Application No. 19659 of Federation of State Medical Boards of the United States, Inc. ("FSMB, Inc."), pursuant to 11 DCMR Subtitle X, Chapter 9 for special exception under Subtitle U § 203.1(n) to allow the establishment of a nonprofit office use in the R-3 Zone at premises 2118 Leroy Place, N.W. (Square 2531, Lot 49) (the "Property").

HEARING DATES: January 31, 2018, February 21, 2018
DECISION DATE: _____, 2018

ORDERED:

That the application to establish a "Nonprofit Organization" office for FSMB Inc. at 2118 Leroy Place N.W. be **DENIED.**

DECISION AND ORDER

PRELIMINARY MATTERS

Self-certification. The zoning relief requested in this case was self-certified pursuant to Subtitle Y § 300.6(b). (Exhibits ("Ex.") 12, 139).

Application. The application was filed by FSMB, Inc. (the "FSMB Inc." or the "Applicant") on October 23, 2017. The original application was filed pursuant to Subtitle X §§ 900 and 1000 for a special exception to operate a nonprofit office use under Subtitle U § 203.1(n), and an area variance from the 10,000 sq. ft. of gross floor area requirement for the building under U § 203.1(n)(2). (Exs. 1, 4). The original application indicated that FSMB Inc. intended to have eight staff in the Property. In its Pre-Hearing Statement filed on January 10, 2018, the Applicant determined without evidence that the 10,000 s.f. requirement had been satisfied, and that no area variance was required (Ex. 103). Also without any explanation, the Applicant's Pre-Hearing Statement raised the number of anticipated occupancy to 25 "Full Time Employees" and proposed monthly night events for up to "50 guests". (Ex. 103). The Applicant then filed an updated Self-Certification Form seeking only Special Exception relief under Subtitle U § 203.1(n), dropping the request for an area variance. (Ex. 139).

Notice of Application and Notice of Public Hearing. By memoranda dated November 6, 2017, the Office of Zoning sent notice of the application to the Office of Planning ("OP"); Advisory Neighborhood Commission ("ANC") 2D, the ANC for the area within which the subject property is located; the single-member district representative for ANC 2D02; the Councilmember for Ward 2; the District Department of Transportation ("DDOT"), each of the four At-Large Councilmembers, and the Chairman of the Council (Ex. 15-24). A public hearing was initially scheduled for December 20, 2017. Pursuant to Subtitle Y § 402.1, the Office of Zoning mailed notice of the public hearing to the Applicant and the owners of property within 200 feet of the subject property on November 6, 2017. (Ex. 25–26). Notice of the public hearing was also published in the D.C. Register. (Ex. 102). On November 28, 2017, shortly before its original pre-hearing statement would have been required, the Applicant requested a postponement of the scheduled hearing until January 31, 2018, which the Board granted. (Ex. 90). The Applicant confirmed by

affidavit that it had posted notice of the public hearing on the subject property on January 16, 2018. (Ex. 115–115B).

Requests for Party Status. ANC 2D was automatically a party in this proceeding. The Sheridan Kalorama Neighborhood Council ("SKNC"), a more than 60-year old nonprofit organization that promotes the interests of the Sheridan-Kalorama neighborhood, filed an advance-consideration party status request on November 14, 2017. (Ex. 28). The Sheridan Kalorama Historical Association ("SKHA"), a nonprofit organization promoting the interests of the Sheridan Kalorama Historic District, filed an advance-consideration party status request on November 15, 2017. (Ex. 85–86). Both SKNC and SKHA (collectively "the Neighborhood Parties"), were granted advance party status during an advanced party status hearing on December 6, 2018. Frederick Guinee, a neighbor who resides directly across the street from 2118 Leroy Place, NW, filed for party status on January 15, 2018. (Ex. 104). His request was ultimately denied during the January 31, 2018 hearing, but he was permitted to testify as an individual in opposition.

Public Hearing. The Board conducted an approximately five-hour public hearing on the application on January 31, 2018. At the end of the hearing, the Board requested the Applicant and the Neighborhood Parties to submit supplemental submissions on February 7, 2018, with responses from all parties due on February 14, 2018. The Board scheduled the public hearing to continue on February 21, 2018, where the Applicant provided rebuttal testimony and all parties gave closing statements. The Board then closed the record except for draft findings of fact and conclusions of law from all parties, which it requested by March 14, 2018. The Board also asked OP to submit a supplemental report by March 21, 2018 addressing the conditions suggested by all parties in their respective draft findings of fact and conclusions of law.

Applicant's Case. Martin Sullivan of Sullivan & Barros, LLP, represented the Applicant. At the January 31, 2018 hearing, he was joined by Eric Fish and Dr. Humayun Chaudhry, FSMB Inc.'s Senior Vice President of Legal Services and President and CEO, respectively. The Applicant presented no expert witnesses and no fact witnesses other than those two employees. The Applicant provided testimony that it was engaged in educational efforts, but did not present evidence that it operates for an exclusively educational purpose. The Applicant also submitted a January 2018 letter from the Colombian Ambassador attesting that upwards of 40 people were using the Building until October 2015, but no witnesses were presented from the Colombian Embassy to support those statements. The Applicant additionally contended that the office operation would have no adverse impacts on the neighborhood uses, but the Applicant did not provide or offer any third-party evidence, written or testimonial, regarding those contentions.

In its testimony, the Applicant did not address through expert or direct testimony the issues raised by the Neighborhood Parties and individuals in opposition regarding the adverse impacts of increased vehicular and pedestrian traffic on Leroy Place and the rear alley to be caused by the requested office use and its regular deliveries and visitors. The Applicant also did not address the safety, noise, health and parking impacts that would be caused by FSMB Inc.'s office use. (1/31 Hearing Tr. 94-134).

During the January 31 Hearing, FSMB Inc. stated that it "would accept [OP's] condition of 15" employees, but it "requested the flexibility" to have five "temporary positions". (1/31 Hearing

Tr. 126). Further, on January 31, FSMB Inc. stated that it "would accept the five-year time limit." (1/31 Hearing Tr. 134). On February 21, 2018, the Applicant provided limited rebuttal evidence in which the FSMB Inc. acknowledged that "some of the issues we work on on behalf of our medical boards include licensing examinations." (2/21 Hearing Tr. 365). During that continued hearing, FSMB Inc. stated that "in discussion with our Board of Directors and our senior leadership, we believe that we could live with the five years" and that FSMB Inc. "would not sell the property if" the five year term was approved by the Board. (2/21 Hearing Tr. 376-377).

Government Reports.

ANC Report. At a regularly-scheduled and duly-noticed public meeting held on November 20, 2017, with a quorum present, ANC 2D voted unanimously to adopt a resolution opposing the Application. (Ex. 93).

OP Report. By report dated January 25, 2018 and through testimony at the public hearing, OP recommended approval of the Application subject to nine conditions only if the Board found that FSMB Inc. was a nonprofit organization and that the Building's 10,000 s.f. requirement was satisfied. (Ex. 110; 1/31 Hearing Tr. at 148–153, and 2/21 Hearing Tr. at 388-394). As to the conditions, OP recommended strong conditions designed to address "the potential adverse effects to the use of the neighboring properties and to provide these operational conditions that could minimize those impacts", including that annual meetings and events will not be held at the subject property and will be held off-site; 5-year limit to approval; the establishment of a neighborhood liaison, and a maximum of fifteen employees may work on-site. (Ex. 110, *See also* 1/31 Hearing Tr. 150).

DDOT Report. DDOT filed its initial report on November 29, 2017, based on an eight-employee office use, stating that it had no objection to the requested relief. (Ex. 92). During the January 31 Hearing, it was pointed out that DDOT's report did not address FSMB Inc.'s proposed 25 full time employee occupancy. At the Board's direction, on February 14, 2018, DDOT did file a supplemental report to reflect an employee cap of twenty-five. (Ex. 145). DDOT concluded that it had no objection, but conditioned its recommendation on FSMB, Inc. providing three long-term bicycle parking spaces for employee use and providing employee-paid transit benefits to its employees. However, the record reflects that DDOT performed no site visits prior to issuing either report and that it was not known if DDOT considered the specific impact of an office use on a residential area when issuing the Supplemental Report.

Letters in support. There were no letters in support of the Application

Persons in support. No persons support the Application.

Parties in opposition. The Board provided separate time for both SKNC and SKHA to present their respective cases. SKNC presented its case first. Nancy Kuhn, Esq. was accepted as an expert in non-profit law and testified for SKNC. Ms. Kuhn testified that as an expert, she had determined that the FSMB Inc. would not satisfy the Zoning Regulations' definition of "Nonprofit Organization" because it was not operated exclusively for a charitable purpose. (1/31 Hearing Tr. at 179–193). Chris Chapin, President of the SKNC, testified as to the history and purpose of

the SKNC and explained that the neighborhood had become more residential in nature due to recent changes to the Zoning Regulations to limit chancery uses. (1/31 Hearing Tr. at 194–98). Mr. Chapin also testified that FSMB Inc. had the opportunity to purchase an office building nearby on Connecticut Avenue, but chose to purchase the Property because it was approximately 35% cheaper than purchasing the approved office space. John Sukenik, member of SKNC's Executive Committee and its past president testified that at least ten neighborhood buildings had recently been converted from chancery to single-family residential, and he testified to the facts of the Property's physical condition and its suitability for residential use. Mr. Sukenik also testified to FSMB Inc.'s anticipated high intensity uses and the negative adverse impact those uses would have on the uses by neighboring properties. (1/31 Hearing Tr. at 198–205). Ellen McCarthy, a Georgetown University professor and former OP Directors who was accepted as a land use expert, testified for SKNC regarding the intent of the Zoning Regulations and Comprehensive Plan to retain and preserve the residential character of the Sheridan-Kalorama Neighborhood. She also testified about the harm that Applicant's office use would cause to the integrity of the zone plan and the residential character of the neighborhood. (1/31 Hearing Tr. at 206–19).

SKHA testified next. Sally Berk, Secretary of the SKHA, testified as to the history and purpose of the SKHA and the residential nature of the Sheridan-Kalorama Neighborhood. (1/31 Hearing Tr. at 230–234). Kindy French, President of the SKHA, testified as to the extent of the potential adverse effects of converting residential buildings to commercial properties in the neighborhood and identified approximately 34 homes in the Sheridan-Kalorama Neighborhood that exceeded 10,000 s.f., and, therefore could be subject to a nonprofit organization use in the future. (1/31 Hearing Tr. at 235).

Persons in opposition. At the January 31, 2018 public hearing, the Board heard testimony in opposition from adjacent residential owners, Marcus Watkins and David Feigin, whose properties are attached to 2118 Leroy Pl. NW. Opposed neighborhood residents Doug LaBossiere, Marie Drissel, and Frederick Guinee also testified. (1/31 Hearing Tr. at 169–77, 247–49; 249–53; 253–58). The persons in opposition testified that the neighborhood had become more residential and that SKNC had worked with OP on a text amendment to the chancery requirements to limit institutional and chancery uses in the neighborhood. The testimony also explained that the Colombians had significantly reduced their usage of the Property by 2007 and even before that had rarely hosted large parties or events. This testimony also explained that there are no other non-residential uses on Leroy Street with anything close to 20-25 employees. Testimony also addressed the small size of the alley and the difficulty of access by a delivery truck. Another witness in opposition testified that he had relied on the Zoning Map when he purchase his property and that he did not chose to, or want to, live across the street from an office use. Witnesses testified about the anticipated adverse impacts that would be caused by an office use of 15-20 employees and additional guests, including individuals smoking near residential homes, and additional vehicular and pedestrian traffic that would be caused on Leroy Place and in the alley. The general testimony of the persons in opposition can be summed up by following statement by Rick Guinee:

> And that's what happens in these sorts of situations when you increase traffic in these residential zones. Life becomes unpleasant, use becomes much more difficult.

