

[DRAFT]

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Board of Zoning Adjustment



**Application No. 19659 of The Federation of State Medical Boards, Inc.**, pursuant to 11 DCMR Subtitle X § 901.2 for a special exception pursuant to Subtitle U § 203.1(n), to use an existing residential building as an office for a non-profit organization in the R-3 Zone at premises 2118 Leroy Place, N.W. (Square 2531, Lot 49).

**HEARING DATES:** January 31, 2018, February 21, 2018

**DECISION DATE:**

**DECISION AND ORDER**

On October 23, 2017, the Federation of State Medical Boards of the United States, Inc. (“FSMB”), the property owner of the subject premises (the “Owner” or the “Applicant”) submitted an application for special exception relief to allow for the use of an existing residential building as an office for a non-profit organization.<sup>1</sup> For the reasons explained below, the Board of Zoning Adjustment (the “Board” or “BZA”) voted to approve the application after the public hearing was completed on February 21, 2018 and after additional materials were submitted to the record on March 14, 2018.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Public Hearing. By memoranda dated November 6, 2017, the Board of Zoning sent notice of the application to the Office of Planning (“OP”); the District Department of Transportation; the Councilmember for Ward 2; Advisory Neighborhood Commission (“ANC”) 2D, the ANC for the area within which the subject property is located; and the single-member district ANC 2D-02. Pursuant to 11-Y DCMR § 402.1, on November 6, 2017, the Office of Zoning mailed notice of the hearings to the Applicant, and the owners of all property within 200 feet of the subject property. Notice was published in the *D.C. Register* on November 3, 2017 (64 DCR 44). The hearing was originally scheduled for December 20, 2017, but the Applicant requested a postponement in order to allow time to work with the community.

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<sup>1</sup> The Applicant originally requested variance relief from the 10,000 square foot GFA requirement of U § 203.1(n)(2). After obtaining a more detailed survey, it was determined that portions of the lower story were permitted to count toward GFA. Accordingly, the Applicant revised the Application and withdrew the requested variance relief in its submission and is effectively self-certifying that portion of the Application.

ANC Report. ANC 2D, an automatic party to this proceeding, submitted a report regarding the application. In its report, dated December 5, 2017, the ANC indicated that at a regularly scheduled monthly meeting with a quorum present, the ANC voted 2-0-0 to recommend denial of the application. (Exhibit 93).

OP Report. In its memoranda dated January 25, 2018, the Office of Planning recommended approval of the requested relief. The Office of Planning noted that the proposal is in harmony with the general purpose and intent of the zoning regulations and zoning maps because this property has been used as diplomatic offices for more than sixty years and there are other buildings on the block used for offices.

The Office of Planning also stated that with adequate operational controls and mitigation measures, the proposed use of a nonprofit organization in this Building should not adversely affect the use of neighboring properties.

DDOT Report. DDOT submitted two reports. In its first report, dated November 29, 2017, DDOT indicated it had no objection to the approval of the application, noting that the proposal will have no adverse impacts on travel conditions of the District's transportation network. DDOT submitted a supplemental report on February 15, 2018. The supplemental report provided further clarification regarding transportation issues raised at the January 31, 2018 hearing. DDOT clarified that in its original report it understood the Applicant was proposing ten (10) employees; in its supplemental report, it acknowledged that the Applicant initially requested up to twenty-five (25) employees, but found no compelling reason to change its original position. It also provided a more detailed analysis, noting that the alley at the rear of the site is sufficient to accommodate deliveries. In its supplemental report, DDOT also requested that the Applicant supply three (3) sheltered bike spaces.

Request for Party Status. The Board received three requests for party status in opposition. The first was from the Sheridan Kalorama Neighborhood Council ("SKNC"), dated November 14, 2017 (Exhibit 28). The second party status request was from the Sheridan Kalorama Historical Association ("SKHA"), dated November 22, 2017 (Exhibit 86). SKNC and SKHA (collectively the "Opponents") requested that the Board take up the Party Status Requests as a preliminary matter. The Board granted the request for Advance Consideration of Party Status Requests (Exhibit 88). At the meeting on December 6, 2017, the Applicant did not object to the Party Status requests. The Board granted party status to both SKNC and SKHA.

The third request for party status in opposition was from Fredrick W. Guinee, dated January 16, 2018 (Exhibit 104). The Board denied Mr. Guinee party status at the hearing on January 31, 2018, finding that the request was untimely, and that two parties in opposition would adequately serve the purpose of representing Mr. Guinee's opinions. There was some debate about whether the request was timely, but because the original hearing was scheduled for December 20, 2017, and Mr. Guinee's request was not received until January 16, 2018, the Board determined the request to be untimely.

Persons in Support/Opposition.<sup>2</sup> There were approximately 60-65 letters in opposition submitted to the record.<sup>3</sup> The persons in opposition raised the following concerns: (1) the office use will undermine the residential character of the neighborhood; (2) office use will set a negative precedent for the reuse of other buildings; (3) office use will disturb the quality of life; (4) traffic, parking and loading; and (5) undefined number of workers coming and going at all hours of the day or night. David Feigin, the adjacent neighbor at 2120 Leroy Place raised concerns in his second opposition letter which related to demolition and construction; issues not within the BZA's purview. Councilmember Jack Evans submitted a letter in opposition stating concerns over: (1) intense office use of a property that had been all-but-vacant for a decade; (2) increases in the tax assessments of similar properties as a result of this one being purchased at a price greatly above the asking price that could reasonably be paid by residential buyers; (3) removal of this property from residential use permanently; and (4) major vehicle circulation problems on a one-lane, one-way street.

As discussed more fully below, the Board is sympathetic to these concerns, but finds that any adverse impacts are mitigated by the conditions of approval.

#### Request to Consolidate and/or Postpone the Case

The Opponents filed a related appeal (Case No. 19719) and requested that the Board consolidate the Appeal and the Application. The Board was not comfortable considering the appeal because it was not ripe and did not see how the cases could be consolidated. The Board denied the motion to consolidate the appeal, finding that by taking up the Application it would render the Appeal moot.

Applicant's Case. The Applicant provided evidence and testimony from two executive staff members of the Federation of State Medical Boards. Dr. Humayun Chaudhry, President and CEO of FSMB, and Eric Fish, Senior Vice President of Legal Services for FSMB, described the FSMB's purpose in buying and potential use of the subject property, explained how the FSMB met the Zoning Regulations' definition of a non-profit organization, and discussed how the proposed project met the general and specific special exception requirements.

## **FINDINGS OF FACT**

### **The Subject Property and Nearby Properties**

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<sup>2</sup> At the end of the hearing on January 31, 2018, the record was left open only for additional information requested by the Board. Two letters in opposition were submitted during that time period—neither of which were requested by the Board. Accordingly, Exhibits 146 and 147 are not considered as part of the record upon which this order is based.

<sup>3</sup> An exact number of letters was hard to determine because numerous letters from the same properties were entered into the record more than once. For example, Exhibits 108 and 118 are identical letters from the owner of 2114 Leroy Place and Exhibit 46 is also from 2114 Leroy Place. Exhibits 113 and 114 are identical letters from 2241 Bancroft Place, NW. Exhibits 30 and 54 are both identical letters from the owners of 2125 Bancroft Place, N.W. Exhibits 42 and 124 are both from the owners of 2134 Leroy Place. Exhibits 34 and 45 are identical letters from the owners of 2124 Leroy Place, NW.

