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December 30, 2003

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: Appeal of Sheridan Kalorama Neighborhood Council
BZA Appeal No. 17086
2319 Wyoming Avenue -- Square 2522, Lot 4
Our File No. 092220.0000

Dear Mr. Griffis:

On behalf of our client, the Sheridan Kalorama Neighborhood Council, enclosed you will find the original and twenty (20) copies of the prehearing statement for the above-referenced appeal.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Jeannine Rustad

cc: Chris Chapin (w/encl.)
Office of Planning (by hand; w/encl.)
ANC 2D
Zoning Administrator (by hand; w/encl.)

Word 45652850.1

BZA
Case No. 17086
Exhibit No. 16

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 16

ORIGINAL

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Sheridan Kalorama Neighborhood Council BZA Appeal No. 17086

STATEMENT OF THE APPELLANT

This is an appeal pursuant to 11 D.C.M.R. §§ 3100 and 3101. The Appellant is the Sheridan Kalorama Neighborhood Council, a District of Columbia Non-Profit Corporation, whose principal address is 2136 Leroy Place, NW, N.W., Washington, D.C. 20008, (the "Property"). Appellant seeks review of the July 14, 2003, decision of General Counsel for the Department of Consumer and Regulatory Affairs ("DCRA"), Karen Edwards, Esquire, allowing the transfer of the Jordanian Chancery to the Yemeni Chancery without the approval of the Foreign Mission Board of Zoning Adjustment ("FMBZA"). As discussed more fully herein, the transfer of the chancery is in violation of the zoning regulations regarding the establishment of a chancery in the D/R-1-B zone district. Specifically, continued use of a chancery is limited to the government that lawfully occupied the chancery as of February 23, 1990. *See* 11 D.C.M.R. § 201.1(m). Therefore, the transfer and subsequent building permit has been issued incorrectly, and the owner must obtain a use variance before proceeding with a commercial use on the site.

Background

In February, 2003, the Jordanian chancery applied for a building permit to assist in the transfer of the Property to the Yemeni chancery. At that time, Kalorama contacted DCRA to inform them that resort to the FMBZA was required before the Property could be transferred or the permit issued. Regardless, in March, 2003, DCRA issued building permit for interior work to the improvements at the Property. By letter dated April 8, 2003, the Council disputed the validity of the

permit on the basis that approval of the FMBZA of a special exception was first required before any transfer of chancery use from the Jordanian chancery to the Yemeni chancery and asked DCRA to reconsider its action. By letter dated July 14, 2003, General Counsel for DCRA, Karen Edwards, Esquire, denied that the zoning regulations, which required such review, was of any legal effect and, instead, stated that the chancery use could be transferred under the Foreign Missions Act, a statute that DCRA has no authority to implement or interpret. Accordingly, the instant appeal was filed.

Discussion

1. Diplomatic Missions and Zoning in the District of Columbia.

In 1938, Congress granted the Zoning Commission its primary power to "regulate the location * * * size * * * and uses of buildings, structures, and land * * * in order, to promote the health, safety, morals, convenience, orderly prosperity, or general welfare of District of Columbia." Act of June 20, 1938, 52 Stat. 797, ch. 534, Section 1; D.C. Code § 5-413. Congress directed the Commission to "promote * * * use of land as would tend to create conditions favorable to health, safety * * * prosperity, [and] protection of property" and "with a view to encouraging stability of districts and of land values therein." D.C. Code § 5-414.

Before 1957, the Zoning Commission placed no restrictions on foreign missions, but, in regulations adopted that year, the Commission concluded that chanceries are "business offices" and should be able to locate in residential areas only through special exception proceedings before the BZA. See Zoning Regs. (1961) Paragraphs 1201, 3101.410. In 1951, the presidentially appointed Board of Commissioners of the District of Columbia ordered that all zoning regulations apply to foreign missions in the District of Columbia.

> In order to afford effective protection to life, health, safety, comfort, and the well being of the community, it is hereby ordered, * * * that * * * those buildings, to be occupied by or for any foreign government shall comply with applicable laws and regulations * * * to the extent set forth herein.
>
> a. Zoning Regulations of the District of Columbia. Full Compliance with All Provisions.

Commissioner's Order No. 61 1054, June 19, 1961, reprinted 7 Whiteman Digest of International Law (1970).

In 1964, Congress placed more severe limitations on foreign diplomatic missions than the Zoning Commission had been willing to adopt, prohibiting them altogether from locating chanceries in residential districts except for medium and high density apartment districts. Act of October 13, 1964, Pub. L. No. 88 659, 78 Stat. 1091 (1964), Section I; D.C. Code § 5-418(c)(1981). Existing chanceries were allowed to continue and "ordinary repairs" could continue to be made to their buildings. Section I, D.C. Code § 5-419(1).

