left from this position on the National Mall.

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<sup>1</sup> Matter of right – projects which are in conformance with all the land use regulations and can proceed to building permit without having to seek any discretionary approvals.

Applications must be submitted at least two weeks in advance of the meeting. If the meeting runs long, the review may be delayed, and the applicant is forced to return in another month.

The criteria for approval by the CFA are very broad. Its original enabling legislation says “such development should proceed along the lines of good order, good taste, and with due regard to the public interests involved.”<sup>2</sup>

Interpretation of the criteria can be idiosyncratic. A hotel proposed by Aria Development was required to go to the Commission four times before it was finally approved. In a notorious case in 2006-7, the District ended up having to purchase a newly-constructed house adjoining Rock Creek Park for \$1.5 million because the permit office had erred in failing to send the building permit application to the CFA in advance. The Commission, despite its staff’s initially advising the District that it could proceed with approvals, reversed course under public pressure and rejected the permit application.

The CFA also has jurisdiction over DC government projects throughout the city. For both DC and private projects, CFA review generally entails considerable costs. Before large projects are even brought to the Commission itself for concept and then permit approval, there may be several meetings with CFA staff and resulting design revisions. One DC building official indicated they routinely build in at least \$60,000 in extra fees for architects to navigate the CFA review process, and that’s for projects not expected to be controversial.

**National Capital Planning Commission (NCPC).** The National Capital Planning Commission review process can exacerbate federal-local tensions. It was originally established as the planning commission of the District of Columbia, and when Home Rule was granted in 1973, NCPC’s role was shifted to focusing on planning for the federal interest. But the NCPC still, by statute, reviews zoning map and text amendments that the DC Zoning Commission has preliminarily approved. This NCPC review nominally assures amendment consistency with the Federal Elements of the Comprehensive Plan. It is usually a smooth process, but it can add a month or more to the time for final zoning approval.

After its review, the NCPC then returns the case to the Zoning Commission with a memorandum indicating whether it has any concerns. The NCPC’s comments are advisory only, and the Zoning Commission may revise its approval in response or not.

There have been occasions where disagreements over the NCPC’s interpretation of federal interest have caused a great deal of friction. The clearest example was a Planned Unit Development (PUD) proposed for a site between Florida and New York Avenues, adjacent to the NoMa Metro Station and the Metropolitan Branch Trail. NCPC took issue with the measuring point for the height, claiming that the design violated the 1910 Height Act, even though the Zoning Commission was following the measuring rules in the Zoning Regulations,

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<sup>2</sup> Shipstead Luce Act.

which are well-established. The vague threats to refer the controversy to Congress did not materialize, but it did delay the approval process and cause the developer to have some concern about potential future legal action.

More serious delays and costs have been imposed in the past, when NCPC exercised “in lieu of zoning” approval over DC projects in the center of the city, because NCPC considered those approvals to be “federal actions”, and therefore, subject to the provisions of the National Environmental Protection Act and the National Historic Preservation Act. Compliance with those acts can be lengthy and costly processes. Preparing for an Environmental Assessment for the renovation of the MLK Jr. Memorial Library was estimated to have caused an 18-month delay and several thousands of dollars in consultant time.

**Capitol Interest Overlay Zone (Architect of the Capitol - AoC).** Special zoning was created and adopted by the DC Zoning Commission to “protect” the interest of Congress, as interpreted by the Architect of the Capitol (AoC.) The zoning puts additional restrictions on the density and height of buildings located within a designated area of several blocks adjacent to the Capitol and restricts specified land uses. In addition, all applications for special exceptions within this zone must be submitted to the AoC for its review, lengthening the BZA review process and causing extra expense for developers to pay their legal and design consultants for meetings with the AoC staff.

The AoC can impose extra conditions or limitations. In a particularly noteworthy case, the AoC insisted that, in the redevelopment of the historic Acacia Insurance building to be the new DC offices of a well-known national law firm, no balconies or operable windows could be located on the side of the building facing the Capitol. They also demanded special restrictions on the ability to access the roof, ostensibly to protect the Capitol from snipers, despite the fact that there were acres of open space between the building and the Capitol front where a determined shooter could have set up.

