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IN REPLY REFER TO:

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(AL-98-301)

July 8, 1998

The Honorable Kathleen Patterson
Council of the District of Columbia
441 - 4th Street, N.W., Room 709
Washington, D.C. 20001

Re: Contracts and Leases (Your letter of July 6, 1998)

Dear Kathy:

To get to the heart of the matter, I believe that subsection (c) of D.C. Code § 1-336, which the Council enacted in 1991 before FRMAA added subsection (b) to section 451 of the Home Rule Charter, is invalid. I also conclude, however, that section 451(b) of the Charter applies to leases. Thus, even without D.C. Code § 1-336(c), the Council now has the authority -- under section 451(b) -- to review and approve proposed leases involving expenditures in excess of $1 million during a 12-month period.

More specifically, *Wilson v. Kelly*, 615 A.2d 229 (D.C. 1992), is controlling here. Applying separation of powers doctrine, *Wilson* stands for the proposition that there are certain executive prerogatives of the Mayor which the Council cannot limit. On the other hand, there are various Mayoral actions that traditionally are subject to Council approval or disapproval. *Wilson* held that the Council did not have approval authority over contracts entered into by the Mayor, because contracts traditionally are exclusively a Mayoral function. Accordingly, the statutory provision at issue in *Wilson*, D.C. Code § 1-1181.5a, "exceeded the Council's resolution authority under section 412(a) of the [Home Rule] Charter, D.C. Code § 1-229 (1992)." *Wilson*, 615 A.2d at 231.

Similarly, if we apply the analysis in *Wilson*, the Council had no authority to adopt D.C. Code § 1-336(c) (1998 Supp.), which was part of the same act, D.C. Code § 1-1181.5a, that the *Wilson* court nullified.[1] Like D.C. Code § 1-118.5a, D.C. Code § 1-336(c) was unlawful because it was not similar to those provisions identified in *Wilson* as coming within the Council's resolution approval authority.

FRMAA, however, in 1995 amended the Charter to add a new subsection (b) to section 451, D.C. Code § 1-1130(b) (1998 Supp.). That Charter amendment required the Council's approval of contracts "involving expenditures in excess of $1 million dollars during a 12-month period" pursuant to particular procedures. If we call a lease a contract -- which I conclude we necessarily should here, *see, e.g., Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477, 482 (D.C. Cir. 1970); *Brown v. Hamilton*, 601 A.2d 1074, 1078 (D.C. 1992); 49 Am Jur. 2d "Landlord and Tenant", § 20 (2nd ed. 1995); *Black's Law Dictionary* (6th ed. 1990), p.889 -- we can see that this Charter amendment gave the Council authority to review and approve large leases that it previously lacked. In my view, the Council had no authority to require approval of large leases until FRMAA granted the Council power in this regard. In short, § 1-336(c), even though it preceded the Charter amendment, cannot stand on its own because, as elaborated in *Wilson*, the Court exceeded its powers in enacting §1-336(c). Put another way, § 1-336(c) did not -- under the required separation of powers -- reflect the kind of Council approval that traditionally had been permitted, and thus continued to be permitted under *Wilson*.

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[1]The Acquisition of Space Needs For District Government Officers and Employees Act of 1990 ("1990 Act"), effective March 8, 1991, D.C. Law 8-257, established for the first time a role for the Council in approving both procurements and leases. Section 2(b) of the 1990 Act amended section 705 of the District of Columbia Revenue Act of 1970 ("1970 Act"), approved January 5, 1971, Pub. L. 91-650, 84 Stat. 1939, D.C. Code § 1-336, to add current subsections (c) through (i). (The 1970 Act as adopted by Congress, currently codified at D.C. Code § 1-336(a) and (b), did not authorize the Council to review or approve leases.) In addition, section 3 of the Council's 1990 Act amended the District of Columbia Procurement Practices Act of 1985 ("PPA") to add section 105A, D.C. Code § 1-1181.5a, which was at issue in *Wilson*. Just as D.C. Code § 1-336(c) requires Council approval of leases with "an average annual gross rental in excess of $1,000,000 over the lease period," D.C. Code § 1-1181.5a as enacted in 1991 required Council approval of "[a]ny contract for goods or services worth over $1,000,000" -- albeit the latter provision contained no annual or other temporal limit of the kind in D.C. Code § 1-336(b).