Congress legislated to preserve residential areas from "esthetic deterioration" and other deleterious effects. S. Rept. 360, 88th Cong., 1st Sess. (1963) at 1. "The proliferation of chanceries within residential areas produces parking problems, traffic congestion and esthetic deterioration." *Id.* at 2. Congress agreed with the Commission that chanceries are business establishments and concluded that local citizens should be protected "from the disruptive effects of the location of commercial enterprises in residential areas." H.R. Rept. 1727, 88th Cong., 2d Sess. (1964) at 3 4. The 1964 Act was intended to provide non discriminatory treatment of foreign missions by establishing uniform standards as to where they might locate. S. Rept. 360, supra, at 1, 2.

In 1982, in the Foreign Missions Act, 22 U.S.C. § 4301, et seq., Congress carefully crafted limited exceptions to the Zoning Commission's plenary power over zoning, leaving its powers substantially intact to regulate land use except as to the location, replacement, or expansion of chanceries in many areas. Moreover, Congress broadened the areas in which chanceries might locate and altered Commission and BZA procedures for processing applications to locate, replace or expand chanceries.

Outside the District, the Foreign Missions Act expressly preserves state and local laws and regulations involving "zoning * * * [and] land use." Sec. 207, 22 U.S.C. § 4307, D.C. Code § 5-1207. Within the District, the new statute made no changes in Zoning Commission, or any other District of Columbia agency, authority to regulate every aspect of land use by diplomatic missions except as to the "location, replacement, or expansion of chancery that would otherwise be considered by the Board of Zoning Adjustment." Sec. 206, 22 U.S.C. § 4306, D.C. Code § 5-1206.

Congress meant to rectify certain problems inherent in the then existing procedures for resolving zoning issues relating to chanceries in the District of Columbia and to provide the State Department with certain authority over foreign missions here that would be used to affect the treatment of our missions abroad. In that regard, when the Act was introduced into the Senate it created a Foreign Missions Commission in the District of Columbia to deal with the location of such missions here because "municipal decisions are taken without fully balancing foreign policy and national security questions." S. Rept. No. 97 329, 97th Cong. 2d Sess. 3 (1982).

Notwithstanding the broad authority the new Foreign Missions Commission was to be given, it was explained that, since this bill was addressed to zoning issues, "the new District of

Columbia Foreign Mission Commission could by statute apply only to all the normal criteria used in existing zoning procedures." Statement of Senator Percy, 128 Cong. Rec. Section 7800 (April 27, 1982). That is, the effect of the bill was viewed solely in the context of zoning matters. See §§ 4604.2, 4604.3 of the Zoning Regulations, Zoning Commission Case 77-45. When the Foreign Missions Act reached the Senate floor, strong opposition was expressed regarding the creation of a Foreign Missions Commission for the District of Columbia, the State Department's assumptions with respect to the ability of the District to properly apply its zoning laws, and assertions that the federal interest was not protected by the District of Columbia zoning process. See 128 Cong. Rec. S7781-8715 (April 27, 1982). Recognizing that the "proposed Foreign Missions Commission is inconsistent with the practices of numerous other foreign nations" (128 Cong. Rec. S7810) and that no evidence has been presented which supported the State Department's claim that the District's application of its zoning laws adversely affected the foreign policy objectives of the United States or justified intervention in state and local land use matters, the Senate amended the Act to delete the provisions establishing a Foreign Mission Commission and to emphasize that the Department of State would have no authority to preempt state and local decisions, even if the legislation served to preempt certain District of Columbia statutes. *Id.* at S87I2-7813.

> As stated by Senator Glenn (128 Cong. Rec. S7787), Congress was not prepared to grant the Federal Government broad new authority to run roughshod over local regulatory activities relating to zoning and land use.

See also the discussion in *Benin v. BZA*, 534 A.2d 310, 315-316 (D.C. 1987).[1]

Similar discussions were held in the House regarding a version, which would have given the National Capital Planning Commission the authority to make final decisions on chancery location applications. In a colloquy between Congressman Ronald Dellums and James H. Michel, Acting Legal Advisor, Department of State, Congressman Dellums defined that portion of the legislation being considered which dealt with the District of Columbia as solely related to zoning issues. *See* Location of Foreign Missions in the District of Columbia, Hearing and Markup before the House Committee on the District of Columbia, 97th Cong., 1st Sess. at 42 (Serial No. 97 27) (June 1981). Moreover, in response to Mr. Michel's statement as to the basis for seeking such legislation, Congressman Dellums noted that the concerns of the State Department related to problems perceived by foreign "governments as they move through the zoning process of the local government." *Id.* at 44.