It is true that development in this area would be limited even without the extra zoning controls. There are already strict limitations on density and height within the locally and federally designated Capitol Hill Historic District.

But the AoC can still threaten the District’s planning autonomy. The best example was in 2007 when the AoC developed a new master plan that recommended establishing a special zone from K Street NW/NE on the north to M Street SW/SE on the South, east to 6th Street NE/SE and west to 6th Street NW/SW. Any building proposed to be more than 40 feet in height within that vast area was to have been reviewed by the AoC and the Capitol Police. They worried that too much density would slow the possible evacuation of Congress and Congressional staffs in the event of an emergency! Amazingly enough, this proposal progressed to the point of detailed zoning language, maps, and a slide presentation before DC representatives, and particularly Delegate Eleanor Holmes Norton, were able to put a stop to it. Nevertheless, it was a reminder of the lack of understanding and concern on the part of the AoC about the District’s economic base and the needs of its citizens.

**Old Georgetown Board (OGB).** The Old Georgetown Board was created as a result of the Old Georgetown Act adopted by Congress in 1950 (Public Law 81-808). The purpose of the Act was to “regulate the height, exterior design, and construction of private and semipublic buildings in the Georgetown area of the National Capital.” The Board consists of three architects appointed by the Commission of Fine Arts and is staffed by the CFA.

In 2017, the Georgetown Business Improvement District prepared a White Paper analyzing the impact of the OGB on the development process. The report identified several issues that make it difficult to develop projects in Georgetown:

- The OGB lacks the kind of clear design guidelines that have been developed by other design review bodies, such as the Board of Architectural Review in Alexandria and the New Orleans Historic District Landmarks Review Commission. This lack of clarity makes it difficult for developers to know what design might be approved.
- There is not enough guidance regarding informal procedures, such as the ability to consult with staff before making a formal submission for OGB review. Applicants often waste time and money fixing design features rejected by the OGB. Informal discussions beforehand with staff would allow submissions to be corrected before formal submission.
- While the regulations indicate that the OGB is only to review external features of buildings as can be seen from “public space”, the Board has been known to review proposed interior modifications and even land use.
- The Board has sometimes required applicants to modify unapproved building features, which predated the current ownership of the property, even when the unapproved building element was not part of the new project submitted for review.
- While most projects in Georgetown do not require review by both OGB and the DC Historic Preservation Review Board (HPRB), the DC Historic Preservation Office (HPO) can require permits go to HPRB after CFA review. In these cases, the BID White Paper notes, “HPRB may request significant and potentially conflicting changes to a project that could require CFA review again. This duplicative process can add ambiguity, delay, and cost to some projects in Georgetown, and there is no clarity in the laws or regulations as to the process for joint review by both boards.”
- There is only a limited time period between review by the Board and the deadline for submission of revised plans, making it difficult for applicants to resubmit in time for the next OGB meeting, adding an unnecessary month’s delay.



Figure 2. The owner of this house has spent more than \$.5M on design and legal fees to get OGB approval for renovations.

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<sup>3</sup>. <https://www.georgetowndc.com/wp-content/uploads/2019/08/Old-Georgetown-Board-Review-Process-White-Paper.pdf>

- Occasionally Board members disagree on a project, providing conflicting or unclear guidance to applicants as to what modifications are necessary to obtain approval.
- The OGB has no process for simple administrative signoffs on minor projects, requiring all construction, regardless of scale, to be approved by the Board. In the historic districts in the rest of DC, approximately 40 percent of the permits for modifications/improvements to contributing buildings are reviewed and approved by HPO staff the same day. Review staff are in the same building, facilitating timely permit signoff.

