



## Appendix Y

Office of the Attorney General Legal Opinion—Authorization to Operate Streetcar



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: September 14, 2010**

**SUBJECT: DDOT's Authority to Operate Streetcars and to Procure Streetcars Through WMATA (AL-10-384)**

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This responds to your July 7, 2010 e-mail, to which you attached a July 6 memorandum to me from Scott Kubly, Associate Director, Progressive Transportation Services Administration, District Department of Transportation (DDOT). In your message, you note that, in the memorandum, Mr. Kubly requests guidance on two issues, *i.e.*, whether DDOT has authority to operate streetcars in the District and “whether DDOT needs Council approval to authorize [the Washington Metropolitan Area Transit Authority] to purchase [street]cars or whether the procurement can be handled through intra-district funding.”

Based on the supplemental information you provided in e-mails to Assistant Attorney General John J. Grimaldi, II, Legal Counsel Division, on July 29 and 30, I will address each of these issues in turn.

Operating Authority

Section 1902 of the FY 2010 Balanced Budget Support Emergency Act of 2010, effective June 28, 2010 (D.C. Act 18-450; 57 DCR 5635) provides that “[o]f the capital funds allocated for the Streetcar Project (SA-306), \$34.5 million shall be subject to the approval by the Council of the District of Columbia of a comprehensive plan for financing, operations, and capital facilities of the streetcar project.”

This provision gives DDOT *implied* authority to operate streetcars on H Street, but *only* for FY 2011, *only* to the extent that the \$34.5 million will cover that operation, and subject to the

Council's approval of the comprehensive plan. In other words, section 1902 is not a general prospective grant of operating authority. Nor, for present purposes, is section 5(2)(H) of DDOT's Establishment Act (D.C. Official Code § 50-921.04(2)(H)).

The lead-in language to section 5 provides that "[t]he offices of the DDOT shall *plan, program, operate, manage, control, and maintain* systems, processes, and programs to meet transportation needs." (Emphasis added.) While the emphasized words are not defined in the Establishment Act, they are used purposefully. That purpose is further reflected in the way the section then breaks out the duties of DDOT's several Administrations.

With respect to the Transportation Policy and Planning Administration, it is *only* authorized to *operate* the School Transit Subsidy Program (section 5(2)(I)) and the DC Circulator (section 5(2)(L)). It can only *develop*, among other things, light rail systems (section 5(2)(H)). In any event, the Establishment Act does not define "light rail systems", and there is nothing in the legislative history to indicate whether, for example, the Council meant the term to include streetcars.

Applying relevant canons of statutory construction to resolve this ambiguity supports the conclusion that DDOT lacks statutory authority to operate a city-wide streetcar transit system. In support of this view is the rule of statutory construction known as *noscitur a sociis*. See 2A *Sutherland Statutory Construction*, § 47.16 (6<sup>th</sup> [Singer] ed. 2000) (Sutherland). This rule holds that, if the intent of the language is unclear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. Thus, when two or more words are grouped together, and ordinarily have a similar meaning, the broader word will be limited and qualified by the specific word. Here, the phrase "light rail systems" is grouped with the limiting terms "paratransit systems," "water taxis," and "tour bus support systems." Since the latter terms connote activities that are supportive, instead of primary, the associated term "light rail systems" necessarily is an activity supportive of a primary transportation system, not such a system itself.

Similarly, the rule of statutory construction known as *ejusdem generis* holds that, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects enumerated by the preceding specific words. *Id.*, § 47.17. Given the ambiguity here, it follows that the final phrase in section 5(2)(H) of DDOT's Establishment Act, "other transportation services to provide for safe and efficient movement of persons throughout the city," also fails to include a comprehensive streetcar system.

As I am sure you know, similar questions about operational authority surfaced several years ago with regard to the DC Circulator. The original version of the Executive Branch bill, the "District Department of Transportation DC Circulator Amendment Act of 2006," reviewed by this Office would have granted expansive power to DDOT over local transit facilities, which were defined as "all real and personal property necessary or useful to render transit service within the District of Columbia, by means of rail, bus, watercraft, aircraft, or any other mode of travel on tracks, rights of way, bridges, tunnels, subways, or any other thoroughfare...." DDOT would also have been given power to plan, develop, finance, operate, control, and regulate the local transit facilities.