The Conference Committee limited the language in Section 206 as proposed by the House and the Senate. The Committee members were willing to restrict the District's zoning agencies only in carefully defined, and very limited, respects. While displacing local use controls in commercial, industrial, waterfront, and mixed use districts with regard to the location of chanceries, the Act retained BZA's role in evaluating applications for chancery sites in residential areas. Sections 206(b)(2)& (c); 22 U.S.C. §§ 4306(b) & (c); D.C. Code §§ 5-1206(b)(2), (c).

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[1] In *Benin*, the Court recognized that Congress, in enacting the FMA, meant to rectify problems inherent in the existing zoning process, and, in that context, adopted a comprehensive scheme for addressing zoning issues that affect chanceries, such as their location and the application of the District's zoning regulations and maps. As additional support for its holding the Court noted that the FMA "repealed the provisions of D.C. Code §§ 5-418(b) through (e) (1981), which had imposed limitations on the construction, alteration, or conversion of buildings for chancery use." *Id.* at 320.

The Act does not allow chanceries to be located in residential areas except in medium high or high-density residential districts. Section 206(b); 22 U.S.C. § 4306(b); D.C. Code § 5-1206(b). Existing chanceries in residential areas keep only those "rights or interests" as to "location, replacement, or expansion" which they had previously acquired but received no additional rights. Section 206(h); 22 U.S.C. § 4306(h); D.C. Code § 5-1206(h).[2] *Id.* at 20877.

In the preface to the House Committee Report, Congressman Dellums stated that the Conference Committee focused on four issues: who was to decide on the location of chanceries, where may they locate, which criteria is to be used by the new Board of Zoning Adjustment and whether the decision making process would be a rulemaking. Reviewing the decision reached on where chanceries may locate, Congressman Dellums stated that the legislation created "one new term, 'institutional use,' which must be defined by planning and/or zoning authorities." *See* Location of Foreign Missions in the District of Columbia, Hearing and Markup before the House

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[2] The terms "location replacement, or expansion" constitute a shorthand description of the various zoning issues that arise from the development of property by chanceries. Thus, when the Bill was introduced into Congress, section 206 provided the following:

> In order to ensure the fulfillment of the international obligations of the policy of this title, and to ensure the orderly development of the national capital, the location, height, bulk, number of stories and size of any building and other real property of a foreign mission in the District of Columbia, and the provision of open space in and around any such building or other property, shall be subject to approval by . . .

127 Cong. Rec. 20875-20876 (September 17, 1981). That language was substituted with the terms "location, replacement or expansion" and read

> Sec. 206. (a) In order to ensure the fulfillment of the international obligations of the United States and the policy of this title, the location, replacement or expansion of any building or other real property in the District of Columbia which is used for the diplomatic, consular, or other governmental activities (except property used exclusively for residential purposes) shall be subject to the approval of . . .

Committee on the District of Columbia, 97th Cong., 1st Sess. at vii (Serial No. 97-27) (June 1981).

Thus, the 1982 law retains Zoning Commission and BZA control over zoning in the District, but restricts their flexibility in determining where chanceries may locate and the considerations to be given to other zoning issues affecting chanceries. *See* H. Conf. Rep., H. Rep. No. 97 693, 97th Cong. 2d Sess. (1982) at 40-43, reprinted 1982 (Pt. 2) U.S. Code Cong. & Ad. News, 691, 701-705. Rep. Fascell reported the balance achieved by Congress to the House. Rep. Fascell informed the House during consideration of the conference report:

> The Committee of conference * * * paid special attention to the section of this provision regarding the location of chanceries in the District of Columbia. After consideration of two compromise proposals, the conference committee agreed to a procedure which balanced both the Federal and municipal interests in choosing sites where foreign chanceries may locate in the District of Columbia. I feel that this legislation represents a good compromise * * * recognizing the understandably strong interest in the District of Columbia in controlling their city plan.