(1/31 Hearing Tr. 258)

Letters in opposition. The Board also received written submissions from more than 70 persons in opposition (Ex. 30–72, 74–83, 89, 94–100, 108–09, 112–14, 118–19, 121, 124–26, and 146–47). The written submissions included concerns about deterioration of the residential quality of the neighborhood; increased density, traffic, pollution, noise; and the economic effect of on home prices and competition for residential space with commercial entities. (Ex. 30–72, 74–83, 89, 94–100, 108–09, 112–14, 118–19, 121, 124–26, 146–47). Letters in opposition from Council Chairman Phil Mendelson and Ward 2 Councilman Jack Evans were filed in the record. (Exs. 147, 199)

Post-hearing submissions. At the conclusion of the January 31 public hearing, the Board closed the record except for additional information. On February 7, 2018, all parties submitted additional information. (Ex. 138–138E, 141). On February 14, 2018, all parties submitted responses. (Ex. 142–43). On February 21, 2018, the Applicant provided rebuttal testimony to the Board and both the Applicant and the Neighborhood Parties gave closing statements. As directed, on March 14, 2018, the parties filed proposed findings of fact and conclusions of law. (Ex. ___).

FINDINGS OF FACT

THE SUBJECT PROPERTY

1. The Property is located mid-block in the northwest quadrant of the District of Columbia at 2118 Leroy Place, NW (Square 2531, Lot 49).

2. The Property is located in the Sheridan-Kalorama neighborhood that has become increasingly residential. One witness testified that "When my family moved to Sheridan-Kalorama in 1980 there were four children residing on our street, two were in my family. Now there are 30 children on our street and this increase is representative of the entire district." (1/31 Hearing Tr. 231).

3. These residential neighbors have a strong sense of community, often volunteering with the numerous neighborhood groups and committees including SKNC, SKHA and the "wildly successful Friends of Mitchell Park which keeps that park beautiful and full of people which that didn't happen before we became such an overwhelmingly residential neighborhood." (1/31 Hearing Tr. 232).

4. The Property contains approximately 5,125 square feet of land area. (Ex. 4, 11).

5. The Property is located in Ward 2 and ANC 2D. (Ex. 15).

6. The Property is located within the Sheridan-Kalorama Historic District. (Ex. 106).

7. The Property is improved with a three-story building, built in 1902 as a residence. (1/31 Hearing Tr. at 117).

8. The Property is zoned R-3, which is a "Residential House zone" designated for "Stable,

low- to moderate-density residential areas suitable for family life and supporting uses." Subtitle D § 100.1. The R-3 zone prohibits permit office use. Nonprofit office use, as requested by the Applicant, is only permitted in a limited manner by special exception approval pursuant to Subtitle U § 203.1(n).

9. The Property abuts single-family residences to the north, south, east, and west. (Ex. 4). The residences on the east and west are attached to the property.

10. Leroy Place is a narrow, one-lane, single-directional street going east. (1/31 Hearing Tr. 196, 205).

11. The Applicant purchased the property from the Government of Colombia in July 2017 following a bidding war among at least three bidders; the Applicant, an individual from California, and a local couple seeking a residential use. (1/31 Hearing Tr. at 202).

RECENT PRIOR CHANCERY USE WAS EXTREMELY LIMITED

12. While the Property had previously been the Colombian Chancery, the overwhelming testimony from neighbors who had lived on the street for almost 40 years, had visited the building and had personal relationships with prior Chancery employees, was that even at its highest occupancy, before 2007, had been relatively limited and was much less intense than the 20 – 25 employees plus guests proposed by FSMB Inc.

13. All Colombian evening events were held at the Ambassador's home. (1/31 Hearing Tr. at 250).

14. The only time there was large attendance was in 2002 and 2006 for the Colombian presidential elections. (1/31 Hearing Tr. at 250).

15. The evidence also documented that the use of the Chancery declined following a "large exodus" in 2007, as detailed by Ms. Drissel. (1/31 Hearing Tr. at 250).

16. By 2013-2014 there was a "skeleton staff" at the Chancery, and in observations between 2013 – 2017, Mr. Guinee, the next door neighbor said "I never observed lines of people waiting to get into the Chancery. I never observed large numbers of people coming or going, I never observed people wandering down the street seeming to be looking for the Colombian Embassy." (1/31 Hearing Tr. at 250, 257).

17. After the "exodus" in 2007, by 2013-2017, the Chancery at most had "five or six people" working there. (1/31 Hearing Tr. 256, 257).

18. Further, the Applicant's purported evidence that the Property was used as a "functional embassy with approximately 25-40 full time diplomats, administrative assistances and military personnel" until October 2015 was based on a single-letter in the record dated January 26, 2018 signed by the Colombian Ambassador, Camilo Reyes (Ex. 134).

19. The record reflects that Ambassador Reyes was not appointed until May 2017, so he could not have had actual, personal knowledge of the level of chancery use until he

came to Washington in May 2017. (Ex. 146)

20. The Applicant did not present any other testimony or witnesses from the Colombian Embassy or Chancery to support its claims of occupancy or usage.

21. Accordingly, the evidence documents that the "implication that the Chancery was filled with employees and events because there were so many offices is just plain false" (1/31 Hearing Tr. 250) and the statements in the January 26, 2018 had no support in the record whatsoever.

RESIDENTIAL NATURE OF LEROY PLACE

22. Leroy Place consists of more than 75% single-family residential homes. (Ex. 105A). When the residential uses of the two religious entities and American Gold Star Mothers' Headquarters are taken into account, 88% of the street is residential. (Ex. 130).

23. There are 17 children and four dogs living on Leroy Place. (1/31 Hearing Tr. 251).

STATUS OF BUILDING; INTERIORS OF THE BUILDING IN GOOD SHAPE

24. The Property, including its interior walls and rooms, is in overall good condition. (Ex. 130; 1/31 Hearing Tr. at 201).

25. The Property also contains a residential garage with two parking spaces, accessible from the narrow rear alley. (1/31 Hearing Tr. at 151). There is no other possible parking on the property.

26. The Property has great potential for residential use, especially given its many remaining residential elements including a large foyer, a beautiful staircase, and light-filled upper levels. (1/31 Hearing Tr. at 201).

27. The Property, according to licensed architect and SKNC architectural expert Guillermo Rueda, could be restored back into a residence because of its existing construction, historic interior elements, and the strong market for such residential redevelopment projects. (Ex. 105A, Tab M).

28. Mr. Rueda also wrote that the costs of a residential restoration would be consistent with the refurbishing budget proposed by the Applicant. (Ex. 105A).

THE BUILDING HAS LESS THAN 10,000 S.F. OF GFA

29. The Applicant initially applied for an area variance on the grounds that the gross floor area ("GFA") of the Building was 8,121.13 sq. ft. (Ex. 4).

30. However, in its pre-hearing statement, the Applicant contended without support, that it recalculated the GFA to contain 2,703.9 more square feet by including the basement area, thus exceeding 10,000 sq. ft. (Ex. 138).

31. Based on SKNC Inc.'s diagram, Guillermo Rueda, a licensed architect with 27 years of experience, performed GFA analysis on the Property using the procedure described in the Zoning Regulations. (Ex. 142. 105A). This analysis shows the Property has only 9,002 sq. ft. of GFA after incorporating the basement area. (Ex. 142).

32. Mr. Rueda could not conduct a site visit because the Applicant denied a request for access to the property. (Ex. 142).

33. However, using the information in the record, Mr. Rueda confirmed that Applicant's architect, Wingate Hughes, miscalculated the GFA of the Property because it failed to include any dimensional information for building elements, even though doing so would be typical for this type of survey. (Ex. 142).

34. Mr. Rueda also confirmed that Wingate Hughes' GFA analysis was also flawed for numerous reasons including using a diagonal "grade plane" analysis and including 298 sq. ft. of garage space, even though the garage is separate, only accessed from the outside, and two stories below the ground floor. (Ex. 142).

35. Using the correct method under the Zoning Regulations, Mr. Rueda's analysis shows that the maximum basement area that may be included in the GFA is only 595 sq. ft. (Ex. 142), and that the Building did not satisfy the 10,000 s.f. GFA requirement.

36. Mr. Rueda was made available for questions, but the Board and the Applicant chose not to cross-examine him. (2/21 Hearing Tr. 393-94) The Applicant did not offer any expert witnesses with regard to the 10,000 s.f GFA requirement, so the Board and Parties in Opposition were not offered the opportunity to test the assertions of Wingate Hughes through cross-examination. The Board accordingly gives little weight to the submissions attributed to Wingate Hughes**.**

FSMB INC. IS A BUSINESS LEAGUE OF STATE MEDICAL BOARDS

37. The Applicant represents the 70 medical and osteopathic boards of the United States and its territories, and is an "advocacy Network" for its members. (Ex. 105). Individual physicians are not members of FSMB Inc. (2/21 Hearing Tr. 365).

38. The Applicant is a 501(c)(6) business league whose mission is to further the interests of its members, the various state medical boards. While FSMB Inc. stated that it was operated exclusively for the purpose of educating its members, the record reflects that the administration of medical licensure examinations to individual physicians accounts for more than 96% of its annual revenue and more than 50% of its non-compensation-related annual expenses.

39. The Applicant identified 215 employees on its 2015 Form 990. (Ex. 105A).

40. The Applicant reported $42 million in revenue for 2015. (Ex. 105A).

			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)	468,065	243,793
	9	Program service revenue (Part VIII, line 2g)	44,414,138	42,062,925
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)	841,035	-160,376
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	620,939	561,246
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	46,344,177	42,707,588
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)	0	0
	14	Benefits paid to or for members (Part IX, column (A), line 4)	0	0
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)	14,949,289	15,809,304
	16a	Professional fundraising fees (Part IX, column (A), line 11e)	0	0
	b	Total fundraising expenses (Part IX, column (D), line 25) ▶0		
	17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	26,907,927	26,438,041
	18	Total expenses Add lines 13–17 (must equal Part IX, column (A), line 25)	41,857,216	42,247,345
	19	Revenue less expenses Subtract line 18 from line 12	4,486,961	460,243
Net Assets or Fund Balances			Beginning of Current Year	End of Year
	20	Total assets (Part X, line 16)	36,622,706	41,542,162
	21	Total liabilities (Part X, line 26)	12,686,810	17,614,430
	22	Net assets or fund balances Subtract line 21 from line 20	23,935,896	23,927,732

41. In 2015, the Applicant reported more than $31 million in examination revenue and almost $9 Million in "FCVS Revenue". Those fees were paid by individual physicians. FSMB Inc.'s members only paid $170,000 in dues. (Ex. 105A).

					(A) Total revenue
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns	1a		
	b	Membership dues	1b		
	c	Fundraising events	1c		
	d	Related organizations	1d		
	e	Government grants (contributions)	1e	243,793	
	f	All other contributions, gifts, grants, and similar amounts not included above	1f		
	g	Noncash contributions included in lines 1a-1f $			
	h	**Total.** Add lines 1a-1f ▶			243,793
Program Service Revenue				Business Code	
	2a	EXAMINATION REVENUE		541900	25,511,806
	b	FCVS REVENUE		541900	8,909,763
	c	EXAMINATION HISTORY REPORTS		541900	6,099,520
	d	BOARD ACTION REVIEW		541900	1,215,280
	e	MEMBERSHIP DUES		541900	173,750
	f	All other program service revenue			152,806
	g	**Total.** Add lines 2a–2f ▶			42,062,925

42. The Applicant's reported examination-related expenses related to examinations administered to individual physicians (not FSMB Inc.'s member medical boards) significantly exceeded its all of other itemized expenses. Specifically, the Applicant reported more than $17 million in expenses for U.S. Medical Licensing Examination and Post Licensure Assessment System transfer fees for 2015. (Ex. 105A).

