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February 10, 2004

BY HAND

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

Re: **BZA Appeal No. 17086** of the Sheridan Kalorama Neighborhood Council Regarding
2319 Wyoming Avenue -- Square 2522, Lot 4
Our File No. 092220.00001

Dear Mr. Griffis:

Attached for filing you will find the original and twenty (20) copies of the Response of the Sheridan Kalorama Neighborhood Council to the Amended Memorandum of Points and Authorities Submitted by the Office of Foreign Missions United States Department of State and the Prehearing Statement of the Department of Consumer and Regulatory Affairs.

Thank you for your attention to this matter.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad

cc: Christopher Chapin
Douglas LaBossiere
Office of Planning (by hand)
Zoning Administrator (by hand)
Advisory Neighborhood Commission 2D (by hand)
Ronald Mlotek, Office of Foreign Missions, U.S. State Department (by email)
Karen Edwards, Office of General Counsel, DCRA (by email)

BZA
Case No. 17086
Exhibit No. 23

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 23

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Sheridan Kalorama Neighborhood Council BZA Appeal No. 17086

RESPONSE OF APPELLANT TO

THE MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED BY THE OFFICE OF FOREIGN MISSIONS UNITED STATES DEPARTMENT OF STATE

AND

THE PREHEARING STATEMENT OF THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

In response to the Memorandum of Points and Authorities submitted by Intervener, the Office of Foreign Missions, United States Department of State ("State Department"), as well as the Prehearing Statement of Intervenor, the Department of Consumer and Regulatory Affairs ("DCRA"), the Sheridan Kalorama Neighborhood Council ("SKNC") submits the following:

First, both the State Department and DCRA's interpretation of the Foreign Missions Act (the "Act") is simply incorrect. That is, there is nothing in the specific terms of the Act which allows *any* foreign mission to continue the use of a chancery but, rather, only allows the foreign missions that existed at the chancery as of October 1, 1982, to continue the use of the chancery. Put another way, it is the particular foreign mission's use which is grandfathered, not the use of a property as a chancery itself. Contrary to the contention of the State Department, the legislative history on the Foreign Missions Act is very clear on this point and it supports SKNC's position in this appeal.

Second, just because the State Department has taken the position in some circumstances that the use of a chancery site is to be grandfathered, and not just the specific chancery, doesn't make it

so. Likewise, the approval of the various Zoning Administrators of the transfers of chanceries from one foreign mission to another doesn't validate this point of view. Instead, it merely illustrates that the Zoning Administrator has, on occasion, misinterpreted the Act and the corresponding zoning regulations, and that the State Department has, also, on occasion, permitted actions in violation of the law.

Third, the nondiscrimination provision of the Act [1] relied upon by the State Department does not apply to this situation. The nondiscrimination provision merely applies in circumstances where the chancery or foreign mission is seeking similar application of specific regulations that would otherwise apply to it, such as area requirements. To the extent Chanceries are treated as nonconforming uses, both the Act and the regulations adopted by the Zoning Commission provide specific criteria for dealing with their use and location, just as the zoning regulations provide alternative ways of dealing with other types of nonconforming uses that rely on unique

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[1] That provision, as set forth in section 4306(b)(3) states as follows:

> (3) In each of the areas described in paragraphs (1) and (2), the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area.

Paragraphs (1) and (2) provide that:

> (1) A chancery shall be permitted to locate as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR).
>
> (2) A chancery shall also be permitted to locate -
>
> > (A) in any area which is zoned medium-high or high density residential, and
> >
> > (B) in any other area, determined on the basis of existing uses, which includes office or institutional uses, including but not limited to any area zoned mixed-use diplomatic or special purpose, subject to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with this section.

circumstances. And, even if the nonconforming provisions of the zoning regulations where to be applied here (*see* § 201.1(m)(5) of 11 DCMR), they would not provide any basis for a claim of discrimination, since they would preclude the transfer to Yemen. As with any other change in nonconforming uses in residential districts, the change must be to either a matter of right use or a community oriented use. *See* 11 DCMR § 2003.5. A chancery fits neither of these descriptions. So, it is not being treated any differently than a nonconforming office or institutional use in a low to moderate density residential zone.