1. The Subject Property is located at 2118 Leroy Place, N.W. (Square 2531, Lot 49).
2. The Subject Property is a large rectangular parcel measuring 5,124 square feet in land area.
3. The Subject Property is located in the R-3 Zone District.
4. The Subject Property is currently improved with a three-story building plus basement (the "Building").
5. There is a garage at the rear of the Property, which is connected to the rest of the Building. The garage has two parking spaces.
6. The Building was originally constructed in 1902, presumably as a residence. It was purchased in 1948 by the Hungarian Government.
7. The Colombian government purchased the Property from the Republic of Hungary, which owned the Property from 1948 to 1951.
8. The Colombian Government used the property as a chancery from 1951, until its conveyance to the Applicant in July, 2017.
9. The Colombian Ambassador provided a letter to the Applicant noting that it had between 25-40 full time employees working on-site at the Property up until October 2015.
10. The Property was conveyed to FSMB on July 18, 2017.
11. At the time of conveyance, the Building had approximately 27 offices and a variety of cubicle spaces spread across multiple floors.
12. Abutting the Subject Property to the east and west are one-family dwellings.
13. Abutting the Subject Property to the north and south are Leroy Place and a public alley, respectively.
14. On the south side of Leroy Place, there is an embassy and two other approved nonprofit office uses.
15. The north side of Leroy Place includes a mosque, two embassies, the Russian Cultural Center, and the front entrance of a Courtyard Marriott Hotel.
16. Although it has a Connecticut Avenue address, the Courtyard Marriott takes up a significant portion of the northeast corner of Leroy Place. The driveway, which is about 110 feet from the Property, exits onto Leroy Place.

17. Leroy Place is characterized by its diversity of uses, especially relative to Bancroft Place to the south, which is made up entirely of single-family dwellings, and California Street, which contains both single family dwellings and multistory residential condominiums and apartment buildings.

### **Public Transportation**

18. The Property is located less than 250 feet from Connecticut Avenue; approximately 500 feet from Connecticut Avenue bus stops; four-tenths of a mile (0.4 mi.) from Massachusetts Avenue bus stops, and four-tenths of a mile (0.4 mi.) from the DuPont Circle Metro entrance.
19. The Property has a Walk Score of 93 out of 100 (a Walker's Paradise). There is a public parking garage two-tenths of a mile (0.2 mi.) from the Property, located at 1825 Connecticut Avenue, and the Washington Hilton garage is one-tenth of a mile (0.1 mi.) from the Property.
20. The Applicant's staff, except for the authorized user of the attached garage, will be directed to park in these garages and will not be permitted to park on Leroy Place or in any residential neighborhood.
21. The most direct route to the Property from the DuPont Circle Metro Station or from the three nearby parking garages where employees driving vehicles will be required to park— is not through the surrounding residential streets, but via Connecticut Avenue

### **The Federation of State and Medical Boards**

22. The Federation of State Medical Boards, Inc. (the "FSMB") is a nonprofit organization founded in 1912. Its mission is to serve the seventy (70) state and territorial medical licensing and discipline boards of the United States, including the District of Columbia Board of Medicine, which is an agency within the District of Columbia Department of Health.
23. For more than 100 years, the FSMB has worked to ensure best practices and high standards of quality in the regulation of physicians nationwide.
24. The FSMB was established as a merger of two predecessor organizations representing the interests of state medical licensing boards: the National Confederation of State Medical Examining and Licensing Boards, and the American Confederation of Reciprocating Examining and Licensing Boards.
25. The FSMB is chartered as a 501(c)(6) non-profit organization and has an affiliated 501(c)(3) foundation, the FSMB Foundation, which provides grants to state medical boards and sponsors educational programming.

26. The FSMB is a co-sponsor of the United States Medical Licensing Examination, a three-step examination used by state medical boards to assesses a physician's ability to apply knowledge, concepts, and core principles before the boards grant a physician the license to practice medicine.
27. The FSMB serves as a convening forum for the state medical boards (including the District of Columbia Board of Medicine), as well as the broader medical regulatory community. FSMB initiatives have shaped state and federal health policy, facilitated the sharing of information between governmental entities, and provided education to help state medical boards, government and policy makers, and the general public as these groups tackle issues related to telemedicine, combating the opioid epidemic, and reducing fraud within the healthcare system.
28. In addition to the development of model policies and best practices for state medical boards, the FSMB provides programming assistance to a variety of federal agencies, such as the U.S. Department of Health and Human Services, the Department of Defense, Department of Veterans' Affairs, the Drug Enforcement Administration, and the Food and Drug Administration.
29. The FSMB currently operates out of two (2) offices for its 170 employees. The main office of the FSMB is located in Euless, Texas and is home to over 160 employees. In 2010, as a result of its growing advocacy and education services for state medical boards on Capitol Hill and increasing involvement with federal policy makers, the FSMB opened its current office in Washington, DC.
30. The D.C. Office, which currently consists of 8 individuals, monitors and reports on regulatory and legislative activity and serves as a contact between state boards and the federal government. The D.C. Office also hosts periodic meetings of workgroups where FSMB committee members and thought leaders gather to address the emerging concepts that will impact the future of healthcare and regulation.
31. The District of Columbia Department of Health, and its subdivision unit, the District of Columbia Board of Medicine, have the responsibility to regulate the practice of medicine within the District of Colombia.
32. In furtherance of this statutory charge, both the Department of Health and the Board of Medicine have regularly called upon the Federation of State Medical Boards to testify in front of City Council, educate the board and its staff about best practices and policies in medical regulation, and provide expertise and staff that complement the research and analysis capacities of their divisions.

## **The Proposal and BZA Application**

33. Originally, the BZA Application was submitted on October 23, 2017, under the 2016 Zoning Regulations, as an application for special exception relief to use the premises for non-profit office use and for variance relief from Subtitle U, Section 203.1(n)(2).
34. In its prehearing statement on January 10, 2018, the Applicant withdrew its request for variance relief, as a more detailed survey demonstrated to them that the Building has over 10,000 square feet of gross floor area, and the Applicant was willing to self-certify as to that aspect of the case.
35. The original hearing was scheduled for December 20, 2017; however, after receiving two requests for party status in opposition, the Applicant requested a postponement in order to work with the parties in opposition.
36. The Applicant is proposing to use the existing Building for non-profit office use, which is permitted subject to certain enumerated conditions listed in Subtitle U, Section 203.1(n).
37. The Applicant is not proposing to expand the existing Building footprint.
38. The purpose of the proposed use is to provide the FSMB with a permanent location to provide services to its member state and territorial medical boards.
39. A permanent FSMB presence will also allow the District Department of Health (“DOH”) unparalleled access to the Federation’s expertise, as part of its mission to protect and enhance the health, safety, and well-being of District of Columbia residents.

### **The Required Zoning Relief**

40. The Application meets the general special exception requirements, as the proposed non-profit office use will not adversely affect the use of neighboring properties, and the proposed use is in harmony with the purpose and intent of the zoning regulations.
41. Subtitle U, Section 203.1 permits an existing residential building and the land on which it is located to be used by a nonprofit organization for the purposes of the nonprofit organization.
42. The Building is in a residential zone, the R-3 Zone.
43. The Applicant is a non-profit organization.
44. The Building is located in the Sheridan-Kalorama Historic District.
45. The Building has a gross floor area of 10,825 square feet.
46. The limited nature of the proposed use makes it so that the proposed office use shall not adversely affect the use of neighboring properties.

47. The Applicant will require employees to park in nearby parking garages, and loading will be limited to the alley; therefore, the amount and arrangement of parking spaces shall be adequate and located to minimize traffic impact on the adjacent neighborhood.
48. 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.
49. The Applicant agrees that 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 (“HPRB”) 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.

## **CONCLUSIONS OF LAW AND OPINION**

The Applicant requests special exception relief pursuant to Subtitle U § 203.1(n) of the Zoning Regulations in order to use the existing Building at 2118 Leroy Place, N.W. for non-profit office use. The Zoning Regulations specify that an existing residential building and the land on which it is located may be used by a nonprofit organization for the purposes of the nonprofit organization, subject to certain enumerated criteria.

The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (*See* 11-X DCMR § 901.2.)

The Board’s discretion in reviewing an application for a special exception under 11-U DCMR § 320.2 is limited to a determination of whether an applicant has complied with the requirements of 11-U DCMR § 320.2 and 11-X DCMR § 901.2 of the Zoning Regulations. If an applicant meets its burden, the Board ordinarily must grant the application. *See, e.g. Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973); *Washington Ethical Society v. District of Columbia Bd. of Zoning Adjustment*, 421 A.2d 14, 18-19 (D.C. 1980); *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981); *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 255 (D.C. 1995).

