DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Sheridan Kalorama Neighborhood Council, Appellant, D.C. Department of Consumer and Regulatory Affairs, Appellee.	)	Appeal No. 17086

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PREHEARING STATEMENT OF THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

The Department of Consumer and Regulatory Affairs (DCRA or Appellee), hereby requests that the Board of Zoning Adjustment (BZA) affirm its decision to allow the transfer of 2319 Wyoming Avenue, N.W. from the Kingdom of Jordan to the Republic of Yemen, in the absence of the approval of the Foreign Mission Board of Zoning Adjustment (FMBZA). The Foreign Missions Act, 22 USCS § 4306(h) (2) (2003), codified at D.C. Official Code § 6-1306(h) (2) (2001 ed), allows the transfer of chancery by a foreign mission to another foreign mission without the need for a FMBZA review.

Background.

The subject property is located at 2319 Wyoming Avenue, Washington, D.C. The Royal Hashemite Kingdom of Jordan took possession of the property on December 2, 1958 and

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has occupied it continuously as t as an embassy and a chancery.[1]/ The property is located in an R-1-B District.

The Republic of Yemen purchased the property from Jordan in 2001 to use the facility as a chancery and embassy. To that end, Yemen applied for, and obtained building permits from DCRA to perform renovations in October 2002. A building permit was issued for interior work described as "interior renovation of walls, door, ceiling and floors," on January 3, 2003. Permit No. B425900. Another permit was issued for exterior work (alteration and repair) - - of an existing retaining wall on the same day. Permit No. B448001. Both permits obtained approval from the historic preservation unit, however, separate permits were required for additional work on electrical, plumbing or mechanical installation.

Appellant, neighbors in the Sheridan Kalorama Council opposed the issuance of the building permits contending the transfer of embassies required review and approval by the Foreign Missions Board of Zoning Adjustment. Further, they argue the District of Columbia zoning regulations govern the chancery transfer issue rather than the Foreign Missions Act. On several occasions the applicant contacted DCRA to express their opposition to the transfer. Following a letter submitted to Denzil Noble, Administrator for the DCRA's Building and Land Administration, the then General Counsel for the agency responded to the neighbors' objections in a letter dated June 12, 2003. This appeal is taken from that letter.

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[1]/ The embassy is located at Square 2522, Lots 4 & 5.

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Discussion.

The issue before the Board is whether the transfer of the use of a foreign mission to another foreign mission requires review by the Foreign Missions Board of Zoning Adjustment. DCRA interprets the Act to allow the transfer of properties if the 'use' is the same and both parties are accredited foreign missions since 1982.

The Foreign Missions Act, 22 USCS § 4301 (2003), *et seq.*, codified at D.C. Official Code § 6-1301 (2001 ed), *et seq.* governs the procedure by which chanceries are permitted to locate, expand or be replaced in the District of Columbia. Specifically, the statute provides that:

> (h) Approval by the Board of Zoning Adjustment or the Zoning Commission, except as provided in 6-1305, by other agency or official is not required:
>
> * * *
>
> (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.

Id., Sec. 6-1306(h) (2) (2001 *ed.*)(Emphasis added).

Although both terms are used, a chancery has a broader meaning and embraces the definition of 'foreign mission.'[2]/

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[2]/ The Foreign Missions Act (FMA) defines a "chancery" as 'The principal office of a foreign mission used for diplomatic or related purposes, and annexes to such offices (including ancillary offices and support facilities), and includes the site and any building on such site which is used for that purpose.' 22 USCA § 4302(a) (2) (2003); D.C. Official Code § 6-1302(2) (2001).

A "foreign mission" is defined as 'Any mission to or agency or entity in the United States which involved in the diplomatic, consular, or other activities of, which is substantially owned or effectively controlled by - - (a) a foreign government, of (b) an organization (other than an internal organization, as defined in section 2034(b) of this title) representing a territory or political entity which as been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of the internal affairs of such territory or political entity'. 22 USCA § 4302(a) (4) (2003); D.C. Official Code § 6-1302(4) (2001 *ed*).

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In this matter, no party disputes the status of the buyer and seller of 2319 Wyoming Avenue, N.W. - - both are chanceries with foreign missions. Indeed, no party suggested the proposed use of the property will change with ownership. The use of the subject property as a chancery has continued since 1958. These pertinent facts support DCRA's interpretation that the statute did not require the need for Board review.

1. *Appellants' contentions create an unreasonable result.*

Appellants, however, urge a different result. Relying upon the zoning regulations, they argue the use of the chancery as a matter of right in an R-1 District is limited to chanceries that existed on September 22, 1978 with continued use of the chancery since February 23, 1990. 11 DCMR § 201.1(m) (1) (2003). This interpretation would restrict all transfers of chanceries requiring Board approval for new owners. Moreover, it suggests a more restrictive interpretation than contemplated by the Council when it passed the FMA.

A better result would be the interpretation of local regulations in conjunction with the applicable statute as well federal law to reach a consistent legal interpretation. Generally, a state statute will be found void, if it actually conflicts with a valid federal statute; such that compliance with both is a physical impossibility. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). Such a result is present here if the appellants' reliance upon the local regulations to the exclusion of the statute is upheld.

FMA indicates that where the transfer from "a" foreign mission, not "the" foreign mission to another foreign mission occurs no additional review is necessary. The zoning regulations appear to place additional restrictions on that language by limiting the use of

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the premises to the same foreign mission. It appears once a new owner/mission obtains the property; the Board must review the use. The basis for that additional restriction stems from the zoning commission's concern over density in residential reasons as expressed in the legislative history (attached to appellant's submission). As appellant noted in their statement, Zoning Commission Order 509-A, Case No. 84-7 (Dec. 11, 1989 & Feb. 12, 1990) centers on "outlier" chanceries or chanceries outside the areas designated by the Act. In this instance, the very result of the appellant's position would be a change of a chancery use that is not an "outlier".

Appellant's contention is also flawed in another way. An embassy can transfer ownership as a matter of right. 201.1(j)[3]/. A chancery and embassy/residence then could change ownership as a matter of right without any FMBZA approval. An official residence could include office space/use in the same location. The regulations are murky at best on these matters but a fair legal interpretation rests with the statute.

2. *Practice of BLRA regarding chancery transfers.*

As noted by the United States Department of State (State), the BLRA has continually interpreted FMA to allow chancery transfers without BZA approval where the use was the same on the same site. While the Zoning Administrator position remains unfilled, officials in that department recall several instances which exemplify that practice. To the extent the local regulations appear inconsistent with FMA, the statute is

[3] / It is helpful to note that the definition of "embassy" consists of the official residence of the ambassador or other chief of a diplomatic mission, or that portion of a combined chancery/embassy devoted to use as such official residence. 11 DCMR 199.1 (2003)

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followed.[4]/ In general, the BLRA adopts the declaration of Richard Massey at State and its recitation of the historical data regarding transfers of chanceries and FMBZA review.

For these reasons, DCRA urges the Board to adopt its interpretation of FMA and affirm its decision to allow the transfer.

Respectfully submitted:

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Certificate of Service

Appellant, counsel for Sheridan Kalorama Council, Richard Nettler and Intervenor, U.S. Department of State, were served through electronic transmission on February 6, 2004.

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[4]/ In oral argument, the appellant suggested the Zoning Administrator must adhere to the zoning regulations. The enabling statute for the ZA position indicates he/she must adhere to all applicable laws and regulations.

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