Finally, as concluded at the initial hearing on this appeal, this Board does have jurisdiction of the instant appeal and, contrary to the State Department's assertions, there is no recourse for private citizens to appeal decisions of the Zoning Administrator to the Foreign Missions Board of Zoning Adjustment ("FM-BZA"), since non-chancery parties are not permitted in FM-BZA matters, which are rulemaking procedures, and neither the Act nor the regulations provide for non-chancery appeals to the FMBZA.

As to DCRA's contentions, DCRA clearly misses the point of this appeal and the arguments expressed both in writing and at the January 13, 2004 hearing on the appeal by the appellant. Specifically, it is not the Appellant's contention that the zoning regulations, rather than the Act, govern the transfer of the Jordanian chancery to the Yemen government. Rather, it is the Appellants position, as supported by the plain language of the Act and the zoning regulations, that this transfer violates BOTH the Act and the zoning regulations. Both the State Department and DCRA conveniently ignore the fact that Congress gave the Zoning Commission the explicit authority to adopt regulations to implement the Foreign Missions Act and that those regulations are what apply, not the notion of what those regulations should have been by DCRA and the State Department.

DCRA has no authority to ignore the application of the Zoning Commission's regulations, nor does it have any responsibility for interpreting the Act. Interpretation of the Act is solely within the purview of the Zoning Commission, the FMBZA and this Board.

ARGUMENT

I. RESPONSE TO THE STATE DEPARTMENT'S MEMORANDUM.

A. The Transfer of a Chancery from one Foreign Mission to Another Requires Approval of the FM-BZA.

1. The Language of the Act.

Section 4306(h)(2) of the Act, relied upon by the State Department in arguing that it is the chancery use, irrespective of the user, that is grandfathers states that:

> Approval by the Board of Zoning Adjustment or the Zoning Commission or, except as provided in section 4305 of this title, by any 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.

Contrary to the State Department's argument, the use of a property as a chancery is not grandfathered. Rather, by the plain language of the Act, it is the use of a property by a specific foreign government that is grandfathered – the foreign government that existed at the property at the time of the adoption of the Act. Nowhere in the Act does it state that *any* foreign mission may continue the use of a chancery existing as of October 1, 1982, as distinct from the foreign mission in existence as of October 1, 1982. This clear reading of section 4306(h)(2) is not redundant with

section 4306(h)(1),[2] as that section merely allowed a chancery, that had been approved at the time of the adoption of the Act but whose occupation, replacement or expansion has not taken place, to go forward. Nor does the Act state in any provision, as alleged by the State Department, 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." State Department Memorandum at p. 1.

To shed clarity on the confusion created by the State Department regarding the applicability of the grandfather provision of the Act, it is important to keep in mind that at the time the Act was adopted, there already existed a Diplomatic Overlay. Recognizing this, the Act, in addition to spelling out the criteria that new chanceries would be subjected to (*see* 22 USC § 4306(d)(1) -- (6) and 11 DCMR),[3] sought to protect existing governments occupying chanceries in underlying zones

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[2] Section 4306(h)(1) provides that review is not necessary:

> (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.

[3] Section 4306(d), which sets out the criteria for chanceries seeking to locate in non-matter of right zone districts provides that:

> Any determination concerning the location of a chancery under subsection (b)(2) of this section, or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, shall be based solely on the following criteria:
>
> (1) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.
>
> (2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.

that did not allow chanceries as a matter of right, whether such chanceries were in the Diplomatic Overlay or not. That is, the grandfathering provision was meant to preclude a foreign government of an existing chancery from having to go before the FM-BZA to prove that it satisfied the criteria set forth in sections 4306(d). In setting up the dichotomy that we have elucidated, Congress was merely adopting the portions of the Foreign Missions Element of the Comprehensive Plan previously adopted by NCPC and which are part of the Legislative History. *See House Hearings at pp* __-___.

a. The Structure of the Act Makes it Clear that Any Government Seeking to Locate a Chancery in the Diplomatic Overlay is Subject to Review of the FM-BZA.

