



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM TO FILE

SUBJECT: The Arch and the Height of Building Act of 1910

The question is whether federal monuments that are built in D.C. are subject to the Height of Buildings Act, ch. 263, 36 Stat. 452 (HBA).

Background

As amended and currently codified in the D.C. Code, the HBA—with some limited exceptions—caps the height of any building “erected, altered, or raised in the District of Columbia” to the length of the sidewalk or street in front of it plus 20 feet, D.C. Code § 6-601.05(a), not to exceed a maximum of 130 feet for buildings “on a business street or avenue,” *id.* § 6-601.05(b), or 90 feet for buildings “[o]n a residence street, avenue, or highway,” *id.* § 6-601.05(c). “Buildings erected, altered, or raised or converted in violation of” the HBA, “are * * * common nuisances; and the owner or the person in charge of or maintaining any such buildings, upon conviction on information filed in the Superior Court of the District of Columbia * * * shall be punished by a fine * * * and shall be required * * * to abate the nuisance.” *Id.* § 6-601.08. A “common nuisance” is a public nuisance. See *Connecticut v. American Elec. Power Co.*, 582 F.2d 309, 350 (2d Cir. 2009), rev’d, 564 U.S. 410 (2011); 58 John Bourdeau et al., *American Jurisprudence 2d Nuisances* § 26 (May 2026 update).

The HBA does not apply to federal buildings

In 1899, Congress passed a law regulating the height of buildings in D.C. Act of Mar. 1, 1899 (1899 Act), ch. 322, 30 Stat. 922. Like the HBA, the 1899 Act regulated the height of buildings in D.C., putting a hard cap on the height of any building and otherwise limited building height by reference to the width of the street in front of the building. § 4, 30 Stat. 922. Section 7 of the 1899 Act provided “[t]hat the limitations of height herein prescribed shall not apply to Federal or municipal buildings.” 30 Stat. 922.

That exemption is still in force notwithstanding the HBA. When the HBA was first voted on by the House of Representatives (as H.R. 19070), it contained a provision expressly repealing the 1899 Act. 45 Cong. Rec. 4534. The House amended H.R. 19070 to remove that provision, changing the express repeal of the 1899 Act (and a 1903 Act amending in immaterial part the 1899 Act) to a repeal of all “laws in conflict herewith.” *Id.* at 4535 (quotations omitted). The purpose of the amendment was to avoid repealing the 1899 Act *in toto*. When asked about the purpose of the amendment, Representative Campbell explained that “[t]he act as reported repeals a number of laws outright, and I am proposing to repeal the laws in conflict herewith rather than to repeal these acts.” *Ibid.*

As amended, Section 9 of the HBA provides that “[a]ll laws in conflict herewith are hereby repealed.” 36 Stat. 455. If the HBA clearly applies to federal building, then there is an arguably conflict between it and Section 7 of the 1899 Act, and the latter would be repealed. There is, however, no conflict with the HBA and Section 7 of the 1899 Act. The HBA does not reference federal buildings. And the

HBA’s context and other statutory indicators suggest that Congress did not intend for the law to apply to federal buildings.

The HBA—and the 1899 Act—are similar to local zoning regulations. And indeed, the HBA has been treated as such after its enactment. The first codification of the laws “relating to or in force in the District of Columbia,” D.C. Code § 1 (1929), set out the HBA in the chapter dealing with zoning, see *id.* § 505. The second edition of the code connected the HBA restrictions to the powers of the D.C. Zoning Commission. D.C. Code § 5-405 (1941) cross-reference. And today, the HBA is listed in the part of the D.C. Code dealing with D.C.’s zoning laws. See D.C. Code § 6-601.05 (placed in chapter 6 of Title 6, titled “Zoning and Height of Buildings”). As a general rule, the federal government does not view itself as bound by local zoning laws—at least absent Congressional direction. See 40 U.S.C. 3312(c) (directing GSA to consider local zoning laws in building construction and alteration, but not mandating compliance with them). There is no such direction in the HBA.

To be sure, the power of the federal government to resist local zoning laws rests on the Supremacy Clause. See, e.g., *United States v. City of St. Paul*, 258 F.3d 750, 754 (8th Cir. 2001). The Supremacy Clause therefore does not affect the HBA, which is a congressional enactment. But the HBA likely rests on Congress’s power “[t]o exercise exclusive Legislation” over the District of Columbia. U.S. Const. Art. I, § 8, Cl. 17. The HBA is therefore a local zoning regulation that serves “local purposes.” *Palmore v. United States*, 411 U.S. 389, 397 (1973). It would be odd to view what is a zoning regulation for D.C. as applying to executive branch construction decisions any differently than any other local zoning regulation.

That the HBA regulates private entities is confirmed by its provision that buildings which exceed the maximum height set by the act are public nuisances whose owners or maintainers are subject to criminal prosecution, a fine, and order to abate the nuisance. It is unlikely that Congress intended to subject the United States or its officers to criminal prosecution in D.C. courts for maintaining a public nuisance. Indeed, the HBA likely does not meet the bar for a waiver of the United States’ sovereign immunity for *civil* damages—it does not expressly waive sovereign immunity nor “explicitly authorize[] suit against [the] government on [a nuisance] claim.” *Department of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 49 (2024) (quotations omitted). “Congress must, at a minimum, mention the government when it wishes to scrap sovereign immunity,” *id.* at 56, and it did not do so in authorizing public nuisance prosecutions for violations of the HBA against “the owner or the person in charge of or maintaining” a too-tall building, D.C. Code § 6-601.08.

