



Appendix P

Office of the Attorney General Legal Opinion—Rails and Overhead Wires for Streetcar



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION**

General Counsel



**Inter-office Memorandum
Privileged and Confidential**

**TO: Gabe Klein, Director
District Department of Transportation**

**CC: Scott Kubly, Associate Director
Progressive Transportation Services Administration**

**THROUGH: Frank Seales, Jr.
General Counsel**

**FROM: Melissa D. Williams
Assistant Attorney General**

DATE: March 5, 2010

RE: Legal Interpretation

CATS NO.: Streetcar Project

The Office of the General Counsel (“Office”) for the District Department of Transportation (DDOT) was asked by the Progressive Transportation Services Administration to collaborate with the Downtown D.C. Business Improvement District (“BID”) to produce a comprehensive memorandum addressing the prohibition of overhead wires in the District.¹ Specifically, the memorandum addresses whether DDOT, through the Council or Mayor, has the authority to amend/repeal legislation pertaining to overhead wires in the District of Columbia on federal and local land.

Overview/Background

In 1889, the U.S. Congress passed a law authorizing the conversion of horse-drawn streetcars to “electric power by storage or independent electrical batteries or

¹ Andrea C. Ferster, Esquire, collaborated on this memorandum on behalf of the BID. Ms. Ferster’s office is located at 2121 Ward Court, N.W., 5th Floor, Washington, DC.

underground wire, or underground cables moved by steam power.” Fiftieth Congress, Sess. II, 793, 797 (1889). Ultimately, D.C. developed a streetcar network that peaked at over 200 miles. Streetcar service was discontinued in 1962, when streetcars were abandoned in favor of buses.

In 2003, the D.C. Department of Transportation (“DDOT”) began to study the possibility of addressing current gaps in transit service in the District of Columbia. The resulting report identified the re-introduction of streetcar service as part of the recommended system plan. This plan envisions a network with 37 miles of streetcar tracks consisting of eight street car lines, to be constructed in three phases. Phase 1 consists of lines in Anacostia, Benning Road, and H Street, N.E.

In 2007, the National Capital Planning Commission (“NCPC”) approved the Anacostia Line segment. However, the accompanying Executive Director’s report noted the ban on overhead wires in the 1889 statute, and made clear that approval of this segment should not be construed as the “Commission’s acceptance of a future streetcar system that uses an overhead contact system within the L’Enfant City and Georgetown.” NCPC Executive Director’s Report, at 2 (Jan. 25, 2007). The NCPC further asserted that the use of streetcars with overhead wires and infrastructure necessary for such wires would “contradict mutually shared planning guidance to protect right-of-way view sheds within the L’Enfant City that are also stated in the Federal and District elements of the Comprehensive Plan. Additionally, the L’Enfant Plan rights-of-way have protection through listing in the District of Columbia Inventory of Historic Sites and in the National Register of Historic Places” *Id.* at 7-8.

In 2009, DDOT began laying tracks for the Anacostia and H Street/Benning Road lines. The modern streetcars that will be used will be eight feet wide, 66 feet long, and are capable of operating in mixed traffic. The streetcars would be powered by overhead catenary wires. The question presented here is whether the use of streetcars powered by overhead catenary wires is statutorily prohibited, and whether this prohibition is based on local law, which the District of Columbia has the authority to amend or repeal.

The following is an analysis of the laws applicable to the plans by the District Department of Transportation (“DDOT”) to construct a network of streetcars powered by overhead catenary wires in the District of Columbia.

Discussion

I. Whether Overhead Wires Are Statutorily Prohibited.

In 1889, the U.S. Congress passed the following law:

[A]ny company authorized by law to run cars propelled by horses within the District of Columbia is hereby authorized to substitute for horse *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 ground 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 services 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.

Fiftieth Congress, Sess. II, 793, 797 (1889) (emphasis added). The statute further provides 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 . . . Provided further, That the foregoing requirements *as to motive power*, rails and road-bed shall not apply to street railroads outside of the city of Georgetown and the Boundary limits of the city of Washington. . . .

