United States Department of State

Office of Foreign Missions
Washington, D.C. 20520

February 6, 2004

Mr. Clifford Moy,
Secretary,
Board of Zoning Adjustment
of the District of Columbia
441 4the Street, N.W.
Suite 220-S
Washington, DC 20001

In re: Appeal of Sheridan Kalorama Neighborhood Council Concerning Chancery of Yemen -- BZA Appeal No. 17086

Dear Mr. Moy:

The Office of Foreign Missions of the U.S. Department of State hereby applies to the Board of Zoning Adjustment for leave to file the attached Amended Memorandum of Points and Authorities in the above-entitled case.

We submitted our original Memorandum to the Board via fax on February 3rd, the deadline the Board established at its hearing on the matter, January 13. Our amended Memorandum, attached, is identical to our original in every respect but two. First, we appended a one-paragraph Introduction. Second, we revised (at p. 10) our one-sentence description of: *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987).

In support of our request for leave to amend, we note the Board already has granted a filing extension until February 6 to the Department of Consumer and Regulatory Affairs. Thus we ask that you grant our request to file the attached amended Memorandum.

Most Sincerely,

Ronald Sol Mlotek
Legal Counsel
Office of Foreign Missions,
United States Department of State
202.895.3501
ofmlegal@state.gov

BZA
Case No. 17086
Exhibit No. 20

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 20

Before the
BOARD OF ZONING ADJUSTMENT
OF
THE DISTRICT OF COLUMBIA

Appeal of
Sheridan-Kalorama Neighborhood Council BZA Appeal No. 17086

Amended
MEMORANDUM OF POINTS AND AUTHORITIES
Submitted by
The Office of Foreign Missions
United States Department of State,
Appellee

INTRODUCTION

On January 13, 2004 the Board of Zoning Adjustment held a hearing on the Appeal of the Sheridan Kalorama Neighborhood Council challenging the decision of Counsel of the Department of Consumer and Regulatory Affairs that the transfer of the Jordanian Chancery site for use as the Yemen Chancery did not require approval of the Foreign Missions Board of Zoning Adjustment. At the hearing, the Department of State raised the issue of jurisdiction as a preliminary matter. In order to entertain the Department's motion to dismiss on jurisdictional grounds, the Board admitted the Department as a party. Upon denying that motion, the Board determined to continue the hearing until February 17, 2004 and ordered all parties to present memoranda on the Appeal by February 3, 2004. This is the Department of State's memorandum.

SUMMARY

The Foreign Missions Act ("FMA") by its own terms makes clear that this Appeal is ill-conceived and must be denied. The law itself is explicit and

unambiguous. In simple English, it states that if a property was utilized for chancery purposes as of the date of the FMA's enactment (October 1, 1982), that property may continue to be used for chancery purposes by any foreign government. 22 U.S.C. 4306(h)(2). It further says that for one chancery to succeed another at such a location requires no official approval or other action on the part of the Board of Zoning Adjustment, the Zoning Commission or any other agency or official. *Id.* The Department of State, charged by Congress with administering the FMA, has always understood that the law means what its plain words say, and has acted accordingly in its instructions to foreign missions wishing to use such properties. All District Zoning Administrators since 1982 have likewise acted in conformity with this interpretation, recognizing matter-of-right occupancy in the case of at least 15 different chanceries which have succeeded pre-existing chanceries at the same grandfathered sites. (*See:* Attached Declaration of the Department of State's Office of Foreign Missions Office Director for Property and Travel Programs.)

Appellant's Appeal must fail on other grounds as well. In addition to misconstruing the FMA's "grandfathering provision", Appellant also ignores the Act's "non-discrimination clause." 22 U.S.C. §4301(b)(3). That provision prohibits denying a chancery any zoning benefit or right that would accrue to any other institutional user in the same zone. In this case, since any other non-conforming use in an "R" zone may be continued by subsequent users, this same right cannot be denied to chanceries, if the site were so occupied as of October 1, 1982.

Appellant also falls short when attempting to invoke the District's own zoning regulations. Appellant argues that those regulations preclude Yemen's matter-of-right occupancy and that the Zoning Administrator erred by failing to recognize this. However, even a cursory examination of the regulation relied upon, 201.1(m), reveals that it applies solely to chancery "outliers" which are located outside the Diplomatic Overlay. This chancery is located well within the Overlay.