The structure and progression of the relevant provisions of the Act makes it clear that the grandfathering provision of section 4306(h) only applies to the governments of existing chanceries and not to governments seeking to take over a chancery. *See* 2A Sutherland Statutory Construction § 47:01 (2000 rev. 6th ed.)(stating that "the starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.") That is, the starting point of the Act, as set forth in section 4306(b), is that ***all***

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(3) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking requirements, subject to such special security requirements as may be determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(4) The extent to which the area is capable of being adequately protected, as determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(5) The municipal interest, as determined by the Mayor of the District of Columbia.

(6) The Federal interest, as determined by the Secretary.

These criteria were incorporated into the zoning regulations by the Zoning Commission at 11 DCMR §§ 1001.1 through 1001.8.

governments seeking to locate their chancery in a non-matter of right zone district – whether it be in the Diplomatic Overlay, high density residential zone districts or special purpose zone districts - are subject to the Act and, therefore, the zoning regulations adopted in accordance with the Act. Specifically, section 4306(d) provides that:

> ***Any*** determination concerning the location of a chancery under subsection (b)(2) of this section, or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, *shall be* based solely on the following criteria . . .

(Emphasis added). Once again, subsection (b)(2) applies to a chancery locating in, *inter alia*, the Diplomatic Overlay and specifically provides that such location of a chancery shall be "subject to disapproval by the [FM-BZA]." Clearly, had Congress intended the grandfathering provision of subsection 4306(h) to apply to ***any*** foreign mission, as asserted by the State Department, it would have used the word "any", as it did in section 4306(d). This distinction in the use of terms by Congress was not accidental but, rather, reinforces Congress's position that the location of all chanceries must be reviewed by the FM-BZA.

The fact, in the present situation, is that even if though the chancery in question is in a diplomatic zone, the chancery has to comply with the six criteria of section 4306(d). There is no exemption in the Act for a chancery seeking to locate in such a zone from seeking the application of the six criteria. That is, the Act does not say that only chanceries which seek to locate at sites in diplomatic zones not previously used by chanceries must apply to the FMBZA. It applies to all chanceries seeking to locate in the overlay. The legislative history, as outlined below, supports this interpretation.

b. The Zoning Regulations, Adopted to Implement the Act, Reinforce the Clear Intention of the Act that Only the Governments Occupying Existing Chanceries Were Exempt from Review of the FM-BZA.

In addition to the clear language of the Act, a review of the zoning regulations adopted to implement the Act reinforces the interpretation that the grandfathering provision of the Act only applies to the governments occupying existing chanceries. Furthermore, the zoning regulations adopted to address the different circumstances (*ie.*, matter of right, Diplomatic Overlay, or existing) and the corresponding processes that a foreign government wishing to locate its chancery in the District may face provides further clarity that the zoning regulations are, indeed, consistent with the Act.

First, there are the zone districts in which a chancery is allowed as a matter of right. These zone districts include commercial, industrial, waterfront, or mixed-use (CR) zone districts. 22 USC §4306(b)(1), *accord.*, 11 DCMR §§ 601.1(r)(allowing a chancery, embassy or international organization to locate in the mixed use (CR) zone districts as a matter of right), 701.6(e), 721.1, 741.1, 751.2(a), 761.1 and 801.2 (allowing a chancery to locate in the C-1, C-2, C-3, C-4, C-5(PAD) and the industrial (C-M) zone districts, respectively, as a matter of right). To locate in any one of these zone districts, a chancery does not have to obtain any approvals or satisfy the criteria of section 4306(d).