Pursuant to Subtitle U § 203.1(n), a special exception for a non-profit use must be granted if the Application meets both the general and specific special exception requirements.

The specific requirements of Subtitle U § 203.1(n) are 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; (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.

The Opponents also raised three threshold issues throughout the course of the hearing and in a related BZA Appeal No. 19719 of the Sheridan-Kalorama Neighborhood Council.<sup>4</sup> Opponents argued the Board had to decide whether the Applicant's non-profit organization qualified as a non-profit organization under the zoning regulations, whether the Building had 10,000 square feet of gross floor area, and whether the Building is an existing residential building, prior to the Board considering the special exception requirements.

*Non-Profit Organization*

The Opponents argued that the Board must decide whether FSMB qualified as a non-profit organization prior to considering the special exception criteria. The Zoning Regulations define a non-profit organization: "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." (11-B §100.2.)

The Applicant provided substantial evidence and testimony as to why it qualified as a non-profit organization under the 2016 Zoning Regulations. The Applicant provided its Articles of Incorporation (Exhibit 148, p. 3). The Articles of Incorporation of FSMB provide that the FSMB is "operated exclusively for scientific and education purposes." To help achieve these objectives, the FSMB studies, determines, advocates and/or advances the adoption and maintenance by the District of Columbia, the several states of the United States and its territories and insular possessions of adequate and uniform standards for licensure in medicine. The FSMB also develops and improves the quality of licensing examinations given to members of the medical profession and assists by means of research and study the member medical boards to improve the quality of their examinations. For example, the DC Board of Medicine is a member of FSMB. Its mission statement is "To protect and enhance the health, safety, and well-being of District of Columbia residents by promoting evidence-based best practices in health regulation, high standards of quality care and implementing policies that prevent adverse events." The DC Board of Medicine, like its

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<sup>4</sup> As of March 14, 2018, the appeal is still listed as "Active."

sister agencies in other states and territories, are supported by the Federation in the efforts to carry out the statutory charge to regulate medicine in the public interest.

The Applicant provided to the Board information regarding its DocInfo service (Exhibit 148, p. 44). As part of its service to the general public, the FSMB hosts this free service which allows the general public to search disciplinary records of physicians and learn how to file a complaint with a state medical board. The DocInfo service has been highlighted in Consumer Reports as a best resource for patients.

In furtherance of its purpose of being an educational non-profit organization, the FSMB is involved in both individual instruction and the instruction of the public. The FSMB hosts meetings that are meant for the education of state medical board members and state medical board employees, who are state employees. The FSMB meetings are also open to the public. The FSMB hosts webinars and round tables that are done via teleconference, again, open to the public in many cases. In sponsoring these events and facilitating exchange of ideas and development of best practices and model guidelines, the FSMB also helps to lessen the burdens of government and educate the public, both of which are recognized as a charitable purpose by the IRS. As explained by Dr. Chaudhry, “many states and territories are struggling with financial resources. And so whatever they can do to streamline their services, we are happy to promote and support. But we're doing what we can to educate doctors, not only about what happens when you get a complaint, but also how do you avoid getting a complaint in the first place and how you promote quality healthcare. Other areas are physician wellness and burnout, prescription drug monitoring programs. You all know we have a nationwide epidemic with prescription opioids and with heroin. And we're providing counsel, working with our partners at the CDC, and the FDA, and others.” (January Transcript p. 109).

Consistent with IRS regulations governing nonprofits, the FSMB does not provide inurement to private individuals.<sup>5</sup> Private inurement is prohibited for both 501(c)(3)s and 501(c)(6)s. The FSMB does provide reasonable compensation to its board of directors, but that is allowable under both the Nebraska Nonprofit Corporation Act and under Treasury regulations. No member or other person receives any private inurement.

At the hearing on January 31, 2018, the Opponents described the FSMB as a “wealthy business league” (Exhibit 130, p. 22). The Opponents argued that the FSMB does not qualify as a nonprofit because it files federal lobbying disclosures and lists expenses related to advocacy on its tax filings. The FSMB rebutted this characterization, clarifying that although the Opponents used the term

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<sup>5</sup> The Board sought clarification on this issue from Ms. Kuhn, Opponents’ tax expert. However, Ms. Kuhn’s explanation of the inurement prohibition waivered upon questioning and was insufficiently persuasive or helpful to the Board. She stated that at first the prohibition against inurement was absolute but then, following questions, she said some incidental inurement was okay but finally settled that each charity should be looked at individually. She ultimately stated: “What I’m saying is that the inurement prohibition under Section 501(c)(6) is much more lenient. This is a very precise and absolute inurement prohibition to any private shareholder or individual.” Regardless, the FSMB does not inure private individuals, which is the requirement under the Zoning Regulations’ definition of a nonprofit organization.

'lobbying' in a pejorative manner, the FSMB files lobbying disclosures based on the meaning of the term as defined in the Lobbying Disclosure Act and as defined by federal tax law. The FSMB is stated that because of the type of number of its interaction with federal agencies and elected legislators, it must file lobbying disclosures with the United State Congress. These requirements apply equally to 501(c)(6)s and 501(c)(3)s. Mr. Fish also testified that "numerous organizations who are 501(c)(3)s engage in legislative advocacy, including the Association of American Medical Colleges and our sister organization, the National Council of State Boards of Nursing. So 501(c)(3)s file lobbying disclosures, 501(c)(6)s do as well, because that is a Senate term that we use. But our activities, if you look at what we are organized and purposed for, are the advocacy around our educational and charitable purposes." (January Transcript p. 98). The FSMB's activities related to advocacy, meet the requirements of the IRC 501(h) which prohibit expenditures related to advocacy to be of an amount that is so substantial in nature that the expenditures would invalidate an organization's non-profit status.<sup>6</sup>

Eric Fish testified to the non-profit status of the FSMB at the hearing on January 31, stating that "the FSMB is a 501(c)(6) organization. As a 501(c)(6) organization, we carry out a charitable purpose in support of our members. Our members are the 70 state medical and osteopathic boards that carry out the duties of state government in the regulation of medicine; members are therefore members of government. Nothing in the definition related to the zoning regulations clarifies that we must be a 501(c)(3)." (January Transcript, p. 94). Further, Mr. Fish testified why organizations might choose a 501(c)(3) status over a 501(c)(6) status, most of which are related to collecting money. At the hearing in January, Mr. Fish explained that "501(c)(3) designations state that an organization must be organized for charitable purposes. Now, an individual organization may choose to be a 501(c)(3) for several threshold issues including the acceptance of public monies or individual monies that would be used, that would be tax-deductible or tax exempt for that individual. The FSMB does not raise funds from the general public. Therefore, getting the 501(c)(3) designation is not that important to our organization." (Transcript, p. 96).

The Opponents' expert tax witness, Nancy Kuhn, conceded that FSMB was organized as a non-profit organization but argued that it did not operate as a non-profit organization. Ms. Kuhn testified that the Zoning Regulations' definition of non-profit was "identical" to the definition of a 501(c)(3).<sup>7</sup> (January Transcript, p. 180). The Applicant provided a side-by-side comparison of

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<sup>6</sup> Roughly one percent of the FSMB's budget is dedicated to advocacy.