Id. (emphasis added)

This statute, on its face, appears to specifically exempt the limitations “as to motive power” from areas outside of the “City of Washington” and the “City of Georgetown.” According to Webster’s Dictionary, “motive power” is defined as a “power used to move or impel, esp. some form of mechanical energy (steam, electricity etc.) used to drive machinery.” The New Lexicon Webster’s Dictionary of the English Language, Encyclopedic Edition (Lexicon Publications, Inc., 1988 Ed.). Accordingly, the negative inference of this provision is that Congress specifically intended only to permit street cars to operate in the District of Columbia using the “motive power” specified in the statute, *i.e.*, “electric power by storage or independent electrical batteries or underground wire, or underground cables moved by steam power.” The specified forms of motive power do not include “overhead wires.” Therefore, the plain language of the statute appears to prohibit D.C. from constructing streetcars using any other “motive power” within the City of Washington and the City of Georgetown.²

The requirements concerning motive power in the 1889 statute applied only to the “City of Washington” and the “City of Georgetown,” as those geographic areas existed prior to 1889.³ The Old City of Washington has been referred to as the L’Enfant Plan, however, maps used by the National Capital Planning Commission and the District of Columbia indicate that the boundaries of the “Old City of Washington” are roughly, Rock Creek Park, north to Florida Avenue, NW; Florida Avenue, NW east to 15th Street, NE;

² See *The Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) (“A statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken — these matters are outside the scope of the statute.”)

³ In 1895, the “City of Georgetown” was abolished as a separate and independent city. See D.C. Code § 1-107.

15th Street, NE south to C Street, SE; and C Street SE west to 22nd Street, NW. The boundaries of the City of Georgetown are apparently set forth in “the Acts of February 11, 1895, 16 Stat 419, ch. 62, and June 20, 1874, 18 Stat. 116 ch. 337.” See D.C. Code Ann. § 1-107.

There is another federal statute, passed in 1888, pertaining to the use of overhead wires. This 1888 statute, unlike the 1889 streetcar statute, is codified in the D.C. Code, and provides that

The 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; 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. . . .

D.C. Code Ann. § 34-1901.01 (emphasis added). Overhead catenary wires for streetcars would appear to be “other wires,” and therefore, would appear to fall within this general ban.

II. Whether the District of Columbia Has the Authority To Amend The 1888 and 1889 Federal Laws.

Since the 1888 and 1889 statutes appear to provide a clear ban on streetcars powered by overhead wires, these statutes must be amended or repealed in order to use this form of motive power for streetcars. The question here is whether the District of Columbia has the authority under the Home Rule Act to amend or repeal these statutes, or whether these federal laws implicate “property or functions of the United States,” so that D.C. lacks authority to change these statutes under D.C. Code Ann. § 1-206.02(a)(3).

A. D.C. Has the Authority Under the Home Rule Act to Amend or Repeal the 1889 Statute Barring Streetcars With Overhead Wires in Certain Geographic Areas.

1. Statutory Limitations on D.C. Legislative Authority.

The U.S. Constitution grants Congress plenary authority over the District of Columbia. Art. I, § 8, cl. 17. Prior to the passage of the Home Rule Act, Congress effectively acted as the local legislative body for the District of Columbia, and enacted numerous laws governing the affairs of the District of Columbia. However, in 1973 Congress passed the Home Rule Act to “relieve Congress of the burden of legislating upon essentially local District matters.” D.C. Code Ann. § 1-201.02(a). Under the Home Rule Act, Congress delegated to the D.C. Council “legislative power,” which “shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of (the) Act.” *Id.* § 1-203.02.

The Home Rule Act establishes specific exceptions to this legislative authority relating to specific geographic areas, which includes, *e.g.*, a prohibition on enacting a “commuter tax,” a ban on enacting any law relating to the organization of the D.C. Courts, relating to the courts of the United States, the U.S. Attorney, or the U.S. Marshall Service, or to the Commission on Mental Health. *Id.* § 1-206.02(a). Of particular note, one of the specific prohibitions relate to D.C.’s appearance, scale, and streetscape: D.C. is not permitted to legislate in a manner that would contravene the 1910 Height of Buildings Act (D.C. Code Ann. § 6-601.05). *Id.* § 1-206.02(a)(6).