Second, there are the zone districts in which chanceries are permitted to locate, subject to the disapproval of the FM-BZA based on the criteria of 4306(d). *See* 22 USC § 4306(b)(2). This provision is broken down into two distinguished areas:

(A) areas which is zoned medium-high or high density residential; and

(B) in any other area, determined on the basis of existing uses, which includes office or institutional uses, including but not limited to any area zoned mixed-use[,] diplomatic or special purpose.

22 USC § 4306(b)(2)(A)&(B) *accord.* 11 DCMR §§ 1000.6 (providing that the "criteria and procedures set forth in this chapter [pertaining to the Diplomatic Overlay] shall also apply to chancery uses in R-5-D, R-5-E and SP districts."); *see also* 11 DCMR §§ 350.6, 503.1 (providing that "a chancery shall be a permitted use in R-5-D or R-5-E [or SP] districts [respectively], subject to disapproval by the Board of Zoning Adjustment in accordance with the requirements of chapter 10 of this title") and 501.3 (providing that "general office use, including chancery, shall be permitted in an SP District as a replacement for office use for international organization, non-profit organization, labor union, architect, dentist, doctor, engineer, lawyer, or similar professional person existing and approved by the Board of Zoning Adjustment or the Zoning Commission or authorized by a validly issued certificate of occupancy prior to January 29, 1999"). Thus, for chanceries seeking to locate in the high density residential neighborhoods (R-5-D or R-5-E), special purpose zone districts, or in the Diplomatic Overlay, they are subject to the disapproval of the FM-BZA and must satisfy the criteria of section 4306(d).

Third, there are foreign governments with existing chanceries, or foreign governments that had obtained the rights to locate their chancery, prior to the adoption of the Act (*ie.*, prior to October 1, 1982). It is for these two (2) circumstances that section 4306(h) was adopted. This section applies both to chanceries within the Diplomatic Overlay, as well as those outside the overlay, which are often referred to as "outlier chanceries" – or chanceries in non-Diplomatic, low density residential

zone districts. As stated above, there was a recognized need to protect governments of these existing chanceries from being subjected to the criteria set forth in section 4306(d) of the Act. Section 4306(h), therefore, grandfathers the chanceries of such governments. As set forth above, all other governments seeking to locate their chanceries in the Diplomatic Overlay (or the R-5-D, R-5-E or SP zone districts) are subject to disapproval of the FM-BZA.

2. The Zoning Commission, Not the State Department or DCRA, is Charged with Interpreting and Implementing Section 4306 *et seq.* of the Act.

As set forth above, it is the Zoning Commission to which Congress delegated the task of implementing section 4306 of the Act, including the adoption of regulations to carry out that section, not the State Department or, for that matter, DCRA. It is not the State Department's duty to implement section 4306 but, rather, the State Department's authority, with regard to the transfer of chancery property in the District of Columbia, is limited to the duties set forth in section 4305.[4] The

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[4] Section 4305 provides, in relevant part:

> (a) Proposed acquisition, sale, or other disposition
>
> (1) The Secretary shall require ***any*** foreign mission, including any mission to an international organization (as defined in section 4309(b)(2) of this title), to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action -
>
> (A) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and
>
> (B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval.

State Department attempts to overcome this delegation of duties by asserting its interpretation of the Act to the Board and relying on *American Bus. Ass'n v. Secretary of Transportation*, 231 F.2d 1 (D.C. Cir. 2000). However, this argument is nothing more than an attempt to confuse the issues and

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> (2) For purposes of this section, "acquisition" includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.
>
> (b) Divesture. The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary -
>
> (1) not to have been acquired in accordance with this section;
>
> (2) to exceed limitations placed on real property available to a United States mission in the sending State; or
>
> (3) where otherwise necessary to protect the interests of the United States.