Lastly, the Department of State respectfully suggests to the Board that it lacks legal jurisdiction to hear and decide this Appeal. Under the FMA and the clear line of judicial opinions that have construed it, the FM-BZA's jurisdiction over any case involving a chancery's location, replacement, or expansion is exclusive. The Board therefore is respectfully requested to reconsider and reverse its prior denial of the Department of State's motion, presented orally at the January 13th hearing, that it dismiss this Appeal for want of jurisdiction. Such dismissal would not preclude Appellants from filing an appeal before the FM-BZA.

I. YEMEN IS ENTITLED TO USE THE SUBJECT PROPERTY AS A CHANCERY WITHOUT APPROVAL OF THE FM-BZA OR SANCTION OF THE ZONING ADMINISTRATOR, BECAUSE THE SITE WAS USED BY A FOREIGN MISSION AS A CHANCERY ON OCTOBER 1, 1982, AND THERE HAS SINCE BEEN NO INTERVENING NON-CHANCERY USE.

A) The Plain Language of the Foreign Missions Act Exempts Yemen from Obtaining FM-BZA Approval to Use the Former Jordanian Chancery Site As Its Chancery.

The statutory provision governing this case is contained in the Foreign Missions Act of 1982 as amended, ("the FMA", 22 U.S.C. §§4301 *et seq.*) and states:

> (h) **Approval by the Board of Zoning Adjustment** or the Zoning Commission or, except as provided in section of this title, by **any other agency or official** is not required –
>
> > (1) for the location, replacement, or expansion of a chancery to the extent that authority to proceed, or rights or interests, with respect to such location, replacement or expansion were granted to or otherwise acquired by the foreign mission before October 1, 1982; or
> >
> > (2) for continuing use of a chancery by **a** foreign mission to the extent that **the** chancery was being used by **a** foreign mission on October 1, 1982. 22 U.S.C. §4306 (Emphasis added).

If the "grandfather provision" at 22 USC 2306(h)(2) initially appears capable of more than one interpretation (as Appellant implicitly contends), one need simply focus on

the use of the definite and indefinite articles: "It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an'." *American Bus Association v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted). Or, as stated in *Black's Law Dictionary*: "The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object." BLACK'S LAW DICTIONARY 1647 (6th ed. 1968).

In short: No agency or official approval or other action is required if any foreign mission wants to use any site in the District for chancery use, provided that: (a) the site in question was being used for chancery purposes as of October 1, 1982; and (b) the chancery use at the site has been continuing since that date. A foreign mission meeting the above requirements need not obtain FM-BZA approval to use the property as a chancery. This scenario precisely describes the factual situation of Yemen. It is undisputed that "the chancery" in question located at 2319 Wyoming Avenue, N.W. was being used by a foreign mission (Jordan) for chancery purposes on October 1, 1982 and that it was acquired in March 2002 by another foreign mission (Yemen) to be used for chancery purposes. Therefore chancery use, from that of Jordan (which purchased the property in 1958) to that of Yemen, was "continuing" since October 1, 1982.

Indeed, unless the statute means what its plain words say, the "grandfather provision" makes no sense at all. It does not establish an amnesty for current embassies, because that goal was accomplished by the provision that directly precedes it, *i.e*,. 22 USC 4306(h)(1). To construe the statute otherwise would be both redundant and illogical.

Therefore, Appellant is demonstrably wrong in asserting that FM-BZA approval is required here. (Revised Statement of Appellant, January 13, 2004 at 11.) Further, Appellant errs in implicitly suggesting that the Zoning Administrator's issuance of an occupancy permit is a legal prerequisite to a determination that the continuing chancery use is authorized. Whereas in all other non matter-of-right chancery cases the FM-BZA determines chancery location, in the small minority of cases involving the transfer of chanceries in continuous existence as of October 1, 1982, the entitlement of use is

automatically conferred by operation of the "grandfather provision". In both situations, the Zoning Administrator subsequently issues an occupancy permit.

B. Even if the FMA's "Grandfather Provision" Were Ambiguous (which it is not), the BZA Should Uphold the Longstanding Interpretation and Consistent Practice of both the Department of State and the Zoning Administrator.

Not surprisingly given the clarity of the text, the legislative history of the FMA sheds no light on the grandfather provision. The Department of State has consistently and without exception interpreted this provision as not requiring any official action on the part of the Board of Zoning Adjustment or any other district or federal official.