2. Zoning Commission Regulations

When Congress enacted the Foreign Missions Act in 1982, it left it to The District of Columbia Zoning Commission, with review by the National capital Planning Commission ("NCPC") to adopt regulations that would implement Section 206(b)(2)(E). Accordingly, in response to the passage of the Foreign Missions Act, the Zoning Commission (Order No. 397) redefined chancery and international organization and refined its prior order establishing a mixed use diplomatic district for the location of new chanceries. *See also* Zoning Commission Order No. 237, Case No. 77-46. The Zoning Commission also promulgated new regulations to govern the Board of Zoning Adjustment process with regard to the placement of chanceries as distinct

from those regulations governing the approval of other uses by the Board. *See* Section 4603.3 of the Zoning Regulations, 11 D.C.M.R. The Zoning Commission did not then adopt regulations to implement section 206(b)(2)(B), which authorized chanceries, subject to BZA approval, in any other area, determined on the basis of existing uses. Instead, on April 9, 1984, the Zoning Commission initiated a case to consider amendments to the zoning regulations which would implement section 206(b)(2)(B). Z.C. Case No. 84-7

In Zoning Commission Order No. 509, Case No. 84-7, February 9, 1987, the Zoning Commission noted that, the National Capital Planning Commission, the federal agency responsible for implementing the Foreign Missions and International Organizations Element to the Comprehensive Plan, and it had explored various alternatives to delineating the areas provided for in section 206(b)(2)(B). The Zoning Commission ultimately determined that "a 'square' should define an 'area' primarily because of the logistic capacity to locate and manage the development of a square, based on municipal records." The Zoning Commission, based on the advice of the Office of Planning, also determined that utilizing the average mixed-use ratio in the squares already designated as a diplomatic district should be used as a guide for identifying other squares in the city that would qualify under section 206(b)(2)(B). Using the District's MAGIS computer data, the average mixed-use ratio was found to approximate a ratio of 2/3 residential-type land uses and 1/3 office, institutional and other land uses.

In its order in the matter, the Zoning Commission noted that:

> The U.S. Department of State (State), by written submission dated February 27, 1986 and by testimony presented at the public hearing, indicated that it does not believe that foreign chanceries have an absolute right to locate in any District area they may choose.

State argues that the Act requires the BZA to accept applications for chancery uses in all Section 206(b) (2) (B) areas, not just those zoned mixed use diplomatic or special purpose. Further, the Section 206 (b) (2) (B) determination is to be made by BZA, based solely on the six criteria set out in the Act. The Act leaves this responsibility to the BZA, not to NCPC or the Zoning Commission.

NCPC and the Commission have their statutory roles with respect to the zoning maps and regulations, but all actions regarding chanceries must be consistent with Section 206.

State opposed the use of a square as the determination of an "area". An additional objection to the proposal is the failure to grant to chanceries the equal treatment required by Section 206 (b) (3) for all Section 206 (b) (2) (B) areas. Among other things, State argues that these two provisions require chanceries to be treated the same as nonprofit organizations under Sub paragraph 3101.412 of the Zoning Regulations.

In response, the Zoning Commission stated that

As to the concerns of the Department of State and others, regarding new chanceries that want to locate in the R-1-A through R-5-B Districts being able to apply directly to the BZA for review, the Zoning Commission concludes that it was not the intent of Congress to require that the BZA consider such applications without the guidance of the Zoning Commission which this rulemaking will provide. No explicit provision to that effect is found in the Act, and a congressional bar on a Zoning Commission role should not be lightly inferred. Indeed, to the contrary, the Act in several places explicitly refers to Zoning Commission action under the Act.

Moreover, the Commission is persuaded that the mapping of the areas will be beneficial to the State Department and foreign governments, because the degree of certainty which will result will allow them to plan more effectively.

As to the concern of State regarding the use of a "square" as an "area", the Commission concludes that defining an area as a square is a reasonable and logistically manageable manner of implementing the Act.

As to the concerns of the ANCs and others regarding the methodology that was used to identify squares that qualify for

> rezoning, the Commission believes that the alternative methodology that was included in the OP memorandum dated June 27, 1986, represents an appropriate, fair, and balanced mechanism to further implement Section 206 (b) (2) (B) of the Act.

Following the issuance of its order, the Zoning Commission received numerous requests, including one from Mayor Barry, to reconsider the decision insofar as it authorized existing chanceries in R-1 through R-5-B districts to expand "outlier chanceries", even though the area did not meet the 1/3-2/3 criteria. In Order No. 509A, the Zoning Commission agreed to reconsider its decision and also agreed that it is not reasonable to allow outlier chanceries to expand. The Zoning Commission explicitly stated that it does not agree with the NCPC that existing outlier chanceries are deemed areas described in D.C. Code § 5-1206(b)(2)(B). The Zoning Commission stated that Congress "used the word 'area' to indicate an area of sufficient size to have significance and import for the purposes of land use regulation." This position, the Zoning Commission said, "is confirmed by the Congressional reference to pluralities of 'existing uses' and of 'office and institutional uses.'"