<sup>7</sup> The definition of a 501(c)(3) organization is: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

the definition of non-profit organization under the Zoning Regulations, and the definition of a 501(c)(3) organization (Exhibit 148, p. 10). The comparison highlighted significant differences between the two definitions. Ms. Kuhn's entire assessment of the FSMB's operation was based on whether FSMB would meet the definition of a 501(c)(3) organization: "But I do not agree that they could meet the operational test under 501(c)(3) because they operate for the benefit of their members to promote the medical profession which is appropriate for a 501(c)(6). They do not operate for the benefit of the public." (January Transcript p. 182). Again—the operational test for 501(c)(3)s does not apply, because the Applicant is not required to meet the definition of a 501(c)(3) organization, only the ZR definition of nonprofit organization. It was pointed out by the Board that while the Board agreed Ms. Kuhn qualified as a tax expert, she was not a zoning attorney or a zoning expert, and the BZA was tasked to determine whether the FSMB meets the Zoning Regulations definition of a nonprofit organization, not whether it meets the IRS definition of a 501(c)(3).<sup>8</sup>

Ms. Kuhn argued that FSMB operates for the benefit of its members, and not exclusively for the public good. According to Ms. Kuhn, the FSMB's "activities are really to promote their members' interests and to promote the state medical board's interests and to run this program of testing, these testing services." (January Transcript p. 186). On cross-examination, Opponents' counsel questioned Mr. Fish on this topic, asking, "You indicate that there are educational purposes. But isn't it also correct to say that the operations are for the purposes of the members themselves and for advancing the members' interests?" Mr. Fish responded, "The members' interests are in the state regulation of medicine that is under attack in Washington D.C. It is also related to the members' duty to serve their state government and carry out the functions of the state government in the regulation of medicine." (January Transcript, p. 146).

Ms. Kuhn cited Rev. Rul. 73-567 to argue that the FSMB cannot meet the requirements of "exclusive operation" under 501(c)(3) because professional certification activities are ineligible under this section.<sup>9</sup> However, Rev. Rul. 73-567 is clearly distinguishable from the activities of FSMB. The organization described in that ruling was a private organization providing private board certification in a particular specialty, not an organization operating as a nonprofit to serve the needs of state regulatory boards established by state statute to carry out state regulatory functions, including the licensing of all physicians within the state. Further, *Kentucky Bar Foundation* is one of at least two cases that rejects the view that nonprofit organizations that sponsor examinations and regulate professionals further the private business interests of the members rather than the public. In that case, the Tax Court held that an organization formed to provide facilities for the operation of the Kentucky State Bar Association, a unified bar, was

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<sup>8</sup> Zoning Commission Board member, Commissioner May, even stated, "And if this were a tax case that might be relevant. But this really just has to do with whether in the words that are in our regulations whether they qualify as a non-profit." (January Transcript, p. 189).

<sup>9</sup> "But I challenge that premise that they would in fact meet the 501(c)(3) requirements. There's a revenue ruling issued by the Treasury, the Department of Treasury directly on point, Revenue Ruling 73-567. It describes a medical specialty board which was formed by members of the medical profession to improve the quality of medical care available to the public and to establish and maintain high standards of excellence in a particular medical specialty." (January Transcript, p. 185).

nonetheless eligible for section 501(c)(3) status. The Service argued that several activities, including an ethics inquiry tribunal, furthered the private interests of lawyers, rather than the public. The court held that protection of the public from unethical lawyers primarily furthered the public interest and was consistent with the section 501(c)(3) status for the organization. (See Exhibit 148, pp. 11-21).

Although she mischaracterizes FSMB's operations, Ellen McCarthy, the Opponents' land use expert, correctly identified the standard of review: the Zoning Regulations definition of a non-profit organization. In her testimony at the January hearing she states:

“The zoning definition of non-profit, which we didn't really dwell as much as I think we should have on this section, says that the organization has to be operated exclusively for charitable, educational purposes, whatever. The, whatever educational purposes or charitable purposes the Applicant is referring to that inure to the broader public are incidental. The mission of this organization is to benefit organizations which regulate medical practice in the states. Their members are not even physicians. Their members are state medical boards and the whole purpose of FSMB is to allow those boards to do their job of regulating better.” (January Transcript, p. 212).

Ms. McCarthy's testimony that “their members are not even physicians” directly contradicts Ms. Kuhn's testimony that “members are private individuals.” (January Transcript p. 188).<sup>10</sup>The Board questioned Ms. McCarthy and asked if she believed there was a public benefit to regulation. She agreed there was some benefit to regulation but argued that there is no public benefit from the services and advocacy provided by the FSMB.

The Board finds the differences in expert testimony revealing and, in light of the evidence presented, finds that the Opponents fundamentally misrepresented the basic purpose and operations of FSMB. FSMB has testified and provided ample evidence that their members are all of the nation's 70 state medical and osteopathic boards and they help those members in numerous ways, all for the purpose of improving and regulating the practice of medicine. The Board finds that the regulation and improvement of the medical practice is undoubtedly a benefit to the public, as it lessens the burdens of government and certainly meets the definition of a charitable organization as defined by the Zoning Regulations.

The Board agrees with the Applicant that an applicant for relief under Subtitle U § 203.1(n) does not have to be exclusively organized and operated as a 501(c)(3). The Zoning Regulations require that an applicant be 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. This Board has granted this exact relief to at least two non-501(c)(3) organizations: BZA Case No. 19131 of Delta

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<sup>10</sup> It was only during cross-examination that Ms. Kuhn said she was mistaken in stating that members were private individuals.

Sigma Sorority, a 501(c)(7) organization and in BZA Case No. 17985 of the National Indian Gaming Association, a 501(c)(6) organization.<sup>11</sup>

Based on testimony and evidence provided by the Applicant regarding its organization and operation, and after weighing testimony provided by the Opponents' expert tax witness, the Board has determined that FSMB qualifies as a non-profit organization, as such term is defined under the Zoning Regulations. The members of the FSMB are not physicians, but state medical boards, as the title of the organization makes clear. Under the articles of incorporation, they are organized for the purpose of educational and scientific purposes. FSMB's primary missions are educational and charitable, as one of the charitable purposes under the IRS interpretation is the lessening the burden of government.

Accordingly, the Board finds that the Applicant has overcome this purported threshold issue and is comfortable evaluating the special exception criteria.

10,000 square feet of GFA

The Opponents argued that the Board must decide whether the Building met the 10,000 square foot GFA requirement prior to considering the special exception criteria.

In its report, the Office of Planning requested documentation of the building area be provided to the record. The Applicant provided evidence to the record demonstrating the compliance with this requirement. At the hearing, Anne Fothergill from the Office of Planning testified that the materials demonstrated that the Application met the 10,000 square foot of GFA requirement.

The Applicant originally requested relief from this requirement. The Applicant was not originally aware that a large percentage of the lower level – all of which was used by the previous owner – is to be included in the Gross Floor Area calculation based on the rules of measurement for Gross Floor Area found in Subtitle B of the Zoning Regulations. Applying these rules of measurement, it was confirmed that the total GFA for the Building is safely over 10,000 square feet, this requirement is satisfied, and the Applicant has therefore withdrawn its variance request. The Applicant submitted several documents to the record demonstrating compliance, including a letter from Wingate Hughes and a survey of the Property (Exhibit 138A).<sup>12</sup> The Opponents challenged this evidence and requested that the Applicant permit an expert of the Opponents' choosing to

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<sup>11</sup> On cross-examination, it was revealed that Ms. Kuhn was not familiar with either of these cases. Mr. Sullivan: "Are you familiar with the previous cases where this Board has determined that non-501C3s were, in fact, eligible for this relief?"

; Ms. Kuhn: I am a tax expert, not a zoning expert, so no. (January Transcript p. 239).

<sup>12</sup> During the hearing, the Opposition raised an issue about the small difference in lower-level floor areas between a Wingate Hughes drawing (3,131.91 sf) and the later letter from Wingate Hughes noting GFA amounts (3,258.20). The difference of about 127 square feet is attributed to a small section of the lower level, near what is described on the Wingate Hughes drawing as a "crawl space." The difference simply represents an amount of floor area that was mistakenly not included in the floor area calculation by Wingate Hughes. The space was correctly included by CAS Engineering in its more technical and detailed engineering review of the lower-level GFA, see Exhibit 138A.

measure the lower level and house. The Board finds that is inappropriate at this stage, as the Zoning Administrator and DCRA will have the final say on this issue and the Applicant has self-certified as to that issue.