As set forth by the OFM Office Director's attached Declaration, since enactment of the FMA at least 10 properties, involving 15 different foreign chanceries, have benefited from the grandfather provision. For almost 20 years, the Department has - without exception - instructed foreign missions wishing to acquire properties for use as chanceries in non matter-of-right districts that they must apply to the FM-BZA *unless* the property in question qualified for grandfathering under Section 4306(h)(2). In the grandfathered cases, the Department simply instructs the foreign mission, for a range of administrative and other practical reasons, to seek an occupancy permit from the Office of the District's Zoning Administrator. In all other chancery zoning cases in which the Departments instructs the acquiring foreign mission to seek FM-BZA approval, it also instructs that in the event such approval is obtained, the mission should thereafter obtain an occupancy permit.

Similarly, as reflected in the Massey Declaration, for more than 20 years the Zoning Administrator has, without exception, issued occupancy permits to foreign missions acquiring chancery properties under the grandfather provision. All five Zoning Administrators who have served the District of Columbia since enactment of the FMA have adhered to this interpretation, agreeing with the Department that no FM-BZA hearing is required.

C. Any Contrary Interpretation of the "Grandfather Provision" Would be Inconsistent with Established Zoning Principles and Would Offend the Anti-Discrimination Provision of the FMA, 22 U.S.C. 4306(b)(3).

It is a well established general principle of zoning law that a non-conforming use in a Residential ("R") zone may be transferred, without limit, to subsequent users, for the same or similar use. *See, e.g. George Washington University v. Board of Zoning Adjustment*, 429 F.2d 1342, 1345 (D.C. App. 1981). This rule is consistent with the overarching principle that zoning law looks to the use, not to the identity of the specific user. Thus, for example, occupancy rights for the site of the Textile Museum on S Street in the Residentially-zoned Sheridan-Kalorama neighborhood may be transferred to another museum as a matter of right, without BZA review.

The FMA "grandfather provision" appears modeled on the rule for non-conforming uses. It is entirely sensible that Congress grafted onto the FMA a rule analogous to the general zoning rule for non-conforming uses, given that most pre-1982 chanceries located in Residential zones were the functional equivalent of non-conforming uses. The grandfather provision can thus be read to simply make clear that chanceries should be treated as if they were - and no worse than - other non-conforming uses.

Indeed, Congress did so conclude. The FMA expressly requires that a chancery not be treated any less favorably than any other office or institutional use in the area. 22 U.S.C. §4306(b)(3). Thus, if the "grandfather clause" is implemented consistent with its plain meaning it ensures compliance with this FMA non-discrimination requirement, *i.e.*, that, like other non-conforming uses in Residential zones, chancery use may be transferred as a matter of right to subsequent users, provided that the subsequent uses are identical or sufficiently similar to the prior use.

II. THE ZONING REGULATIONS DO NOT REQUIRE AN FM-BZA HEARING IN THIS CASE

Appellant appears to be contending that zoning regulations, specifically regulation 201.1(m), promulgated under Zoning Commission Order 509-A, require an FM-BZA hearing. However, even cursory scrutiny of this argument reveals it to be irrelevant to the facts of this Appeal.

Appellant's argument has confused regulations pertaining to sites located *outside* the Diplomatic Overlay Zone with those lying within. Section 201.1(m) of the Zoning Regulations, promulgated through Order 509-A, applies exclusively to pre-existing chancery sites which are zoned R-1 to R-5-B, *i.e.*, sites *not* within the Diplomatic Overlay. The text of Order 509-A reinforces this unambiguously:

> The prohibition on the expansion of **outlier**[1] chanceries and the reason set forth in this Order reflect and comport with the issues and concerns that a number of Advisory Neighborhood Commissions expressed. Zoning Commission Order No. 509-A, Case No. 84-7, at p. 4. [Emphasis added.]

In short, Regulation 201.1(m), on which Appellant hinges his entire argument does not even apply to Yemen. The Jordanian/Yemini site is of course not an outlier; it is located within the D-Overlay. It is Chapter 10 of the Zoning Regulations that governs chancery locations in the D-Overlay; not Order No. 509-A and its related regulations.

Appellant's entire line of oral argument at the January 13th hearing, regarding the apparent conflict between the Zoning Regulations and Federal and District statute appears baseless. Accordingly, Appellant's assertion that the Zoning Administrator was bound to follow regulations inconsistent with the statute, is not only legally dubious[2] but factually erroneous.