What makes these issues with the OGB particularly frustrating is that it is so unnecessary. The District has a high-functioning, nationally regarded Historic Preservation Review Board and Historic Preservation Office (HPO) staff. It establishes clear and detailed guidelines for every locally designated historic district, and efficiently manages modifications to contributing buildings and landmarks, as well as assuring that new construction in those districts is consistent with their historic character. While the OGB was necessary in 1950, it is definitively redundant now.

## Limitations On Improvements to Parks and Federally Owned Public Spaces



Figure 3. Even though DC paid the entire cost, it still took a special bill from Congress to permit the formerly decrepit Franklin Square to be completely renovated.

Except for two new parks developed (using private funds) as part of the Anacostia Waterfront Initiative, all major parks in the District are owned and managed by the National Park Service (NPS). That is problematic for several reasons. First, the NPS has been underfunded for years, leading to inadequate spending on maintenance and security for the DC parks. This impairs the visitor experience. It also means that parks can have a negative impact on adjacent property values and quality of life. Many have encampments of unhoused populations, rats, broken equipment and facilities and poor-quality landscaping. Even when the Downtown Business Improvement District offered, along with the District of Columbia government, to pay for the

revitalization of Franklin Square, it took an act of Congress and an act of the DC Council, over several years, to finally undertake the work.

A second problem is that NPS operating procedures and regulations do not distinguish between the situation of great wilderness parks and those in urban areas. In a typical city, groups that want to hold a festival, concert or fair in a park can simply obtain a city permit and use the proceeds from food and beverage sales or sales of products at a fair to pay for the expense of the event. For NPS-run parks, rules prohibit “commercial” sales by entities that have not obtained a concession license, which better suits something at a National Park lodge or professional excursion that take place over a full season or a year. Whereas urban parks are

typically a source of neighborhood activity generating social capital and community pride in other cities, parks in the District remain underutilized.

These issues aren't confined to major DC parks either. Under the L'Enfant Plan, the intersections of the diagonal streets and the grid create several so-called "reservations", in some cases small traffic islands or somewhat larger parcels known as "bow-tie parks" because of their shape. In some cases, NPS has ceded control over these parcels to the DC government, through a process known as an "administrative transfer of jurisdiction", generally for a specific transportation purpose, but title remains with the federal government. The transfer of jurisdiction can take years to complete.

When the District, or a private entity, proposes adding public art, or play equipment or a similar improvement to these small reservations, the process of getting permission discourages all but the most dedicated. It can entail a lengthy course of compliance with the National Environmental Policy Act and the National Historic Preservation Act. In a recent example, the District, at the request of Capitol Hill residents, undertook the design and improvement of the Eastern Market Metro Plaza, a series of six small parcels intersected by Pennsylvania Avenue in the vicinity of Eighth Street NE. The initial request was made in 2013, and the project was not completed until April 2021.

There are many other larger pieces of federally owned land that have been provided to the District on an administrative transfer of jurisdiction, for uses ranging from schools and libraries to trash transfer stations. Virtually all these parcels are titled in the name of the US government and under the aegis of the National Park Service. What this means in reality is that the DC government bears the full cost of maintaining and operating the facilities located there, but even simple additions or modifications require an expensive and time-consuming process to obtain federal approval, on top of whatever DC approvals are necessary.

Any attempt to gain title can face stiff congressional opposition. This was the case for several parcels along the Anacostia Waterfront and even in the case of land like Reservation 13, which had housed DC facilities like the jail and the general hospital for decades.

Legislators from states that have large federal landholdings, under agencies such as the Forest Service or Bureau of Land Management, feel that they too should be able to acquire what they view as their share of federal land. However, there are two significant differences separating their situation from the District's situation.

First, a substantial portion of the federal land holdings in the West are in remote areas, whereas the District's are in a city. Many federal land holdings house critical facilities for the functioning of the District, like schools and libraries.

Second, the lack of DC ownership of the land on which these facilities are located is a major anomaly. The land is owned by the federal government because the District was originally effectively a federal agency, and thus all public land was federal land. When the District was

granted Home Rule and expected to function as a regular municipality and supported by its own tax dollars, the transfer of responsibility and authority was incomplete. The District was saddled with the responsibility of providing services and facilities for its population and the federal government, but not all the resources necessary to fulfill that mission.