(Emphasis added.) Additionally, the State Department's duties, as set forth in section 4303 of the Act, are related to foreign missions:

> The Secretary shall carry out the following functions:
>
> (1) Assist agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a *foreign mission* may be entitled.
>
> (2) Provide or assist in the provision of benefits for or on behalf of a *foreign mission* in accordance with section 4304 of this title.
>
> (3) As determined by the Secretary, dispose of property acquired in carrying out the purposes of this chapter.
>
> (4) As determined by the Secretary, designate an office within the Department of State to carry out the purposes of this chapter. [1] If such an office is established, the President may appoint, by and with the advice and consent of the Senate, a Director, with the rank of ambassador. Of the Director and the next most senior person in the office, one should be an individual who has served in the Foreign Service and the other should be an individual who has served in the United States intelligence community.
>
> (5) Perform such other functions as the Secretary may determine necessary in furtherance of the policy of this chapter.

distract the Board's attention from the statutory structure, as provided by Congress, and the zoning regulations adopted by and interpretations of the Zoning Commission.

What was at issue in *American Bus. Ass'n* was whether the Department of Transportation ("DOT"), to which authority of implementation had be granted in the American with Disabilities Act ("ADA"), had authority to adopt a rule imposing a remedy not set forth in the ADA. The relevant provision of the ADA stated that "the remedies and procedures set forth in section 2000a-39a) of this title are *the remedies and procedures* this subchapter provides . . ." *Id.* 231 F.3d at 4. The court concluded that the use of the word "the" limited the remedies to those set forth in the subchapter, noting that, had Congress "intended those remedies not to be exclusive, it would have provided that the relief available to an ADA plaintiff '*includes*' the 2000a-3(a) remedies." *Id* at 5. However, what the State Department omits from this decision is that in getting to this point, the Court noted, as to statutory interpretation that:

> 'First always,' the reviewing Court must consider "whether Congress has directly spoken to the precise question at issue." An affirmative answer 'is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If, on the other hand, 'the statute is silent or ambiguous with respect to the specific issue,' the court must uphold 'a reasonable interpretation made by the administrator of an agency.'

Id. at 4 (citations omitted). In the instant case, as set forth above, Congress has spoken on the issue as to whom the grandfathering provision applies. Specifically, the plain language of the Act makes it clear that the grandfather provision of section 4306(h) only applies to the existing governments occupying a foreign mission, not to the chancery use itself. To the extent that the Board determines the language of the Act is not clear, it must then look to the Zoning Commission's interpretation of

the Act (which, incidentally, DCRA is charged with executing), as set forth in the zoning regulations.

Three sections of the zoning regulations are illustrative of the fact that a foreign mission seeking to locate in a Diplomatic Overlay is subject to the criteria of section 4306(d) of the act are:

> **1000.6** The criteria and procedures set forth in this chapter *shall* also apply to chancery uses in R-5-D, R-5-E and SP districts.
>
> **1001.1** A chancery shall be a permitted use in a Mixed Use Diplomatic (D) district, subject to disapproval by the Board of Zoning Adjustment (the "Board"), based on the criteria set forth in this section.
>
> **1002.1** To locate, replace or expand a chancery in R-5-D, R-5-E, SP, or D districts, or to reconstruct an existing chancery that is destroyed in an R-1, R-2, R-3, R-4, R-5-A, R-5-B or R-5-C district, application shall be made to the Board of Zoning Adjustment.

Again, these provisions, as with the Act, do not say that the provisions do not apply to a foreign mission seeking to locate a chancery in a property previously used by another foreign mission as its chancery. Rather, they require that the location of a chancery, without exception, be subject to review by the FM-BZA. Or, in accordance with section 1002.1 of the zoning regulations, the *replacement* of a chancery (for example, the replacement of the chancery of the government of Jordan with the chancery of the government of Yemen) to be subject to review by the FM-BZA. What is not subject to review is foreign governments of existing chanceries. *See* 11 DCMR § 201.1(m)(1).

