



January 18, 2018

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VIA IZIS

Frederick L. Hill
Chairperson
Board of Zoning Adjustment
441 4th St. NW, Suite 210 South
Washington, DC 20001

Re: Application No. 19659 (FSMB) – Party Status Opponent SKNC Pre-hearing filing

Dear Chairperson Hill & Members of the Board:

On behalf of the Sheridan-Kalorama Neighborhood Council (“SKNC”), we hereby submit a pre-hearing statement outlining its position and providing information about its presentation to the Board at the public hearing of January 31, 2018, as directed by the Board at the advance party status public meeting on December 6, 2017.

Thank you for your attention to this matter. SKNC will continue to update the record, as necessary, throughout this process.

Sincerely,

By: Samantha L. Mazo

SLM:MHM

LEGAL\34155107\1

Certificate of Service

I certify that on January 18, 2018, a copy of this party status in opposition pre-hearing filing was served, via email, as follows:

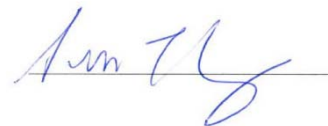
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Samantha L. Mazo

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**SHERIDAN-KALORAMA
NEIGHBORHOOD COUNCIL
PARTY STATUS OPPOSITION**

**BZA CASE NO. 19659:
FEDERATION OF STATE
MEDICAL BOARDS**

PARTY STATUS OPPONENT’S PREHEARING STATEMENT

I. INTRODUCTION AND SUMMARY OF SKNC POSITIONS

Party in Opposition, Sheridan Kalorama Neighborhood Council (“SKNC”)¹, hereby submits its statement in opposition to BZA Application No. 19659, filed by Federation of State Medical Boards, Inc. (“FSMB, Inc.” or the “Applicant”) requesting relief from Subtitle U § 203.1(n) to use the vacant Colombian Chancery building at 2118 Leroy Place, NW (the “Chancery Building”) for FSMB, Inc.’s expanded District office and meeting location (FSMB, Inc.’s proposed project will be referenced herein as the “Proposed Office”).²

FSMB, Inc.’s application must be denied because:

- **The Threshold Requirements for Subtitle U § 203.1(n) are not met:**
 - FSMB, Inc. is not a “nonprofit organization” under the Zoning Regulations: Subtitle U § 203.1(n) only permits special exception use for a “nonprofit organization”. That term is specifically defined in the Zoning Regulations and is not satisfied by FSMB, Inc., a 501(c)(6) tax-exempt business league engaged in lobbying efforts.
 - Property is not an “Existing Residential Building”: Subtitle U § 203.1(n) only permits special exception approval for “use of existing residential buildings.” Even assuming

¹ As set forth in the advance party status meeting, SKNC has served the Sheridan-Kalorama neighborhood for more than 50 years, and works to rehabilitate and enhance its residential nature. Its efforts have been successful in preserving residential uses throughout the neighborhood.

² FSMB, Inc. initially requested variance relief from Subtitle U § 203.1(n)(2) under the zoning regulations [the requirement that a building be 10,000 s.f. of gross floor area] because the Chancery Building was 8,121 s.f. in gross floor area. However, without any evidence whatsoever, FSMB, Inc. now asserts that relief is not necessary because unnamed “consultants” have determined that approximately 2,000 s.f. of the below-grade lower level count towards gross floor area. As FSMB, Inc. presents no evidence to support this claim, SKNC rejects this assertion and continues to argue that a variance from Subtitle U § 203.1(n)(2) is required.

arguendo, FSMB, Inc. is a nonprofit organization, which it is not, then Subtitle U § 203.1(n) does not apply because, as the Applicant argues extensively, the Chancery Building has been used non-residentially and is currently vacant.

- The Proposed Office is not in Harmony and will cause adverse effects: The Proposed Office, with 25 staff and meeting space for an entity that is “for profit” under the Zoning Regulations is not in harmony with the general purpose and intent of the Zoning Regulations. Further, the Proposed Office will adversely affect the use of neighboring property through increased bus and vehicular traffic and permanently removing a property from residential use.
- **The Variance is Still Required and the Standards are Not Met.**
 - No evidence that Gross Floor Area requirement is met: FSMB, Inc. retracts its earlier position and provides no evidence that Subtitle U § 203.1(n)’s 10,000 s.f. gross floor area requirement is satisfied. Assuming that a variance is required, FSMB, Inc. does not carry its burden because the Property is not unique, it would not be unnecessarily burdensome to convert the building to residential, and FSMB, Inc.’s use would cause substantial detriment to the Zone Plan and the public good.