The Opponents provided a list of properties in the Sheridan-Kalorama Historic District which exceed 10,000 square feet (Exhibit 128) in an attempt to demonstrate that other properties in the area could apply for a special exception. They used the PIVS system to verify that these properties had over 10,000 square feet, as indicated in Exhibit 134, Tab C. Searching 2118 Leroy Place on PIVS proffers the same results, that the Property has over 10,000 square feet, specifically 12,713 “Gba”. The Opponents contradict themselves by arguing that those properties are eligible and at risk for being converted to non-residential use based on this information, but the Applicant’s property does not meet the 10,000 square foot requirement, despite its inclusion on the PIVS system as a property over 10,000 square feet.

The Opponents have also requested that as a condition of approval, the FSMB must provide to the BZA record, documentation that the Building meets the 10,000 sq. ft. requirement and allow third party experts to verify the Applicant’s documentation. FSMB must abide by, or appeal, a decision by DCRA on the Gross Floor Area. A “third-party” expert cannot overrule DCRA, and therefore such an exercise would serve no purpose. Opponents retain the ability to challenge the eventual GFA determination by DCRA.

Based on the evidence and testimony provided by the Applicant and taking into account the evidence and testimony provided by the Opponents, the Board determined that the Applicant has self-certified on the question of the Building’s Gross Floor Area, and evidence presented shows that it is certainly plausible that the Zoning Administrator could find that the Building has a Gross Floor Area in excess of 10,000 square foot GFA requirement. Therefore, it is appropriate for the Board to accept the Applicant’s self-certification and defer to the eventual determination of the Zoning Administrator on this point.

#### Residential Building

The Opponents argued that the Board must decide whether the Building qualified as a residential building prior to considering the special exception criteria.

The Applicant provided ample testimony and evidence that the Zoning Commission intended that this special exception was permitted for properties in residential zones, not that the Building had to be used as a residence prior to the non-profit use. As affirmed by the DC Court of Appeals, the established Law is: “the phrase “existing residential buildings” requires only that a structure be residentially zoned, not that it be in actual use as a residence, in order to qualify for use by a non-profit organization.” *French vs. DC Board of Zoning Adjustment*, affirming BZA Order No. 15555 for 2110 LeRoy Place, NW. In affirming, the Court noted that no less than four (4) previous BZA cases before that case held the same position, that the subject building did not need to be an existing residential *use*. While each BZA case is decided on its own merits, it is not decided on its own law. The Opponents have provided no evidence as to why the Board should discard long-established law on this point, reject the Court of Appeals ruling, and decide that this was not a residential property despite being in a residential zone.

Based on the evidence provided by the Applicant, the DCCA Case, and weighing the testimony and evidence provided by the Opponents, the Board determined that the Building is a residential building because it is in a residential zone. Accordingly, the Board finds that the Applicant has overcome this purported threshold issue and is comfortable evaluating the special exception criteria.

**Specific Enumerated Requirements under 203.1(n):**

*(1) Historic Building*

The first enumerated requirement of Subtitle U § 203.1(n) is that the building be listed in the District of Columbia's Inventory of Historic Sites or within a district, site, area, or place listed on the District of Columbia's Inventory of Historic Sites. As noted on the DC GIS Map, which is publicly available, the Building is located in the Sheridan-Kalorama Historic District. The Office of Planning stated in its report that the Building is located within the Sheridan-Kalorama Historic District. The Applicant provided evidence that the Building is located in the Sheridan-Kalorama Historic District. The ANC, the Opponents, and the persons in opposition agree that it is located in the Sheridan-Kalorama Historic District. Accordingly, the Application meets the first requirement of Subtitle I § 203.1(n).

*(2) 10,000 Square Feet of GFA*

The second enumerated requirement of Subtitle U § 203.1(n) is that 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. This requirement was raised as a threshold issue by Opponents. As requested by the Board and the Office of Planning, the Applicant submitted documentation to the record demonstrating compliance with this requirement (Exhibit 138A). Accordingly, the Board has determined that the Application meets the second requirement of Subtitle I § 203.1(n).

*(3) Shall not Adversely Affect the Use of Neighboring Properties*

The third enumerated requirement of Subtitle U § 203.1(n) is that the use of existing residential buildings and land by a nonprofit organization shall not adversely affect the use of the neighboring properties. As discussed in more detail below, under the general special exception requirements, the Board has determined that the proposed use will not adversely affect the use of neighboring properties. Accordingly, the Application meets the third requirement of Subtitle U § 201.3(n).

*(4) Parking*

The fourth enumerated requirement of Subtitle U § 203.1(n) is that the amount and arrangement of parking spaces shall be adequate and located to minimize traffic impact on the adjacent neighborhood.

The Applicant provided evidence and testimony demonstrating how the amount and arrangement of parking will have minimal traffic impact on the adjacent neighborhood. The proposed non-profit office use is a use that is inherently quiet and generates little traffic. There are currently two full-sized parking spaces on the Property and only eight full-time employees at the existing FSMB office in the District. The proposed use will generate no additional parking demand, and many office employees currently utilize public transportation. The Property is located less than 250 feet from Connecticut Avenue; about 500 feet from Connecticut Avenue bus stops; .4 miles from



Massachusetts Avenue bus stops, and .4 miles from the DuPont Circle Metro entrance. It has a Walk Score of 93 out of 100 (a Walker's Paradise). There is a public parking garage about .2 miles from the Property, located at 1825 Connecticut Avenue, and the Washington Hilton garage is .1 mile from the Property. All Applicant's staff will be directed to park in these garages and will not be permitted to park on Leroy Place or in any residential neighborhood.

In its presentation at the January hearing, the Opposition argued there would be adverse impacts to neighbors because "staff comings and goings for 25 FTE's specifically employed to host, entertain, visit, and meet with members" would lead to numerous taxi and Uber trips, noise, pollution, light, and health impacts. Support services such as catering, deliveries, landscaping and cleaning would be required. They argued there would be a safety threat to pedestrians due to the high number of curb cuts. (Exhibit 130, p. 24). Although sympathetic to these concerns, the Board finds these concerns to be typical of city living no matter what neighborhood, including concerns regarding "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." (Exhibit 105, p. 18).

On this issue, the Office of Planning and the Department of Transportation agree and are consistent with the Applicant's presentation of this issue. In its report, the Office of Planning noted that Leroy Place is a narrow one-way street, and that parking and loading concerns could be adequately addressed through conditions of approval. OP recommended that the Applicant be required to have employees park in nearby parking garages, that deliveries be restricted to weekday hours, and that loading take place in the alley. The Applicant has agreed to these conditions. At the hearing, the Office of Planning testified that the Applicant meets this fourth enumerated requirement, as these agreed-upon conditions would limit visitors and staff to foot traffic from Connecticut Avenue, which is less than a block away, and will therefore minimize traffic impact to the adjacent neighborhood.

In its report, the District Department of Transportation states that "the proposed action will have no adverse impacts on the travel conditions of the District's transportation network." The second DDOT report dated February 14, 2018 provides a more detailed analysis of its assessment. The report states that the Applicant is not required to provide any parking and finds that the limited options available for long-term on-street parking will limit vehicular trips to the site. Vehicles that do not display a Zone 1 or 2 permit may only park on the northern side of Leroy for up to two hours.<sup>13</sup> The report also addressed delivery and loading, finding that the 15-foot rear alley is sufficient to accommodate loading. Standard delivery vehicles such as FedEx and UPS currently provide mail and delivery services to residents on this block and this existing condition will remain regardless of the Applicant's proposal.

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<sup>13</sup> In his testimony, Chris Chapin, the president of the Sheridan-Kalorama, argued that any FSMB employee who lives in Ward 1 or Ward 2 and has a sticker could park all day on Leroy. Again, the Applicant would require employees to park in garages, not street parking, regardless of whether they had an RPP sticker for Ward 1 or 2.

The report also detailed the numerous forms of public transportation in the surrounding area, including but not limited to several bus lines, the DuPont Circle Metro, and a BikeShare station. The report raised the issue that if the Applicant were to have twenty-five employees, it would be required to provide a SmartBenefits Program. Although the Applicant is not required to provide bike parking, DDOT requested that the Applicant provide three (3) long-term bike spaces. Overall, DDOT found that while the proposed use may lead to a minor increase in vehicular, transit, pedestrian, and bicycle trips, it would have no objection to the special exception approval.