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[1] The term "outlier chancery" developed in the early 1980s in discussions between various governmental agencies seeking to implement the newly enacted FMA.

[2] Even if the regulations applied to this case, the FMA expressly preempts state or municipal law or government authority contrary to 22 U.S.C. 4306. *See* 22 U.S.C. 4307.

III. UNDER THE CONTROLLING STATUTE, ONLY THE FM-BZA HAS JURISDICTION TO HEAR AND DECIDE THIS CASE.

There have been other attempts (by other Sheridan Kalorama-based plaintiffs, represented by Appellant's Counsel here) to obtain BZA – as opposed to FM-BZA – jurisdiction over a chancery zoning question. The U.S. Court of Appeals for the District of Columbia has exhaustively addressed the issue and concluded, on review of the overall scheme of the FMA and its legislative history, that the FM-BZA has *exclusive* jurisdiction over chancery-related matters.

In 1995, in the well known case of the proposed new Turkish Chancery, the Circuit Court of Appeals held that the FMA "gives the [FM-BZA] **exclusive** jurisdiction over **all** proposals involving 'the location, replacement or expansion of chanceries in the District of Columbia." *Sheridan Kalorama Historical Association v. Christopher*, 49 F3d 750, 757 (.D.C. Cir. 1995) (emphasis added, citations omitted).

In that case, the Court concluded that Turkey's application for permission to demolish a building and construct a new chancery was properly submitted to the FM-BZA "rather than to whatever local body would have been appropriate but for the FMA." *Id.* at 758. The Court concluded that although the text of the relevant provision was somewhat ambiguous, the most plausible reading of the statute was that FM-BZA jurisdiction is exclusive not only as regards the "location" of a chancery (as plaintiff had contended in an overly literal reading), but that it also extends to the "replacement" or "expansion" of chanceries.

> The plaintiffs argue . . . that the DCFMA-BZA had no jurisdiction over Turkey's proposal to demolish and rebuild its chancery, primarily because ... the only portion of the statute that expressly requires a foreign mission to file an application with the DCFMA-BZA, states:
>
> > If a foreign mission wishes to **locate** a chancery in an area ... or wishes to appeal an administrative decision relating to a chancery ... based in whole or in part upon any zoning

> map or regulation, it shall file an application with the Board of Zoning Adjustment ...
>
> The plaintiffs take this to mean that all chancery land-use issues other than initial location must come before the DCFMA-BZA only by way of an appeal from some other body; of course, Turkey's chancery is already "located" at the Massachusetts Avenue site, and the mission is not appealing any "administrative decision" to the DCFMA-BZA.
>
> [This provision of the FMA], however, **cannot describe the universe of cases that may come before the DCFMA-BZA**. ....
>
> The only way to give effective operation to [several provisions of the FMA, taken together] is to conclude that ...[one provision] gives the DCFMA-BZA **exclusive original jurisdiction** over zoning determinations governing the "location, replacement, or expansion" of a chancery; **as to all other** zoning issues relating to a chancery, DCFMA-BZA **has exclusive appellate jurisdiction** under [a different provision].

Id. at 757 (emphasis added, citations omitted). The Circuit Court quoted an earlier decision, in which the D.C. Court of Appeals had similarly concluded: "The language of the FMA leaves little doubt that Congress wished to create a comprehensive scheme for the fair and expeditious decision of issues relating to foreign chanceries in the District of Columbia." *Id.*, citing *Embassy of the People's Republic of Benin v. D.C. Board of Zoning Adjustment*, 534 A.2d 310 (D.C. App. 1987) at 316. Accordingly, the Circuit Court affirmed the District Court's ruling that Turkey's application was properly submitted to the FM-BZA, "rather than to whatever local body would have been appropriate but for the FMA." *Sheridan Kalorama Historical Association*, 49 F.3d at 758.

In *Benin*, the Embassy appealed to the BZA, the D.C. Administrator's denial of its petition for a special exception to allow it to construct a large antenna tower at the site of its chancery. The BZA had concluded that the FMA did not apply to Benin's application. The Court reviewed the legislative history of the FMA, in which Congress recognized that decisions about chancery issues could have a substantial impact on U.S. interests abroad and therefore intended to ensure that the FMA incorporated a balance of federal and local interests. *Benin*, 534 A.2d at 315. The Court also noted that Congress perceived the protection of U.S. interests

abroad "required the expeditious resolution of chancery issues" and thus the FMA was intended to eliminate "time-consuming and overlapping proceedings" consistent with "the need for federal participation in decisions concerning foreign missions in the United States." *Id.* at 315, 316. "The final compromise left D.C. zoning law intact to the extent it was consistent with the FMA." Id. at 316. The Court thus concluded that the "language and legislative history of the FMA compel us to hold that Benin's application was required to be treated as a FMA case." *Accord: Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987) (concluding that the FMA, rather than generally applicable zoning regulations, governed an application for a variance and special exception made by the Taiwan "mission" to the United States.)