II. The Property

A. Approximately 75% of Leroy Place is single-family residential

The Chancery Building is located at 2118 Leroy Place NW (the “Property”). This block of Leroy Place is punctuated by Phelps Place NW to the west and Connecticut Avenue NW to the east and is a narrow, one-way street with on-street parking on both sides. The Property is not the largest lot on Leroy Place.

The Property is zoned R-3, a single-family residential zone, and is within the boundaries of the Sheridan Kalorama Neighborhood (the “Neighborhood”) and the Sheridan Kalorama Historic District (the “Historic District”). The Neighborhood and Historic District are residential in nature, and the Historic Preservation Office’s brochure on the Historic District highlights that “Sheridan-Kalorama has a distinctly residential ambiance.”

FSMB, Inc.'s characterization of the surrounding uses on Leroy Place, especially in the image attached as Exhibit 103B in the public record, is, at best, misleading. Therefore, instead of being an overly "institutional" setting, approximately 75% of the buildings on the block are now single-family residential homes. A diagram showing the overwhelmingly-residential nature of Leroy Place is attached at Tab A. Further, throughout the Neighborhood, many properties have been reverted back to residential use from a prior non-residential use as identified in Tab B. Undoubtedly, the trend in the Neighborhood is to return properties back to residential uses when grandfathered Institutional/Chancery uses are sold.

B. The Chancery Building: Substantial Use of the Building Ended in 2007³

As acknowledged by the Applicant, the Chancery Building is now "vacant" and "has been used for non-residential, office purposes by the Republic of Colombia" for many decades. (Applicant's Pre-Hearing Statement at pgs. 1, 3). However, evidence that will be presented by SKNC members and other neighbors will contradict FSMB, Inc.'s assertion that there was "moderate to heavy use" of the Chancery building "until 2017" (Applicant's Pre-hearing Statement at pgs. 9, 3). As will be testified to at the hearing, activity at the Colombian Embassy decreased steadily by 2007, and by 2012, very few visitors entered or exited the building. Official business was instead conducted at other Colombian government buildings, and the Republic of Colombia purchased their present location at 1724 Massachusetts Ave. in 2007 ("1724 Massachusetts Avenue"). Necessary building permits for repairs and updates for 1724 Massachusetts Avenue were issued in 2007 as reflected in the Office of Tax and Revenue report and PIVS at Tab C. Accordingly, despite FSMB, Inc.'s assertions to the contrary, activity at the

³ As an initial matter, the Applicant has not provided any elevations or geo-tech studies showing the Property and/or any topographic changes that may be on it. Accordingly, the only evidence before the Board are the Google map images presented by FSMB, Inc. and additional photos that show the Chancery Building to be a three-story structure that is accessed via a 15-foot wide alley to the rear.

Chancery Building substantially tapered off after 2007, and, as even the Applicant acknowledged, the Property is now vacant.

C. 2017 Sale of the Property – There was a bidding war and FSMB, Inc. paid \$650,000 more than the asking price.

On page 3 of its brief, FSMB, Inc. asserts “the Property was offered to the public, but found no residential-dwelling takers.” This misconstrues the facts as described in the affidavit of John Sukenik attached here at Tab D (the “Sukenik Affidavit”) showing that indeed, there was a residential buyer – potentially two – and the only reason there were “no residential-dwelling takers” is because FSMB, Inc. bid up the Property’s price by \$650,000 more than the asking price.

As detailed in the Sukenik Affidavit, which has based on John Sukenik’s discussion with the Property’s listing agent, the Colombian government put the Property up for sale in July 2017 for \$3.5 million. That amount was consistent with the District’s most recent appraisal identified by the District’s Office of Tax and Revenue attached to the Sukenik Affidavit. This Property’s listing information stated that the Property “could be a spectacular residence.” *See* Sukenik Affidavit, Tab D.

There were three bidders on the Property, a local couple, a California individual, and FSMB, Inc., and the local couple stated that their interest was to use the Property for a single-family residential use. With three active buyers interested in the Property, the Sukenik Affidavit explains that there was a “bidding war” in which the ultimate sales price of the Property was escalated far beyond the original \$3.5 million listing price by FSMB, Inc. which ultimately paid a total of \$4.15 million.

Accordingly, but for the actions of FSMB, Inc., the Property may likely have been sold to an individual – either the local couple or the California individual, and the Property then could have been used as a single-family home.