24	Other expenses Itemize expenses not covered above (List miscellaneous expenses in line 24e If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O)	
a	USMLE TRANSFER FEES	17,578,737
b	PLAS TRANSFER FEES	130,400

43. But, the Applicant reported $190,000 in expenses for lobbying for 2015. (Ex. 105A).

d	Lobbying	191,872

44. FSMB Inc. also reported only $95,000 in expenses for conferences for 2015. (Ex. 105A).

19	Conferences, conventions, and meetings	95,648

45. The Applicant conceded that it lobbies, and currently spends $400,000 in lobbying expenditures per year. (1/31 Hearing Tr. at 97–98).

46. The Applicant also has a separate 501(c)(3) "Research & Education Foundation." (Ex. 105, 105A) that is not the applicant for the requested relief. The charity has no employees and total expenses of only $59,000.

FSMB INC.'S PROPOSED OFFICE USES OF THE PROPERTY

47. FSMB Inc. told a SKNC member that it had looked at commercial property space around the city including on Connecticut and Massachusetts Avenues and picked Leroy Place because it could be purchased at a substantially lower price compared with a commercially zoned property. (1/31 Hearing Tr. at 195).

48. The record reflects the existence of two commercial buildings on Connecticut Avenue a few hundred feet away are being offered for sale at an asking price of $740 per square foot, whereas the Applicant purchased the Property for less than $400 per square foot. (Ex. 125, 130, 132; 1/31 Hearing Tr. at 195).

49. The Applicant, with more than $42 million in annual revenues, is not cash-strapped, and could easily pay commercial rates for its property. (1/31 Hearing Tr. at 195–96).

50. After initially proposing 10 employees, the Applicant now wishes to use the property as an office for as many as 25 employees and to host monthly evening events for up to 50 guests. (Ex. 103, 1/31 Hearing Tr. at 126; Ex. 145).

51. Applicant has consistently increased its proposed employee count, such that its current proposal may not reflect its future intent to heavily staff the Property commensurate with the capacity of the building. (Ex. 89, 146).

52. FSMB, Inc. encourages its members to visit its Washington, DC offices. (1/31 Hearing Tr. at 203–04).

53. FSMB, Inc. currently has at least 12 and as many as 22 committees and work groups. (1/31 Hearing Tr. at 204).

54. FSMB, Inc. asserts it currently holds two to three meetings and workshops per quarter, and may host more if it receives the requested relief. (1/31 Hearing Tr. at 112, 146, 204).

55. Advocacy organizations, like FSMB, Inc., host, entertain, visit, and meet at their offices and travel to and from Capitol Hill. (1/31/ Hearing Tr. at 204).

56. The Applicant's asserted limited use would be unique among advocacy and policy oriented organizations. (1/31 Hearing Tr. at 204)

ADVERSE AFFECTS OF THE FSMB INC.'S OFFICE USE

57. An office building surrounded on all sides by single-family residential homes will cause greater congestion, including from its increased need for trash collection services, telecommunication services, maintenance and repair services, and cleaning services. (Ex. 105, 123; 1/31 Hearing Tr. at 205).

58. The Applicant's proposed office use of the Property would be at a density far greater than the uses of all other buildings in the R-3 zone on Leroy Place. FSMB Inc. has proposed allowing 25 people to work at the Property, but FSMB Inc. offered no evidence of any other property with anywhere close to that number of people. All evidence in the record is of far less dense use of properties. For example, four people occupy the large single-family home across the street. (Ex. 123). Even the diplomatic properties and the house used by the Gold Star Mothers have far fewer than 15 people working at them. Notably, Mr. Marcus Watkins, who owns the adjacent/attached property stated that "we don't have, you know, a business or corporation with 20 to 25 people" on Leroy Place. (1/31 Hearing Tr. 171).

59. Due to the one-lane, one-way nature of Leroy Place and the curb cuts along its north side, FSMB Inc.'s office use would cause greater traffic impact from ride-sharing vehicles drop-offs and pick-ups. (Ex. 105, 123; 1/31 Hearing Tr. 205, 258, 173).

60. The street configuration means that a car stopped in front of the Property to pick up or drop off FSMB Inc.'s employees or guests will block all cars behind it, likely leading to backups on Leroy Place and making it difficult for the residents of the properties on the north side of Leroy to access their driveways. (Ex. 123; 1/31 Hearing Tr. 257-258).

61. The narrowness of Leroy Place and the difficulty of maneuvering through it is further evidenced by the fact that buses are prohibited from the street. (Ex. 123)

62. The narrowness of the rear alley would also cause delivery trucks to block the alley way. (Ex. 105; 1/31 Hearing Tr. at 251).

63. FSMB Inc.'s use will also cause an increase in pedestrian traffic from an inappropriate level of non-residential activity from comings and goings of commuting employees and visitors. (1/31 Hearing Tr. at 258; Ex. 123).

64. The use would also impact parking because employees who live in Ward 1 or Ward 2 will park on Leroy Place by using their residential parking sticker, freeing them from parking in a garage, and making enforcement of proffered parking conditions impossible. (1/31 Hearing Tr. at 196).

65. FSMB Inc. has not indicated that it would subsidize employee parking.

66. The current offices of FSMB Inc. are less than a block from the Dupont south Metro stop. The subject property is approximately one half-mile from the nearest Metro stop. (2/21 Hearing Tr. 369-370).

67. In light of the greater distance from the Metro and the increased number of employees as compared to the current FSMB Inc. office, the Board finds that there is likely to be increased commuting by private vehicle by FSMB Inc. employees, guests and patrons as compared to the current FSMB office location. The Board further finds that contentions regarding past and current experience of FSMB Inc. employee commuting patterns are unsupported by the record and, in any event, do not support predictions by FSMB Inc. of future patterns.

68. Guest and employees commuting by private vehicle are likely to circulate the neighborhood for free parking spaces rather than park at a nearby garage for a $30/day or $275/month charge, which will cause greater traffic. (Ex. 124, 130).

69. Employees barred from smoking inside the Property will pollute the outside air in the surrounding residential neighborhood to the detriment of the neighbors. (Ex. 123, 146, 171). Residential pedestrians, including the children on Leroy Place and the surrounding streets, will be exposed to the odors, smoke, pollutants and visual impacts of cigarettes.

70. Conversion of the property to a commercial use will prevent occupancy by residential users who will increase neighborhood safety at night and on weekends. (Ex. 105; 1/31 Hearing Tr. at 232).

71. Adjacent neighbors are concerned about the need to underpin the Property to support the increased use. (1/31 Hearing Tr. at 176). FSMB Inc.'s construction plans are entirely unknown.

72. Granting the special exception for 2118 Leroy Place would also lead to likely destabilization in the neighborhood real estate market, as it will have a domino effect, permitting other 501(c)(6) business leagues to outbid residents for properties in the neighborhood. (Ex. 29, 89, 105, 124).

73. Granting the special exception would drive up the price for the 34 structures of more than 10,000 sq. ft. in the Sheridan-Kalorama neighborhood. (Ex. 130; 1/31 Hearing Tr.

at 224, 235, 248–49).

74. Driving up the price of structures over 10,000 square feet will reduce the value of other homeowners' properties by diminishing the residential quality of the neighborhood and reversing the trend to return to residential use. (Ex. 105, 105A; 1/31 Hearing Tr. at 196, 205–06, 217).

75. Granting the Application will also cause adverse effects by requiring the neighbors to monitor FSMB Inc.'s activities to ensure compliance with any and all conditions of approval. The burdens placed on neighbors of policing for compliance by FSMB Inc. and its employees and visitors of conditions on number of employees, traffic, deliveries, parking, smoking, event use and other matters relating to office use that might form part of a grant of a special exception would themselves adversely affect the use of property by residential neighbors.

76. With the adverse effects of FSMB Inc.'s office use, the evidence in the record documents that neighboring residential "life becomes unpleasant, use becomes must more difficult." (1/31 Hearing Tr. 258).

SKNC'S LAND USE EXPERT TESTIMONY ON ADVERSE EFFECTS

77. The only land use expert to testify before the board, Ellen McCarthy, found that Sheridan-Kalorama is a stable, low-density, single-family neighborhood. (Ex. 124; 1/31 Hearing Tr. at 206).

78. Ms. McCarthy testified that the Property is zoned R-3, low-density residential zone, designed to provide stable, low to moderate density residential areas suitable for family life and compatible uses. (1/31 Hearing Tr. at 206–207).

79. Ms. McCarthy identified several large structures in the neighborhood have been converted back to housing from other uses, partly because of the alteration of the zoning formula which now more strongly favors conversion to residential uses when diplomatic uses cease. (1/31 Hearing Tr. at 207).

80. Ms. McCarthy established that the Zoning Text Amendment that created the Nonprofit Organization Special Exception (ZC 73-32) was created at a time when the District of Columbia was losing population, as opposed to the current trend. (Hearing Tr. at 208–09). She also found that the intent of ZC 73-32 was to promote the public health and general welfare by keeping large, historic buildings from becoming "derelict" in a manner that. (1/31 Hearing Tr. at 210).

81. Ms. McCarthy testified that granting the Application was not directly in furtherance of the intent of ZC 73-32 because the Property was in no danger of standing vacant and deteriorating as a potential residence. (1/31 Hearing Tr. at 211).

82. Based on the record in this case, including the testimony of Ms. McCarthy, the testimony concerning the bidding war for the Property, the testimony concerning the current condition of the Property, and the lack of any evidence offered by FSMB Inc. concerning

likely deterioration or destruction of the Property, it is a matter of fact there is no risk that the Property would deteriorate or become derelict or destroyed in the absence of the grant of a special exception to permit office use.

ENTIRE COMMUNITY OPPOSES THE PROJECT

83. Applicant's outreach was limited to an ANC 2D meeting, a single meeting with neighborhood representatives at the Property site, a brief email conversation with one neighbor, and several emails exchanged with one other neighbor. (Ex. 136, 146). There was no outreach to the neighbor who lives directly across from the Property. (Ex. 123).

84. There are no letters or statements from the community in support of this project.

85. The ANC opposes the requested relief. (Ex. 93).

86. The councilman for Ward 2, Jack Evans, and the chairman of the DC Council, Phil Mendelson, both oppose the requested relief. (Ex. 119, 147).

87. Both SKHA and SKNC oppose the requested relief.

88. The two neighbors that the Applicant discussed the development with, Dr. David Feigin and Dan Melman, whose properties abut and are connected to the Property, both oppose the requested relief. (Ex. 108, 109).

89. The neighbor directly across Leroy Place from the Property, Frederick Guinee, opposes the requested relief. (Ex. 77, 104, 123 and 146; and 1/31 Hearing Tr. 253-258)

90. Dr. Feigin, Mr. Melman and Mr. Guinee each lives within 200 yards of the subject property. Each of these neighbors testified and/or submitted letters that office use is incompatible with the residential life that they enjoy on Leroy Place and that office use will adversely effect the use by their families of their homes. Marcus Watkins, the owner of the property at 2114 Leroy Place testified that it's "one thing to be next to an embassy", but "it's another thing from my viewpoint to be next to an office building and an office structure." (1/31 Hearing Tr. 170). Mr. Watkins stated that he believed this use will "ultimately [is] going to have a negative impact on our overall property values." (1/31 Hearing Tr. 171).

