Before the
BOARD OF ZONING ADJUSTMENT
OF
THE DISTRICT OF COLUMBIA

Appeal of
Sheridan-Kalorama Neighborhood Council BZA Appeal No. 17086

D.C. OFFICE OF ZONING
2014 FEB 13 PM 4:26

MEMORANDUM IN REPLY
TO APPELLANT'S SUBMISSION
Submitted by
The Office of Foreign Missions
United States Department of State,
Appellee

At the Board of Zoning Adjustment's (BZA) January 13 hearing on this Appeal, Appellant's Counsel asserted that the District's Department of Consumer and Regulatory Affairs (DCRA) could not refuse to abide by a District zoning regulation, even if DCRA Counsel had determined the regulation to be inconsistent with both District and Federal Statute, namely the Foreign Missions Act, and therefore invalid. (DCRA Counsel, in her oral presentation, characterized this position as "peculiar".) The Board of Zoning Adjustment (BZA) requested Appellant's Counsel to provide legal support for this proposition, and he promised to do so.

In his letter to the Board dated February 2, Appellant's Counsel provides what he purports to be the promised case authority to which he referred on January 13: *Office of Consumers' Counsel v. Federal Energy Regulatory Commission,* 655 F.2d 1132 (D.C. Cir. 1980). Appellant's letter, however fails to specify how or where that opinion specifically supports Counsel's remarkable assertion. Appellant's failure on that score, however, is not remarkable, given

BZA
Case No. 17086
Exhibit No. 24

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 24

that the cited case provides no support whatsoever for his claim. Indeed, it appears to undermine it completely.

In *Consumers' Counsel*, the D.C. Circuit commenced its review of FERC's regulatory action by quoting the relevant provision of the Administrative Procedures Act, 22 U.S.C. 706(2), which requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be – (c) in excess of statutory jurisdiction." *Office of Consumers' Counsel* ,655 F.2d at 1141. The Court stated that, in reviewing how an agency had interpreted its own statutory authority, the Court would be guided by such factors as "the [agency] interpretation's inherent reasonableness, its consistency with prior precedent, *its basis in statutory text* and legislative history, and whether it is based on experience or expertise peculiarly within the agency's ken." *Id.* (emphasis added). Thus, a court faced with a legal challenge to the validity of an agency's regulation would examine whether the agency's regulation had a basis in statute.

In other words, the holding in *Consumers' Counsel* can in no way be read to suggest that an agency is bound to adhere to a regulation that is plainly in conflict with the governing statute, until a court can examine whether it is or not. Completely to the contrary, the decision that Appellant's Counsel cites explicitly states that the **key** factor in reviewing the validity of an agency's action was whether the agency had the statutory basis for it. "[I]t is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute." *Id.* at 1148 n. 32.

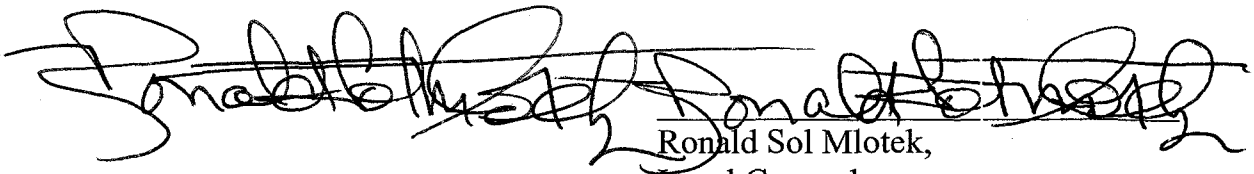
Significantly, this is the holding for which *Consumers' Counsel* continues to be cited. *See e.g., Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) ("An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress."); *Association of American Physicians and Surgeons, Inc. v. FDA*, 226 F.Supp. 204, 215 n. 17, invaliding an FDA regulation in reliance on *Consumers' Counsel).*

It is nonsensical to imply, as does Appellant, that an agency must, in robotic fashion, abide by regulations even when it finds them contrary to law, unless and until a challenge is brought to a court. The Office of Foreign Missions has already demonstrated that Appellant has cited in his favor a Zoning Regulation (201.1(m)) that is irrelevant to this case. (Office of Foreign Missions Memorandum, Section II.) Above we demonstrate that the case authority cited for the irrelevant regulation is, in itself, irrelevant – at least to support Appellant's own case. (It is highly relevant to the support of ours.)

As if this were insufficient, we also demonstrated in our Memorandum (Section III) that *even if* Zoning Regulation 201.1(m) were not irrelevant to the case, i.e., even if it said what Appellant claimed it does, it would make not the slightest difference, inasmuch as it would be invalid as a matter of law, by virtue of impermissible inconsistency with the FMA's provision at 22 U.S.C. Section 4306(h)(2)..

