SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION, **Petitioner,** **v.** **D.C. BOARD OF ZONING ADJUSTMENT,** **Respondent.**	**2023-CAB-002455** **Judge Carl E. Ross** **CASE CLOSED**

ORDER

Pending before the Court is Petitioner Massachusetts Avenue Heights Citizens Association ("Petitioner" or "MAHCA") Petition for Review of Agency Order or Decision, filed on April 18, 2023, Respondent District of Columbia Board of Zoning Adjustment's ("Respondent" or "BZA") Opposition filed on December 8, 2023, and Petitioner's Reply filed on January 9, 2024. The Court has considered the parties' briefings, the submitted agency records, and the entire record therein, and for the following reasons the Petition is **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

A chancery may locate, as a matter of right, in a commercial, industrial, waterfront, or mixed-use zone. D.C. Code § 6–1306(b)(1). A chancery can also locate "in any other area, determined on the basis of existing uses . . . subject to disapproval by the District of Columbia Board of Zoning Adjustment." ("DCBZA" or the "Board") D.C. Code § 6–1306(b)(2). Accordingly, a chancery seeking to locate under D.C. Code § 6–1306(b)(2) must apply with the Board. *See* D.C. Code § 6–1306(c). If a chancery requests to locate in a low- to medium-density residential zone, such as an R-1-B zone, the Board first determines "whether the proposed location is in a mixed-use area determined on the basis of existing uses, which includes office and

institutional uses." 11-X DCMR § 201.3. The area is "mixed-used" if more than 50% of it is devoted to non-residential uses. *See* 11-X DCMR § 201.5. The area considered "shall be the area that the [Board] determines most accurately depicts the existing mix of uses adjacent to the proposed location of the chancery." 11-X DCMR § 201.4. When an applicant is seeking to establish a chancery in a low- to medium-density residential zone and proposes a mixed-use area other than the square where the property is located, the applicant shall include a statement explaining the basis for using the area. *See* 11-Y DCMR § 301.7. If the Board finds the area is mixed-use, then it will determine the merits of the application based on the six criteria in D.C. Code § 6–1306(d). The Board will then either "not disapprove" or "disapprove" a chancery application. See 11-X DCMR § 201.1.

The instant petition seeks review of the Board's decision on March 9, 2023 to not disapprove Kosovo's application to locate its chancery in a residential zone. On September 9, 2022, Kosovo applied to the Board seeking to locate its chancery on 3612 Massachusetts Avenue, N.W. ("Subject Property"), which is in an R-1-B zone, a low-density residential area. Brief for Respondent ("B.R.") at 3. As such, the Board was obliged to determine whether the Subject Property is in a mixed-use area determined based on existing uses. The Subject Property is in Square 1931. Kosovo proposed a mixed-use determination based on an area beyond Square 1931 and included a statement explaining its basis for the proposed area. *See* Brief for Petitioner ("B.P.") at 16-17.

Petitioner opposed the chancery application. *See* R. at 205–222. It urged the Board to only consider Square 1931 for the mixed-use area. *See id.* And that if the Board was inclined to not disapprove the application, then it should wait to do so until Kosovo and the neighbors could propose mitigation measures. *See id.* The Board held its hearing on February 15, 2023. *See* R. at

330–424. After the hearing, Petitioner proposed thirteen conditions it wanted the Board to require. *See* B.R. at 8-9.

On March 9, 2023, the Board issued a final order not disapproving the chancery application. See R. at 305–313. The Board did not impose Petitioner's proposed conditions on Kosovo. The Board found that the relevant mixed-use area comprised Square 1931 and portions of Squares 1940, 1942, and 1944. See R. at 306-7. The Board determined limiting consideration to Square 1931 would be overly narrow because "it would not take into account the presence of religious, institutional, and educational uses that also describe the existing mix of uses adjacent to the proposed chancery location." See *id*. The Board found, based on its mixed-use area, 76.6% of the area was non-residential, so Kosovo's application satisfied the mixed-use requirement. See R. at 308. Next, the Board considered the six factors set forth in the Foreign Missions Act, incorporated into District law under D.C. Code § 6–1306(d). The Board found that each of the criteria under § 6–1306(d) supported not disapproving the application. *See* B.R. 9-10.

