DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Sheridan Kalorama Neighborhood Council, Appellant, D.C. Department of Consumer and Regulatory Affairs, Appellee.	)	Appeal No. 17086

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Supplemental Statement of
D.C. Department of Consumer and Regulatory Affairs

The District of Columbia Department of Consumer and Regulatory Affairs (DCRA) provide this supplemental statement to clarify three issues raised by the appellant, Sheridan Kalorama Neighborhood Council. In support of the contention that the building permit was issued in error, appellant urges the Board of Zoning Adjustment (BZA) to accept three key presumptions that: (a) the Zoning Administrator must adhere to the D.C. zoning regulations; (b) the Foreign Missions Act is not consistent with the local zoning regulations; and (c) the Zoning Administrator did not routinely allow transfers of foreign missions without Board review. In this regard, appellant offered the following case, *Office of Consumers' Counsel v. Federal Energy Regulatory Commission,* 655 F.2d. 1132 (1980) as support for the proposition that DCRA failed to properly interpret its own statutory authority in the oral argument of January 13, 2004. DCRA seeks to comment briefly on these points.

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Board of Zoning Adjustment
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EXHIBIT NO. 26

Finally, the history of ZA review does not support appellant's arguments. The Zoning Division reviews applications for these requests in the manner described in DCRA's earlier submission. However, in several cases over the last ten years, the ZA has relied on FMA and allowed the transfers without FMBZA approval. A declaration, attesting to that fact, from the Acting ZA is attached.

DCRA also notes that the FMA is not inconsistent with the local zoning regulations as suggested by appellant. The statute expressly contemplated circumstances, such as this matter, where the local regulations must be reconciled with the statute. In any case where location, replacement and expansion of a mission are at issue, governed by Section 6-1307, the FMA is the controlling law. Specifically, the statute provides:

> Nothing in § 6-1302, §6-1303, §6-1304 or §6-1305 may be construed to *preempt any state or municipal law* or governmental authority regarding **zoning**, land use . . . (emphasis added)

Id.

Although, the statute allows for the local zoning regulations to preempt its requirements, it does not provide for those circumstances upon application of Section 6-1307.[2]

DCRA recognizes that the ZA also has a role regarding the need to review zoning

[2]/ The FMA as codified in the District of Columbia Official Code contained the same language as the federal statute.

Appellant's contention the Zoning Administrator must adhere to the D.C. zoning regulations, in all circumstances, is not well-founded. The responsibility to administer zoning laws includes a burden to interpret the regulations and issue well-reasoned legal decisions. Moreover, the ZA may make recommendations for changes to the zoning regulations as well.[1]/ The *Consumer* case correctly explained that an agency decision, among other things, should be inherently reasonable and consistent with prior precedence. *See Office of Consumers' Counsel*, 655 F.2d at 1141. Appellant's assertion that the Board strictly apply the matter of right provision in the local regulations, Section 201.1, would create a different condition and flies in the face of the FMA goals.

Indeed, the strict application of Section 201.1 in the zoning regulations would result in the most restrictive conclusion - - no foreign mission *could change* locations after 1990 without FMBZA approval. Each request would require time and resources for a Board approval and decision. The burdensome administrative process would not necessarily reduce density in residential communities or traffic - - constant concerns of the zoning commission. Indeed, no noteworthy benefit would inure to Board for such administrative reviews since typically the use of the property has not changed.

Further, Appellant has provided no evidence, and they cannot, that suggests the Zoning Commission anticipated FMBZA review for every transfer requested by a foreign mission. This interpretation would burden the administrative process; hinder the business activities of international communities and waste government resources. In fact, the condition of adding an administrative review process would likely eviscerate the FMA and reduce both the efficiency transfers and undercut diplomatic relations.

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[1] / *See* Reorganization Plan, No. 55.

regulations and make recommendations to the zoning commission.

Respectfully submitted:

Lisa A. Bell, Office of the General Counsel
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Certificate of Service

Appellant, counsel for Sheridan Kalorama Council, Richard Nettler and Intervenor, U.S. Department of State, were served through electronic transmission on February 24, 2004.

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Declaration of Denzil Noble
Acting Zoning Administrator
Building and Land Administration
Department of Consumer and Regulatory Affairs

I, Denzil Noble, declare I am a citizen of the United States of America and I am person over the age of eighteen, and I am competent to testify to the following:

1. I am employed in the Building and Land Administration (BLRA) of the District of Columbia Department of Consumer and Regulatory Affairs,

2. I have worked at BLRA for 20 years and held several different positions. At present, I am both the Administrator of the division and Acting Zoning Administrator.[1]/

3. In my position as Acting Zoning Administrator (ZA), I supervise BLRA's Zoning Office which handles, among other things, applications by embassies, chanceries and foreign missions for building permits and certificate of occupancies. Records

[1] / Mr. Noble has been Acting Zoning Administrator for 11months.

pertaining to these requests are generally maintained in BLRA and I have reviewed those files in preparation of my statement.

4. Every application for a building permit submitted by an embassy to BLRA is first reviewed by the Foreign Missions office of the United States Department of State. In all cases, BLRA consults with the State Department on pertinent facts related to the application. Thereafter, the application is reviewed by the Zoning Division to determine if the proposed 'use' and the proposed construction conform to the requirements of the zoning regulations.

5. During my tenure with BLRA, and to the best of my knowledge, the Zoning Administrator has approved applications for transfers of embassies, chanceries or foreign missions, without referral to the Foreign Missions Board of Zoning Adjustment (FMBZA), when the subject property was occupied by an embassy, chancery or foreign mission on or before October 1982.

6. In making such determinations, the ZA reviewed the applicable zoning regulations and statutes before making a decision. In particular, I rely on the Foreign Missions Act, as it appears in D.C. Official Code § 6-1301 (2001), *et seq.* While I cannot be sure as to the actual number of transfers or the specific time in which they occurred, I am not aware of any instance in which an application for a transfer was referred to the FMBZA. I understand the goals of FMA to be the expeditious and effective handling of highly sensitive international obligations, namely the location, replacement or expansion of official residences and offices of foreign governments.

7. I have reviewed the declaration submitted by Richard C. Massey on behalf

of the State Department, dated February 3, 2003, on the issue of "grandfathering." I have no reason to dispute the examples of foreign missions transfer set forth in that document.

I hereby declare under penalty of perjury the statement set out above is true to the best of my knowledge.

_____
Denzil Noble

Date: _____

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DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS - Office of the General Counsel

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