There is no specific prohibition in the Home Rule Act that bars the District of Columbia from legislating on the specific subject of streetcars and/or overhead wires. However, there is a general prohibition in section 602(a)(3) of the Home Rule Act, providing that the District of Columbia has no authority to “(3) [e]nact 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 to the District.” D.C. Code § 1-206.02(a)(3).

In interpreting the Home Rule Act, the Courts have held that the District of Columbia has the authority to amend or repeal congressional statutes that are “local” rather than “national” laws. *District of Columbia v. Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110, 113 (D.C.1982), *cert. denied*, 460 U.S. 1016 (1983) (holding that the D.C. Council had the authority to repeal a federal statute extending federal workers compensation laws to private employers in the District of Columbia); *Hall v. C & P Telephone Co.*, 793 F.2d 1354, 1373 (D.C. Cir. 1986) (holding that the D.C. Court of Appeals’ construction of this congressional statute as being a “local law that did not affect federal functions” must be given deference by the federal court).

Accordingly, the question of whether D.C. has the authority to repeal or amend the 1889 federal law barring streetcars using overhead wires as their “motive power” in the limits of the City of Washington and Georgetown turns on whether the statute affects “the functions or property of the United States or which is not restricted in its application exclusively in or to the District.” D.C. Code Ann. § 1-206.02(a)(3).⁴

Several cases interpreted this clause in the context of statutes enacted by Congress in legislating on behalf of D.C. prior to the passage of the Home Rule Act. In particular, in *District of Columbia v. Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110 (D.C. 1982), the Court held that the D.C. Council had the authority under the Home Rule Act to repeal a federal law regulating workers compensation for private sector employees in the District of Columbia, which was passed by Congress prior to the passage of the Home Rule Act. The union challenged the D.C. law, arguing that workman's compensation in the District was a federal matter, and that the new law

⁴ In this case, since the relevant congressional statute applies exclusively within the District of Columbia, the repeal of this law is “restricted in its application exclusively to the District.” D.C. Code § 1-206.02(a)(3). *See, e.g. Brizill v. D.C. Board of Elections and Ethics*, 911 A.2d 1212, 1215-16 (D.C. 2002) (D.C. lacked the authority to enact a law that was inconsistent with a congressional statute that applied to the District of Columbia and to “Indian country” and “possessions” and territories of the United States)

affected a “function of the United States,” and was invalid. The court rejected this argument, finding that the language of the Home Rule Act . . . was included to “safeguard the operations of the federal government on the national level.” *Id.* at 116. The court quoted the following language from the legislative history of the Home Rule Act:

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.

District of Columbia v. Greater Washington Central Labor Council, AFL-CIO, 442 A.2d at 116. (*citing* House Comm. on The District of Columbia, 93d Cong., 2d Sess., D.C. Executive Branch Proposal for Home Rule Organic Act 182 (Comm. Print 1973). Accordingly, the District may repeal or amend a federal statute that is restricted in its application exclusively in or to the District.

2. The District of Columbia is Not Prohibited from Enacting Legislation Repealing the Ban on the Use of Overhead Wires to Power Streetcars

The question here is whether the ban on streetcars powered by overhead wires concerns “federal operations in the District,” or “property held and used by the federal government for conduct of its administrative, judicial, and legislative operations,” or “the monuments pertaining to the nation’s past.” *Greater Washington* 442 A.2d at 116. While the 1889 statute concerns the streets of Washington, one court held that these streets -- even streets within the boundaries of the old “City of Washington” -- do not constitute property held and used by the federal government for conduct of its administrative, judicial, and legislative operations.” See *Techworld Development, Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 113 (D.D.C. 1986), *judgment vacated*, 1987 WL 1367570 (C.A.D.C. 1987) (holding that the closing of 8th Street N.W. “is precisely the sort of local matter Congress wishes the D.C. Council to manage,” notwithstanding the fact that “title to the street was vested in the United States.”)

