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via IZIS

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Application No. 19659 of FSMB; Response to Opponents' Submission

Dear Chairman Hill and Members of the Board:

On behalf of the Applicant, below is the response to the Opponent's Post-Hearing Submission filed February 7.

Overview

Pursuant to the Board's request at the hearing, the Opponents' Submission was to comment on the specific conditions for approval proposed by the Office of Planning, and to respond to a request for additional information on the number of large residential buildings in the Kalorama neighborhood.

The inherent disposition of the opposition toward the Application can be summed up in the Opponent's opening paragraphs, in which their counsel states in bold letters that "no conditions will effectively mitigate FSMB Inc.'s adverse effect on the use of the neighboring properties…". This disposition did not arise from reasoned consideration of the Applicant's intended use of the subject property and consideration of the conditions proffered by both the Applicant and the Office of Planning. It existed well before the introductory meeting between the Applicant and members of the neighborhood, a meeting at which the Applicant was told in no uncertain terms that the Application would be opposed on principle. The Opponents refuse to entertain even the idea that the proposed use may be conditioned in such a way as to not have any material impact on the use of neighboring properties.

The Opponents' positions related to the adverse effect on the Kalorama neighborhood essentially ignores the history, rationale, and burdens that must be met for this Board to grant a special exception. Instead they make an argument that is applicable perhaps in the case for a text amendment case before the Zoning Commission—that is, Kalorama should be free of non-residential uses and exempt from special exceptions. It follows that the Opponents believe that even if the Applicant were to meet the burdens set forth in Subtitle U Section -203.1(n), which the Applicant does, this Board should refrain from granting special exception approval despite previous exceptions received by non-profit organizations on the very same block. The fundamental argument of the Opponents is not directed at the Applicant, but at this Board, and argues that Kalorama is in some way unique and zoning laws should reflect that. That is to say that the Opponents hold themselves out as more unique and deserving of privileged consideration by this Board, even more unique and deserving than residents of other historic residential neighborhoods like Dupont Circle or Georgetown; neighborhoods where such special exceptions have been granted.

The Office of Planning report, which recommends approval of the Application with conditions, forces the Opposition to begrudgingly address conditions. But, the Opponents allege - completely without justification and counter to the cooperative behaviors exhibited by the Applicant thus far- that the conditions simply will not be honored and therefore would not be effective. It is offensive to the Applicant to be characterized as nefarious, especially when it has been successfully addressing neighbor concerns during the pendency of this Application, and intends to continue strong community engagement should the BZA approve its Application. The Opponents are reluctant to comment whether proposed conditions are able to mitigate perceived impacts on the neighborhood because to do so would render their fundamental basis for opposing this application impotent. It is the continuation of what is really the only argument presented by the Opponents, to paraphrase: '*any and all* nonresidential use is adverse to our neighborhood – regardless of what the Zoning Commission thinks – and for that reason there is no need for us to actually identify any specific instance or example of how the use of a neighboring property may be affected by this proposal.'

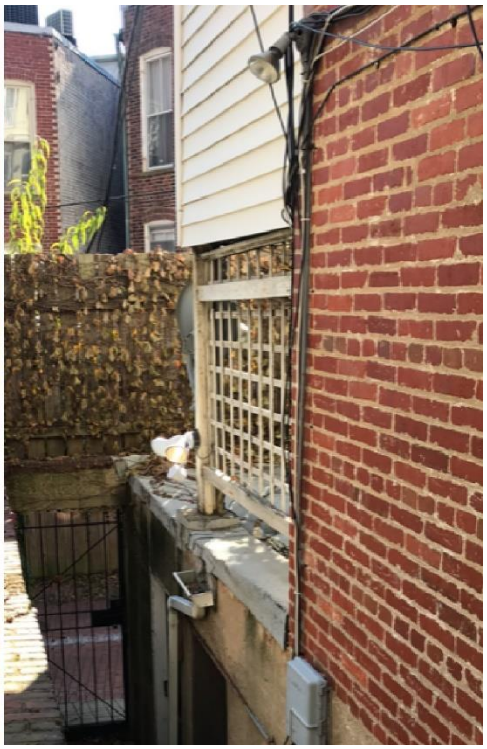
The Opponent's argument is devoid of any credible example of potential adverse effect of the Applicant not only using, but improving, the existing Property. It rests on conclusory statements that there is "ample" testimony that establishes adverse effect, statements that this Board should not find persuasive. The entire argument has been a general accusation of inherent harm, without any specific example of actual potential harm because the Applicant's use will not create adverse effects. The Applicant will use the Property for normal business operations and will host periodic meetings of limited attendance. The Applicant seeks to hold one four-day meeting of its Board of Directors at the Property. The testimony offered by the Applicant, and the reviews of both the Office of Planning and the District Department of Transportation, illustrate that the Applicant's use will not create traffic or parking issues. What the Applicant is proposing is a benign level of use, one which is completely consistent with previous successful applications for relief of this type granted by this Board for. And the conditions offered by the Applicant are not only enforceable, they are eminently believable, by all but the Opposition.[1]

Response to Suggested Revisions to Conditions

OP Condition No. 1 – As part of its on-going exploration of improvements with architectural firms, the Applicant believes that there are aspects of the existing structure which may need to be replaced, or improved upon, for both safety and cosmetic reasons. A narrowly crafted condition, subject to neighborly scrutiny, may preclude the ability of the Applicant to undertake such renovations.

For example, the photo below showcases the condition of the rear exterior of the property. The Applicant believes the neighbors would view modifications to the exterior favorably, especially in light of its current appearance. The Applicant believes the proffered condition, as currently drafted, would limit the ability to make desired changes such as the removal of vinyl siding or poorly constructed wooden lattice privacy screens.