91. As many as 70 neighbors wrote letters in opposition to the requested relief. (Ex. 30–72, 74–83, 89, 94–100, 108–09, 112–14, 118–19, 121, 124–26, 146).

92. Six neighbors testified as individuals in opposition before the Board. (1/31 Hearing Tr. at 169–77, 247–49; 249–53; 253–58; 198–206).

93. On February 15, 2018, the Washington Business Journal published an article about this case with the headline: "*Just about every resident of Sheridan-Kalorama hates this project. Here's why*."

CONCLUSIONS OF LAW

Applicant Has not Met the Burden of Proof for Relief

The Board is authorized to grant relief only when the required burden of proof is satisfied. The Zoning Regulations are clear that the applicant, and the applicant alone, bears the burden of satisfying the standards of the special exception and variance tests. As to special exceptions, the Zoning Regulations expressly state, "The applicant for a special exception shall have the full burden to prove no undue adverse impact and shall demonstrate such through evidence in the public record. If no evidence is presented in opposition to the case, the applicant shall not be relieved of this responsibility". *See* Subtitle X § 901.3. *See also* Subtitle X § 1002.2 (placing the burden of proof to satisfy the variance test solely on an applicant").

As detailed in the findings of fact, the Board finds that the Applicant failed to satisfy its burden of proof because:

- The evidence in the record is that FSMB is not a nonprofit as defined by the Zoning Regulations, including the testimony of the only expert in non-profit law;

- Evidence in the record documents that the building is less than 10,000 GSF;

- The only expert evidence in the record is that the Application is not in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;

- The only evidence in the record is that the project will tend to adversely affect the use of neighboring properties

The Board is Authorized to Interpret the Zoning Regulations and Determine Correct Relief.

The Board has the final administrative authority to interpret the Zoning Regulations. *See Murray v. Board of Zoning Adjustment*, 572 A.2d 1055 (D.C. 1990). To that end, the Board credits SKNC's land use expert with an understanding that the Board is permitted to interpret the Zoning Regulations as narrowly as necessary to effectuate their purposes. The Board is further persuaded by SKNC's land use expert's testimony that it must interpret the Zoning Regulations "to limit the encroachment of non-residential uses into near northwest neighborhoods" in furtherance of the Comprehensive Plan's Near Northwest Element 1.1.7.

Pursuant to the DC Code § 6-641.07(g)(4), the Board is the final arbiter of the correct relief appropriate for an application. Indeed, the Board is not limited to the relief requested in an applicant's "self-certified" application.

This authority has been exercised in numerous other cases where the Board determined that the relief requested in a self-certified or Zoning Administrator referred application was not sufficient. Namely in *Application No. 17656 of Alley Cat Mews, L.L.C.,* the Board denied an application that had been self-certified as an area variance, but the Board decided a use variance was required. Further, in *Application No. 16875 of All Souls Memorial Episcopal Church*, the Board

determined that a use variance was necessary even after the Zoning Administrator found that only special exception relief was required. Indeed, in that case, the Board found that use variance relief was required because the conditions of the special exception relief were not satisfied. That application was ultimately denied because the Board found the requested use would significantly alter the character of the residential zone.

These case are instructive to the Board because they support the Board's ability to require a different area of relief than the one that had been "self-certified" in circumstances, such as this one, where the application does not satisfy the special exception requirements.

FSMB Inc. is Not a "Non-Profit Organization" under the Zoning Regulations and Use Variance Relief is Required.[1]

In this case, the Board was expressly charged, both by the Zoning Enabling Act (D.C. Official Code § 6641.07) and directly by OP in its Staff Report (BZA Ex. No. 110) to determine whether FSMB Inc. satisfied the definition of a "Non-profit Organization." The answer to that question based on the evidence of record is clearly "**THAT IT DOES NOT**".

The Zoning Regulations define "Organization, nonprofit" as "An organization organized, registered with the appropriate authority of government, and ***operated exclusively*** for religious, charitable, literary, scientific, community, or educational purposes, or for the prevention of cruelty to children or animals; provided that no part of its net income inures to the benefit of any private shareholder or individual." *See* Subtitle B § 100.2.

Based on many well-accepted doctrines of regulatory interpretation, including "the Whole Act Rule", the Board is simply not permitted to ignore or "write out" the requirement that to satisfy the "Organization, nonprofit" definition, FSMB Inc. must be "operated ***exclusively***" for charitable purposes. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805)(applying the "whole act rule", which has evolved to holdings that find "any attempt to segregate any portion or exclude any other portions from consideration is almost certain to distort the [regulatory] intent", 2A Southerland § 47.02).

While the Board acknowledges that FSMB Inc. has an educational component for its members (including conferences and working sub-committees to further the educational interests of its member state medical boards), the overwhelming evidence of record documents that FSMB Inc. is mainly a business league organized and operated to administer licensure examinations to individual physicians- who are not FSMB Inc. members. This is well documented by a close review of FSMB Inc.'s revenues and expenses referenced above. This evidence of record demonstrates that both the expenses and revenue associated with the licensure administration substantially outstrip FSMB Inc.'s educational mission for its members. Indeed, the evidence is clear that even a generous review of the 2015 990 Form details that FSMB Inc. spent more than $2,000,000 more

[1] The Board is also persuaded that the Application must be processed as a use variance because the Building does not satisfy the requirements of an "Existing Residential Building". The Board is not persuaded by the Applicant's reliance on *French v. D.C. Bd. of Zoning Adjustment* 658 A.2d 1023, 1033 (1995) because that is an extremely limited holding. Further, the Zoning Regulations clearly establish that a "Chancery" use is non-residential in nature (*See* Subtitle B § 200.2(g)).

on "licensure" examination expenses than it did on all of the non-property-related expenses combined. With this clear evidence of record, it is impossible for the Board to determine that FSMB Inc. is operated "exclusively" for "educational" purposes as FSMB Inc. attempted to argue. Further, the Board finds it determinative that SKNC Inc. has conceded that it is not "exclusively charitable". Indeed, SKNC Inc. acknowledges that it lobbies the government and administers licensure examinations. (1/31 Hearing Tr. 97; 2/21 Hearing Tr. 365). Further, the SKNC Inc.'s 990 Form indicates more than $200,000 in "data licensing revenue" that is not tax deductible. (Ex. 105A, Tab E, pg. 9.)

Further, the Board credits the testimony of SKNC's non-profit expert that FSMB Inc. did not satisfy Zoning Regulation's definition of "organization, nonprofit". The Board found that SKNC's expert appropriately determined that FSMB Inc. was operated for the purposes of its members, the 70+ State Medical Boards, and, therefore, was not organized or operated for the charitable public. Further, the Board found it determinative that SKNC's non-profit expert found that the Zoning Regulation's definition of "organization, nonprofit" was substantially similar to the language of Internal Revenue Code Section 501(c)(3). Accordingly, because FSMB Inc. is a Section 501(c)(6) business league, the Board agrees it does not satisfy the Zoning Regulation.

The Board is also persuaded by the fact that the great majority of approved BZA cases for the non-profit special exceptions were 501(c)(3) charities. *See* Case Nos. 16762, 16853, 16974, 17302, 18604, 18315, 18969

The Board is not persuaded by the two cases cited by the Applicant to support its position that a non-profit's tax exempt status has been irrelevant to the Board. Indeed, the Board finds those two cases, BZA cases 17985 and 19131 to be easily distinguishable, because unlike the case at hand, the charities in those case was previously located in their respective neighborhoods. The Board knows that is certainly not the case here, where FSMB Inc. is seeking relief to move into the Sheridan-Kalorama neighborhood and establish a new use there.

Therefore, based on the substantial evidence of record, FSMB Inc. does not satisfy the requirements of an "organization, nonprofit" under the Zoning Regulations. There is no evidence to the contrary.

Accordingly, the Board cannot approve FSMB Inc.'s use as a special exception. A use variance is required. As discussed below, the Board has concluded that there is no evidence in the record to support a use variance.

FSMB Inc. Does Not Satisfy the Use Variance Standard

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property…." D.C. Official Code §

6641.07(g)(3) (2008 Supp.), 11 DCMR Subtitle X § 1000.1. Further, "an applicant for a use variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property." *See* Subtitle X § 1002.1(a). Finally, relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." D.C. Official Code § 6-641.07(g)(3) (2008 Repl.), 11 DCMR Subtitle X § 1000.1.

The Zoning Regulations are clear that a use variance is required when an applicant requests approval for "a use that is not permitted matter of right or special exception in the zone district where the property is located." *See* 1001.4(a). Further, the Courts have established that "a determination of whether a variance is a use variance will turn on whether the relief would 'change the character of the zoned district'" *See Taylor v. D.C. Bd. of Zoning Adjustment,* 308 A.2d 230, 233 (D.C. 1973) and that "[d]eterminations with respect to the treatment and classification of proposed variances are best made … on an ad hoc basis, by the agency from whose regulations those variances are sought." *See Wolf, v. D.C. Bd. of Zoning Adjustment,* 397 A.2d 936 (D.C. 1979). It is also well accepted that "If the variance will permit a use of the land that changes the character of the neighborhood, then it is more likely that the variance will be held to be a use variance." *See 1 E. Ziegler, Rathkopfs The Law of Zoning and Planning* 3 58:4, p. 58- 17 (4th ed. 2001).

The Board finds that there is no evidence in the record to support a use variance.

No Exceptional Conditions: Applicant's Desire to Use a property Does not Create an Exceptional Condition

There is no evidence of "exceptional conditions" for the Property. It is neither exceptionally narrow nor shallow. Further, it is not configured in a unique shape, and it does not experience exceptional topographic changes different from other properties along Leroy Place. Therefore, the Property does not specifically fall under the Zoning Regulation's definition of unique.

Even accepting *arguendo* that the D.C. Court of Appeals has found that "uniqueness" "may arise from a confluence of factors which affect a single property" *See Gilmartin*, 579 A.2d at 1168, the Board finds that Property would not be unique. Rather, the Board can find nothing unique about this Property. Indeed, the record establishes that at 5,124 s.f. it is not the largest lot on this block of Leroy Place, and it was not the largest structure in the neighborhood. Further, it is well-established that "an applicant's desire to utilize property for a certain use is not by itself sufficient to create an extraordinary or exceptional situation or condition under the zoning regulations" *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 540 (D.C. 1972). As such, the Board finds that FSMB, Inc. has failed to carry its burden of proof on the first prong (Uniqueness), and the use variance relief should not be granted.

This is a Self-Imposed Hardship: FSMB Inc. Purchased the Property Knowing the Relief was Required

Next – this Board finds that there is no undue hardship because FSMB Inc.'s need for the relief was self-imposed. It is well-settled that a use variance may not be based on a claimed hardship that is self-imposed. *See e.g. Foxhall Community Citizen's Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 524 A.2d 759, 761 (1987). This Board must follow the Court's direction that selection of a site with knowledge that zoning relief is needed is a quintessential self-imposed hardship that precludes use variance relief. *See Foxhall, 524 A.2d at 762*.