On April 18, 2023, Petitioner filed its Petition for Review of Agency Order alleging that the Board erred as a matter of law and the Board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See generally* B.P.

LEGAL STANDARD

In reviewing a BZA decision, the Court must determine "(1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C.1994) (quoting *Glenbrook Road Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 31 (D.C.1992)). Courts of this jurisdiction will not reverse a final agency

decision unless the agency's findings and conclusions are "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" in excess of its jurisdiction or authority; or "[u]nsupported by substantial evidence in the record of the proceedings before the Court." D.C. Code § 2-510 (a)(3) (2001); *see also Oakland Condo. v. D.C. Bd. of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011) (quoting *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 433 (D.C. 2008).

This Court must uphold the validity of the BZA's findings if they are "supported by and in accordance with . . . reliable, probative, and substantial evidence." D.C. Code § 1-1509 (e) (1999); *see Citizens Ass'n of Georgetown v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 41 (D.C.1979). Beyond that, our review of a BZA decision is "limited to a determination of whether the decision is arbitrary, capricious, or otherwise not in accordance with the law." *Georgetown Residents All. v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41 (D.C. 2003) (quoting *Davidson v. District of Columbia Board of Zoning Adjustment*, 617 A.2d 977, 981 (D.C. 1992) (citation omitted). In addition, we defer to the BZA's interpretation of the zoning regulations and must uphold that interpretation "unless it is plainly erroneous or inconsistent with the regulations." *Glenbrook Road Ass'n v. District of Columbia Board of Zoning Adjustment*, 605 A.2d 22, 30 (D.C. 1992) (citation omitted).

DISCUSSION

Here, Petitioners seek review of a decision by the D.C. Board of Zoning Adjustment to approve an application ("Application") submitted by the Embassy of the Republic of Kosovo for the classification of a proposed location of the Kosovo Chancery at 3612 Massachusetts Avenue N.W. Specifically, Petitioners challenge the Board's determination to classify the area as a "mixed use" exception for a low-density residential zone. *See generally* Pet. Brief.

Before approving or denying a chancery application, BZA must first make the threshold determination of whether an area is "mixed-use" based on existing uses. If BZA determines that an area is not "mixed-use" it must deny the pending application. *See* D.C. Mun. Regs 11.X § 201.7. If BZA determines that an area is "mixed use," it then considers the merits of the Chancery Application in deciding whether to ultimately approve or deny the application. D.C. Mun. Regs 11.X §201.6.

An area qualifies as a "mixed use area" if, as of the date of the chancery application, over 50% of the zoned land within the area is designated for non-residential uses. *See* D.C. Mun. Regs. 11.X § 201.5. The considered "area" must be the area that BZA determines is the most accurate depiction of the existing mix of uses adjacent to the chancery's proposed location. *See* D.C. Mun. Regs. Subtitle X § 201.4. Here, the Board concluded that "the relevant 'area' comprises Square 1931 and portions of Squares 1940, 1942, and 1944." BZA Notice at 2; *see also* D.C. Mun. Regs. Subtitle Y § 301.7 (noting that the applicable Zoning Regulations do not limit the Board's consideration to the square where a proposed chancery would be located but the Applicant must include an explanation stating the basis for using the total area considered in calculating the percentage of existing uses as long as the explanation is not solely based on previous Board action for another location). Based on the Application, the Board determined that the Applicant provided the necessary explanation pursuant to Subtitle Y § 301.7 because the Applicant explained that Square 1931 and portions of Squares 1942 and 1944 portray the most accurate depiction of the surrounding area which "contains a mix of religious uses, educational uses, and detached dwellings." BZA Notice at 2. In its determination, the Board also considered the Embassy of the Republic of Liberia to be "residential use," which the Application had classified as "non-residential use," and accounted for three adjacent federally owned reservations as non-residential