## **Delays and Intrusion on the Local Comprehensive Plan Creation and Amendment Process**

The official Comprehensive Plan is actually two documents, one for the District and one for the federal government. The federal Plan is prepared by the staff of the National Capital Planning Commission, a federal agency, and adopted by them. The DC Comp Plan is prepared by the Mayor, through the DC Office of Planning, and adopted by the DC Council. It is a key land use document for the city. By law, zoning “may not be inconsistent” with the Comprehensive Plan. Because of its importance in determining zoning, the Comp Plan is reviewed extensively, amended approximately every four years, and adopted officially as legislation by the DC Council.

But the NCPC can veto any adopted elements of the DC Comp Plan it believes would have an undesirable impact on a “federal interest”. The DC Council must amend the language to NCPC’s satisfaction or delete it. Only once NCPC is satisfied can the Plan proceed to the next step in the process—which is another obstacle to the speedy adoption of an updated development framework and affront to DC self-determination.

The Comp Plan then must receive Congressional approval. Admittedly, this step is relatively pro forma, and generally the plan is held and then “deemed approved”. But for property owners awaiting a change in the Plan so they can request new zoning, it can add several months, depending on whether Congress is in session.

## **Federal Role in the Local Zoning Process**

The DC zoning system is a major aberration in the city’s land use control. Zoning is the basic tool that exists throughout the country to control the pattern of development. In the US constitutional system, the fundamental power to control land use rests with state governments, which then adopt enabling acts to delegate that power to local jurisdictions. The District, however, does not have the same sovereignty over land use, even for land that is not owned by the federal government.

In other jurisdictions, the local government establishes a zoning commission, whose duties typically include adopting zoning regulations and a map divided into zones indicating where specific regulations apply. The zoning commission often reviews individual major private development projects as well. There is typically a secondary board, often known as a board of zoning appeals or zoning adjustment, which has limited powers to provide some flexibility in cases where a strict application of the zoning regulations would seriously impair a property owner’s ability to use his or her land.

In the situations described above for other jurisdictions, all the members of the commissions and boards are appointed by local officials. In the District, however, the federal government has a “big brother” role in virtually the entire process. First, the DC Home Rule Act, adopted by Congress in 1973, requires that two of the five members of the Zoning Commission are ex officio federal employees, one from the National Park Service and one from the Architect of the Capitol. The District has no say in who is appointed from either of those bodies, and no remedy if the federal representative is acting inappropriately. The other three members are appointed by the DC Mayor and confirmed by the DC Council, and they serve for four years and must be reappointed to serve beyond that time. There is no comparable term limitation for the federal members.

Somewhat similarly, the Board of Zoning Adjustment (BZA) has five members, one of whom is required to be an employee of the National Capital Planning Commission, and one is a member of the Zoning Commission, whose members serve on a rotating basis. Therefore, for some cases, two out of the five BZA decision-makers are federal employees.

While neither body has a voting majority of federal representatives, the fact that there is no limit on the terms of the federal officials means that they often have clout out of proportion to their numbers, particularly given that the mayoral appointees are volunteers, serving without compensation and in addition to their regular employment. By contrast, the federal employees are serving as part of the terms of their employment. One current federal representative has served for more than 20 years on the Zoning Commission, while also representing the National Park Service on the National Capital Planning Commission. Since most mayoral appointees serve for four years or less, the long-serving federal officials may have a numerical advantage or at least an advantage in terms of familiarity with the rules and procedural options. There have been instances in the past for projects that abut federal property, where the federal representatives have imposed conditions on a decision beyond what would have been a concern of local representatives.

## **Miscellaneous**

**Some Economic Development Disadvantages of Not Having Voting Representation in Congress.** One of the major advantages of being a state is having voting representatives in Congress to look after local interests, for example, by supporting federal funding for local investments. The lack of a powerful congressional delegation can discourage businesses and residents from choosing to locate in the District.