[1] For instance, the condition to park in nearby garages. Why would employees even want to park on LeRoy Street when multiple garages are a 2-minute walk away. This is not a difficult condition for FSMB to require of its employees, which it will do, but it is also the most likely and logical place for employees to park, *even if* it wasn't a condition of employment for them.

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Additionally, the subject Property is located in a historic district and as such, exterior changes would be subject to approval by the Historic Preservation Review Board, and DCRA. This process mirrors the intent of the condition and will prevent significant changes to the footprint of the Building. In order to fully improve upon the property and make it consistent with the historical and upscale nature of the neighborhood, the Applicant would request flexibility to make minor alterations to the exterior, while not necessarily altering the footprint of the subject building.

OP Condition No. 3 – the Applicant has agreed to require its employees to park in one of several nearby garages. FSMB does not require its employees to decide between daily parking and monthly parking leases. The suggested revision is not necessary, has no implications for adverse effect, and is meant merely to further burden the Applicant, and the ANC, with additional recordkeeping.

OP Condition No. 7 – the Applicant has merely requested to have occasional board meetings on the Property, and does not hold "events" as such term is traditionally understood in cases such as the Halcyon House and Tudor House.

OP Condition No. 9 – the Applicant continues to strongly object to any time limit. Time limits have never been proposed or implemented for such lightly proposed uses. They have been adopted in the Halcyon House and Tudor House cases, uses which involve bus tours, weddings, receptions, and a level of potential impact completely unlike that proposed here.

The existence of a time limit may also impact the willingness of the Applicant to invest a significant amount of capital into a superior renovation of this Property. As with any large scale renovation (both

commercial and residential), capital expenditures become more palatable when the expense can be recouped over a long time frame.

OP Condition No. 10 – the Applicant was surprised to see that its correspondence with Opponents' counsel was forwarded directly to the Board. Nevertheless, the substance of that email is the same argument we have posited from the beginning. DCRA will in the end determine the exact Gross Floor Area amount. In the meantime, the Applicant has submitted a topographical survey prepared by an engineer with considerable experience with DC zoning. The Applicant should not be required to submit further to what Opponents term an "independent" third party. This is a move simply meant to further burden the Applicant and this process. DCRA has a process for determining GFA amounts, notwithstanding Opponents experts claims of DCRA incompetence on the subject. And there is a process available to Opponents for challenging that final determination. At any rate, the calculation of GFA for this Property is not a close call. The Property slopes significantly to the rear, the first floor is already elevated well above street level, and the current calculation exceeds the 10,000 square foot threshold by over 800 square feet.

SKNC Additional Proposed Conditions

1) Lighting – Applicant will be happy to work with the neighborhood on lighting for the Property.

2) Window Treatments – Applicant intends to design its own window treatments and fails to see how these will affect *the use* of neighboring properties. We do not believe that any other property in Kalorama, or anywhere else for that matter, is subject to regulation of its interior window treatments.

3) Traffic Study – There simply is no need for a comprehensive traffic study. The Applicant's use will add little to no traffic on LeRoy Street. Taxis and Ubers will be very infrequent, as will be deliveries. It is not necessary to engage a traffic engineer to confirm this. Burdening the Applicant and the Board with this additional requirement will not change the fact that there is no adverse effect on the use of neighboring properties from the proposed use.

4) Requirement to Sell Property as a Single-Family Residence – the Applicant finds this suggestion beyond the bounds of a reasonable request, particularly since this property has not been a residence for over 65 years. This condition would have absolutely no impact on whether or not the current proposed use would adversely affect the use of neighboring properties, so it is obviously offered merely to burden FSMB as an organization. Furthermore, this could be considered a personal condition, as it has nothing to do with the operation of the proposed use and only affects FSMB. Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property and are unlawful, per se. *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023 (1995).

5) Resident in the Property – Even without an individual residing in the property, the Applicant has shown itself to be responsive to neighbor requests and cooperative. The Applicant agrees to a neighborhood liaison program which will further create bonds between it and the neighbors. It is also not feasible or appropriate to have an employee residing in the Property, nor would FSMB subject one of its employees to the scrutiny the Opponents promise for the occupants of this building going forward.

List of Large Buildings in the Neighborhood

It is not entirely clear why the Opponents originally raised this issue at the hearing. We believe that its primary point is to argue that if the Board approves this Application, it will lead to other applications for similar properties. We would just note that this relief has been available for 10,000 sf + buildings in Kalorama since 1971. In 1991, the Board approved BZA Case No. 15555, for a property located at 2110 LeRoy Place, which was then the military attache building for the Italian government, and had been for some time.

This Opponent raised this same issue back in 1991 in the Cullen case. In response to that argument, the Court of Appeals stated that:

"Second, since applications for special exceptions under section 217.1 are not granted as a matter of right but are evaluated on a case-by-case basis, there is little danger that the issuance of a special exception in this case will establish a precedent permitting a flood of non-profit organizations into any particular zoning district. Rather, the careful and thorough scrutiny given by the Board to the application in this case reflects the nature of the burden which any applicant must satisfy when seeking a special exception." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023 (1995).

To further allay the Opponents' concerns, we note that after the Cullen case was approved in 1991, it was twenty-six years before another such application would be filed in Kalorama, that being the present case. The Applicant is proposing no changes in law or interpretation from what existed in 1991, despite Opponents' counsels claim at the hearing that the Applicant is "encouraging" a broader interpretation than what currently exists. For these reasons, the Opponents' stated fears of a flood of applications are, as they were in 1991, unfounded.

Finally, regarding the list of large homes, the Applicant would just note that almost all of them are reportedly used for embassy use, which tends to disprove the Opponents' claims that large buildings are not more difficult to sell and use for single family residential use.

Sincerely,

Martin Sullivan

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