Finally, FSMB, Inc.’s reference to the sales background of a property at 2241 Bancroft Place, NW is irrelevant. That structure, at 8,212 s.f., was offered for \$6.2 million, or almost twice the Property’s original asking price. Indeed, properties in this price range in the Neighborhood normally take months to sell, given the relatively narrow market for such homes. Further, 2241 Bancroft is neither vacant, nor is it an Institutional use and/or Chancery building.

III. FSMB, INC.’s USE

A. FSMB, Inc. is a 501(c)(6) Business League

It is undisputed that FSMB, Inc. is a 501(c)(6) business league, as indicated on their 990 filing with the IRS. *See Tab E.* That filing states FSMB, Inc. has 215 employees and net assets of \$23,927,732 and is a “leader in medical regulation, serving as an innovate catalyst for effective policy and standards.” *See* FSMB, Inc. IRS 990 at Tab E.

At pages 5-6 of its pre-hearing statement, FSMB, Inc. explains that it is a business league and that it:

“serves as a convening forum for the state medical boards... [and its] initiatives have shaped policy, facilitated the sharing of information between governmental entities... In addition to the development of model practices and best practices for state medical boards, the FSMB provides programming assistance to a variety of federal agencies, such as the Department of Health and Human Services, the Department of Defense, Department of Veterans’ Affairs, the Drug Enforcement Administration and the Food and Drug Administration.”

FSMB Inc.’s website discusses the organization’s lobbying and policy activities, which include “FSMB Policies”; “Legislation Tracking” and “Government Affairs”, and describes the organization as:

“a national nonprofit representing the 70 medical and osteopathic boards of the United States and its territories. Since its founding, the FSMB has grown in the range of services it provides – from assessment tools to policy documents, from credentialing to disciplinary alert services – while continuing to serve the interests of its member boards. The ultimate objective is to promote excellence in medical practice, licensure, and regulation as the national resource and voice on behalf of state medical boards in their protection of the public.”

See Tab F.

In discussing the lobbying efforts, FSMB Inc.’s website identifies that the organization has an “Advocacy Network” for its members, and the website page on the “Roles and Responsibilities” includes the following language,

Should you then be interested in scheduling a meeting with one or more of your Members either in D.C. or in your home state, please contact Jonathan Jagoda at jjagoda@fsmb.org. Our staff will then contact the Member's scheduler and coordinate a time for you to meet with the congressional office. Most meetings are held at the staff level, but Members often attend the meeting for a few minutes depending on their schedule and availability.

See Tab F.

B. The FSMB Research and Education Fund is Not the Applicant Before the Board

While FSMB, Inc. may have a separate 501(c)(3) “Research and Education Fund” (the “Fund”), the Fund is not the owner of the Property or the applicant before the Board. As stated on the Fund’s 990 filing, the Fund’s mission is “To promote research and education to improve the quality of health care through effective Physician Licensure and Regulation.” A copy of the Fund’s Internal Revenue Service (“IRS”) 990 filing is attached here at Tab G.

The Fund’s 2015 990 filing with the IRS states that it had 0 (zero) employees and less than \$2,706,572, but its reported revenue fell to a mere \$13,900 in the same year. Meanwhile, FSMB Inc.’s 2015 revenue exceeded \$40 million. Clearly, with zero employees, it would be impossible for the Fund to “use” the Property.

IV. THE PROPOSED OFFICE DOES NOT SATISFY THE THRESHOLD REQUIREMENTS FOR SPECIAL EXCEPTION RELIEF

The Property is zoned R-3, which is intended to permit attached rowhouses on small lots. The purpose of the zone is to “allow for row dwellings, while including areas within which row dwellings are mingled with detached dwellings, semi-detached dwellings, and groups of three (3) or more row dwellings.” Subtitle D § 300.6.

This zone limits the matter of right uses to single family homes, religious institutions, community centers, daytime care uses, and public schools, among others. Chanceries existing as of 1978 can continue as a matter of right but cannot be expanded, and use of a chancery by a new government would require special exception approval.

General offices are not permitted as a matter of right or by special exception, in furtherance of the R-3 zone’s residential purpose. A small handful of non-residential uses are permitted as a special exception, including “nonprofit organization” pursuant to Subtitle U § 203.1(n), which states:

Use of existing residential buildings and the land on which they are located by a **nonprofit organization** for the purposes of the **nonprofit organization**: (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; (2) If the gross floor area of the building in question, not including other buildings on the lot, is ten thousand square feet (10,000 sq. ft.) or greater; (3) **The use of existing residential buildings and land by a nonprofit organization** shall not adversely affect the use of the neighboring properties; (4) The amount and arrangement of parking spaces shall be adequate and located to minimize traffic impact on the adjacent neighborhood; (5) No goods, chattel, wares, or merchandise shall be commercially created, exchanged, or sold in the residential buildings or on the land by a nonprofit organization, except for the sale of publications, materials, or other items related to the purposes of the nonprofit organization; and (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; [emphasis added]

As discussed below, the Proposed Office does not satisfy the threshold requirements for this special exception because it is not a “nonprofit organization” as that term is defined in the Zoning Regulations, and the Property is not an “existing residential building”.