The Board agrees with the report by the Office of Planning, and the Report by the District Department of Transportation, and finds that the proposed conditions regarding parking and loading will be sufficient to minimize the traffic impact on the neighborhood. The Applicant has two dedicated parking spaces in its garage. The chancery use took away a parking space, as it was dedicated to diplomatic parking; the proposed non-profit office use will return these formerly designated diplomatic parking spaces to public use. Employees will be required to walk to the site or to park in numerous nearby garages. Ubers and taxis are not limited to business use and are likely used by residents in the area. The Applicant testified that an Uber would likely set a pick up on Connecticut Avenue specifically because of the trouble with procuring taxis and Ubers on a one-way street. Any loading or catering will take place at the rear of the Property. Standard delivery vehicles such as FedEx and UPS currently provide mail and delivery services to residents on this block and this existing condition will remain regardless of the Applicant's proposal. It is likely that cleaning and landscaping services are currently used by residents of the block, and the Building could require a cleaning service regardless of whether it was residential or office use. The Opponents have provided no evidence as to how there will be additional pollution or health issues due to the office use. Accordingly, the Application meets the fourth requirement of Subtitle U § 203.1(n).

*(5) Goods and Chattels*

The fifth enumerated requirement of Subtitle U § 203.1(n) is that 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.

The Office of Planning's report acknowledged that no goods would be sold in the Building.

The Applicant testified that it will not create, exchange, or sell any goods, chattels, wares, or merchandise in the residential Building, except for the sale of publications, materials, or other items related to the purposes of the nonprofit organization. In this case, the Applicant would be permitted to provide pamphlets related to the purposes of the nonprofit organization.

Based on the testimony from the Applicant and the report by the Office of Planning the Board finds that the Applicant will not create, exchange, or sell any goods, chattels, wares, or merchandise in the residential Building, except for the sale of publications, materials, or other items related to the purposes of the nonprofit organization. The Applicant is permitted to provide pamphlets related to the purposes of the nonprofit organization. Accordingly, the Application meets the fifth requirement of Subtitle U § 203.1(n).

*(6) Additions to the Building*

The sixth and final enumerated requirement of Subtitle U § 203.1(n) is that 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 Office of Planning's report stated that the Applicant is aware that any proposed modifications could require review and approval from the Historic Preservation Office and Historic Preservation Review Board.

Based on the testimony from the Applicant and the report by the Office of Planning, the Board finds that Applicant is not proposing any additions. The Board understands that the Applicant is aware that 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 site beyond those that are necessary, and approved by HPO, to provide access in compliance with ADA requirements or to ensure the structural safety of the Building. Accordingly, the Application meets the sixth and final requirement of Subtitle U § 203.1(n).

***General Special Exception Requirements***

The Application must also satisfy the general special exception criteria of Subtitle X § 901.2 which states that the Board is authorized to grant special exception relief where, in the judgement of the Board, the special exception "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;" and "will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps."

As discussed below, the Application meets the general special exception criteria.

In harmony with the general purpose and intent of the zoning regulations

The Application meets the exact purpose and intent of the Zoning Regulations. In its report, the Office of Planning stated "the zoning regulations allow for a nonprofit office use in the R-3 zone by special exception if it meets the criteria detailed above. The Opponents argued that the Application is not in harmony with the general purpose and intent of the Zoning Regulations because this is a residential neighborhood. The regulations *only* permit this relief in residential neighborhoods.

In 1974, Zoning Commission Order No. 83 (Case No. 73-32) enacted this special exception. The Commission laid out the purpose and principle behind allowing the use of large residential

properties for non-profit office use. Specifically, the Commission found that: “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.” The Commission further provided that: “There are instances where continued use as residences of such large buildings is no longer assured, leading to their dilapidation and destruction; The use of such buildings for nonprofit organization is an appropriate means of providing for the preservation of such buildings, thereby promoting the public health and general welfare.”

Ellen McCarthy, the Opponents’ land use expert, testified that “the Zoning commission order suggests buildings that are of that historic nature that have gross floor areas in excess of 10,000 square feet and that you could, that those buildings could then be used for non-profit organizations as an appropriate means for providing not just for the preservation of such buildings, but also by allowing non-profit organizations to locate there it would promote the public health and general welfare.” (January Transcript, p. 210). The Applicant agrees that the ZC specifically identified these types of properties as appropriate for the use by nonprofit groups that promote the public health and general welfare. The Board finds that the FSMB, as a nonprofit group tasked with promoting the public health and general welfare through activities like implementing best practices and assisting physicians, fits that description. And, as discussed above, the Property and Application safely meets the enumerated special exception criteria.

The Opponents argued that because the Zoning Commission placed limits on which buildings could qualify for conversion to office use, they intended to limit residential conversions to office use (Exhibit 130, p. 37). The Applicant did not disagree, as this is the basis for the special exception. The Opponents argued that demographics have changed since 1974 and this special exception is no longer needed to protect houses. However, the Board pointed out during the January hearing that the Zoning Commission had the opportunity to update, remove, or alter the text of the regulation during the 2016 ZRR, but chose to keep the regulation exactly as is.<sup>14</sup>

Sally Berk, secretary for SKHA, testified that an office use would undermine the Comprehensive Plan. The SKHA provided a statement in opposition which stated that the proposed use was inconsistent with the Comprehensive Plan (Exhibit 106, p. 4). The Opponents also provided testimony from Ellen McCarthy. During the hearing on January 31, Ms. McCarthy also provided excerpts from the Comprehensive Plan. The Opponents made the same argument in the DC Court of Appeals case *French v. Board of Zoning Adjustment* (where the owner of 2110 Leroy requested,

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<sup>14</sup> “What I can’t quite understand is the zoning regulations were recently redone. And that piece, now maybe it was just missed, but that piece was still maintained. I mean right now the zoning allows a non-profit to be able to go into this spot even with the change in people kind of moving back into the city. And so do you think there needs to be a zoning regulation change? I mean is this an amendment that needs to be done for this location because right now we have the 10,000 square feet and above you can have this, a non-profit can move into these buildings with a special exception. So are you saying that you don’t think that is appropriate and that should be now amended in the zoning regulations?” (January Transcript, p. 220).

and was granted, the same relief). In that case, the Court stated: “As zoning commission is exclusive agency vested with responsibility for assuring that zoning regulations are not inconsistent with comprehensive plan, board of zoning adjustment, whose limited function is to assure that regulations adopted by zoning commission are followed, has no authority to implement comprehensive plan.” *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023 (D.C. 1995), as amended (May 16, 1995).<sup>15</sup>

Based on the evidence and testimony provided by both the Applicant and Opponents regarding the Zoning Commission’s intent in enacting this regulation, the Office of Planning report, and the fact that this provision was included in ZR 16, the Board finds that the Application is in harmony with the general purpose and intent of the Zoning Regulations.

Will not tend to affect adversely the use of neighboring property

The second prong of the general special exception requirements is that the requested relief will not tend to affect adversely the use of neighboring property. This is also the third enumerated requirement of Subtitle U § 203.1(n).