Appellant weakly suggests that it has not appealed this allegedly erroneous decision of the Zoning Administrator to the FM-BZA because the FMA and the FM-BZA regulations only explicitly provide for the filing of applications by chanceries. Like the plaintiffs challenging Turkey's demolition, Appellant strains for an overly narrow reading of the FMA while ignoring its context and its text. The Courts have clearly and repeatedly concluded that the FM-BZA is the exclusive venue for all matters relating to chancery zoning. Indeed, while it may be true that 22 USC §4306 expressly addresses the filing of foreign mission applications, it also states that determinations – any and all determinations – involving the location, replacement or expansion of foreign missions are subject to the procedures set forth in 22 USC §4306 and that such determinations shall not be subject to the administrative proceedings of *any other* agency or official, except as provided elsewhere in the FMA. *See:* 22 USC 4306(a); 4306(c)(3).

In short, given the overwhelming weight of judicial decisions concerning its exclusive jurisdiction, it is highly unlikely that the FM-BZA would reject an appeal such as Appellant's on the grounds that Appellant lacks standing, and/or that the FM-BZA lacks jurisdiction to hear it. While there may not be expressly authorization for such an appeal in the relevant statute or regulations, neither do

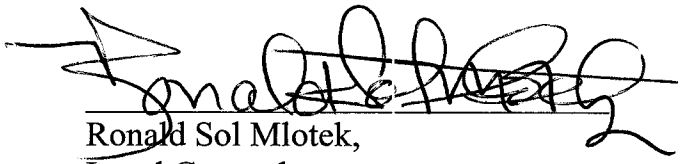
they preclude it. In light of the judicial holdings about the relative jurisdictions of the BZA and the FM-BZA, the only conclusion that can be drawn is that the FM-BZA provides the exclusive venue for an appeal such as the one Appellant brings here is before the FM-BZA.

CONCLUSION

This Appeal fails on numerous counts. It ignores the FMA's grandfather and non-discrimination clauses. It misconstrues the District's regulations. It is filed in a venue which the courts have unanimously and repeatedly stated is improper for cases involving chancery land use matters. It should and must be denied.

February 6, 2004

RESPECTFULLY SUBMITTED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State

OF COUNSEL:
Susan R. Benda,
Attorney-Adviser,
Office of the Legal Adviser,
U.S. Department of State

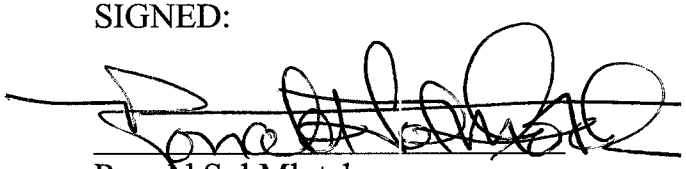
CERTIFCATE OF SERVICE

I hereby declare and certify that I personally served copies of this Amended Memorandum of Points and Authorities upon Counsel for the other parties in this case, this 6th day of February, 2004, by causing the same to be electronically transmitted, via e-mail, to Counsel for the other parties to this matter, to wit:

Richard Nettler, Esq,
Counsel for Appellants, at
rbnettler@rkmc.com

Lisa Bell, Esq.,
Counsel for Appellee,
Department of Consumer and Regulatory
Affairs of the District of Columbia, at
Lisa.Bell@dc.gov

SIGNED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions,
U.S. Department of State

Before the
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OF
THE DISTRICT OF COLUMBIA

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SUMMARY

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BZA (FAX)
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If the "grandfather provision" at 22 USC 2306(h)(2) initially appears capable of more than one interpretation (as Appellant implicitly contends), one need simply focus on the use of the definite and indefinite articles: "It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an'." *American Bus Association v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted). Or, as stated in *Black's Law Dictionary*: "The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object." BLACK'S LAW DICTIONARY 1647 (6th ed. 1968).