Irrelevant case law, cited to support an irrelevant District regulation, which would still have been invalid even if not irrelevant -- such exponential irrelevance manifestly demonstrates that Appellant's case is absolutely devoid of legal merit. It should and must be denied.

RESPECTFULLY SUBMITTED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State

OF COUNSEL:
Susan R. Benda,
Attorney-Adviser,
Office of the Legal Adviser,
U.S. Department of State

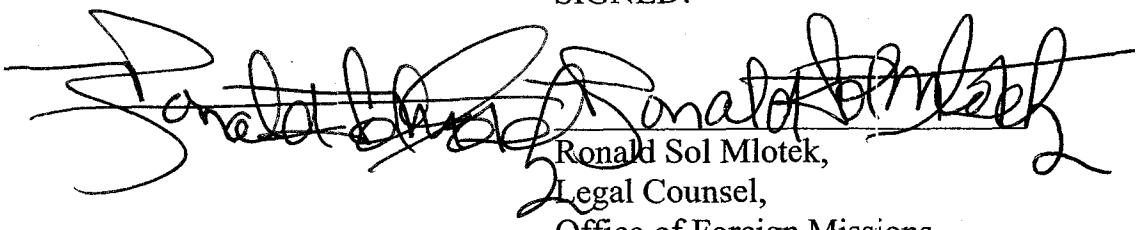
CERTIFICATE OF SERVICE

I hereby declare and certify that I personally served copies of this Amended Memorandum of Points and Authorities upon Counsel for the other parties in this case, this 10th day of February, 2004, by causing the same to be electronically transmitted, via e-mail, to Counsel for the other parties to this matter, to wit:

Richard Nettler, Esq.,
Counsel for Appellants, at
rbnettler@rkmc.com

Lisa Bell, Esq.,
Counsel for Appellee,
Department of Consumer and Regulatory
Affairs of the District of Columbia, at
Lisa.Bell@dc.gov

SIGNED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State

Before the
BOARD OF ZONING ADJUSTMENT
OF
THE DISTRICT OF COLUMBIA

Appeal of
Sheridan-Kalorama Neighborhood Council BZA Appeal No. 17086

MEMORANDUM IN REPLY
TO APPELLANT'S SUBMISSION
Submitted by
The Office of Foreign Missions
United States Department of State,
Appellee

At the Board of Zoning Adjustment's (BZA) January 13 hearing on this Appeal, Appellant's Counsel asserted that the District's Department of Consumer and Regulatory Affairs (DCRA) could not refuse to abide by a District zoning regulation, even if DCRA Counsel had determined the regulation to be inconsistent with both District and Federal Statute, namely the Foreign Missions Act, and therefore invalid. (DCRA Counsel, in her oral presentation, characterized this position as "peculiar".) The Board of Zoning Adjustment (BZA) requested Appellant's Counsel to provide legal support for this proposition, and he promised to do so.

In his letter to the Board dated February 2, Appellant's Counsel provides what he purports to be the promised case authority to which he referred on January 13: *Office of Consumers' Counsel v. Federal Energy Regulatory Commission,* 655 F.2d 1132 (D.C. Cir. 1980). Appellant's letter, however fails to specify how or where that opinion specifically supports Counsels remarkable assertion. Appellant's failure on that score, however, is not remarkable, given

BZA
Case No. 17086
Exhibit No. 24
FAX

that the cited case provides no support whatsoever for his claim. Indeed, it appears to undermine it completely.

In *Consumers' Counsel*, the D.C. Circuit commenced its review of FERC's regulatory action by quoting the relevant provision of the Administrative Procedures Act, 22 U.S.C. 706(2), which requires that a court "hold unlawful and set aside agency action, findings, and conclusions found to be -- (c) in excess of statutory jurisdiction." *Office of Consumers' Counsel* ,655 F.2d at 1141. The Court stated that, in reviewing how an agency had interpreted its own statutory authority, the Court would be guided by such factors as "the [agency] interpretation's inherent reasonableness, its consistency with prior precedent, *its basis in statutory text* and legislative history, and whether it is based on experience or expertise peculiarly within the agency's ken." *Id.* (emphasis added). Thus, a court faced with a legal challenge to the validity of an agency's regulation would examine whether the agency's regulation had a basis in statute -- precisely the opposite of what Appellant's Counsel argued to this Board on January 13th.