A. FSMB Is a 501(c)(6) Business League; Not a “Nonprofit Organization” Under the Zoning Regulations

The DC Zoning Regulations define “Organization, Non-Profit” as:

Organization, Non-Profit: 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 no part of its net income inures to the benefit of any private shareholder or individual. [emphasis added]

(Subtitle B § 100.2)

FSMB, Inc.’s operations do not satisfy the definition above, and so should not be regarded as a nonprofit organization under the Zoning Regulations entitled to special exception

approval in Subtitle U § 203.1(n). Due to FSMB, Inc.'s lobbying and other business-related efforts, its activities are certainly not “exclusively” for “religious, charitable, literary, scientific, community, or educational purposes, or for the prevention of cruelty to children or animals”, as expressly stipulated in the definition.

Further, it's important to recognize that the IRS distinguishes between more than 20 different kinds of non-profit organizations. A summary review of the IRS's terminology makes it clear that the Zoning Regulations define “nonprofit organization” in such a way as to apply only to 501(c)(3) charities. As shown in the chart on page 67 of IRS Publication 557, attached at Tab H, while 501(c)(3) charities are organized and operated “primarily for religious, charitable, scientific, educational, and certain other purposes”, 501(c)(6) business organizations are typically business leagues or associations that are organized and operated primarily to promote and lobby for the **common business interests** of its members. [emphasis added] Further, the IRS publication states that “An organization that is exempt under section 501(c)(6) can work for the enactment of laws to advance the common business interests of the organization's members.” Other examples of 501(c)(6) organizations include the U.S. Chamber of Commerce and the National Football League. *See* Tab H.

The definition of “nonprofit organization” in the Zoning Regulations and description of 501(c)(3) charities by the IRS are nearly identical, as to distinguish it from the numerous other types of non-profit organizations under IRS rules. To illustrate this point, below is a chart that compares the Zoning Regulations' definitions of “nonprofit organization” with the IRS' definition of 501(c)(3) charities and 501(c)(6) organizations. The language that is similar highlighted in yellow. Importantly, the classification language for a 501(c)(6) organization,

which is shown in red, is not similar to the Zoning Regulations definition of “nonprofit organization”.

ZR58 Definition of “nonprofit organization”	Zoning Regulation Definition of “nonprofit organization”	IRS – Classification of 501(c)(3) charity	IRS – Classification of 501(c)(6) organization
An organization organized 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.	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.	Religious, Educational, Charitable, Scientific, Literary, Testing for Public Safety, to Foster National of International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organizations	“Improvement of business conditions of one or more lines of business” Business Leagues, Chambers of Commerce, Real Estate Boards, etc.

There are other important differences between 501(c)(6) organizations and 501(c)(3) charities. To that end, 501(c)(6) organizations are entitled to separate regulation and exemptions from a 501(c)(3) charity. For example, a 501(c)(6) organization is required to pay property taxes, while a 501(c)(3) charity is not. Moreover, membership dues and other payments to a 501(c)(6) charity are tax-deductible only if they are “qualified business expenses.” Further, as a 501(c)(6) organization, FSMB Inc. has greater latitude with regard to its private inurement practices, which allow persons with influence inside the organization to compensate their leadership much like what would occur in the for-profit industry. This suggests that part of FSMB Inc.’s net income may inure to the benefit of a private shareholder or individual, in direct contradiction to the latter portion of the definition of “nonprofit organization” in the Zoning

Regulations cited above. Also, the fact that FSMB, Inc. has created a separate 501(c)(3) Fund is dispositive that indeed FSMB, Inc. is not a charity and should not be considered a “nonprofit organization” under the Zoning Regulations.

Limiting the interpretation of the Zoning Regulations’ definition of “nonprofit organization” to 501(c)(3) charities is consistent with other DC Code sections. For example, D.C. 29-401.02(3)-(4) states in relevant part, “Charitable corporation” means a domestic nonprofit corporation that is operated primarily or exclusively for one or more charitable purposes” and “Charitable purposes means a purpose that: Would make a corporation operated exclusively for that purpose eligible to be exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986”. *See* DC Code section, Tab I.