In short: No agency or official approval or other action is required if any foreign mission wants to use any site in the District for chancery use, provided that: (a) the site in question was being used for chancery purposes as of October 1, 1982; and (b) the chancery use at the site has been continuing since that date. A foreign mission meeting the above requirements need not obtain FM-BZA approval to use the property as a chancery. This scenario precisely describes the factual situation of Yemen. It is undisputed that "the chancery" in question located at 2319 Wyoming Avenue, N.W. was being used by a foreign mission (Jordan) for chancery purposes on October 1, 1982 and that it was acquired in March 2002 by another foreign mission (Yemen) to be used for chancery purposes. Therefore chancery use, from that of Jordan (which purchased the property in 1958) to that of Yemen, was "continuing" since October 1, 1982.

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Therefore, Appellant is demonstrably wrong in asserting that FM-BZA approval is required here. (Revised Statement of Appellant, January 13, 2004 at 11.) Further, Appellant errs in implicitly suggesting that the Zoning Administrator's issuance of an occupancy permit is a legal prerequisite to a determination that the continuing chancery use is authorized. Whereas in all other non matter-of-right chancery cases the FM-BZA determines chancery location, in the small minority of cases involving the transfer of chanceries in continuous existence as of October 1, 1982, the entitlement of use is automatically conferred by operation of the "grandfather provision". In both situations, the Zoning Administrator subsequently issues an occupancy permit.

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C. Any Contrary Interpretation of the "Grandfather Provision" Would be Inconsistent with Established Zoning Principles and Would Offend the Anti-Discrimination Provision of the FMA, 22 U.S.C. 4306(b)(3).

It is a well established general principle of zoning law that a non-conforming use in a Residential ("R") zone may be transferred, without limit, to subsequent users, for the same or similar use. *See, e.g. George Washington University v. Board of Zoning Adjustment*, 429 F.2d 1342, 1345 (D.C. App. 1981). This rule is consistent with the overarching principle that zoning law looks to the use, not to the identity of the specific user. Thus, for example, occupancy rights for the site of the Textile Museum on S Street in the Residentially-zoned Sheridan-Kalorama neighborhood may be transferred to another museum as a matter of right, without BZA review.

The FMA "grandfather provision" appears modeled on the rule for non-conforming uses. It is entirely sensible that Congress grafted onto the FMA a rule analogous to the general zoning rule for non-conforming uses, given that most pre-1982 chanceries located in Residential zones were the functional equivalent of non-conforming uses. The grandfather provision can thus be read to simply make clear that chanceries should be treated as if they were - and no worse than - other non-conforming uses.

Indeed, Congress did so conclude. The FMA expressly requires that a chancery not be treated any less favorably than any other office or institutional use in the area. 22 U.S.C. §4306(b)(3). Thus, if the "grandfather clause" is implemented consistent with its plain meaning it ensures compliance with this FMA non-discrimination requirement, *i.e.*, that, like other non-conforming uses in Residential zones, chancery use may be transferred as a matter of right to subsequent users, provided that the subsequent uses are identical or sufficiently similar to the prior use.

II. THE ZONING REGULATIONS DO NOT REQUIRE AN FM-BZA HEARING IN THIS CASE

Appellant appears to be contending that zoning regulations, specifically regulation 201.1(m), promulgated under Zoning Commission Order 509-A, require an FM-BZA hearing. However, even cursory scrutiny of this argument reveals it to be irrelevant to the facts of this Appeal.

Appellant's argument has confused regulations pertaining to sites located *outside* the Diplomatic Overlay Zone with those lying within. Section 201.1(m) of the Zoning Regulations, promulgated through Order 509-A, applies exclusively to pre-existing chancery sites which are zoned R-1 to R-5-B, *i.e.*, sites *not* within the Diplomatic Overlay. The text of Order 509-A reinforces this unambiguously:

> The prohibition on the expansion of **outlier**[1] chanceries and the reason set forth in this Order reflect and comport with the issues and concerns that a number of Advisory Neighborhood Commissions expressed. Zoning Commission Order No. 509-A, Case No. 84-7, at p. 4. [Emphasis added.]

In short, Regulation 201.1(m), on which Appellant hinges his entire argument does not even apply to Yemen. The Jordanian/Yemini site is of course not an outlier; it is located within the D-Overlay. It is Chapter 10 of the Zoning Regulations that governs chancery locations in the D-Overlay; not Order No. 509-A and its related regulations.