During the above-referenced proceedings, the Sheridan-Kalorama Neighborhood Council pointed out to the Zoning Commission that the square-by-square analysis OP and NCPC used to identify concentrations of institutional uses city-wide in the 1980's was fraught with problems. First, the land-use data used for the 33% calculations failed to accurately distinguish between institutional and residential properties. For example, OP and NCPC classified the Afghanistan property as 100% institutional, even though a portion of the property was used by the ambassador for his residence. Additionally, in 1986, OP and NCPC treated the Property as institutional, even though it was occupied then as a residential facility.

The second main problem arises from using a city square as the land-area basis for the 33% calculation. Squares may make some sense for a city-wide analysis, but not for smaller, neighborhood analysis. Zoning maps do not regulate land use on a square-by-square basis; instead, they recognize that block frontages and other neighborhood characteristics should drive how zoning boundaries are drawn. Had a block-frontage approach been taken in 1986, virtually none of the areas now zoned diplomatic in Sheridan-Kalorama would have satisfied the 33% institutional requirement.

What is most disturbing about the 33% test is that once it is met and a square is made eligible for chancery use, there is nothing to prevent the square from becoming 100% chancery. It is a one-way valve. And experience shows that once a property is converted to office use, it remains so. We have few examples of a chancery being sold back into private hands for residential use; the renovation cost alone is prohibitive.

This all runs completely counter to Congress's intent. According to the legislative history, Congress did not intend to permit "chanceries to be located in any area which is essentially a residential use area."((H.R. Rep. No. 693, 97th Cong., 2d Sess. 41 (1982)). Congress' intent is reflected in section 201.1(m), which only grandfather's a chancery use for that government which existed as of February 23, 1990, which section has been misinterpreted by DCRA.

3. Transfer of the Chancery to the Yemin Government Requires Relief from the Foreign Missions Board of Zoning Adjustment ("FMBZA").

Continued use of a property as a foreign chancery is limited to the government that lawfully occupied the subject chancery as of February 23, 1990. 11 D.C.M.R. § 201.1(m)(1). Clearly, then, in order for a chancery to change hands, relief must be obtained from the FMBZA.

As explained above, this interpretation is consistent with the legislative purposes of the Foreign Missions Act, prior orders of the Zoning Commission, the plain language of the Foreign Missions Act and the zoning regulations. Under the Foreign Missions Act, the Zoning Commission has the responsibility for adopting regulations to implement the provisions of the Act.

When the Foreign Missions Zoning Commission took up the issue of existing chanceries in the 1980s it read § 4306(h) of the Act, the section relied upon by DCRA, to apply to only the chancery that existed at the time the Foreign Missions Act was passed. So, as indicated above, section 201.1(m) of the zoning regulations states that after February 23, 1990, the continued use of the chancery that was grandfathered is limited to the government that occupied the chancery on that date. New users in R-1 through R-5-B districts must go through the FMBZA process. That is, whenever a nonconforming chancery use within a residential zone either changes ownership or use, a new owner may not occupy the premises with a use that is in violation of the zoning regulations unless the new owner obtains a special exception.

Whenever a property owner seeks to convert the existing non-conforming use to another non-conforming use, the property owner must comply with section 2003 of the Zoning Regulations, which provides as follows:

> 2003.1 If approved by the Board of Zoning Adjustment as authorized in ''3105 through 3108, a nonconforming use may be changed to a use that is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter of right, subject to the conditions set forth in this section.
>
> 2003.4 When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use.

2003.5 In Residential Districts, the proposed use shall be either a dwelling, flat, apartment house or a neighborhood facility.

Thus, consistent with the zoning regulations and the grandfathering provision of the Foreign Missions Act, any foreign mission which seeks to locate at a property in a residential district that has been used by a chancery must seek approval from the FMBZA, regardless of the fact that the property had been used by a chancery in the past. The FMBZA is entitled to review each application anew to insure that the criteria for locating a chancery in any location in the applicable residential district are appropriate.

Witnesses

1. Dan Brown
2. Doug Leboissiere
3. Neighborhood representative

Conclusion

In light of the foregoing, the law in the District is that if you have a nonconforming use and thereafter use the premises for an illegal use, you lose the right to re-establish the prior non-conforming use or take advantage of any of the non-conforming use provisions of the Zoning Regulations. That rule of law should apply here to void the building permit issued to the owner of the subject premises. Accordingly, the transfer of the chancery from the Jordanian to the Yemin government must be approved by the FMBZA and the decision of DCRA reversed.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI

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