In short, several criteria disqualify FSMB, Inc. from consideration as an “nonprofit organization” as defined in the Zoning Regulations. If the use is not deemed to be an eligible nonprofit organization, it would not be eligible for any office use on the property without a use variance.⁴ Notably, this conclusion is consistent with the BZA’s prior holdings as the cases FSMB, Inc. cites all approved uses by 501(c)(3) charities.⁵ Indeed, in BZA Case No. 18604 (the Halcyon House), the Board’s second condition of approval reads “[that] Property shall be used only for a 501(c)(3) nonprofit organization.”

B. The Chancery Building is Vacant and Non-residential

⁴ Importantly, in BZA case 17050, which was withdrawn, OP recommended denial of a use variance for an office use at 2209 Massachusetts Ave. an R-3-zoned chancery. A copy of the OP report is at Tab I. In recommending a denial, OP stated:

- “The precedent to allow conversion of a chancery to an office use would have a detrimental effect on the existing residential character of the neighborhood.”
- “Although applicant’s architect estimates it would cost approximately \$2,000,000 to convert back to a residential use, the applicant’s arguments that this structure would not be easily converted to residential use falls short when it was built and used as a residential structure for most of its existence”
- “The presence of so many foreign missions already heavily impacts the area. The conversion of chanceries to office uses would further alter the residential nature of the neighborhood.”

⁵ One of the applicants in a case referenced by FSMB Inc. no longer exists, but that applicant’s parent organization is a 501(c)(3).

The Special Exception permitted in Subtitle U § 203.1(n), is limited only to the “Use of existing residential buildings.” As stated at least six times in FSMB, Inc.’s filing, the Chancery Building is a vacant, non-residential building *See* FSMB Inc.’s Prehearing statement at pgs. 1-3, 8-11, and 14.

Further, the Zoning Regulations expressly determine that a chancery use, such as the subject Chancery Building, is *not* residential in nature. Specifically, Subtitle B § 200.2(g), the “use category” definition of “chancery” states (emphasis added):

(1) Chancery:

- (a) The principal offices of a foreign mission used for diplomatic or related purposes, and annexes to such offices (including ancillary offices and support facilities), including the site and any building on such site that is used for such purposes; and
- (b) Exceptions: This use category **does not** include uses **which would typically fall within the office or residential use** categories, such as an ambassador’s residence or embassy staff residence building.

Because the Chancery Building is clearly and indisputably *not* an “existing residential building”, then Subtitle U § 203.1(n) does not apply. 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 eligibility for Subtitle U § 203.1(n) is premised on the subject building being an “existing residential building”. *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) .

Accordingly, because the Chancery Building is not an “existing residential building”, then special exception is not permissible under Subtitle U § 203.1(n), even assuming *arguendo*

that FSMB, Inc.'s use is an "organization, nonprofit" as defined by the Zoning Regulations – which it is not.⁶

C. Project Not in Harmony with Purpose and Intent of the Zoning Regulations

Even if the threshold requirements of Subtitle U § 203.1(n) are met (which they are not), the Proposed Office use is not permissible as a special exception because it will not be in harmony with the general purpose and intent of the Zoning Regulations and Maps, and will tend to adversely affect the use of neighboring property.

Under Subtitle X § 901.2, the Board is authorized to grant a special exception where it finds the relief granted is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided that all of the specific requirements for the relief are met:

- (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 Subtitle X § 901.2.

The application is not in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. The DC Zoning Regulations specifically state that the Residential House (R) zones are "residential zones, designed to provide for stable, low- to moderate- density **residential areas suitable for family life and supporting uses.**" Subtitle D § 100.1. [emphasis added] They also state the purpose of R zones is to recognize and reinforce "the importance of neighborhood character, walkable neighborhoods, housing affordability, aging in place,

⁶ Aside from seeking a use variance (which should be required here), FSMB Inc.'s only option would be to seek a variance for relief from the "use of existing residential building" limitation in the Subtitle U § 203.1(n). Such request has not been made and would likely be denied for the reasons set out in 17050.

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.” Subtitle D § 100.2(b) [emphasis added].

As discussed above, an office use is not permitted, except as part of a nonprofit organization pursuant to Subtitle U § 203.1(n). As stated above, the Proposed Office use does not satisfy the threshold requirements of that regulation because it does not satisfy the Zoning Regulation’s definition of “nonprofit organization”, and the Chancery Building is not an “existing residential building” that is even eligible for the special exception use. Accordingly, expanding the application of Subtitle U § 203.1(n) to include a use that is *not* a nonprofit organization in a structure that is *not* an existing residential building is *not* in harmony with the general purpose and intent of the Zoning Regulations.