One example relates to universities. Given the District’s very limited taxable land mass, there have long been tensions between the city and its universities, whose land is tax exempt. One major university, which owns additional land in suburban Virginia, was asked as part of its campus plan approval process about how much its employees and programs contributed to the DC tax base. In addition to admitting that the great majority of its employees lived outside the city (and therefore their incomes are prohibited by federal law from being taxed by the

District), the university explained that it conducts much of the research that could potentially generate economic value at the Virginia campus, because having two senators and several House representatives meant the possibility of getting additional federal funding through congressional intercession, a possibility they did not have in the District.

The former Walter Reed campus provides another example. When the Base Realignment and Closure process declared the more than 100 acres of land to be surplus, the District submitted an application for the land to be transferred. However, two federal agencies used their position to preempt the District's claim to a substantial portion of the property, even though at least one of the agencies did not have a clear need or plan. A private hospital, using its lobbyists, was able to wrest control over some of the land the District wanted, which was initially claimed by the Department of State, by getting Congress to pass legislation turning over the area in question to the hospital.

**Conflicting Jurisdictions.** Pennsylvania Avenue NW between the White House and the Capitol is a good example of the difficulties that can occur with various federal oversight bodies. The National Park Service controls the area between the curb and the building face. The District Department of Transportation (DDOT) controls the space from curb to curb. NCPC interprets the Pennsylvania Avenue Design Guidelines. The General Services Administration (GSA) oversees the process of permitting new development in the former Pennsylvania Avenue Development Corporation (PADC) territory.

These jurisdictional lines tripped up the Newseum's battle to remove a 40-foot-tall streetlight that was situated right in front of the portion of the building's façade inscribed with the First Amendment. The streetlight obscured the message, which was the essence of the Newseum's reason for being. But DDOT was concerned about pedestrian safety, so it insisted on sufficient lighting to minimize pedestrian/vehicle conflicts. NPS would not agree to placing more lighting by the crosswalk, because it would interfere with the symmetry of the landscaping and benches. After several months, hours of time, and thousands of dollars of bills from the Newseum's attorneys and lighting consultants, the museum officials finally gave up. The streetlight is still there today, while the Newseum is not.

Now that Johns Hopkins University (JHU) is redeveloping the building, it has now faced numerous bureaucratic complexities and extra costs. The GSA had to review compliance with the PADC requirements, and, since the proposed design needed an amendment to the PADC Plan, it also had to be referred to Congress for approval, which is never a short process. The GSA then had to refer the project to NCPC for its review, which, because it is considered a federal action, could have required a full Environmental Analysis and Section 106 Historic Preservation review.

Fortunately, in this case, the local Historic Preservation Office declared that there was no potential for adverse effect, so that lengthy process was avoided. Then NCPC had to review the design, and the National Park Service had to approve all changes to the public space

along the perimeter of the building. JHU had to go before CFA three times, because it was required to tweak the design in response to the CFA's comments at the first review. It went before the NCPC three times for information presentation, concept approval, and preliminary/final approval. Each of those formal Commission appearances were preceded by several consultations with staff, and of course, for each of the consultations and presentations to the review bodies, JHU had to pay attorneys and consultants.

## **Some Counter Considerations**

**Design Quality.** While it seems clear that the lack of statehood does impose substantial delays and costs on development in the District, there are some benefits that the outside federal review offers. As the DC Public Library's program of construction of new branch libraries has shown, aiming for high-quality architecture can result in a building that adds value and community pride to a neighborhood. On paper, reviews by CFA and NCPC are intended to provide that quality.

But the District should not have to report to an outside federal agency like CFA to achieve good design for DC government projects. The US General Services Administration's Design Excellence program provides a great example of how an agency like the DC Department of General Services could create its own group of distinguished architects and urban designers to review proposed new construction and provide suggestions for how to improve the quality of the product.