In this case, there is ample evidence that FSMB Inc. was aware of the need for relief in order to operate its office use in the Sheridan-Kalorama neighborhood. The following exchange is instructive on this point:

> CHAIRPERSON HILL: And so you purchased the property knowing that you had to go through this process?
>
> MR. FISH: Yes, sir. After consulting with Mr. Sullivan, but also looking at the regulations and some of the previous decisions that have been issued for special exemptions, we felt that we fit the conditions that would bring us here today.
>
> CHAIRPERSON HILL: Okay. But you did know that you had to come through us first?
>
> MR. FISH: Yes, sir.

(1/31 Hearing Tr. 122)

Accordingly, the "undue hardship" here was directly self-imposed, and the Board cannot approve a use variance. Also, the evidence of record documents that FSMB Inc. saved at least 30% by purchasing the Property instead of the for-sale commercial properties immediately nearby on Connecticut Avenue. *See* BZA Ex. No. 132. Indeed, the evidence of record was that FSMB Inc. chose to purchase the Property in a residential neighborhood, knowing that it would need to go through the BZA process. The evidence also demonstrated that FSMB Inc. paid significantly less to purchase the Property than if it had purchased the available commercial offices on Connecticut Avenue. For these reasons, the harm was self-induced, and there is no undue hardship on FSMB Inc. if the use variance is denied.

FSMB Inc. Use will Cause Substantial Detriment to the Public Good and Zone Plan

Finally, the substantial evidence of record is that permitting FSMB Inc.'s office use on the Property would cause substantial detriment to the public good and substantial impairment to the intent, purpose and integrity of the zone plan. The Zoning Regulations only permit a very narrow type of office use on the Property – "nonprofit organization" – and it has been determined that FSMB Inc. does not satisfy that definition. Accordingly, permitting that office use in the neighborhood would substantially impair the intent, purpose and integrity of the zone plan. Further,

the evidence is overwhelming that FSMB Inc.'s proposed office use would cause substantial detriment to the public good, both through its increased use intensity on the site and the negative impacts on the vehicular and pedestrian circulation, but also on its negative impacts on the surrounding property values and the usual certainty associated with those values.

The Board can find no evidence in the record that the Applicant satisfies the District's stringent use variance requirements. Therefore, because FSMB Inc. does not qualify as an "organization nonprofit" and does not satisfy the use variance standards, its application is hereby **DENIED**.

Insufficient Evidence that the Property Building Satisfies the 10,000 s.f. Gross Floor Area of Subtitle U § 203.1(n)(2), and Area Variance Relief is Necessary.

While it is this Board's position that the Application must be denied for the reasons stated above, the Board will now also detail how the Application fails the necessary area variance test due to the fact that the Building does not exceed 10,000 s.f. in gross floor area ("GFA") as required in Subtitle U § 203.1(n)(2). Accordingly, and relief cannot be approved as a special exception, and area variance is requirement. For the reasons discussed below, the Board finds that the area variance standard has not been satisfied.

FSMB Inc. 10,000 s.f. GFA Analysis is Not Credible

While the Board acknowledges that the Applicant has "self-certified" that it satisfies the 10,000 s.f. requirement and has filed a diagram in the record claiming to satisfy the requirement (Ex. No. 138A, the "FSMB Analysis"), the Board does not find that information sufficient or credible. In particular, the Board discredits the FSMB Analysis because it is based on information that FSMB Inc. would not allow the SKNC expert access to the Building to confirm. The Board finds it even more troublesome that FSMB Inc. would not permit the SKNC expert to conduct a site visit to confirm the FSMB Analysis when the record establishes that it was only after FSMB Inc.'s counsel "got into the building and realized that the 1st floor was higher" that FSMB Inc. identified that the Building exceeded the 10,000 s.f. requirement. Further, the Board found it impossible to credit the FSMB Analysis when it relied on a document referenced as "Exhibit A" that was conspicuously missing and never entered into the record. *See* Ex. No. 138A reference to "Page 12 of the Study (Study attached as Exhibit A)". Accordingly, the Board does not credit FSMB Inc. with providing sufficient evidence into the record that the 10,000 s.f. requirement was satisfied.

Board Adopts SKNC Analysis

The only credible evidence in the record is the SKNC expert's GFA analysis in the record at Ex. No. 142 Tab A (the "SKNC Analysis"). The SKNC Analysis determined that the Building was 9,002 s.f. in GFA, almost 10% less than the 10,000 s.f. required. The Board credits the SKNC Analysis because unlike the FSMB Analysis, it was prepared by an expert in architecture relying on the text of the Zoning Regulations. The SKNC Analysis applied the correct "grade plane method" pursuant to Subtitle C § 304.5 of the Zoning Regulations for an attached building. It also appropriately identified the correct midpoints at the front and rear of the Building and connected those points with a straight line. The FSMB Analysis used a diagonal line to connect the

"dots", which is not correct and is part of the reason this Board finds the FSMB Analysis to lack credibility.

Even including the inside of the interior walls (again, another indicia of a correct analysis that the Board found to favor the credibility of the SKNC Analysis over the one prepared for FSMB), the SKNC Analysis concluded that only 1,954 s.f. of the lower level counts towards overall building GSF, resulting in a building size well under the 10,000 s.f. GFA. Accordingly, the only credible evidence in the record demonstrates that area variance relief is necessary from Subtitle U § 203.1(n)(2). As discussed below, the Board found that standard was not met.

Area Variance Standards Are not Satisfied[2]

The Board is authorized to grant area variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property … or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties upon the owner of the property…." D.C. Official Code § 6641.07(g)(3) (2008 Supp.), 11 DCMR Subtitle X § 1000.1. Finally, relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map." D.C. Official Code § 6-641.07(g)(3) (2008 Repl.), 11 DCMR Subtitle X § 1000.1.

No Exceptional Conditions

Similar to the above discussion of the use variance, the Board does not find that the Property exhibits the necessary "exceptional condition". In addition to the reasons discussed above, the Board also finds that the Property does not satisfy the first prong of the variance test because it finds unconvincing FSMB Inc.'s prior argument for "uniqueness" (as made in its initial application statement), which was that the building was "large", and apparently did not satisfy the 10,000 s.f. gross floor area requirements due to something the Applicant would like to characterize as a "technicality." The Board finds that this argument fails to pass muster because failure to satisfy a zoning requirement cannot be the basis for a claim of uniqueness. Indeed, finding so would effectively gut the "uniqueness" prong all-together because anyone could claim their property is "unique" simply because it does not satisfy the Zoning Regulations. Such an argument is circular and is rejected by the Board here.

No Practical Difficulties because the Record documents that the Property could have been Sold and Renovated as a Single Family Home

Next, while the Board acknowledges that a showing of "practical difficulties" necessary for an area variance, is less stringent than the requirement for a use variance, *Palmer v. D.C. Board of*

[2] The Board is similarly not convinced by the Applicant's arguments about the potential impact of pending Zoning Text amendment No. 17-18. Indeed, the record on rebuttal reflects that even the Applicant understood that it must satisfy the gross floor area in place under the current regulations. (2/21 Hearing Tr. 413). Accordingly, as the Board only credits the SKNC Analysis, it finds that the 10,000 s.f. GFA requirement has not been satisfied.

Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972), the Board finds that standard has not been met here. Rather, the more credible evidence in the record documents (1) that the Building could have been purchased for a single-family use; and (2) that it could be renovated for use a single-family home.

The more credible evidence of record regarding the sale came from John Sukenik, who provided an affidavit of conversations with the Property's listing agent, who was also a personal friend and a real estate agent who has handled the sale of many properties in Sheridan-Kalorama. *See* BZA Exhibit No. 105, Tab D (the "Sukenik Affidavit"). Based on direct conversations, the Sukenik Affidavit explains that one of the potential purchasers of the Property was a couple who wanted to use the property as a residential home. That couple was out-priced through a bidding war, led by FSMB, Inc. But for FSMB, Inc.'s offer of $650,000 over the asking price, the Property could have been sold and used as a single-family home. *See* BZA Exhibit No. 105, Tab D.

The Board finds the Sukenik Affidavit to be more credible than the evidence regarding the sale presented by FSMB Inc. Specifically, during the January 31, 2018 hearing, FSMB Inc.'s power point presentation included an image of a letter dated November 29, 2017 from the "buyer's agent" apparently stating that there were two other bidders, but neither was a couple. *See* BZA Ex. No. 136. The Board does not find FSMB Inc.'s information to be as credible as the Sukenik Affidavit because it was only a "snip" of the letter, not an entire copy, and it was dated after Mr. Sukenik had his discussion with the listing agent. Further, the fact that the November 29, 2017 letter came from FSMB Inc.'s real estate agent in the transaction makes it initially questionable, because the Board believes that agent would have had a self-interest to provide information supporting FSMB Inc.'s relief application. Further, the Board questions why FSMB Inc. did not disclose the November 29, 2017 letter earlier in the process.

Questions about this motivation lead the Board to conclude FSMB Inc.'s information on the property sale is less credible than the Sukenik Affidavit. Accordingly, the Board finds there to be sufficient evidence in the record that the Property could have been purchased by a couple for use as a single-family residence, and FSMB Inc. has not provided a showing of "practical difficulties".

Moreover, FSMB Inc. presented no evidence in the record whatsoever that the Building could not be renovated to become a private residence in accordance with the R-3 zone requirements. Rather, the opposite is true. The record is replete with evidence that the Property **was** in suitable condition and includes a "grand staircase" and other attractive architectural features. Further, there is sufficient evidence that at least ten other neighborhood properties formerly in diplomatic or institutional use have been converted to residential uses in the neighborhood. *See* BZA Exhibit No. 105A, Tab B.

Finally, the record only contains expert evidence that the Building **could be renovated** to be returned to a single-family home. *See* BZA Exhibit No. 105A, Tab M. There is no evidence to the contrary. Specifically, according to Guillermo Rueda, SKNC's architectural expert, and a licensed architect in the District who had designed the conversion of another property in the neighborhood from institutional to residential use, restoration of the Building into a residence would not be "practically difficult." SKNC's expert's opinion was based on the Property's size,

current configuration, and other facts. Mr. Rueda also found that the potential residential restoration costs would not exceed the refurbishing budget proposed by the Applicant at the November 20, 2017 ANC meeting.

Notably, FSMB Inc. provided no evidence in the record whatsoever to counter the statements of SKNC's expert. Accordingly, the only evidence in the record is that FSMB Inc. would encounter no practical difficulties in converting the Building to residential. No, with no "practical difficulties" having been demonstrated, the Board can only concluded that FSMB Inc. has failed to satisfy the second prong of the area variance test.

Substantial detriment to the public good and zone plan would be caused

Finally, the only evidence in the record was that granting the area variance would substantially impair the public good and the integrity of the zone plan. The evidence in the record is clear that the special exception limits the use to "existing dwellings" of 10,000 s.f. in GFA or more as a way to limit number of structures that would be eligible for the relief. Further, the Board found persuasive OP's statement in a Staff Report for another case, BZA Case No. 19505 (which was ultimately withdrawn by that applicant):

> "A variance from the 10,000 square foot building requirement would cause substantial harm to the zoning regulations, as it would be directly contrary to the intent of the provision. The building size requirement is the linchpin of the special exception clause."

The Board also credits SKNC's land use expert's comments that the Board should not anticipate DCRA would make an independent determination on the 10,000 s.f. requirement when reviewing the building permit. Regarding FSMB Inc.'s contention that "that this will be caught by DCRA when the building permit is submitted if it's not 10,000 square feet", Ms. McCarthy, SKNC's land use expert who formerly led OP testified,

> **That's just not realistic.** DCRA has such a huge workload when you bring in your permit and it's processed and the zoning staff looks at the application they will look at what the architect has said is the square footage of the building. They have no time or resources to go out and measure the perimeter to determine exactly where the grade is less than four feet or the ceiling is less than four feet above the grade. So it is important for the Board to look at the issue of whether this is 10,000 square feet and I think it's pretty clear it is not."