Appellant's entire line of oral argument at the January 13th hearing, regarding the apparent conflict between the Zoning Regulations and Federal and District statute appears baseless. Accordingly, Appellant's assertion that the Zoning Administrator was bound to follow regulations inconsistent with the statute, is not only legally dubious[2] but factually erroneous.

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[1] The term "outlier chancery" developed in the early 1980s in discussions between various governmental agencies seeking to implement the newly enacted FMA.

[2] Even if the regulations applied to this case, the FMA expressly preempts state or municipal law or government authority contrary to 22 U.S.C. 4306. *See* 22 U.S.C. 4307.

III. UNDER THE CONTROLLING STATUTE, ONLY THE FM-BZA HAS JURISDICTION TO HEAR AND DECIDE THIS CASE.

There have been other attempts (by other Sheridan Kalorama-based plaintiffs, represented by Appellant's Counsel here) to obtain BZA – as opposed to FM-BZA – jurisdiction over a chancery zoning question. The U.S. Court of Appeals for the District of Columbia has exhaustively addressed the issue and concluded, on review of the overall scheme of the FMA and its legislative history, that the FM-BZA has *exclusive* jurisdiction over chancery-related matters.

In 1995, in the well known case of the proposed new Turkish Chancery, the Circuit Court of Appeals held that the FMA "gives the [FM-BZA] **exclusive** jurisdiction over **all** proposals involving 'the location, replacement or expansion of chanceries in the District of Columbia." *Sheridan Kalorama Historical Association v. Christopher*, 49 F3d 750, 757 (.D.C. Cir. 1995) (emphasis added, citations omitted).

In that case, the Court concluded that Turkey's application for permission to demolish a building and construct a new chancery was properly submitted to the FM-BZA "rather than to whatever local body would have been appropriate but for the FMA." *Id.* at 758. The Court concluded that although the text of the relevant provision was somewhat ambiguous, the most plausible reading of the statute was that FM-BZA jurisdiction is exclusive not only as regards the "location" of a chancery (as plaintiff had contended in an overly literal reading), but that it also extends to the "replacement" or "expansion" of chanceries.

> The plaintiffs argue . . . that the DCFMA-BZA had no jurisdiction over Turkey's proposal to demolish and rebuild its chancery, primarily because ... the only portion of the statute that expressly requires a foreign mission to file an application with the DCFMA-BZA, states:
>
> > If a foreign mission wishes to **locate** a chancery in an area ... or wishes to appeal an administrative decision relating to a chancery ... based in whole or in part upon any zoning map or regulation, it shall file an application with the Board of Zoning Adjustment ...

> The plaintiffs take this to mean that all chancery land-use issues other than initial location must come before the DCFMA-BZA only by way of an appeal from some other body; of course, Turkey's chancery is already "located" at the Massachusetts Avenue site, and the mission is not appealing any "administrative decision" to the DCFMA-BZA.
>
> [This provision of the FMA], however, **cannot describe the universe of cases that may come before the DCFMA-BZA.** ....
>
> The only way to give effective operation to [several provisions of the FMA, taken together] is to conclude that ...[one provision] gives the DCFMA-BZA **exclusive original jurisdiction** over zoning determinations governing the "location, replacement, or expansion" of a chancery; **as to all other** zoning issues relating to a chancery, DCFMA-BZA **has exclusive appellate jurisdiction** under [a different provision].

Id. at 757 (emphasis added, citations omitted). The Circuit Court quoted an earlier decision, in which the D.C. Court of Appeals had similarly concluded: "The language of the FMA leaves little doubt that Congress wished to create a comprehensive scheme for the fair and expeditious decision of issues relating to foreign chanceries in the District of Columbia." *Id.*, citing *Embassy of the People's Republic of Benin v. D.C. Board of Zoning Adjustment*, 534 A.2d 310 (D.C. App. 1987) at 316. Accordingly, the Circuit Court affirmed the District Court's ruling that Turkey's application was properly submitted to the FM-BZA, "rather than to whatever local body would have been appropriate but for the FMA." *Sheridan Kalorama Historical Association*, 49 F.3d at 758.