In other words, the holding in *Consumers' Counsel* can in no way be read to suggest that an agency is bound to adhere to a regulation that is plainly in conflict with the governing statute, until a court can examine whether it is or not. Completely to the contrary, the decision that Appellant's Counsel cites explicitly states that the **key** factor in reviewing the validity of an agency's action was whether the agency had the statutory basis for it. "[I]t is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute." *Id.* at 1148 n. 32.

Significantly, this is the holding for which *Consumers' Counsel* continues to be cited. *See e.g., Killip v. Office of Personnel Management,* 991 F.2d 1564, 1569 (Fed. Cir. 1993) ("An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress."); *Association of American Physicians and*

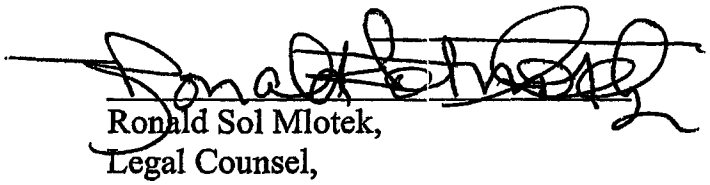
Surgeons, Inc. v. FDA, 226 F.Supp. 204, 215 n. 17, invaliding an FDA regulation in reliance on *Consumers' Counsel).*

It is nonsensical to imply, as does Appellant, that an agency must in robotic fashion abide by regulations even when it finds them contrary to law, unless and until a challenge is brought to a court. The Office of Foreign Missions has already demonstrated that Appellant has cited in his favor a Zoning Regulation (201.1(m)) that is irrelevant to this case. (Office of Foreign Missions Memorandum, Section II.) Above we demonstrate that the case authority cited for the irrelevant regulation is, in itself, irrelevant – at least to support Appellant's own case. (It is highly relevant to the support of ours.)

As if this were insufficient, we also demonstrated in our Memorandum (Section III) that *even if* Zoning Regulation 201.1(m) were not irrelevant to the case, i.e., even if it said what Appellant claimed it does), it would make not the slightest difference, inasmuch as it would be invalid as a matter of law, by virtue of impermissible inconsistency with the FMA's provision and 22 U.S.C. Section 4306(h)(2) Foreign Section.

Irrelevant case law, cited to support an irrelevant District regulation, which would still have been invalid even if not irrelevant -- such exponential irrelevance manifestly demonstrates that Appellant's case is absolutely devoid of legal merit. It should and must be denied.

RESPECTFULLY SUBMITTED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State

OF COUNSEL:
Susan R. Benda,
Attorney-Adviser,
Office of the Legal Adviser,
U.S. Department of State

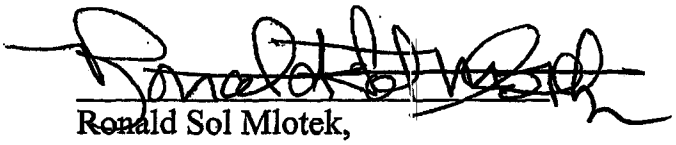
CERTIFCATE OF SERVICE

I hereby declare and certify that I personally served copies of this Amended Memorandum of Points and Authorities upon Counsel for the other parties in this case, this 10th day of February, 2004, by causing the same to be electronically transmitted, via e-mail, to Counsel for the other parties to this matter, to wit:

Richard Nettler, Esq,
Counsel for Appellants, at
rbnettler@rkmc.com

Lisa Bell, Esq.,
Counsel for Appellee,
Department of Consumer and Regulatory
Affairs of the District of Columbia, at
Lisa.Bell@dc.gov

SIGNED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State



OFM
OFFICE OF FOREIGN MISSIONS
U.S. DEPARTMENT OF STATE

Legal Counsel
Office of Foreign Missions

FAX TRANSMISSION COVER SHEET

TO

D.C. BZA – ATTN: MR. MOY,
FAX# 202.727.6072
IN RE: BZA APPEAL No. 17086

FROM

RONALD MLOTEK
LEGAL COUNSEL
OFFICE OF FOREIGN MISSIONS
U.S. DEPARTMENT OF STATE
3507 INTERNATIONAL PLACE, N.W.
WASHINGTON, D.C. 20008

TELEPHONE: (202) 895-3501
FAX NO.: (202) 895-3515
OFMLEGAL@STATE.GOV

DATE 10 FEBRUARY, 2004

NO. OF PAGES 6 PAGES, INCLUDING THIS COVER SHEET.

COMMENTS

Dear Mr. Moy:

I am herewith transmitting to you the Reply submission of the Office of Foreign Missions, U.S. Department of State in BZA Appeals Case # 17086, brought by the Sheridan Kalorama Neighborhood Council, in connection with the Chancery of Yemen. We will be submitting the physically signed copy by mail, along with the signed Declaration of Richard Massey, which was atached to our original Submission on February 3. Thank you.