Further, the predecessor to Subtitle U § 203.1(n) was adopted for the purpose of ensuring that “large residential buildings” do not become “dilapidated” and vacant. That is not the case here when the evidence states that a potential residential purchaser was out-bid by the FSMB, Inc. in a possible “bidding war.” The Property was not going to be dilapidated.

Accordingly, FSMB Inc.’s proposed office use is not in harmony with the general purpose and intent of the Zoning Regulations, which is to encourage residential use of R-3 zoned properties and to only permit non-residential uses under circumstances that do not exist here.

D. Project Will Tend to Adversely Affect Use of Neighboring Property

As stated earlier, 75% of the properties on Leroy Place are residential in use, including the two homes directly adjacent to the Chancery Building, those across the street, and those behind the alley to the rear of the Property.

In light of the surrounding residential uses, the Proposed Office will adversely affect the neighbors especially because FSMB, Inc.’s website invites all of FSMB Inc.’s 700+ members to its office, stating, “FSMB members are encouraged to visit the new offices whenever they are in Washington.” *See Tab K.* The proposed Office use, including the myriad of “invited” guests will adversely affect the neighboring residential properties due to the numerous visitor vehicular trips the use will generate (likely most in taxi or uber), in addition to the support services that will be required, including, but not limited to: cleaning crews, trash pick-up, landscapers, event arrivals and departures, and deliveries – on a block with a narrow right-of-way with multiple curb cuts and parking on both sides of the street.⁷ Indeed, Leroy Place prohibits buses due to the narrow street width.



The Proposed Office use is also likely to cause noise, pollution, and light impacts due to the frequent cars idling on the street waiting for passengers, which will directly cause back-ups along the one-way, narrow street.

⁷ More information on the size and scale of FSMB, Inc.’s operations is evident in the annual filing, available at: https://www.fsmb.org/Media/Default/PDF/Publications/FSMB_2015_Annual_Report.pdf

Further and importantly, the neighborhood will be affected adversely by permanently removing residential uses and creating a likely domino effect of other 501(c)(6) associations claiming qualified non-profit organization status to locate their offices in R-3 zoned neighborhoods. Further, adding the Proposed Office use on the Property will create an adverse effect to neighboring properties by creating dark properties on nights and weekends.

Finally, the intensity of FSMB Inc.'s use is a substantial change for the Property and the neighborhood because substantial use of the Chancery Building ended in approximately 2007. Therefore, the addition of FSMB, Inc.'s office use for 25 employees and guests will cause a significant and adverse effect on the Neighborhood. We direct the Board to BZA Case No. 13787 where it denied a request for special exception approval for a nonprofit organization, finding that use would create adverse effects because the space it was moving into was vacant and accordingly the Board found that "the proposed use is a more-intense use of the premises than had existed on the site in the last three years." That is certainly the case here, where the Colombian's use reduced significantly beginning in 2007. Further, the fact that FSMB Inc.'s use will be significantly more intense than the Colombian's recent use of the Chancery Building is markedly different from the factual situation presented in BZA Case No. 15555, where the Board noted that applicant, a 501(c)(3) nonprofit charity, would have a less intense use of that subject building.

E. Project Does Not Satisfy Special Exception Conditions For Non-Profit Organization

Use of existing residential buildings and the land on which they are located by a non-profit organization for the purposes of the non-profit organization is also specifically

regulated by the conditions contained in Subtitle U § 203.1(n), many of which the Applicant does not satisfy, even if it was a qualified non-profit organization, which it is not:

- (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 any 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. This cannot be believed without evidence to document it. That has not been produced, and a variance should continue to be required.

- (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 outlined above, the Chancery Building is not an “existing residential building”. However, even if it was, FSMB Inc. fails to demonstrate how it will not adversely affect the neighboring properties. The Applicant claims that the proposed office use will not inflict greater impacts than the previous chancery use. However, in order to make this determination, facts relating to the former chancery use must be presented so that a fair comparison can be made. These facts are not included in the Applicant’s materials. Rather, the only proffered evidence is that the Chancery Building use became very limited after 2007, and that it is vacant now.

Following pressure from the ANC, FSMB Inc. now admits that the Proposed Office will have 25 full time employees (“FTE”), which really says that only 25 employees will be in the Proposed Office at any one time. It does not address the issue of when one employee comes in the morning and then leaves for the day only to be replaced by another “FTE”, or another. This could potentially create not one vehicular drop off per day per employee, but potentially multiple ones, as some employees come and go. This issue has not been explained or documented.