In *Benin*, the Embassy appealed to the BZA, the D.C. Administrator's denial of its petition for a special exception to allow it to construct a large antenna tower at the site of its chancery. The BZA had concluded that the FMA did not apply to Benin's application. The Court reviewed the legislative history of the FMA, in which Congress recognized that decisions about chancery issues could have a substantial impact on U.S. interests abroad and therefore intended to ensure that the FMA incorporated a balance of federal and local interests. *Benin*, 534 A.2d at 315. The Court also noted that Congress perceived the protection of U.S. interests abroad "required the expeditious resolution of chancery issues" and thus the FMA was intended to eliminate "time-consuming and overlapping proceedings" consistent with "the need for federal participation in decisions

concerning foreign missions in the United States." *Id.* at 315, 316. "The final compromise left D.C. zoning law intact to the extent it was consistent with the FMA." Id. at 316. The Court thus concluded that the "language and legislative history of the FMA compel us to hold that Benin's application was required to be treated as a FMA case." *Accord Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987) (concluding that the FM-BZA, and not the regular BZA, should have heard the application for chancery use by Taiwan's mission to the U.S.)

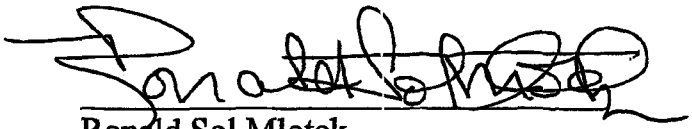
Appellant weakly suggests that it has not appealed this allegedly erroneous decision of the Zoning Administrator to the FM-BZA because the FMA and the FM-BZA regulations only explicitly provide for the filing of applications by chanceries. Like the plaintiffs challenging Turkey's demolition, Appellant strains for an overly narrow reading of the FMA while ignoring its context and its text. The Courts have clearly and repeatedly concluded that the FM-BZA is the exclusive venue for all matters relating to chancery zoning. Indeed, while it may be true that 22 USC §4306 expressly addresses the filing of foreign mission applications, it also states that determinations – any and all determinations –involving the location, replacement or expansion of foreign missions are subject to the procedures set forth in 22 USC §4306 and that such determinations shall not be subject to the administrative proceedings of *any other* agency or official, except as provided elsewhere in the FMA. *See:* 22 USC 4306(a); 4306(c)(3).

In short, given the overwhelming weight of judicial decisions concerning its exclusive jurisdiction, it is highly unlikely that the FM-BZA would reject an appeal such as Appellant's on the grounds that Appellant lacks standing, and/or that the FM-BZA lacks jurisdiction to hear it. While there may not be expressly authorization for such an appeal in the relevant statute or regulations, neither do they preclude it. In light of the judicial holdings about the relative jurisdictions of the BZA and the FM-BZA, the only conclusion that can be drawn is that the FM-BZA provides the exclusive venue for an appeal such as the one Appellant brings here is before the FM-BZA.

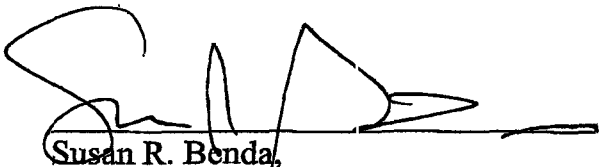
CONCLUSION

This Appeal fails on numerous counts. It ignores the FMA's grandfather and non-discrimination clauses. It misconstrues the District's regulations. It is filed in a venue which the courts have unanimously and repeatedly stated is improper for cases involving chancery land use matters. It should and must be denied.

RESPECTFULLY SUBMITTED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions
U.S. Department of State



Susan R. Benda,
Attorney-Adviser,
Office of the Legal Adviser
U.S. Department of State

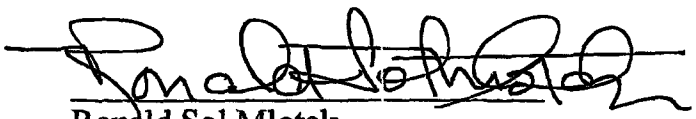
CERTIFICATE OF SERVICE

I hereby declare and certify that I personally served copies of this Memorandum upon Counsel for the other parties in this case, this 3rd day of February, 2004, by causing the same to be electronically transmitted, via e-mail, to Counsel for the other parties to this matter, to wit:

Richard Nettler, Esq,
Counsel for Appellants, at
rbnettler@rkmc.com

Lisa Bell, Esq.,
Counsel for Appellee,
Department of Consumer and Regulatory
Affairs of the District of Columbia, at
Lisa.Bell@dc.gov

SIGNED:



Ronald Sol Mlotek,
Legal Counsel,
Office of Foreign Missions
U.S. Department of State