In 1995, the U.S. Department of Justice Office of Legal Counsel (“OLC”) issued a legal opinion distinguishing *Techworld* from the closing of Pennsylvania Avenue in front of the White House by the U.S. Secret Service States as a security measure following the Oklahoma bombing. The OLC opinion held that the Secret Service had the authority to close Pennsylvania Avenue, reasoning that the street closing implicated “the indisputably federal function of protecting the President.” OLC Opinion re Authority of the Secretary of the Treasury to Order the Closing of Certain Streets Located Along the Perimeter of the White House, at 7. (May 12, 1995) (hereinafter “May 12, 1995 OLC Opinion”). The opinion also noted that the streets slated for closing were 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;” and 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.” *Id.*

Here, in addition to traversing areas within the larger limits of the old “City of Washington,” D.C.’s proposed streetcar system will traverse areas that are within the National Capitol Service Area. *See* D.C. Code Ann. § 1-207.39, defining the boundaries of the National Capital Service Area). However, while the May 12, 1995 OLC Opinion views this geographic area as one in which the federal interest is “greater” than other geographic areas, the reasoning of the opinion primarily rests on the “federal function” of protecting the President, which is codified in several federal statutes. While the OLC opinion also makes reference to “federal interests” in the National Capital Service Area, the opinion acknowledges (using the double negative) that “the language and legislative history of the provision do not suggest that the District of Columbia has no jurisdiction over the National Capital Service Area.” May 12, 1995 OLC Opinion, at 7. Indeed, the ultimate holding of the OLC is that federal statutes give the Secret Service the authority to close virtually any street where necessary to protect the President, within or outside of the District of Columbia. The heightened federal interest in the National Capital Service Area was therefore *dicta* and did not control the outcome of the OLC’s analysis.

D.C. already operates an extensive network of public transportation services within the National Capital Service Area. The operation of streetcars using overhead wires within this area would not intrude on the ability of any federal agency to exercise a statutory function. While the NCPC views the protection of view sheds within this area as a federal “interest,” the fact that the NCPC identifies a “federal interest” in a particular geographic area does not mean that the District is therefore barred from enacting legislation that affects this geographic area. To the contrary, federal law establishes a separate mechanism for the NCPC to protect these federal interests, such as by commenting on planning and development in the District of Columbia. *See, e.g.*, 40 U.S.C. § 8721(a)(1). In the case of proposed “District developments and projects,” the NCPC provides a “report and recommendations” to the agency; “[a]fter 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.” *Id.* § 8722(b).⁵

Moreover, while Congress also defined the National Capital Service Area in the Home Rule Act, it did so solely for the purpose of facilitating joint management of services and administrative functions between the federal and local government, and not

⁵ In addition to the NCPC’s role in commenting on proposed federal and district development and projects, the NCPC must approve “the location, height, bulk, number of stories, and size of federal public buildings in the District of Columbia and the provision for open space in any around the same” 40 U.S.C. § 8722(d). The NCPC also has the authority to disapprove “public buildings erected by any agency of the Government of the District of Columbia in the central area of the District (as defined by concurrent action of the Commission and the Council of the District of Columbia) . . .” *Id.* § 8722(e). In other words, NCPC’s approval authority only extends to public buildings. NCPC does not have statutory authority to approve or disapprove whether the District can proceed with its plans for a streetcar and/or overhead wires. According to Black’s Law Dictionary, a “building” is “[o]rordinarily, a structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.” A streetcar system does not fall within this definition.

to carve our areas of exclusive geographic jurisdiction where D.C. authority is barred. *See Intel Corp. v. District of Columbia*, 448 A.2d 261, 267 (D.C. 1982), *cert. denied*, 459 U.S. 1087 (1982) (holding that D.C. had the authority to tax personal property within the National Capital Service Area). Any suggestion in the May 12, 1995 OLC Opinion that the District of Columbia was prohibited from enacting legislation that affects this geographic area is *dicta* since D.C. conducts numerous administrative functions –public transit services, regulation of street vendors, sanitation services, etc. – within this geographic area without intruding on “functions or property of the United States.”

Indeed, the ban on streetcars with overhead wires in the 1889 statute extends to the City of Georgetown, an area that would be outside of the area that the OLC views as an area of heightened federal interest. Under the OLC’s view, D.C. could therefore repeal the ban on overhead wires in Georgetown, but not in the “City of Washington.” This would make little sense in terms of discerning whether Congress viewed the 1889 streetcar statute as a federal versus local matter, since Congress in 1889 did not differentiate between these geographic areas: both areas were equally important to warrant a Congressional ban on overhead wires. And yet, there is no comparable authority for identifying a heightened federal interest in Georgetown as a specific geographic area in which the United States has an interest.