uses, which the Application omitted, into its mixed-use calculations. *See* BZA Notice at 2. The Board also heard comments from Petitioner that BZA should only consider Square 1931 as the relevant area for purposes of the mixed-use determination, as Square 1931 is predominantly zoned for residential use. BZA Notice at 3. However, the Board determined that limiting the area of consideration to just Square 1931 would be "overly narrow" because it would not take into account the presence of religious, institutional, and educational uses that also describe the existing mix of uses adjacent to the proposed chancery location." BZA Notice at 3. More specifically, the Board considered adjacent properties included both adjoining properties and properties that "are not distance and/or share the common corridor of Massachusetts Avenue," in its definition of "adjacent." *Id*; *see also* D.C. Mun. Regs Subtitle B § 100.1(g) (noting that "words that aren't defined in [Subtitle B] take on the meaning given to them in Webster's Unabridged Dictionary"); *see also* Webster's Unabridged Dictionary (defining "adjacent" as "a : not distant or far off; nearby but not touching. b: having a common border; living nearby or sitting or standing relatively near or close together). BZA ultimately reasoned that restricting the "area" to Square 1931" only would "improperly exclude a number of nearby existing non-residential uses and would not result in the area that most accurately depicts the existing mix of uses adjacent to the Subject Property." BZA Notice at 3. Based on its initial determination that the relevant area for mixed use consideration encompasses Square 1931, and parts of Squares 1940, 1942, and 1944 based on their proximity to the proposed location, the Board found that 76.6 percent of the area accounts for nonresidential uses. BZA Notice at 4. That is, a percentage more than the 50 percent threshold for "presumptive treatment as mixed use." D.C. Mun. Regs Subtitle X § 201.5.

After making the threshold determination of whether the proposed location of the Kosovo Chancery was a "mixed use" area, the Board then considered the Applications on the merits

pursuant to the Foreign Missions Act Criteria. D.C. Mun. Regs Subtitle X § 201.8; *See also* D.C. Code § 6-1306(d). First, the Board found that the Application fulfilled the United States' international obligation to "facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital" because the State Department affirmed that the Board's approval of the Application would fulfill the required international obligation under the Foreign Missions Act Criteria. *See* D.C. Code § 6-1306(d); *see also* Exh. 30. Next, the Board determined that the Application complied with the governing historic preservation laws because the office of Planning Historic Preservation Office indicated that the Property was not a designated historic landmark or located in a historic district. *See* Exh 28. The Board also considered the adequacy of parking relative to the number of employees, the number of expected daily visitors in affecting traffic in the area, and the Property's access to public transportation in determining that the requested parking space designations were reasonable and did not need special security requirements. BZA Notice at 4-5; *See also* Exh. 30.

The Board next weighed the State Department's determination that the area is capable of being adequately projected in determining that the fourth criteria was met. BZA Notice at 5. Next, the Board considered the Office of Planning's determination and rationale that approving the Application was in the municipal interest as the Application meeting the fifth criteria. *Id*. The Board also factored in discussions regarding public space considerations, the Applicant's agreement to implement discussed improvements, and the Applicant's proposed expedited timeline. BZA Notice at 5-6. Finally, the Board determined that approval of the Application is in the federal interest because the State Department deemed the project essential for facilitating U.S. Diplomacy and promoting U.S. interests. BZA Notice at 6; *See also* Exh. 30.

Based on the Board's decision, Petitioner contends that there are three (3) overarching issues presented for review. The Court now addresses each issue in turn.