The confusion of the State Department's proposed "the" versus "a or an" dichotomy is gleaned by applying this dichotomy to the whole of section 4306. *See, e.g.,* 22 USC §§ 4306(b)(1)&(2), (c)(1)("If *a* foreign mission wishes to locate *a* chancery in *an* area described in

subjection (b)(2) . . .").[5] The literal interpretation proposed by the State Department of the word "the" versus "a" or "an" would be inconsistent with the intent of the Act and leads to absurd and far-reaching results – exempting uses which are otherwise clearly subject to review under the Act -- and, as such, cannot be given such strict application. *See* 2A Sutherland Statutory Construction at § 46:07. Moreover, it is clear from section 4306(d) of the Act that Congress didn't intend section 4306(h) of the Act to apply to *any* foreign mission, as proposed by the State Department. *See* argument above in section I.A.1(a) at pp. 6-7.

3. The Legislative History of the Act Supports the Appellant's Position that the Transfer of a Chancery from One Government to Another Requires Approval of the FM-BZA.

The State Department is erroneous in asserting that the legislative history of the Act sheds no light on this matter. Instead, the legislative history makes it clear that the grandfather clause only applies to the existing government occupying a chancery. Given the outline of the Act provided above, this is also the only interpretation that makes any sense.

In the House Conference Report No. 97-693 on the Foreign Missions Act, at p. 704, the Conference makes it clear that section 206(h) (codified as 22 USC § 4306(h)) is merely a grandfather provision for the foreign mission which occupied an existing site and nothing more, "so that such issues [as to its particular location and use] need not be reopened." The Senate Report No. 97-329 states that the provision (section 206.1 in the Senate Bill) was "necessary to protect rights and uses which were acquired prior to enactment of this section." It was never viewed as a provision that provided future chanceries (or uses of a site by different foreign missions) with the opportunity to

5 This listing is not intended to be all inclusive and, for the Board's convenience, a copy of sections 4303, 4305 and 4306 of the Act are attached hereto.

ignore the application of the criteria adopted under section 206(b)(1). Thus, when the Zoning Commission adopted regulations to govern the application of the Foreign Missions Act, it correctly limited the application of the provision to only existing chanceries and the governments which occupied them and, as with other grandfathering rules in zoning, required new users to seek relief from the Board under the criteria or to preclude the location of a new chancery to the site where the site did not meet the institutional use requirements.

The provision reflected a policy adopted by NCPC in 1979 as part of the Foreign Missions and International Agencies Element of the Comprehensive Plan for the Nations Capital. The provision (section 313.63) provided that existing chanceries may be retained but, under 313.62, new chanceries had to meet the criteria established elsewhere in the Plan.

4. Section 201.1(m) of the Zoning Regulations.

To the extent that the State Department says that section 201.1(m) of the zoning regulations, whether it applies or not, cannot be contrary to the Act is simply a misstatement of the what the Act says and the Zoning Commissions' specific rejection of the State Department's position on this when it adopted this provision. The Zoning Commission, with review and comment by the National Capital Planning Commission, was charged with the adoption of regulations consistent with the Act. 22 U.S.C. § 4306(e)(2).[6] Accordingly, chapter 11 of the zoning regulations, as well as section 3134, was adopted by the Zoning Commission. Subsequently, in 1990, the Zoning Commission adopted

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[6] Section 4306(e)(2) provides that:

> Proposed actions of the Zoning Commission concerning implementation of this section shall be referred to the National Capital Planning Commission for review and comment.

See also, Revised Statement of the Applicant at pp. 4-6 regarding the authority of the Zoning Commission over chancery cases.

section 201.1(m), making it clear that, in low density residential districts, the Act is intended only to apply to a foreign mission in occupancy at the time of the adoption of that provision. Specifically, section 201.1(m)(1) states:

> Chancery existing on September 22, 1978; provided, that the following requirements shall be met:
>
> (1) After February 23, 1990, *the continued use of the chancery* ***shall be limited to the government that lawfully occupied the chancery on that date;***

11 DCMR §201.1(m) (emphasis added). This section is consistent with the Act, as illustrated by the legislative history of the Act and constitutes the Zoning Commission's explicit interpretation of the section of the Act relied upon by the State Department and DCRA.