During the public roundtable on the bill, Carol Schwartz, then Chair of the Committee on Public Works and the Environment, expressed concern that the definition of local transit facilities was too expansive, in that it would expand DDOT's authority under the Establishment Act "by allowing not only Circulator buses but watercraft, aircraft and ports." See committee report on Bill 16-634 at 4. Chairman Schwartz said that she would not support such a broad definition to be part of the bill, but would consider such a proposal as a separate piece of legislation. *Id.* Accordingly, the committee recommended that the definition be stricken from the bill and added language to make it "clear that authority [was] only being granted for the operations of the D.C. Circulator within the District of Columbia." *Id.* at 5.

Had the Council wished to extend DDOT's authority under the Establishment Act beyond that of operating the Circulator, it could have retained the language in the Executive's version of Bill 16-634. The fact that it chose not to take that approach is telling. In *Jackson v. District of Columbia Board of Elections and Ethics*, No. 10-CV-20, slip op. at 29 (D.C. July 15, 2010), the Court of Appeals examined the Charter Amendments Act (CAA) and the Initiative, Referendum, and Recall Procedures Act (IPA), which the Council had passed within a year of each other. Finding that "[t]en of the thirteen Council members who voted in favor of the CAA were still on the Council when the IPA was passed," *id.* at n. 29, the court stated that "contemporaneous legislative exposition" aids in construing statutes. *Id.* at 29 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003)).

Similarly, here, ten of the thirteen members of the Council which passed the Establishment Act were still sitting on the Council at the time Bill 16-634 came before it. Those members, then, were charged with knowledge about the Establishment Act, and their decision, just two legislative periods later, to reject the Executive's broad definition of local transit facilities and to add only section 5(2)(L) for operation of the Circulator is relevant in capturing the Council's view of the parameters of DDOT's authority under the Establishment Act.

All this said, I think it would be wise, as Mr. Kubly suggests in his memo, to continue to work with Councilmember Graham on clarifying legislation for authority to operate the streetcar system.

### Procurement Approach

While there may be valid policy considerations for using the Washington Metropolitan Area Transit Authority (WMATA) to procure the streetcars, as Mr. Kubly outlines, that is not my call. My focus, rather, is on the legal issue of whether the procurement can be accomplished through a memorandum of understanding (MOU) between DDOT and WMATA. The short answer is no. More specifically, and in a very similar context, the Attorney General has adopted this Division's finding that "the weight of opinion holds that WMATA is not a District government agency" for purposes of entering into an MOU pursuant to the Local Economy Act (codified at D.C. Official Code § 1-301.01(k) (2010 Supp.)). See footnote 2 on page 2 of the attached March 4, 2008 memorandum to your General Counsel. Some further discussion of this issue is warranted, however, given Mr. Kubly's reliance, on page 3 of his memorandum, on the Attorney General's March 21, 2008 letter opinion to the Inspector General.

It is true that, in his letter opinion,<sup>1</sup> the Attorney General stated that “DDOT and WMATA might consider proceeding under [the Local Economy Act] in the future and that “[i]t is an open question whether WMATA may [be] considered a District agency for purposes of the Local Economy Act.” See footnote 6 on page 4 of the letter opinion. This was intended as a neutral comment, inasmuch as the Local Economy Act was inapplicable to the purchase of the rail cars at issue in the letter opinion. This Division has now considered whether the door that the letter opinion left ajar should be opened or closed; and we believe it should be closed.