A locally appointed body would also be conscious of local needs and concerns, in contrast to the current situation. A DC official recalled an instance where the CFA was considering imposing additional design constraints on the rear of the new Palisades recreation center—constraints that would have imposed needless additional construction and redesign costs (even though the proposed changes would have been virtually invisible to DC residents). The CFA did not want the rear of the building to be seen from across the Potomac River in Virginia by cars whizzing by on the George Washington Memorial Parkway.

**Alternatives to the current composition of the Zoning Commission.** The system of having zoning approvals rest with the Zoning Commission removes elected officials from having the final say on approvals of major development projects. One way of restoring local control over that process would be to reconstitute the Zoning Commission to remove the federal officials. This would provide local control, while avoiding a common problem in other jurisdictions where developers frequently make generous political contributions. When development approvals are made by elected officials, the public may worry their decisions were swayed by campaign contributions rather than the best use and design for a particular site.

Many jurisdictions deal with that issue by creating a separate local Planning Commission, which reviews and makes recommendations on planning and zoning before the projects go to the elected council. This could be done in the District, to serve as a mediating force before

projects go for final approval to the DC Council. The members of the Planning Commission would be drawn from the local jurisdiction, not federal agency representatives. That would return consideration of development projects to local control. This could entail some extra costs and delays, and, since the members of the Planning Commission would have to be approved by the elected body, it wouldn't always insulate project review from political considerations. Nevertheless, it is difficult to make the case that zoning decisions on privately owned land outside the Monumental Core should be made by federal officials.

## **Postcards from the Future**

It's January 2nd, 2023. All legislative hurdles have been cleared, and the State of Washington, Douglass Commonwealth has been established. The boundaries have been drawn to include all land within the current District boundaries, excluding a Federal Enclave around the Capitol and the White House. The Governor and the Legislature have instituted several legislative changes. First is the DC Height Act of 2023. It limits the height of buildings in the vicinity of the Federal Enclave to preserve view corridors, and then establishes height limits in the rest of the state, permitting greater heights along major commercial and mixed-use corridors or areas, set forth in the DC Comprehensive Plan. In addition to the overall height limitations, the Plan requires the establishment of stepbacks above certain heights, to provide for light and air at the street level and retain the sense of openness that has long characterized the city. The Zoning Commission, consisting of five members nominated by the Governor and approved by the Legislature, has taken advantage of the additional permitted heights to allow for greater density in some zones, with the requirement that a significant portion of this extra density must include affordable housing, and incentives exist for small, locally owned retail at the ground level.

The Legislature has also established a Design Review Commission, and all proposed public buildings (e.g., libraries, police and fire stations, public housing, shelters, and recreation centers), must be approved by the Commission as part of the State's Design Excellence Program.

The Shipstead-Luce Act has been substantially amended. Only federal construction and private construction within or immediately adjacent to the Federal Enclave will be required to seek the approval of the reconstituted Commission of Fine Arts. The Old Georgetown Act has been repealed, and the State Historic Preservation Review Board will have sole jurisdiction over development visible from public space in Georgetown.

While major parks such as Rock Creek Park and the Fort Circle Parks will remain property of the National Park Service, most of the remaining parcels, which were ceded to the National Park Service by virtue of being public land in a jurisdiction where "public" was initially automatically synonymous with "federal", will have title transferred to the State. This includes all land that had previously been subject to an administrative transfer of jurisdiction to the District of Columbia for education, library, transportation, or related purposes.

## Conclusion

The assumptions upon which the District has been denied statehood are outmoded. It has a greater population than two states and is much more than an enclave of federal public buildings. Some historians believe that one of the major reasons the Founding Fathers wanted a federal district was their fear of a repetition of the Pennsylvania Mutiny of 1783, when the Pennsylvania Executive Council refused to intervene after several hundred angry veterans of the Revolutionary War surrounded the building where Congress was meeting. They held the body hostage, demanding the veterans' overdue pay from the war. Thus, historians suggest, for the new capital, Congress wanted to be in a district where it could command its own security. It is truly ironic that, when a major security test came on January 6th, 2021, it was the local Metropolitan Police Department that provided 1,000 officers for protection of the Capitol, while Congress waited for its own federal forces to finally show up.