1/31 Hearing Tr. 218-219.

Accordingly, for these reasons, the Board finds that the record does not support the granting of an area variance from the 10,000 s.f. requirement. For this reason, the Application is **DENIED.**

Insufficient evidence in the Record to Satisfy the Special Exception Standard

While it is this Board's position that the Application must be denied for the reasons stated above, the Board will now also detail how the Application fails to satisfy the Special Exception standard of Subtitle U § 203.1(n).

The Board is only authorized to grant a special exception where it finds the special exception:

> 1. Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
> 2. Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
> 3. Subject in specific cases to special conditions specified in the Zoning Regulations. 11 DCMR § X-901.2 and D.C. Code § 6-641.07(g)(2).

The Applicant has the burden of proving the standards have been satisfied. That burden has NOT BEEN SATISFIED HERE.

The "Cullen Case" does not Direct the Board to Approve the Special Exception

Despite the Applicant's frequent urging, the Board has not been convinced that it should approve the Application simply because it approved a nonprofit office in 1991. *See Application No. 15555 of Ann Cullen* (the "Cullen Case"). Although the Cullen Case applied to another property on Leroy Place – 2110 Leroy Place – the Board finds that there are many difference between that case and the current Application. In particular, the Cullen Case applied to 2110 Leroy Place, which is much closer to Connecticut Avenue and other commercial uses, including the Marriot Courtyard hotel, and, therefore, more commercial in nature than is the Property, which is mid-block. Further, the Cullen Case included significant evidence that the proposed non-profit use would be less intense that the previous use on that property. This is significantly different from the subject case, where the evidence in the record established that the Colombian chancery use of the Property was never as intense as FSMB Inc.'s proposed office, and that the chancery use indeed decreased substantially after 2007. Accordingly, unlike the Cullen Case, the evidence is clear that FSMB Inc.'s use will be more intense than the prior use. Finally, unlike FSMB Inc., the applicant in the Cullen Case provided expert testimony and evidence from traffic and architectural experts. That type of expert opinion is entirely missing here, where the only experts were the ones provided by SKNC, and the record is entirely devoid of expert evidence from FSMB Inc.

Finally, the Board finds it of particular importance that in affirming the Cullen Case, the Court of Appeals clearly established that it did not intend for that case "green light" nonprofit office uses in the Sheridan-Kalorama neighborhood. Specifically, the Court in *French v. D.C. Bd. of Zoning Adjustment* specifically limited its interpretation of the Cullen Case to *that property*

> [because special exception applications] 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.

Accordingly, the Board rejects FSMB Inc.'s desire to require a "lock step" adoption of the Cullen Case.

The Board Instead Finds other Decisions to be More Persuasive.

Instead of relying solely on the Cullen Case, the Board has found other cases to be persuasive in framing its decision to deny the pending special exception request. Of particular importance, the Board looks to its decision in *Application No. 13787, of Francois R. LePelch* (1982), in which the Board denied a special exception to change a beauty salon to general offices. In that case, the Board denied the requested special exception because the office use was more intense than the previous use. Further, as in the subject case, the Board found that the applicant failed to provide sufficient evidence that the office uses' noise, traffic and other "deleterious external effects" would not impact the surrounding uses.

The Board also finds persuasive two cases where office and institutional-type uses were denied in the Sheridan-Kalorama Neighborhood. First in *Appeal No. 7160 of Edmund T. Sommer, Jr. and Christa K. Sommer* (1963), that Board denied the requested relief, finding

> Our review of the neighborhood…. leads us to the inescapable conclusion that that the Sheridan-Kalorama Neighborhood is saturated with more than its fair share of chanceries and office uses that are immune to compliance with Municipal Regulations. Unless supported by exceptional and unusual circumstances the [intent] of this Board in the future will be to look with displeasure upon all requests for new [office and institutional-type uses] locating in the Kalorama area.

Second, in *Application No. 11184 Margaret R. Castle* (1972), the Board denied special exception relief for a school in the Sheridan-Kalorama neighborhood because the requested use "would have the likely effect of causing adjoining and nearby property to have a lower market value than such properties would otherwise have if the property is continued in use as a single-family residence."

These cases appropriately recognize the special, residential character of the Sheridan-Kalorama neighborhood and the difficulties it faces due to the incursion of chanceries and office uses. The Board finds these cases to persuasive and an influential counter to the Applicant's reliance on the Cullen Case.

Insufficient Evidence that FSMB Inc.'s use will be in Harmony with the General Purpose and Intent of the Zoning Regulations and Maps

After reviewing the complete record, the Board finds that the Applicant has failed to provide sufficient evidence to determine that it's proposed office use will be in Harmony with the General Purpose and Intent of the Zoning Regulations and Maps.

First, the R-3 zone is low density in nature and is designed for "Stable, low- to moderate-density residential areas suitable for family life and supporting uses" with the purpose of recognizing

"the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place, preservation of housing stock, improvements to the overall environment, and low- and moderate-density housing to the overall housing mix and health of the city." *See* Subtitle D § 100.

Further, the Board agrees with SKNC's land use expert that the interpretation of the Zoning Regulations should be consistent with the Comprehensive Plan and the text amendment that established the "Nonprofit Organization" Special Exception itself ("ZC 73-32"). To that end, the Board strongly takes into consideration that Comprehensive Plan: Near Northwest Element 1.1.7 "strongly discourages conversion of housing units to non-residential uses such as medical offices, hotels and institutions and that zoning regulations must be maintained to limit the encroachment of non-residential uses into near northwest neighborhoods." Also, it is of great importance to the Board that the purpose of ZC 73-32 "was to keep large properties from becoming "derelict" and "vacant" to "promote the public health and general welfare" due to the population decline in effect in 1973. (1/31 Hearing Tr. 209-210).

The preamble to ZC 73-32, states:

ZONING COMMISSION NO. 83
CASE NO. 73-32
January 26, 1974

WHEREAS,	It is in the public interest to provide for the continued use and maintenance of large residential buildings within historic sites and districts, and it is in the public interest to maintain and preserve large residential buildings of historical and architectural significance which are not within historic sites and districts; and
WHEREAS,	There are instances where continued use as residences of such large buildings is no longer assured, leading to their delapidation and destruction; and
WHEREAS,	Application of current Zoning Regulations will not accomplish the purposes set out above; and
WHEREAS,	Buildings of such nature have gross floor areas in excess of 10,000 square feet;
AND WHEREAS,	The use of such buildings for nonprofit organizations is an appropriate means of providing for the preservation of such buildings, thereby promoting the public health and general welfare;
NOW THEREFORE,	It is hereby ORDERED that the District of Columbia Zoning Regulations be AMENDED, as follows:

(Ex. 133).

With the Zoning Regulations, Comprehensive Plan and indeed the purpose of the subject special exception as guides, the Board finds that the Applicant is not in harmony for the following reasons:

- The only evidence in the record is that the Application is inharmonious with the intent of the Zoning Regulations that support "stable, low-to-moderate density residential areas" that are conducive to family life. The evidence in the record is that Sheridan-Kalorama is such a neighborhood where families are choosing to follow the departure of chanceries, and where even some of the existing institutional uses have a strong residential component. The Board finds that allowing FSMB Inc.'s office use to enter this neighborhood, in a mid-block location, is directly contrary to the purpose and intent of the Zoning Regulation.

- The evidence presented demonstrates that the Application is clearly inconsistent with the Comprehensive Plan's direction that "strongly discourages conversion of housing units to non-residential uses" in northwest. The evidence before the Board demonstrates that the Application is doing just that by seeking to permanently remove a structure from residential use.

- The Board is also persuaded by the Comprehensive Plan's direction that "the zoning regulations must be maintained to limit the encroachment of non-residential uses into near northwest neighborhoods." Accordingly, the Board will interpret the language of the Zoning Regulations in a manner that is consistent with the Comprehensive Plan direction. Such interpretation results in a conclusion that the Application is not in harmony.

- Finally, this Board concludes that the Application is not consistent with the purposes of ZC 73-32, which were to keep large properties from becoming derelict. The evidence of record demonstrates that the Property was not going to be vacant or fall into disrepair. Instead, all of the evidence of record (provided both by the Applicant and SKNC) was that there were multiple offers on the Property, and that FSMB Inc. paid $650,000 above the asking price. Further, the evidence is clear that FSMB Inc. as a wealthy business league that is not operated "exclusively" for charitable purposes is not the type of non-profit anticipated in ZC 73-32.

The Board believes it is important that the Applicant has provided no evidence supporting an argument the Application is in harmony with the zone plan or regulations. Accordingly, based on the evidence of record, the Board must find that the Application is not in harmony and deny the special exception for that reason.

Insufficient Evidence that FSMB Inc.'s use will not tend to cause an adverse effect on the Neighboring Properties.

This is a critical issue in which the Board finds that the Applicant has failed to satisfy its burden of proof. Namely, the Applicant did not provide any traffic, parking or land use experts to sup-

port its position. This lack of expert evidence directs the Board to find that the Applicant's assertion of "no adverse effect" was based solely on conjecture and is completely lacking of support by experts or individuals other than the Applicant itself.

The Applicant's failure to provide the necessary evidence of "no impact" directs the Board to rely on the overwhelming evidence of SKNC, SKHA, their experts and neighbors that the Application does indeed tend to cause adverse effects, and, therefore, must be denied.

Board bases its analysis of Adverse Effect on the Property's use as a single-family dwelling

In coming to this conclusion, the Board first asks the question of what should the "adverse effect" be based on, the former chancery use or the permitted single, family dwelling use? As to the response to this question, the Board finds the Applicant's attempt to argue that "adverse effect" must be compared to the former chancery use lacks credibility. This is due to the fact that the Applicant bases its support for this position in a January 26, 2018 letter from the current Colombian Ambassador, Camilo Reyes, claiming that the chancery was "functional" with "approximately 25-40 full-time diplomats, administrative assistants and military personnel" until "October 2015". *See* BZA Ex. No. 134. The Board finds this letter to have no credibility for two reasons. First, the fact the letter was drafted just days before the January 31 hearing shows that it was self-serving and its validity should be discounted for that reason alone. However, second and more importantly, the record reflects that Ambassador Reyes, the signatory of the letter who stated that "I hereby present the facts", was not even ***appointed*** to be the Ambassador until May 2017. *See* BZA Ex. 146. Accordingly, Ambassador Reyes could have had no personal knowledge of the number of employees at the Chancery prior to his arrival in Washington.[3]

Accordingly, the only credible evidence in the record comes from the multiple neighbors who testified that the Property's chancery use reduced substantially after 2007 and was basically vacant. Indeed, the Board finds the strong testimony of neighbors, including Marie Drissel, who testified that they walked up and down the street numerous times a day for thirty years and had close relationship with former and current chancery staff, as well as the testimony of the Property's neighbors, next door and directly across the street, who also testified that the Property's use reduced substantially, to be compelling and believable. Therefore, the Board finds that the Property was all but vacant in the almost 10 years leading up to its sale, and, accordingly, rejects the Applicant's attempt to claim that "adverse effect" should be based on the former Colombian chancery use.