Since the HBA does not meet the standard for a congressional waiver of sovereign immunity for civil damages, it would be odd to conclude that it waived the traditional immunity of the federal government and its employees against local criminal laws for actions done in their official capacities, cf., e.g., *Cunningham v. Neagle*, 135 U.S. 1, 76 (1890) (Because the defendant “was acting under the authority of the law of the United States, and was justified in so doing * * * he is not liable to answer in the courts of California.”), even assuming such structural immunities are waivable, but cf. *United States v. Meanor*, 442 U.S. 477, 490-491 (1979) (assuming, without deciding, that Speech and Debate immunity is waivable). Indeed, because “[i]n its inception, a public, or common, nuisance was an infringement of the rights of the Crown,” and “invasion[s] of the rights of the public,” Restatement (Second) Torts § 821B cmt. 1 (1979), the inference from the authorization of public nuisance suits in the HBA is that Congress had in mind private entities when it passed the law.

Further supporting the conclusion that the HBA regulates private entities is that the public nuisance prosecutions it authorizes occur in the local D.C. courts. See D.C. Code § 6-601.08 (referencing the D.C. Superior Court); HBA, § 8, 36 Stat. 454 (referencing “the police court of the District of Columbia”). These are “strictly local courts,” *Palmore*, 411 U.S. at 407; see D.C. Code § 11-101 (The Superior Court is “established pursuant to article I of the Constitution.”); *id.* § 11-923(b)(1) (“[T]he Superior Court has jurisdiction of any criminal case under any law applicable exclusively to the District of Columbia.”); *Gassenheimer v. District of Columbia*, 6 App. D.C. 108, 115 (1895) (“The whole purpose of the establishment of the Police Court was that there should be a tribunal competent to deal summarily with petty offences.”); D.C. Code § 43 (1901) (providing that the police court has jurisdiction of non-capital crimes and offenses committed in D.C. and “all offenses against municipal ordinances and regulations”), analogous to state courts, see *Palmore*, 411 U.S. at 407 (“These courts were expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia, and to exercise the powers of a State government in all cases where legislation is possible.”) (citations, omissions, and quotations marks omitted); *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1124 (D.C. Cir. 2004). Such courts are not the typical fora for suits involving the United States. Rather, Congress contemplated that criminal prosecutions against the United States or its officers—including in D.C.—would occur in federal court, see 28 U.S.C. 1442(a), (d)(5) (permitting removal of criminal prosecutions in D.C. superior court to federal court), as would civil tort claims, see 28 U.S.C. 2674.

Authorizing criminal prosecution for a public nuisance in local D.C. courts therefore strongly suggests that Congress did not intend for the HBA to apply to the United States.

Subsequent legislation has confirmed that the HBA is a local zoning regulation governing private conduct. Currently, the D.C. Zoning Commission regulates the “height * * * of buildings and other structures” under the provisions of Chapter 6, Subchapter IV, of the D.C. Code. D.C. Code § 6-641.01. Subchapter IV further provides that “[t]he permissible height of buildings in any district shall not exceed the maximum height of buildings” under the HBA. *Id.* § 6-641.06. But the D.C. zoning regulations expressly do “not apply to federal public buildings.” *Id.* § 6-415.15. Rather, “in order to ensure the orderly development of the national capital, the * * * height * * * of federal public buildings in the District of Columbia * * * will be subject to the approval of the National Capital Planning Commission” (the Commission). *Ibid.* This provision was included to “exempt[] Federal public buildings from” regulation by the D.C. Zoning Commission, “provided that [they] * * * meet the approval of” the relevant federal agency (currently, the Commission). S. Rep. No. 1962, 7th Cong., 3d Sess. 5 (1938).

Federal law confirms that federal buildings are not subject to local zoning regulations. The Commission’s organic statute exempts federal buildings from D.C. zoning regulation, instead providing that the “height * * * of federal public buildings in the District of Columbia * * * [is] subject to the approval of the Commission.” 40 U.S.C. 8722(d).¹

There are, therefore, two different zoning regimes for buildings in D.C.—one for local buildings, which are subject to regulation by the D.C. Zoning Commission and which, in turn, is directed to ensure

¹ The Commission, to be sure, has stated that the HBA “is implemented * * * through [the Commission’s] review of development proposals on federal property.” Nat’l Capital Planning Comm’n, *Legislative Authorities: Height of Buildings Act* (last visited May 21, 2026), <https://www.nepc.gov/about/authorities/>. But this statement is consistent with treating the HBA as a relevant consideration and not as a binding constraint.

that the height of any building is consistent with the HBA; and one for federal buildings, which are exempt from that regulatory scheme and are instead regulated by the Commission, which has discretion in regulating building height. On top of that, there is yet another federal statutory scheme governing monument design in D.C. that does not reference the HBA. See 40 U.S.C. 8905(b) (listing criteria for “site and design proposals” for commemorative works in D.C. that do not reference the HBA).

It would be inconsistent with the system of separate regulatory schemes to treat federal buildings as subject to the HBA, which is ensconced in the local D.C. regulatory zoning scheme from which federal buildings are expressly exempted. This underscores the common understanding that local D.C. zoning rules, to include the HBA, do not regulate the federal government and even indicates that to the extent the HBA ever did apply to federal buildings, it has been superseded by subsequent developments in D.C. zoning regulation.

CONCLUSION

In sum, federal buildings are not subject to the HBA. The 1899 Act’s exception for federal buildings from height limits does not conflict with the HBA because the latter does not apply to federal buildings. Rather, the HBA is just a local zoning ordinance and does not apply to the United States—a point confirmed by subsequent D.C. zoning ordinances and federal law, which establish different regulatory schemes for local D.C. construction and federal construction in D.C.