Uprisings aside, it is clear that the lack of statehood for the District of Columbia results in delays and inefficiencies that hamper the private development community's ability to construct and maintain the offices, residences, businesses, and cultural facilities important to the District's economic vitality. It also hampers the local government's efforts to provide necessary local facilities in an orderly and efficient manner, responsive to the needs and desires of its citizens. Establishing Washington, Douglass Commonwealth as the 51st state could go a long way to reversing these inefficiencies and problematic restrictions and permit the growth of a National Capital to rival the great capital cities in the rest of the world.

**“Quite apart from our fight for D.C. statehood, I will continue our two-track approach to achieve complete self-government for the District... Land-use policies are among the most important priorities for state and local jurisdictions. Whether it is the U.S. Commission of Fine Arts, the D.C. Zoning Commission, or the National Capital Planning Commission, federal authorities have no business in local land decisions. Not only is this interference undemocratic, it delays and increases costs for development in the District.”**

**Eleanor Holmes Norton**

# Appendix – More Detailed Profiles of Federal Oversight Agencies

## National Capital Planning Commission

### 1. Agency Description

NCPC is a federal agency charged with planning for federal facilities and interests within the National Capital Region. It was established by Congress in the National Capital Planning Act of 1952 as amended. It consists of 12 commissioners and a number of professional staff. The District is represented on the Commission but does not have control; of the 12 members, only 4 directly represent the city: there are 2 appointed by the Mayor, and the Mayor and Chairman of the City Council are ex officio members. The other members of the Commission are 3 federal appointees (one at-large, one from Maryland and one from Virginia), leaders of the House and Senate committees with oversight responsibility for the District (2) and the heads of 3 federal agencies with sizable land holdings in the District – the National Park Service, General Services Administration and the Department of Defense.

### 2. Agency powers with direct impact on District of Columbia land use or planning prerogatives

- Review of District projects outside the Central Area – advisory only
  - Is interpreted broadly by NCPC and has included transportation projects (ranging from bridges to Capital Bikeshare locations), commemorative works, schools, recreation centers, and parks)
- Veto power over any Comp Plan provisions deemed not in the federal interest
  - Can delay final adoption of the Comp Plan
- Review of zoning cases re: impact on federal interest – advisory only
  - Can delay issuance of final orders
  - Can involve disagreements over what is federal interest, eg. Height Act issues on New York Avenue cases
- Review of street and alley closings – advisory only – delays over construction of MCI Center and CityCenter
- Review of amendments to the Highway Plan – approval
  - As a “federal action,” can trigger NEPA and Section 106
- Review of District Capital Improvements Plan – advisory only

## US Commission of Fine Arts

The US Commission of Fine Arts (CFA) was established in 1910, as a product of the City Beautiful movement. The Commission, which is comprised of seven members, appointed by the President and generally including no more than one member who lives or works in DC, has two significant roles which affect DC development. The Shipstead Luce Act, passed by Congress in 1930, gives the CFA jurisdiction to review all proposed construction, public or private, within the boundaries established by the Act, which are very broad:

**“ . . . when application is made for permit for the erection or alteration of any building, any portion of which is to front or abut upon the grounds of the Capitol, the grounds of the White House, the portion of Pennsylvania Avenue extending from the Capitol to the White House, Rock Creek Park, the Zoological Park, the Rock Creek and Potomac Parkway, Potomac Park, The Mall Park System and public buildings adjacent thereto, or abutting upon any street bordering any of said grounds or parks, the plans therefor, so far as they relate to height and appearance, color, and texture of the materials of exterior construction, shall be submitted by the Commissioners of the District of Columbia to the Commission of Fine Arts.”**