The Office of Planning, in its report, stated that with “adequate operational controls and mitigation measures, the proposed use of a nonprofit organization in this Building should not adversely affect the use of neighboring properties. The property has been used as diplomatic offices for more than sixty years and there are other buildings on the block used for offices.” The Office of Planning offered a number of conditions designed to mitigate any adverse effects. OP also stated in its report that “a facility with restricted employee numbers, parking, loading, and hours of operation and events should not adversely affect the use of neighboring properties.” This was echoed in OP’s testimony during the hearing: “again we have found that with restricted employee numbers, parking, loading, hours of operation and events that with these conditions to lessen or mitigate any impacts that this use should not adversely affect the use of the neighboring properties.” The Board questioned whether OP had considered the opposition letters in the file in making its report. Ms. Fothergill from the Office of Planning responded that “the idea is that we, and the Applicant even stated that our conditions are quite strict. I mean we tried to address the potential impacts by

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<sup>15</sup> Full discussion: We turn next to petitioners' claim that the Board's order violates the Comprehensive Plan. Specifically, petitioners argue that the Comprehensive Plan, as amended, explicitly designates the area surrounding the Cullen property for “moderate density residential” use. Relying on this provision, and on the proposal by the Office of Planning to rescind section 217 altogether, petitioners claim that the Board should not have granted the special exception. This court has held, however, that “the Zoning Commission is the exclusive agency vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan.” *Tenley & Cleveland Park Emergency Committee v. District of Columbia Board of Zoning Adjustment*, 550 A.2d 331, 341 (D.C.1988), cert. denied, 489 U.S. 1082, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989). Given this holding, we must decline to consider petitioners' arguments based on the Comprehensive Plan, since the Zoning Commission has not been heard from in this case (nor, as far as we know, have its views been sought). The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed; it has “no authority to implement the Comprehensive Plan.” *Id.* at 341 n. 22.

restricting the, any possible night time use, visitors, circulation issues with these conditions to address the neighbors' concerns.”

The Board finds that although there are numerous letters, some of the letters are from identical addresses and most voice same general concerns. Based on the record, the remaining general concerns raised by the Opponents, the ANC and the persons in opposition can be grouped into the following categories: the office use will undermine the residential character of the neighborhood and disturb the quality of life; intense office use of a property that had been all-but-vacant for a decade; impacts on property values; removal of this property from residential use permanently.

**Residential Character of the Neighborhood and Previous Use**

The Board has determined that while there may be some slight impact on the adjacent properties, adequate controls will ensure the impact of the requested office use does not rise to the level of an adverse effect on the *use* of the adjacent properties as residential buildings. Mr. Sukenik, a former president of the SKNC testified that as it pertains to Sheridan-Kalorama, that “whenever it's a non-residential use it's an adverse impact.” In its rebuttal statement, provided in Exhibit 141, the Opponents further object, stating that “no conditions will effectively mitigate FSMB’s adverse effect on the use of neighboring properties.” (January Transcript, p. 226). The Board disagrees.

This requirement is not meant to be an abstract concept which automatically deems nonresidential use as inherently adverse. This relief obviously presumes a certain level of nonresidential use; typically, office, and sometimes museum-related or event space. For the Board to find that nonresidential use is inherently suspect in this situation would be to contradict the very purpose of this special exception.

Opponents also testified that they could not trust that FSMB would honor any condition.<sup>16</sup> Despite this negative assertion, this Board finds that the FSMB has proven its responsiveness and its desire to be neighborly. For example, the Applicant purchased the property at the end of July and immediately reached out to the ANC SMD Commissioner, Ellen Goldstein, in August. The Applicant met with Commissioners Goldstein and Bender, as well as Kindy French and Christopher Chapin, at an introductory meeting on October 4, 2017. The FSMB has provided evidence and testimony that it quickly and effectively responds to the requests of neighbors. FSMB immediately improved landscaping, maintenance, lighting, and security at the request of the neighbors, and even responded to requests to alter these requests, as demonstrated by several emails submitted to the record (Exhibit 136, pp. 30-32).

While the Board sympathizes with the neighbors’ desire to keep the residential “feel” of the neighborhood, it finds that this can be done through adequate controls, such as agreed-upon lighting, a neighborhood liaison, and a 24-hour call line for neighbors. These conditions will help ensure the neighbors feel like they have the same access to the FSMB as they would another neighbor. The Property was previously used as an office for a chancery, there are several other institutional uses in this block—which is only 75% residential, and the block is directly adjacent

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<sup>16</sup> In its rebuttal statement, provided in Exhibit 141, the Opponents even state that “no conditions will effectively mitigate FSMB’s adverse effect on the use of neighboring properties.” (January Transcript, p. 226).

to Connecticut Avenue. The chancery operated until 2015 without many of the residents noticing its presence and it is likely that the continued use as an office will not impact the “feel” of the neighborhood. The secretary of the SKHA, Sally Berk, testified as to the organizations implemented and activities organized by the SKHA and how the proposed office use would deny the neighborhood “people who participate in these organizations.” The Board would again note that the Building has not been used as a residence for over sixty (60) years, and that the proposed use would keep the status quo., The Board does not find that the use by the Applicant will change the character of the street or adjacent neighborhood. Accordingly, the office use will not adversely affect the neighbors’ ability to use their properties as residential properties.

The Applicant provided evidence of the intensity of use by the prior owners. The record includes a signed letter from the Colombian Ambassador (Exhibit 134), which states, “the Government of Colombia purchased the above-mentioned property in 1951, from the Government of Hungary and was used as the Embassy of the Republic of Colombia in the United States (Chancellery) from 1951 to October 2015.” The letter continues, “The Government of Colombia used the property as a functional Embassy with approximately 25-40 full time diplomats, administrative assistants and military personnel. Colombia maintained the property. . . including using the building for storage and other auxiliary functions until the time of sale in July 2017 [and] all contracts for utilities, janitorial services, security, insurance and gardening were in force until the time of the sale.” The Applicant also provided evidence of events held at the Property, including visits from senior government officials and press conferences, as recently as 2014 (Exhibit 136, p. 54).

The Applicant also provided evidence and testimony of how the proposed use of the property would be light to moderate office use, not “intense” as argued by the Opponents. At most, the FSMB has had 1-2 visitors a week at its current office. The Applicant has agreed that its annual meeting will not be held at the Subject Property and will be held offsite. Events, as the term is commonly understood, will not take place on the Property. The Premises will not be rented out or used by anyone other than FSMB, for any types of parties or similar events. FSMB has provided ample testimony and evidence to show that its operations are not that of a lobbying group or PAC, which may hold more frequent and larger events The FSMB stated that it does not host campaign fundraisers or solicit funds from the public in furtherance of campaigns.

FSMB is proposing to hold a maximum of three (3) committee meetings per quarter, not to exceed more than 25 invitees per meeting. FSMB is proposing to hold a maximum of one (1) reception per quarter to be held the night before a committee meeting. The reception will end by 8pm and shall not exceed 50 guests.

The Opponents have provided no evidence that FSMB’s proposed use would be more intense than the previous use. The Opponents argued that, based on observations by neighbors, the chancery use had been limited and there were only 2-3 employees at the chancery since 2007. They argued that the proposed non-profit office use would adversely affect the use of neighboring properties because it would be more intense than the previous use by the Colombian Chancery. Marie Drissel, who lives over 200 ft. from the Property at 2135 Bancroft Place, provided testimony (Exhibit 125) that “the relatively small chancery staff declined the entire time [our Colombian intern] lived with us.” She testified that there was a large exodus in 2007, with a skeleton staff in 2014. Mr. Guinea also testified that there was limited use at the Colombian embassy, based on his observations.

During the January hearing, the Opponents provided evidence that the FSMB encourages members to visit whenever they are in Washington (Exhibit 130, p. 23).

In addition, the Opponents have characterized the FSMB's proposed use as more intense than actually desired. At the January hearing, Opponents continually mischaracterized FSMB as a lobbying group, a trade organization, and a "major membership" organization that would create a substantial traffic flow. advocacy. During the January hearing, the Opponents provided evidence that the FSMB encourages members to visit whenever they are in Washington (Exhibit 130, p. 23). Numerous times the Opponents stated that the FSMB has 700+ members; they did this so many times that a Board member even referred to the FSMB as a large group with "700 members."

In light of the evidence, the Board does not find these observations to correctly indicate the intensity of use, nor do they support the claim that use by the FSMB would be more adverse than the use of the property as a chancellery.

The evidence is clear that the FSMB has only 70 members and the proposed office use will be extremely limited. General invitations to visit an office, commonly made by government officials, private businesses, and nonprofit organizations do not compel this Board to find that the proposed use, and any resultant, be any different than presented by the Applicant.