In addition to the law's customary use of "contract" to include a lease, there are several other factors that weigh in favor of construing the word "contract" in section 451(b) of the Charter to include a lease. First, there is little doubt that, in adopting this provision, Congress probably was aware of the Council's 1990 Act that included §1-336(c). *See supra* note 1. But even if Congress was not in fact aware of § 1-336(c), courts likely would presume such awareness, because section 451(b) and the 1990 Act relate to the same subject matter. *See, e.g.*, 2B *Sutherland Statutory Construction* § 51.04 (5th ed. 1992). Furthermore, although only part of the 1990 Act was at issue in *Wilson*, there is no reason to believe -- given the applicability of the ruling in *Wilson* to all parts of the 1990 Act -- that Congress intended to grant the authority sought by the Council with respect to procurements but not with respect to leases. Absent written legislative history to the contrary, the better view is that Congress intended to grant all the authority sought in the 1990 Act, including review of proposed leases. This interpretation is supported by the "12-month" criterion in section 451(b), which mirrors the "annual" criterion contained in D.C. Code § 1-336(c).

Second, the conclusion that Congress intended section 451(b) to cover leases is reinforced by the rule of statutory construction described in 2B *Sutherland Statutory Construction* § 49.05 (5th ed. 1992), which requires that deference be given to the consistent and reasonable interpretation of a statute by the instrumentality charged with its administration. *Cf. Stevenson v. District of Columbia Board of Elections and Ethics*, 683 A.2d 1371, 1378 (D.C. 1996) (applying this rule to an administrative board and citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Here, Council legislation adopting criteria for the Council's review of contracts "[p]ursuant to" section 451(b) has expressly provided that these criteria also apply to the review of proposed leases. *See, e.g.*, section 2 of the Establishment of Council Contract Review Criteria Emergency Amendment Act of 1997, effective December 16, 1997, D.C. Act 12-214, amending section 105a(a) and (d) of the PPA. In addition, I understand that, since FRMAA, the Mayor routinely has submitted large leases to the Council for its approval, and the Council has approved the leases, pursuant to resolutions that have cited as underlying legal authority section 451(b) as well as D.C. Code § 1-336.[2] Therefore, the courts would give deference to

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[2]If D.C. Code § 1-336(c) is void based on *Wilson*, the only lawful predicate for these resolutions is section 451(b). The apparent practice of the Mayor and the Council to cite the two provisions, coupled with the fact that each provision purports to grant the full power required, evidences a practical interpretation that either provision authorizes the Council to review and

the reasonable interpretation by the Council and the Mayor -- the instrumentalities charged with the administration of section 451(b) -- that section 451(b) covers leases.

Third, the purposes of FRMAA show that section 451(b) encompasses eliminating the District government's budget deficit and providing for review of the financial impact of activities of the government. *See* FRMAA, section 2(b). It cannot fairly be argued that these purposes would be fully served by excluding proposed large leases from Council review under section 451(b) even as other kinds of proposed large contracts were subject to such review. Accordingly, this reasoning buttresses my belief that Congress intended that proposed large leases be subject to Council review.

This is not to say that there are no reasonable arguments going the other way. For example, in section 203(b) of FRMAA, D.C. Code § 47-392.3(b) (1997), Congress clearly specified that "contracts and leases" are subject to the review and approval of the Financial Authority; therefore, a reasonable argument can be made that Congress also would have used the phrase "contract or lease" in section 451(b) of the Charter if it had, in fact, intended to authorize the Council to review and approve leases. Other arguments of this kind may be available. However, I believe that, while the matter is not entirely free from doubt, the more persuasive position is that leases are covered by section 451(b). This position also has the virtue, incidentally, of being the most prudent, given that Council review and approval of proposed large leases will avoid any possible doubt concerning their validity under section 451(b).

Finally, to address the point in your July 6, 1998 letter to me, I doubt that the Council could, by act, substitute a 15 calendar day review for the 45 day review period in section 451(b), as the Council attempted to do by adding subsection (d-1) to D.C. Code § 1-336 last year. This is so even though, when subsection (d-1) was passed, the Council lawfully could enact legislation to implement its lease-approval power under section 451(b). I note, however, that section 451(b) does not in all cases mandate a 45-day approval period. Under subsection (b)(2)(A) approval is deemed to take effect within 10 days of the Mayor's submission if "no member of the Council introduces a resolution " of approval or disapproval.

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approve large leases.

Furthermore, the Council can, by amendment of internal rules -- even for particular leases -- reduce the review period to fewer than 45 days. While the Council cannot create a legislative limitation on the 45-day review power Congress granted under section 451(b), there is no reason why the Council cannot, by unanimous agreement, forbear from using that full period.

Sincerely,

John M. Ferren
Corporation Counsel