[3] The Board notes that the letter purportedly from Ambassador Reyes was neither sworn nor notarized and that the Applicant did not offer a sponsoring witness for the letter. The Applicant did not make Ambassador Reyes or anyone from the embassy staff available for cross-examination. In light of the ambiguities in the letter concerning where the 25-40 employees worked (the Colombian government has had multiple office spaces in Washington, DC) and when they worked there, the Board finds the letter unconvincing, in particular in light of the ample record evidence that very few people worked at the chancery in recent years as discussed above. While the Board would give due weight to testimony from competent embassy staff with personal knowledge, especially if offered the opportunity to question them, the Applicant chose not to offer such personnel. For example, cross-examination might have offered clarity to the ambiguities, and it might have additional insight that could have been helpful to the Board.

As such, the Board must base its "adverse effect" decision on the only possible matter of right use for the Property – a single family home.

Board finds that the Application will tend to have an adverse effect on the use neighboring properties.

In light of the above, the Board must review the record and determine whether the Applicant's office use will tend to have adverse effects on the use of the neighboring properties that would be over and above the impacts that a single-family residential use. Based on the record before the Board, the only response to that question is YES.

Vehicular and pedestrian traffic caused by FSMB Inc. office use will create an adverse effect

The record is replete with evidence that the FSMB Inc.'s office use would precipitate a significant increase in intensity over a single-family dwelling. FSMB Inc. has requested 20+ employees and the evidence in the record documents that it has 70+ state medical board members – each composed of numerous members and their own staff – and many invited guests. Further, the Applicant has asked for at least monthly night events for up to 50 guests in addition to multiple guests/ visitors a week. The Board acknowledges the reality that office uses generate more vehicular trips than a single-family dwelling, as offices require cleaning crews, commercial trash pick-up, landscapers, event staff and more frequent deliveries.

Further, as a business league with a large lobbying arm, this evidence in the record establishes that FSMB Inc.'s use will require its employees to take frequent trips to Capitol Hill and other offices with all trips likely be taken by taxi/uber, not metro. This anticipated high uber/car usage was even acknowledged by FSMB Inc.'s witness when discussing the differences between FSMB Inc. current office location, which is located "less than a block" from the Dupont South metro station, and the Property, which is located a half-mile from the Dupont north entrance and would require a pedestrian to walk up a steep hill. (2/21 Hearing Tr. 369).

Accordingly, the Board finds the record documents the anticipated adverse effect on neighboring uses caused by increased vehicular and pedestrian traffic on Leroy Place, which is a narrow, one-lane, one-way street.[4] The street configuration means that a car stopped in front of the Property to pick up or drop off FSMB Inc.'s employees or guests will block all cars behind it, likely leading to back-ups on Leroy Place and making it difficult for the residents of the properties on the north side of Leroy to access their driveways. FSMB Inc.'s office use will also cause adverse impact of increased frequency of vehicles stopping on Leroy Place and driving through the neighborhood to get to the Property, as it can only be accessed from Connecticut Avenue by driving down Bancroft or California Streets. Due to the one-block, one-way nature of Leroy Place, the additional vehicular impact of the office will certainly increase vehicular traffic through the rest of the neighborhood.

[4] The narrowness of Leroy Place and the difficulty of maneuvering through it is further evidenced by the fact that buses are prohibited from the street.

Impacts of office deliveries will also be felt on the rear alley, which is a 15' alley with a difficult hairpin turn and lined with garages. These impacts are likely to impact the alley abutting neighbors' ability to access their driveways from the alley. Finally, the evidence shows insufficient loading area in the alley, and the Applicant never provided a truck-turn diagram into the record to document how a truck will access the alley. The overwhelming evidence of record was that the alley was narrow, difficult to maneuver, and that trash trucks frequently are stuck in the turn at the top of the alley.

Also, the evidence in the record established that FSMB Inc.'s use would create an additional strain on the limited supply of parking spaces in the neighborhood, as FSMB Inc. employees and their guests choose to park in the neighborhood rather than paying the hourly rate at the commercial parking garages on Connecticut Avenue.

Therefore, the only evidence of record documents that the increased pedestrian and vehicular traffic that will be caused by FSMB Inc. office use will tend to cause additional adverse effects on the neighboring uses over and above what a single-family residential use would cause. Indeed, the Applicant presented to no evidence whatsoever as to what level of traffic such a residential use would create. Accordingly, the Board is left to conjecture and assumptions, none of which can support a Board's approval of special exception relief.

Negative impact on property values will tend to adversely affect the neighboring uses

The Board credits the testimony of SKNC's land use expert that one of the most important functions of zoning is to provides a "framework with respect to how land can be used and its density intensity it helps to provide for a stable market in land [because] prospective purchasers know what they may build and how they may use an existing building. And presumably that knowledge constrains what they pay when they purchase a property." (1/31 Hearing Tr. 214-215)

Accordingly, the Board credits the land use expert's testimony that granting the relief will negatively impact the property values by "destabilizing of the residential real estate market." (1/31 Hearing Tr. 214).

In this case, the evidence presented established that granting the special exception and permitting FSMB Inc.'s office use on the Property would likely drive up the price of properties in the neighborhood that exceed 10,000 s.f. because testimony established that there are thousands of associations in Washington (and its suburbs) that may seek to purchase those properties as their headquarters. Indeed, the record reflects that there are at least 34 homes in the Sheridan-Kalorama Neighborhood that could exceed 10,000 s.f. in size. The Board is concerned that granting this application could open the door to those other homes becoming offices. Such uses would absolutely change the nature of the neighborhood making it more commercial in nature. This change would also negatively impact the homes in the neighborhood that are less than 10,000 s.f. in size, as their desirability could decrease as the neighborhood becomes more commercial.

The Board credits the testimony of SKNC, the neighbors and SKNC's land use expert, who stated

> Granting this special exception would establish a precedent which would put a quick stop to the recent trend in Sheridan-Kalorama buildings of formerly non-residential uses being transformed back into homes. It would be directly contrary to the established Comp Plan policy to limit the encroachment of commercial uses into near northwest neighborhoods.

(1/31 Hearing Tr. 215-16).

Accordingly, the Board further finds that the Application would tend to adversely affect the use of neighboring properties through the destabilization of the real estate market that could result in the neighborhood becoming more commercial in nature.

Requiring the neighborhood to monitor the FSMB Inc.'s compliance with conditions of approval causes creates its own adverse impact

Finally, the Board credits the testimony of SKNC, neighbors and SKNC's land use expert that burdening the neighbors on Leroy Place and the surrounding neighborhood with monitoring FSMB Inc.'s compliance with conditions creates its own adverse effects. Indeed, SKNC's land use expert stated the issue well, when she testified,

> the burden of policing adherence to the conditions will fall on the neighbors. Are they the ones that are supposed to go out and check every employee that's walking in to see whether they're an intern or not and to keep tabs on how many employees are located in the building?

(1/31 Hearing Tr. 217-18).

Of course, this applies equally to other conditions as well. Monitoring conditions on parking would require neighbors to follow workers to their cars; monitoring conditions on smoking would require neighbors to watch what employees are doing outside the building; monitoring where deliveries are made would require neighbors to be vigilant about truck and delivery personnel as well. Monitoring could include confrontations with people who are not neighbors, and therefore have no concern with neighborhood relationships, reporting burdens, and risks associated with potentially adversarial encounters.[5] None of these would exist absent the Board's approval of an office use on the Property.

Based on the evidence in the record, the Board concludes that FSMB Inc.'s proposed office use will tend to adversely affect the use of neighboring properties. Accordingly, the special exception standards have not been satisfied.

[5] The record includes testimony of the burdens of these sorts of monitoring activities, including evidence of one neighbor being verbally abused when by a truck driver making a delivery to the chancery when asking him to move the vehicle from blocking Leroy Place. (Ex. 123)

Insufficient Evidence that FSMB Inc.'s use satisfies the "special condition" requirements of Subtitle U § 203.1(n) .

The Board also finds that the Applicant has not demonstrated compliance with the standards and requirements set forth in Subtitle U § 203.1(n) as follows:

(1) *If the building is listed in the District of Columbia's Inventory of Historic Sites or, if the building is located within a district, site, area, or place listed on the District of Columbia's Inventory of Historic Sites;*

The Building is located within the Sheridan Kalorama Historic District.

(2) *If the gross floor area of the building in question, not including other buildings on the lot, is ten thousand s.f. (10,000 sq. ft.) or greater;*

FSMB Inc. initially stated that gross floor area of the building in question, not including other buildings on the lot, was 8,121.13 s.f., and appropriately requested an area variance from this provision for which the support is lacking, as will be discussed below. Now without credible evidence, FSMB, Inc. has merely asserted that it "found" enough square footage in the lower level to bring it over the 10,000 s.f. mark. As stated above, the Board credits the report of SKNC's architectural expert that at most, the Building is 9,002 s.f. in gross floor area. Accordingly, this requirement is not satisfied, and the special exception cannot be granted.

(3) *The use of existing residential buildings and land by a non-profit organization shall not adversely affect the use of the neighboring properties;*

As discussed at length above, the overwhelming evidence in the record documents that FSMB Inc.'s office use will adversely affect the use of neighboring properties by (1) introducing a new commercial use in the neighborhood; (2) increasing vehicular and pedestrian traffic on Leroy Street and throughout the neighborhood; (3) potentially causing a destabilization in the surrounding real estate market as larger buildings can be sold to wealthy business leagues for a higher price and smaller residential buildings have difficulties being sold due to the resulting commercialization of the neighborhood; and (4) requiring the neighbors to monitor FSMB Inc.'s operations to determine that they are in compliance with any conditions of approval.

(4) *The amount and arrangement of parking spaces shall be adequate and located to minimize traffic impact on the adjacent neighborhood;*

The Board finds that based on the evidence in the record, the traffic and parking demands of the Property could far exceed its parking supply when it is used for meetings. A much greater degree of pedestrian and motor traffic including, but not limited to, likely extended periods of dangerous double parking in flagrant violation of clearly posted signage, blocking fire hydrants, impeding bicycle traffic, illegal parking, and

limiting parking for neighbors on the block would be extremely disruptive to this residential street, especially due to its narrowness. Surrounding blocks would also be adversely affected.

In short, the Board concludes that there is no possibility of creating dedicated parking to accommodate such levels of activity, nor has FSMB, Inc. documented that there is an adequate amount of public parking available in close proximity for guests and workers to use.

(5) *No goods, chattel, wares, or merchandise shall be commercially created, exchanged, or sold in the residential buildings or on the land by a non-profit organization, except for the sale of publications, materials, or other items related to the purposes of the non-profit organization; and*

The Applicant represents that no goods, chattel, wares, or merchandise shall be commercially created, exchanged or sold in the residential buildings or on the land by a non-profit organization, except for the sale of publications, materials, or other items related to the purposes of the non-profit organization.

(6) *Any additions to the building or any major modifications to the exterior of the building or to the site shall require approval of the Board of Zoning Adjustment after review and recommendation by the Historic Preservation Review Board with comments about any possible detrimental consequences that the proposed addition or modification may have on the architectural or historical significance of the building or site or district in which the building is located;*

The Board notes that FSMB, Inc. now says that it may need to make modifications to the interior and exterior of the building. The special exception regulations are clear that any exterior changes would require BZA and HPRB approval. To date, the Applicant has provided no plans or documents to illustrate these proposed changes.

Accordingly, the Board finds that the Applicant does not satisfy the requirements for a special exception under Subtitle U § 203.1(n), and the Application should be **Denied**.

Great Weight

The Board is required to give "great weight" to the recommendations made by OP and those concerns of the affected ANC. D.C. Official Code §§ 1-309.10(d) & 6-623.04 (2008 Supp.)