As the foregoing makes clear, the question of whether a federal statute applicable exclusively to the District of Columbia nonetheless implicates the “powers or functions of the United States” does not turn on whether there is a “federal interest” in the geographic area where the legislation applies, as the May 12, 1995 OLC opinion suggests. Rather, this question of whether D.C. legislation implicates “properties or functions of the United States” requires an examination of the specific federal interest or function that might be affected by the exercise of local legislative authority. This reading of the Home Rule Act is likewise consistent with its legislative history, which notes that “the whole complicated matter of Federal functions versus local functions or Federal interests versus local interests, admittedly not easy to distinguish” was designed to inform the question of whether the legislation would impact “the conduct of Federal business.” *See 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)(cited in *District of Columbia v. Greater Washington Central Labor Council, AFL-CIO*, 442 A2d at 116).

Moreover, it is significant that where Congress wanted to prohibit the District of Columbia from repealing or amending a federal statute in order to protect view sheds within the District of Columbia, it did so very clearly. For example, the 1912 Height of Buildings Act is a federal statute that was enacted to protect view sheds throughout the City of Washington. As noted above, the Home Rule Act has a separate provision that expressly bars D.C. from repealing or amending this federal statute. *See D.C. Code* § 1-206.02(a)(6). This suggests that Congress did not believe that the general provision barring D.C. from legislating in areas that affect the “the functions or property of the United States” was sufficient to prevent D.C. from changing the 1910 Height of Buildings Act, and that a specific prohibition was necessary. By implication, had

Congress wished to also prohibit the District of Columbia from enacting legislation that permitted overhead wires within the City of Washington, it would have included in the Home Rule Act a specific prohibition relating to overhead wires, similar to the provision related to the 1910 Height of Buildings Act. *See McCray v. McGee*, 504 A.2d 1128, 1130 (D.C.1986) (“[W]hen a legislature makes express mention of one thing, the exclusion of others is implied, ‘because there is an inference that all omissions should be understood as exclusions.’”).

Nor would it be correct to argue that an impact on “functions or property of the United States” exists because streetcars could affect elements of the L’Enfant Plan, which is listed in the National Register of Historic Places. The fact that D.C. cannot adopt legislation affecting “monuments pertaining to the nation’s past” cannot be construed as barring D.C. from enacting legislation that affects historic properties in general, or even historic properties having some national significance. The District of Columbia has on numerous occasions passed legislation that affects historic properties, including, but not limited to the legislation affecting the construction of the D.C. Correctional Treatment Facility, the arena, and the new convention center. As the court explained in *Techworld Development Corp, supra*, the Home Rule Act “withholds authority over property used by the United States in connection with federal governmental functions, and over property of national significance. The Council may not concern itself with the Lincoln Memorial, or the White House, or with the United States Courthouse.” *Techworld*, 648 F. Supp. at 115. The streets of the L’Enfant Plan (or for that matter, the streets of the Anacostia Historic District) do not rise to the level of the federal interest in National monuments such as the Lincoln Memorial or federal public buildings.

Accordingly, as discussed in this memorandum, there is a sound basis for arguing that the 1889 statute banning streetcars using overhead wires for their motive power is essentially a local law that does not implicate property or functions of the United States. Therefore, this statute can be amended or repealed by the District of Columbia.

B. D.C. Has the Authority Under the Home Rule Act to Amend or Repeal the 1888 Statute Barring “Other Wires” in the D.C. Streets and Avenues.

The foregoing analysis should also apply with respect to the 1888 ban on overhead wires. If the ban on overhead wires in the context of the 1889 statute does not implicate “property or functions of the United States,” then the ban on “other wires” in the context of telecommunications poles, wires and conduits should likewise not implicate “property or functions of the United States.” The fact that the 1888 statute banning “other wires” was codified in D.C. Code § 34-1901.01, also suggests that the question of wires is a purely local statute.

Accordingly, there is a sound basis for arguing that the 1888 statute banning “other wires” on local streets is a local law that does not implicate the “property or functions of the United States.” Therefore, this statute can also be amended or repealed by the District of Columbia.