I. Whether the Decision was unlawful because the Application sought, and the Decision granted, an exception from the zoning applicable to the Property that contravened the District of Columbia's Comprehensive Plan

Petitioner first argues that BZA's decision was unlawful because it contravened the District of Columbia's Comprehensive Plan. Regulation of the location of foreign missions in the District of Columbia is subject to the provisions of the Foreign Missions Act, 22 U.S.C. § 4301, et seq. (1988) (FMA); *see also* D.C. Code §§ 5-1201, -1213 (1988). The FMA was intended to protect the interest of the United States, while also giving due consideration to local concerns about the location of foreign missions. *United States v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 995 (D.C. 1994); *see also* S. REP. No. 329, 97th Cong., 2d Sess. 1 (1982), reprinted in 1982 U.S. C.C.A.N. 714. The Foreign Missions Act establishes the procedures through which zoning decisions concerning chanceries are made. *Dupont Circle Citizens Asso. v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987).

The District of Columbia's Comprehensive Plan is a "high-level guide that sets a positive, long-term vision for the District of Columbia." Mayor Muriel Bowser Office of Planning Comprehensive Plan, District of Columbia Government (July 2, 2024), https://planning.dc.gov/page/comprehensive-plan. The Comprehensive Plan "includes policies and actions that set priorities for the District's land use, public services, infrastructure, and capital investments." *Id*. The guide itself gives a general overview of how land in the District is *intended* to be used. *Id*. (emphasis added). However, the Comprehensive Plan does not bind the BZA's determinations, and instead sets up intended goals for land development. Indeed, whether BZA's determination did contravene the Comprehensive Plan is immaterial, insofar as the BZA is only

subject to the procedures established by the Foreign Missions Act. 22 U.S.C.A. § 4301 et seq. (1987 Supp.); D.C. Code § 5-1201 et seq. (1987 Supp.); *see also Embassy of People's Republic of Benin v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 310 (D.C. 1987) (where the Court of Appeals, in overturning the BZA's conclusion that the FMA was inapplicable to an application for special exception relating to a chancery property, held that "the FMA… is the exclusive procedure available" to make determinations about chancery applications); *see also Dupont Circle Citizens Asso. v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987) (holding that the Court must apply only the substantive provisions of the FMA, rather than the generally applicable zoning regulations, where an application must be treated as one for chancery use even if the property was not a formally recognized chancery). The Court need not further determine the issue of whether the application sought, and decision granted, an exception that contravened the Comprehensive Plan because the Comprehensive Plan is not binding on BZA's final determination. Because the BZA is only bound by the FMA, BZA did not err in its use of FMA's six (6) criteria to make its determination; rather, its analysis of the application through the lens of the FMA was in accordance with the law.

II. Whether the FMBZA contravened the Comprehensive Plan, the Zoning Regulations, and the FMA in making its mixed-use determination.

Petitioner next argues that BZA contravened the Comprehensive Plan, the Zoning Regulations, and the FMA in making its mixed-use determination. Petitioner raises that the Board's decision is unlawful because "at each step required in assessing whether the Property is in a mixed-use area, the Board ignored the purposes of the Comprehensive Plan, which govern the application of the Zoning Regulations" and in turn circumvents the FMA's purpose. Pet. Brief at 26. As an initial matter, the Court has already determined that the Comprehensive Plan does not create a binding rule for BZA to follow in making its determination.

Here Petitioner specifically raises that the Board's decision to look beyond Square 1931 at adjacent areas contravened the relevant Zoning Regulations and was arbitrary and capricious. Petitioner's analysis cites only to the Applicant's considerations regarding how the Applicant decided to expand the relevant area beyond just Square 1931, noting that "The Applicant's deterministic rationale made no sense," and not BZA's final determination. *See generally* Pet. Brief at 26-28. While the Board accepted the Applicant's application, the extent to which it adopted the Applicant's rationale is not something the Court can assume. Rather, the Court is limited to reviewing the *Board's* decision as it is made in the final Notice of Rulemaking.