Mr. Kubly is undeniably correct in concluding, on page 3 of his memorandum, that “for purposes of budgeting, procurement of and provision of transportation WMATA functions as a District agency.” The WMATA Compact itself (codified at D.C. Official Code § 9-1107.01 (2010 Supp.)) describes WMATA as “a common agency of each signatory party [*i.e.*, the District, Maryland, and Virginia],” Art. II, § 2, and as “an instrumentality and agency of each of the signatory parties,” *id.* at Art. III, § 4; see also *Lucero-Nelson v. Washington Metropolitan Area Transit Authority*, 1 F. Supp.2d 1, 19 (D.D.C. 1998) (describing WMATA as an “interstate compact agency and instrumentality of three separate jurisdictions”). However, the WMATA Compact makes it clear that this “agency” function is only for carrying out the Compact’s purposes, which are to (1) operate WMATA transit facilities, (2) coordinate the operation of WMATA and private transit facilities into a unified regional system, and (3) serve such other regional purposes as the signatories might authorize by appropriate legislation. See Art. II, § 2. These purposes are different than those of agencies, departments, and other entities of the District government, such as DDOT’s purposes here to establish a city-wide streetcar system outside the jurisdiction and control of WMATA.

Furthermore, Congress, which adopted the WMATA Compact as federal law, never incorporated it into the District of Columbia Home Rule Act (Home Rule Act), approved December 24, 1973, Pub. L. No. 93-198, D.C. Official Code § 1-201.01 *et seq.* (2006 Repl. & 2010 Supp.), or defined WMATA as part of the District government under the Home Rule Act. Therefore, WMATA is not an agency, department, or other entity of the District government for purposes of the Home Rule Act. Since the power of the former Board of Commissioners to authorize the exchange of goods and services, by MOU, among agencies of the District government pursuant to the Local Economy Act was transferred to the Mayor-Commissioner under Reorganization Plan No. 3 of 1967 and, thereafter, to the Mayor under section 422 of the Home Rule Act (D.C. Official Code § 1-204.22 (2010 Supp.)), the Local Economy Act is, in effect, incorporated into the Home Rule Act, and its reference to “departments, officials, or agencies of the District” that may exchange goods and services necessarily means only entities that the Home Rule Act recognizes as being within the District government. Otherwise, the incorporation of the Local Economy Act would be incongruous and absurd. Courts will not interpret language of a statute in a way that leads to absurd results. See, *e.g.*, *District of Columbia National Bank v. District of Columbia*, 348 F.2d 808, 810 (D.C. Cir. 1965); *Peoples Drug Stores v. District of Columbia*, 407 A.2d 751, 754 (D.C. 1983); 2A *Sutherland*, § 45.12. It follows that WMATA, not being part of the District government under the Home Rule Act, cannot be considered as an agency of the District government under the Local Economy Act, either. Nor are we aware of any historical practice whereby a District agency and WMATA have used the Local Economy Act to procure goods or

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<sup>1</sup> The letter opinion, a copy of which is attached, was researched and drafted by the Legal Counsel Division.

services. Consequently, DDOT has no authority to procure streetcars through WMATA using the Local Economy Act.

Last, I would also like to relate at least two other considerations that militate against going the MOU route. First, if there is any thought that an MOU would avoid Council scrutiny of the procurement, it is fanciful. The Council is already quite aware that “[t]he District is preparing to submit an order for streetcars late in the summer.” Section 2(b) of the Transportation Infrastructure Emergency Declaration Resolution of 2010, effective June 29, 2010 (Res. 18-525; 57 DCR 5856). More to the point, the Council has made the \$34.5 million for FY 2011 subject to its approval “of a comprehensive plan for financing, operations, and capital facilities.” The plan could be dead on arrival if it contained a provision that the procurement was going to be accomplished by a means that would not be the subject of further Council review.

Second, an MOU would lack certain features that a contract would otherwise possess and would be desirable, if not necessary, in a transaction this size – most importantly, an enforcement mechanism. Generally, in the event of a breach of an MOU, a party’s sole remedy, other than to attempt to resolve the problem through informal consultation and negotiations, is simply to terminate the agreement.

Should you have any questions concerning this memorandum, please contact either Mr. Grimaldi at 724-5198, or me at 724-5524.

WCW/jjg

Attachments (as stated)