Further, the nature of the Proposed Office will not contribute to or interact with neighboring properties in a manner that is consistent with a residential neighborhood. This constitutes an adverse impact because it erodes the features inherent to residential uses. These adverse impacts could include:

- Preventing the gain of residents as neighbors, involved in neighborly activities including supporting residents in tasks such as shoveling snow, pet-sitting, baby-sitting and minding older children, and reporting suspicious activities.
- Obliging neighbors to monitor the activities of an effectively vacant property during the weekends.

Finally, granting permission for this use will materially weaken the primarily-residential nature of the block. Continued, broad-based, nonresidential use would adversely affect the holistic residential nature of this block. It would be by far the largest non-residential use in terms of its occupants. In addition, non-residential users could artificially drive up property values because families would effectively be competing with the commercial market buyers, as occurred here.

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

FSMB, Inc. notes that there are currently two full-sized parking spaces on the Property and that their number and arrangement will be adequate to minimize traffic and parking impacts on the adjacent neighborhood. However, 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, possibly 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, 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 Applicant is not planning to modify the exterior of the Building or the site; however, modifications to the interior of the building may occur. The plans provided do not contain sufficient information on this point. If substantial, interior changes could trigger the need for additional review, particularly by the Historic Preservation Office.

F. The Cases Relied Upon by FSMB, Inc. Do Not Require the Board to Approve the Subject Application

FSMB, Inc. devotes almost two, single-spaced pages referencing “Case Law”, in an effort to convince the Board that since special exceptions have been granted in the past, it should do so again here. These efforts are not persuasive. Indeed, at most, those cases document that the BZA has, in the past, approved nonprofit uses as special exceptions where the standards were met. That is not the case here.

First, the nonprofit organizations seeking special exception relief in the cases FSMB, Inc. relies on are 501(c)(3) charities. Copies of the 990 Filings for those charities are attached at Tab L. As documented extensively, FSMB Inc. is a 501(c)(6) business organization. Accordingly, while the other charities could have satisfied the Zoning Regulations’ definition of “nonprofit organization”, FSMB Inc. cannot.

Second, in all but one case, those subject properties had been “existing residential uses”. Indeed, in BZA Case No. 18604, the Halcyon House had been used residentially as a dorm by Georgetown University since the 1960s, and FSMB Inc.’s statement that it “had not been used for residential purposes” was incorrect. Further, the Tudor House and the Dower House, which were part of the Tudor Place Foundation cases (BZA Case No. 14729, 16477, 17984) had been residentially used prior to nonprofit special exception approval. Also, the Cady Lee Mansion, the subject of BZA Case No. 16878, had been residentially used up until shortly before the

special exception approval was granted. Finally, FMSB, Inc.'s reliance on BZA Case No. 15555 is misguided. That case was approved in 1991, and as is bounded by a nine-story hotel to the north, and other RA-4 zoned properties along Connecticut Avenue. The higher density nature of the surrounding uses factored into that applicant's argument that the property was "not appropriate" for residential uses. Also, it appears that very different evidence was presented in Case No. 15555. To that end, the Board relied on evidence demonstrating that the non-profit organization's use would be less intense than the former use and on evidence presented expert witness testimonies from traffic and architecture experts. No similar evidence has been presented here. FSMB, Inc. has presented nothing but innuendo to support its claims regarding the "intensity" of the former Consulate Building use. Rather, the only evidence in the record on this issue is from the neighbors who have (and will) document that the Colombian use of the Consulate Building has been negligible for almost a decade. Also, FSMB, Inc. has proposed no expert witnesses, and, instead, stakes its claims on unnamed consultants.

For these reasons, the cases cited to by FSMB, Inc. should not be relied upon by the Board in its evaluation of the subject case.

V. THE APPLICANT FAILS TO MEET THE BURDEN OF PROOF FOR VARIANCE RELIEF

FSMB Inc. has not provided any evidence that it satisfies the 10,000 s.f. gross floor area requirement of Subtitle U § 203.1(n)(2), and it has the express burden of proof to do so pursuant to Subtitle X § 1002.1. Accordingly, the Application requires a variance from this provision. By their nature, variances are the most difficult types of relief to obtain, and are granted sparingly, if at all.⁸ The standards for granting a variance are a well-accepted three-part test adopted into the Zoning Regulations, as follows:

⁸ Importantly, OP recently recommended denial of similar, variance relief for a proposed non-profit structure.