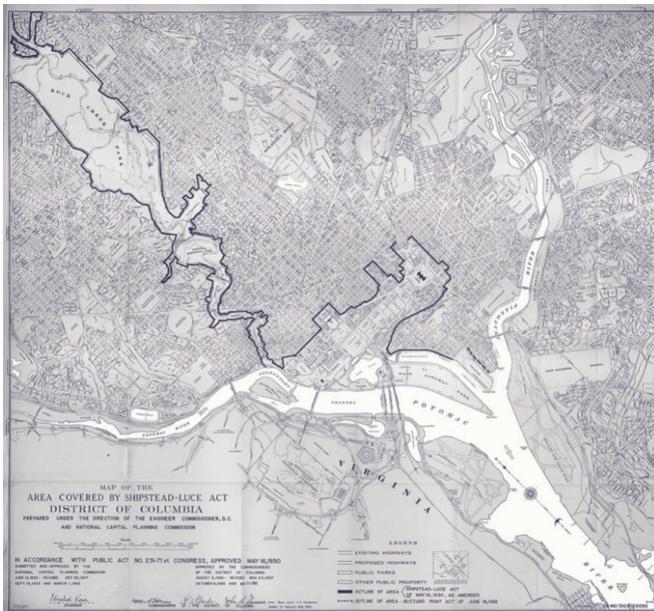


Figure 4 Map of the boundaries of CFA jurisdiction under the Shipstead Luce Act.

The criteria for review are also very broad: “such development should proceed along the lines of good order, good taste, and with due regard to the public interests involved.” (Shipstead Luce Act) In practice, the CFA interprets those boundaries expansively, to include any projects within sight of the National Mall or Rock Creek Park. The case of the Cotton Annex provides a good example of the extra costs and delays the CFA review can cause. Each time the project is reviewed by the Commission, developers will typically engage land use attorneys, architects and possibly other experts to first meet with the staff, at least one time or more, if the staff raises issues, for the first “concept” review. Then the same

stable of experts are used to present the project to the Commission members, who only meet once a month, with a required waiting period from the time of project submittal to the actual

meeting. If the Commission members have any issues or concerns, the same process is triggered once again, before concept approval is granted. The whole process is typically repeated for the permit review as well.

In addition to the Shipstead Luce delays, the CFA also requires review of DC government projects. It can be a somewhat arbitrary process, as exemplified by the Woodridge Library example. The initial concept review of the project by the Commission was generally favorable, but, when the project returned for final approval, a Commission member who had not been present for the first meeting, objected to the design, and the project had to be tweaked, resulting in delay and redesign costs.

In the end, CFA reviews are advisory, and the District may disregard them, but generally, given that the District must return for each project, the city typically attempts first to find an acceptable middle ground, but this can add months to the design schedule.

### **Old Georgetown Board**

The Old Georgetown Board is a part of the CFA. It was established by Congress in the 1950 Old Georgetown Act, which designated the official boundary of Old Georgetown, and assigned responsibility to the CFA to assure that development would be consistent with the character of the historic area. The Board is composed of three architects appointed by the CFA, and supported by CFA staff, which reviews all permit applications for exterior work visible from public space on structures within the Old Georgetown boundary. All building permit applications which are submitted to the DC Department of Consumer and Regulatory Affairs are checked first to ascertain whether they are for work within Old Georgetown. If so, the permit application is referred to CFA/OGB for its review. While OGB recommendations are advisory, in practice, the District of Columbia permit officials generally abide by the recommendations.

### **Architect of the Capitol - AoC**

The Architect of the Capitol (AoC) is the agency which plans for, and maintains, the Capitol District, which includes the Capitol building, the Senate and House office buildings, the Library of Congress and the Supreme Court. It is overseen by a congressional committee.

Special zoning was created and adopted to “protect” the interest of Congress, as interpreted by the Architect of the Capitol. The zoning restricts the density and height of buildings located within a certain area adjacent to the Capitol and restricts certain land uses. In addition, all applications for special exceptions within this zone must be submitted to the Architect of the Capitol for its review, and AoC can impose conditions or limitations if it feels they are relevant.



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