In considering the Application, its own independent review of the adjacent areas, and comments from the neighborhood association, the Board ultimately determined that limiting the area of consideration to just Square 1931 would be "overly narrow" because it would not take into account the presence of religious, institutional, and educational uses that also describe the existing mix of uses adjacent to the proposed chancery location." BZA Notice at 3. As previously noted, the Board defined the word "adjacent" to include both adjoining properties and properties that "are not distance and/or share the common corridor of Massachusetts Avenue." *Id*; *see also* D.C. Mun. Regs Subtitle B § 100.1(g) (noting that "words that aren't defined in [Subtitle B] take on the meaning given to them in Webster's Unabridged Dictionary"); *see also* Webster's Unabridged Dictionary (defining "adjacent" as "a : not distant or far off; nearby but not touching. b: having a common border; living nearby or sitting or standing relatively near or close together). BZA's rulemaking explained that restricting the "area" to Square 1931" only would "improperly exclude a number of nearby existing non-residential uses and would not result in the area that most accurately depicts the existing mix of uses adjacent to the Subject Property." BZA Notice at 3. Based on its initial determination that the relevant area for mixed use consideration encompasses

Square 1931, and parts of Squares 1940, 1942, and 1944 based on their proximity to the proposed location, the Board found that 76.6 percent of the area accounts for nonresidential uses. BZA Notice at 4; *see also* D.C. Mun. Regs. Subtitle X § 201.4 (noting that the considered "area" must be the area that BZA determines is the most accurate depiction of the existing mix of uses adjacent to the chancery's proposed location). Indeed, BZA made the relevant findings of fact regarding why it considered areas adjacent to Square 1931, which is supported by the Agency Records containing images of Square 1931 and its surroundings, and which ultimately leads the court to conclude that BZA's mixed use determination is legally sufficient and flows from the findings *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C.1994). Because BZA's mixed-use determination is supported by substantial evidence in the record, the Court cannot conclude that the determination was arbitrary and capricious.

III. Whether the FMBZA acted arbitrarily and capriciously at each stage of the decision-making process prescribed by the Foreign Missions Act.

Finally, Petitioner argues that BZA acted arbitrarily and capriciously in its application of the FMA's six (6) criteria, focusing on the criteria that seeks to determine if the application is in the municipal interest. *See* Pet. Brief at 36. Petitioner. Specifically, Petitioner notes that the Board's determination of the "municipal interest" was based only on the Office of Planning's recommendations, which was inherently unlawful. *Id*. However, Petitioner only raises that the Office of Planning's recommendation contravened the municipal interest stated in the Comprehensive Plan. Petitioner fails to further explain how the Board's reliance on the Office of Planning's recommendation was in any way contrary to the *law* or demonstrate *how* the Comprehensive Plan has any bearing on the FMA. Without a clear showing that the Board's reliance was antithesis to the law as the BZA is required to abide by when making determinations, coupled with the Board's sufficient and detailed consideration of the FMA's six criteria, the Court

cannot find that BZA acted arbitrarily and capriciously at each stage of the decision-making process.

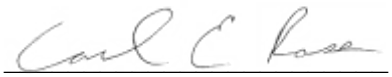
CONCLUSION

After careful review of the parties briefings, the Board's Notice of Final Rulemaking, the submitted agency records, and the relevant law, the Court cannot conclude that BZA's findings and conclusions are "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" in excess of its jurisdiction or authority; or "[u]nsupported by substantial evidence in the record of the proceedings before the Court." D.C. Code § 2-510 (a)(3) (2001). Accordingly, it is this 19th day of July 2024 hereby

ORDERED that the Petition is **DENIED**; and it is further

ORDERED that all future hearings in this matter are **VACATED** and this case is **CLOSED**.

SO ORDERED.



Judge Carl E. Ross

Copies to:
All Parties and Counsel