- Property must be unique: “[w]here, by reason of **exceptional narrowness, shallowness, or shape of a specific piece** of property at the time of the original adoption of the regulations, or **by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition** of a specific piece of property” AND
- Uniqueness must cause practical difficulty in providing a residential use: “the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in **peculiar and exceptional practical difficulties** to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship” AND
- No substantial Detriment: “provided, that the relief can be granted **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.”

Subtitle X § 1000.1 [emphasis added].

A. The Property Is Not Affected by an Exceptional Situation or Condition

As a general matter, the Property is not unique. Clearly, 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 Street.

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 Property would not be unique.

FSMB Inc.’s prior argument for “uniqueness” is that the building is “large”, and apparently didn’t satisfy the 10,000 s.f. gross floor area requirements due to something the Applicant would like to characterize as a “technicality.” Unfortunately for the Applicant, it is well accepted that 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 should be rejected here.

Rather, there is nothing unique about this Property. Indeed, at 5,124 s.f. it is not the largest lot on this block of Leroy Place, and at 8,121 s.f. it is not the largest structure in the neighborhood. As such, FSMB, Inc. has failed to carry its burden of proof on the first prong (Uniqueness), and the variance relief should not be granted.

B. Strict Application of Zoning Regulations Would Not Result in Practical Difficulty

1. Property Could Have Been Sold as a Residence

The Sukenik Affidavit explains that there was a bidding war that included a couple that wanted to use the property as a residential home. That couple was out-priced through a bidding war, lead by FSMB, Inc. But for FSMB, Inc.’s offer of \$650,000 over the asking price, the Property could have been used as a single-family home. *See* the John Sukenik Affidavit, Tab C.

This would suggest that multiple offers to purchase the property, including expressly one – and possibly two – for residential use directly refutes FSMB Inc.’s stated claim that the prior office configuration for the Colombian Embassy “renders the property less than ideal and makes it unlikely that the Property would be used as a single family residence.” *See* Applicant’s Statement, pg. 6.

2. Property Could Be Renovated to Become a Single-Family Home

FSMB Inc. has not presented any evidence whatsoever that the Chancery Building could not be renovated to become a private residence in accordance with the R-3 zone requirements. Rather, the opposite is true. SKNC will present evidence from neighbors that the Chancery

Building could be renovated to be returned to a single-family home. In addition, according to Guillermo Rueda, a licensed architect in the District, it would not be practically difficult to restore the building back into a residence because of the Property's size, wall locations, and other facts. Mr. Rueda's also found that the residential restoration costs in-line with the refurbishing budget proposed by the Applicant at the November 20, 2017 ANC meeting. His letter and resume are located in Tab M.

C. There will be Substantial Detriment to the Public Good

For these reasons, OP has found as much in another case, concluding:

“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.”⁹

Next, despite the Applicant's summary conclusive statements to the contrary, it is clear that granting this variance relief will cause substantial impairment of the intent, purpose, and integrity of the zone plan by approving the requested relief. As noted, the R-3 zone is intended for residential use.

SKNC defers to the wisdom of the District's technical planners and is also of the opinion that the requested relief, if granted, would substantially harm the Zoning Regulations.

VI. SUBSTANTIAL COMMUNITY OPPOSITION

- FSMB Inc. has done next to no community outreach. Indeed, the first time SKNC or others had seen FSMB Inc.'s proposed conditions was its Pre-hearing statement. Regardless, the proffered conditions do not diminish the damage to the residential nature of the Neighborhood.
- The Proposed Office is unanimously opposed in the neighborhood.

⁹ See OP report for BZA case #19504, pg. 3-4.

- ANC 2D voted to oppose the Application.
- There are more than 70 letters in opposition, many of which from neighbors within 200 feet of the Property.
- SKNC along with the Sheridan Kalorama Historical Association have been granted party status in opposition. A third request for party status in opposition was filed on January 15, 2018 by the owner of the property directly across the street on Leroy Place.

VII. SKNC PRESENTATION AT THE JANUARY 31, 2018 BZA HEARING

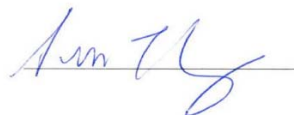
SKNC requests 25 minutes and anticipates presenting the following at the BZA hearing:

1. Christopher Chapin – President of SNKC
2. John Sukenik – Member of SKNC Executive Committee
3. Expert Testimony by Ellen McCarthy (expert in land use). See resume in Tab N.

VIII. CONCLUSION

For the reasons stated above, the requested relief fails to meet the applicable standards for zoning relief under the Zoning Regulations. Accordingly, SKNC respectfully requests that the Application be denied.

Respectfully submitted,
COZEN O'CONNOR



Samantha L. Mazo