While the Board believes the testimony and observations from neighbors were genuine, it is possible that the chancery operated with moderate-heavy office use without much impact on the community. The signed letter, evidence of events hosted at the chancery as recently as 2014 and the observations of the surrounding neighbors demonstrate that it is possible to have moderate office use mid-block without significant impact.

The Applicant is not proposing intense office use, the use will be heavily conditioned and less intense than the previous use, and the Property has not been vacant for over a decade, as demonstrated by the letter from the Colombian Ambassador. The Colombian Embassy operated with between 25-40 employees until 2015 with little disturbance to the neighborhood—and it did not have any conditions or limits placed on its use.

The Opponents' position is that no controls will be adequate to limit any impact of office use. The Board finds that with adequate controls and conditions, the limited office use proposed— of up to twenty employees who walk to the office, and a handful of meetings— would not adversely affect the use of neighboring properties.

### **Increases and Decreases on Property Values**

The Applicant provided testimony regarding its search for a new office and neighborhood outreach. Explaining the search for the new office, Mr. Fish testified that "Approximately 18 months ago, the FSMB Board of Directors directed staff and our Finance Committee to search for a permanent home for the FSMB. As Dr. Chaudhry pointed out, we started with one employee. We were successful in serving our member boards. We grew in staff. We outgrew the space that we are currently in. It is a 2,000 square foot place. We have a copy room that serves as a kitchen and a break room. We have a small conference room that we cannot use to host these individual work groups that come in. We looked at over 30 properties. And as with any residential search,



we looked all over the city, and we looked at all the different types of properties. There were brownstones that were basically a vertical representation of our current space that did not have the flexibility that we would like. There were condos that were under development, and there were also large properties, much like the 2118 Leroy property, and others that we considered. Some of these were in residential zones, but we believe that we fit the description and the requirements that are a part of that exception.”

The Opponents argue that the Applicant could have purchased other properties in a commercial zone for a higher price (Exhibit 130, p. 38). However, the Applicant is not required to prove that it exhausted all other options before purchasing this Property. The Applicant is also not required to prove that the Property cannot be used for residential purposes. While this testimony is informative, it is not relevant to the special exception standards, as it relates to the variance request which the Applicant is no longer seeking.

The Opposition argued that the use of this Property as a non-profit office would adversely affect the use of their properties because it had the potential to increase tax assessments of similar properties as a result of this one being purchased at a price greatly above the asking price that could be reasonably paid by residential buyers. Conversely, some Opponents argued that the value of the homes on the block would decrease because residential purchasers would not be interested in relocating to a mixed-use street. Opponents testified that properties in the area which were previously non-residential were converted back to residential use and therefore the subject Property could also be converted back to residential use. To support this claim, a neighbor testified that a couple wanted to use the Property as a residence. The Applicant provided information to the contrary, showing that there were only three bids received: from the FSMB, from a foreign government, and from a real estate developer. (Exhibit 136, pp. 17-18).

The Board finds that there is no evidence that the tax assessments of similar properties would increase. The Opponents provided no testimony or evidence that tax assessments of neighboring properties have increased or decreased. The Opponents did not provide clarification as to what was meant by “similar properties.” Increased tax assessments can be caused by many factors and attributing potential increases or decreases of property to the continued non-residential use of this Building is speculative. The Opponents appeared to contradict themselves on this point—as to whether this would result in an increase or decrease to property value. Determining whether the Applicant paid too much for the Property and whether or not the Property *could* be used as a residence is also highly speculative and outside the scope of the special exception criteria. Accordingly, the Board finds that these alleged concerns related to property values and the residential market are general and do not adversely affect the use of neighboring properties as residential properties.

**Removal of the Property from Residential Use Permanently**

The Opponents argued that this special exception removes properties from residential use permanently and therefore degrades the residential character of Sheridan-Kalorama.

The Board finds that there is no reason why the Property cannot be used as a residence if the office use ceases. The Opponents argue that because the FSMB will do some interior renovations to the Building it will never again be used as residential. The Opponents’ positions are contradictory, as

the current Building is configured as office use and the Opponents argued that it can be easily converted back to residential (Exhibit 131 pp. 1-2). The SKHA provided written and oral testimony that at least a dozen properties that were previously non-residential were converted back to residential use (Exhibit 127, p.2). Accordingly, the Board finds that there is no evidence to prove that this Property will be permanently removed from residential use. The Property has not been used for residential purposes for at least sixty (60) years with little impact. Accordingly, the office use will not adversely affect the neighbors' ability to use their properties as residential properties.

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Based on the case record, the testimony at the hearing, and the findings of fact and conclusion of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for a special exception under 11-U DCMR § 203.1, to allow non-profit office use in the R-3 Zone. Accordingly, it is **ORDERED** that the application is **GRANTED WITH THE FOLLOWING CONDITIONS:**

1. There is to be no expansion of the existing Building footprint, and other external alterations are subject to approval by the DC Historic Preservation Office.<sup>[17]</sup>
2. The office hours of operation will be 8am to 6pm Monday through Friday.
3. Staff and visitor parking will be in nearby garages only and on-street parking will not be allowed. FSMB shall memorialize the restriction on street parking in the employee handbook. FSMB may utilize the two spaces in its own garage, accessed from the rear of the property, for its senior staff from time to time.<sup>[18]</sup>
4. A maximum of twenty (20) people may work on-site.<sup>[19]</sup>
5. All deliveries will be restricted to weekday office hours.
6. Loading will be restricted to the alley.
7. Annual meeting and events will not be held at the subject property and will be held off-site. The Premises will not be rented out or used by anyone other than FSMB, for any types of

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<sup>17</sup> The Office of Planning's proposed condition differed slightly, in that it suggested no alterations. The Applicant is proposing to be permitted to do alterations, but agrees to the condition that it will not expand its building footprint.

<sup>18</sup> This condition matches OP suggested condition, and was reinforced at the suggestion of the Opponents.

<sup>19</sup> The Office of Planning, has, of this filing, limited this number to fifteen (15), based on the Applicant's current plan. Applicant would accept fifteen (15), but believes that twenty (20) persons would not rise to the level of adversely affecting the use of neighboring properties, based in part on the previous use of 25-40 persons, and the use approved at 2110 Leroy, for 35 persons.

parties or similar events. Fundraisers are also prohibited. FSMB may hold a maximum of three (3) committee meetings per quarter, not to exceed more than 25 invitees per meeting. FSMB may hold a maximum of one (1) reception per quarter to be held the night before a committee meeting. The reception will end by 8pm and shall not exceed 50 guests.

8. The Applicant and the ANC shall establish a neighborhood liaison to provide a forum for concerns and provide information about activities to property owners within 200 feet of the subject property, and the Applicant shall designate one of its executive officers as its liaison to the forum, which shall convene no less frequently than on a quarterly basis.
9. [This Order shall be effective for a period of \_\_\_ years.][<sup>20</sup>]
10. FSMB will maintain security lighting in the rear of the Property. Exterior lighting will be consistent with the style customary to Sheridan-Kalorama and will be selected with the neighborhood liaison.
11. FSMB shall maintain a 24-hour emergency response service and provide contact numbers to the ANC, neighborhood liaison, and to all neighbors within 200 feet of the Property.
12. FSMB agrees to provide a dedicated space for at least three (3) bicycles in the garage or lower basement area of the Building.
13. No smoking would be allowed anywhere on the Property, and employees will be subject to the smoking policies contained in the FSMB Employee Handbook.
14. Applicant shall give notice and a copy of plans to the liaison, ANC, the SKNC, the SKHA, and the two abutting neighbors whose properties abut the site and to Mr. Guinea.

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**VOTE:**

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<sup>20</sup> The Applicant will accept the Board's determination on this, but believes that a term limit is not warranted based on the relatively benign use proposed. If a time limit is required, then the Applicant suggests a period of ten (10) years would be more appropriate. If it to be 5 years, then the Applicant would request that it run from the date of issuance of the certificate of occupancy.