OP's recommendations are limited to the special exception relief, and it did not opine on either the use or area variance relief. Further, OP's recommendation are predicated on documentation that the Building satisfies the 10,000 s.f. requirement and that the Board finds FSMB Inc. to be a "nonprofit" organization under the Zoning Regulations. Accordingly, if the Board finds, as it does here, that FSMB Inc. is not a "nonprofit organization" under the Zoning Regulations and that the

10,000 s.f. requirement has not been met, then the Board is not required to give great weight to OP's finding on the special exception relief.

Further, the Board takes heed that OP's recommendation on the special exception is predicated on strong conditions set out in Ex. 110, namely:

- A maximum of fifteen (15) employees may work on-site;
- Annual meetings and events will not be held at the subject property and will be held off-site;
- The proposed nonprofit office use will be approved for a period of five years.

Therefore, if the Board were to grant the special exception (which it is not), then the Board would have to give great weight to all of OP's conditions. It is the Board's position that all of OP's conditions, but in particular the ones referenced above are thorough and based on strong evidence in the record and in OP's institutional knowledge as the District's technical planners.

The Board notes that during the January 31, 2018 hearing, Anne Fothergill, the OP staffer testified that OP's stringent conditions, including the restriction on night events were prepared to "to address the potential impacts by restricting any possible night time use, visitors, circulation issues with these conditions to address the neighbors' concerns." (1/31 Hearing Tr. 154). The Board also finds it important that OP defended its proposed 5-year limit on the length of the approval stating the condition was

> an attempt to provide some checks and balances for the Applicant and the neighbors to sort of reassess. And it was in response to the neighbors' concerns in an attempt to mitigate those to allow an opportunity to reassess in five years.

(1/31 Hearing Tr. 155).

Finally, the Board finds OP's testimony in support of the 15-employee condition to be persuasive. Particularly, on questioning by the Applicant and the Board, OP testified that it determined the 15-employee cap because FSMB Inc.'s

> application initially, I believe their request was a staff cap of 25. But their application, yes, so their proffered conditions was 25 but their application stated that they had eight employees in the D.C. office currently and they were going to expand to ten. And so we, it was a big leap to 25. And since we were trying very hard to provide these restrictions that would lessen adverse impacts to the use of neighboring properties it was hard to get to 25 from 10.

(1/31 Hearing Tr. 155-56).

The Board will also give great weight to OP's testimony on rebuttal questions about whether it would accept a 20-employee cap. On that point, even after reviewing the Applicant's post-hearing submissions on the issue of the employee cap, OP continued to support its 15-person cap stating,

> so initially, the application said that they have currently eight employees, and they were going to possibly expand to ten. And so, giving some legal room, OP recommended a cap of 15. That's where the 15 came from. It was just adding for possible interns. I'm still not clear how we get to 20. And so, we would stick with our cap of 15, because I haven't really seen an explanation of how -- the jump to 20, from eight to ten.

(2/21 Tr. 390).

Accordingly, if the Board were to grant the special exception, it would give great weight to the testimony of OP regarding the necessity of all proposed conditions, but in particular the conditions regarding the night meeting restrictions, 15-employee cap and 5-year time limit.

The Property is located within the jurisdiction of ANC 2D. The Applicant presented the Application at a duly noticed and lengthy meeting on November 20, 2017. The evidence in the record reflects that there was significant discussion of the Application and both the positions for and against the Application were expressed. As identified in the record, with a quorum of 2 of 2 ANC members present, the ANC voted 2-0-0 to oppose the Application. (BZA Ex. 93). The ANC report notes that the ANC "carefully considered the applicant's request" and "after considering all the responses to our questions, we have decided to oppose" the Application. The Board is required to give great weight to the ANC's "considerations" of the responses and, accordingly, its decision to oppose the Application. The Board does so here, and takes into consideration the extensive evidence in the record of strong and vigilant community opposition from the neighbors, SKNC and SKHA. Also, the Board takes note that there is no single letter or statement of support for the Application in the record

SKNC/SKHA Conditions of Approval:

While the Board agrees that all relief should be denied. It does address and approve in theory the following conditions proposed by SKNC and SKHA for the special exception relief:[6]

1. There will be no expansion of the footprint or interior space of the existing building at the Property. All external alterations to the existing building are subject to approval by the D.C. Historic Preservation office.

2. FSMB, Inc.'s office hours of operation will be 8:00 a.m. to 6:00 p.m. on Monday through Friday.

3. FSMB, Inc. staff and visitor parking will be located in the nearby parking garages only, and on-street parking will not be permitted. FSMB, Inc. shall provide copies of any and all leases for parking spaces to ANC 2D, and ANC 2D shall be notified of any termination of such leases.

[6] At the request of the Board at the close of the 2/21/18 hearing, SKNC/SKHA met with FSMB Inc. on March 1, 2018 to discuss potential conditions. This list reflects SKNC/SKHA's conditions of approval following that meeting. The Board will identify that numerous of SKNC/SKHA's conditions overlap and are consistent with those provided by FSMB Inc. Those overlaps identify areas of commonality between the parties.

4. There shall be a maximum of fifteen (15) people working at the Property.

5. All deliveries to the Property shall be made during weekday office hours.

6. All loading activity shall be restricted to the alley.

7. FSMB, Inc. shall not hold annual meetings and events at the Property. All annual meetings and events must be held off-site.

8. ANC 2D shall establish a neighborhood liaison to provide a forum for concerns and provide information about activities to property owners within 200 feet of the Property. FSMB, Inc. shall designate one of its executive officers as a liaison to the forum, which shall convene not less than a quarterly basis.

9. The approval of the non-profit office use at the Property shall be valid for a period of five (5) years.

10. Any lighting, security and window treatments at the Property shall be consistent with the style customary to the Sheridan-Kalorama neighborhood, and will be selected in consultation with the neighborhood liaison.

11. FSMB, Inc. will have an employee reside full-time at the Property, and the employee will be charged with being responsive to residents' concerns and requests. In the alternative, FSMB, Inc. shall maintain a 24-hour emergency response service and provide contact numbers to ANC 2D, the neighborhood liaison, and all neighbors within 200 feet of the Property.

12. FSMB, Inc. shall supply three (3) sheltered bicycle spaces to support the needs of bicycle commuters in conjunction with FSMB Inc.'s Transportation Demand Management Plan.

13. There shall be no smoking allowed anywhere on the Property. Any smoker shall relocate along Connecticut Avenue NW if they wish to smoke. FSMB, Inc. shall post notices on the front and rear of the building that clearly prohibit smoking for FSMB, Inc.'s employees, guests, vendors and/or visitors.

14. FSMB, Inc. shall be prohibited from administering any examinations at the Property.

15. Upon the filing of any application for a building permit, FSMB, Inc. shall provide notice and a copy of the filings along with any related plans to the following parties: (1) ANC 2D; (2) the neighborhood liaison; (3) SKNC; (4) SKHA; (5) the two abutting neighbors of the Property; and (6) Mr. Frederic Guinee.

SKNC/SKHA's "15-person" and "5-year" Conditions are Adopted because FSMB Inc.'s Use Will Cause Adverse Impacts, and the Office Use is New to the Residential Neighborhood:

Two (2) of the above conditions - condition number four and condition number nine - have not been agreed to by FSMB, Inc.

As to condition number four, FSMB, Inc. seeks to raise the maximum to twenty (20) people working at the Property. In this regard, the Board gives great weight to OP's recommendation discussed above, which has stated its support for SKNC/SKHA's proposed limitation of a maximum of fifteen (15) people working at the Property. The Board agrees that a limitation to 15-persons in the Property is the only way to meaningfully address adverse impacts of FSMB Inc.'s office use in the neighborhood. There is no evidence in the record to support increasing the overall capacity to 20 persons.

As to condition number nine, FSMB, Inc. seeks to place no restriction on the length of the approval, or to extend it to 10 years. The Board notes that this is contrary to Mr. Fish's position at the February 21 hearing in which he said, "In discussion with our Board of Directors and our senior leadership, we believe that we could live with the five years…" (2/21 Hearing Tr. 377).

Again, the Board gives great weight to the recommendation of OP, which originally proposed to limit the term of this approval to no more than five (5) years. The Board also finds that a condition limiting approval to a term of five years would align with Board precedent when new special exception uses apply to enter a neighborhood for the first time.

In particular, the Board looks to BZA Case No. 18138A, in which it denied that applicant's request to reconsider and eliminate/change the five year approval limitation. In that case, the Board noted that it could not "**simply hope for the best**" in approving the use. Instead, the Board explained that

> It is the Board's duty to see to it that every special exception granted meets the twin objectives of 11 DCMR § 3104 - harmony with the purpose and intent of the Zoning Regulations and Maps and no tendency to adversely affect neighboring property. These objectives apply prospectively and they apply irrespective of whether there is evidence of adverse impacts in the record. One way to try to ensure that these two goals are met, ***particularly with new uses***, is to impose a time limitation. Therefore, imposition of a time limitation to try to ensure no adverse impacts on neighboring property in the future may be based on the need to meet the general mandates of § 3104. (Emphasis added)

Further, the Board specifically stated that:

> Because every special exception granted by the Board, ***particularly a first-time use***, contains an element of uncertainty purpose of a term limit is not to mitigate adverse impacts, but to allow the Board to re-assess its approval and the circumstances surrounding it at some point in the future, when those circumstances, or the use itself, may have changed. A term limit provides an antidote to the inherent uncertainty in granting a first-time special exception.

> ***Without a foreknowledge of the future***, a term limit allows the Board ***to "hedge its bets"*** that its prediction of no adverse impacts, or that predictable adverse impacts can be mitigated, will prove correct. As aptly expressed by a New Jersey court when ruling on the validity of a five-year term on a special use permit for a new use, the term "would provide an escape-hatch if the board concluded that continuance of the [use] thereafter was not consistent with the public good." *Citing to Houdaille Construction Materials, Inc. v. Bd. of Adjustment of Tewksbury Township*, 223 A.2d 210 (N.J. Super. App.Div. 1966). (emphasis added)

Similarly, in BZA Case No. 18095A, another special exception for a new use in a neighborhood, the Board denied that applicant's request to reconsider the five-year limitation.

In that case, the Board opined that:

> A term limit is somewhat different from other conditions because of its different purpose. The purpose of a term limit is not to mitigate adverse impacts, but to allow the Board to re-assess its approval and the circumstances surrounding it at some point in the future, when those circumstances, or the use itself, may have changed" [and]
>
> to insure that in the event conditions have changed at the expiration of the period prescribed the Board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances.

BZA Case No. 18095A

As such, a term limitation "is the Board's tool to try to guard against unforeseeable adverse impacts that may arise in the future, either due to the use itself, or due to changes in the neighborhood outside the control of the special exception applicant." *Id*.

Accordingly, in light of this strong precedent, because the Board concludes that a five year limitation is an appropriate condition of approval for this matter because FSMB Inc.'s requests relief for a new special exception use in the Sheridan-Kalorama neighborhood.

For the reasons stated above, the Board concludes that the Applicant has not satisfied the requirements of Subtitle U § 203.1(n) for the property at 2118 Leroy Place, NW. Accordingly, the Board of Zoning Adjustment hereby **ORDERS DENIAL** of the Application.

VOTE: 5-0-0 (Frederick L. Hill, Peter May, Lesyllee M. White, Carlton Hart and Lorna John to Deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWOYEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRES-

SION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2018, a copy of the foregoing Sheridan Kalorama Neighborhood Council and Sheridan Kalorama Historical Association Draft Findings of Fact and Conclusions of Law was served, via electronic mail, on the following:

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