B. Neither the State Department's nor DCRA's Interpretation of the Act, to the Extent they are Incorrect, Control the Meaning of the Act or the Corresponding Regulations.

Contrary to the fact that the Zoning Commission was charged with adopting regulations to implement and interpret the Act, the State Department contends that it is its interpretation, as well as the interpretation of the Zoning Administrator for the Building and Land Regulations Administration of DCRA, which controls the meaning of the Act. As set forth above, the Zoning Commission, and not the State Department, was given the duty of implementing section 4306 of the Act. The Zoning Administrator has no authority to interpret the Act but, rather, must execute the zoning regulations, which it has chosen to ignore.

Even if the State Department or the Zoning Administrator were authorized to implement section 4306 of the Act, to the extent that the State Department and the Zoning Administrator have approved transfers of the use of a chancery from one foreign mission to another without referral to

the FM-BZA, such transfers were in violation of the Act. Clearly, these transfers were contrary to the provisions of the zoning regulations regarding chanceries. Specifically, the transfer in question violates, section 1001.1 of the zoning regulations, which requires the location or replacement of a chancery in the Diplomatic Overlay to be subject to review by the FM-BZA. The mere fact that these previous transfers were not appealed does not sanctify the continued illegal transfer of chanceries. Nor do these prior transfers constitute compelling reason for the Board to ignore the clear language of the Act and regulations to the contrary or to adopt the State Department's misinterpretation of the Act in disregard of the legislative history of the Act.

C. The Act Carves Out Special Treatment for Chanceries and, Therefore, the Nondiscrimination Provision of the Act Does Not Apply to the Transfer of Chanceries.

The Act carves out special treatment for chanceries, which special treatment has been incorporated into the zoning regulations. Most notably, applications for chanceries are considered as rulemaking procedures and, as such, no person may have standing as party. 22 U.S.C. §4306(f); 11 DCMR §§ 3134.2 & 3134.3. Moreover, the nondiscrimination clause, by its very terms, does not grant chanceries exceptional relief that exceeds those applicable to other office or institutional uses. 22 U.S.C. § 4306(b)(3).

As set forth above, sections 1000.6, 1001.1 and 1002.1 of the zoning regulations require the review of the FM-BZA for the location (or replacement) of chanceries in the Diplomatic Overlay, as well as in the R-5-D, R-5-E and SP zone districts. Furthermore, in accordance with section 1002.1, reconstruction of "an existing chancery that is destroyed in an R-1, R-2, R-3, R-4, R-5-A, R-5-B or R-5-C district" requires review of the FMBZA. There is no distinction given to properties that have been used as a chancery for a different foreign government. Thus, chapter 20 of the zoning

regulations does not apply to the transfer of a property for chancery use from one foreign mission to another. *See also*, 11 DCMR §§ 201.1(m)(1)(restricting the continued use of a property as a chancery to the foreign mission that existed as of February 23, 1990) and 201.1(m)(providing that the reconstruction of a chancery destroyed by fire ,etc., shall not be subject to the requirements of chapter 20). Even if chapter 20 applied, it would not allow the transfer of a property for chancery use from one government to another, as section 2003.5 provides that if a nonconforming use in a residential district is changed, it must be changed to "either a dwelling, flat, apartment house, or a neighborhood facility." 11 DCMR § 2003.5. Clearly, a chancery does not fit these descriptions.

D. The Board Correctly Decided it Has Jurisdiction Over this Appeal.

The State Department provides a very artful argument on why the FM-BZA has jurisdiction over this appeal. However, despite its eloquent citation of cases on the jurisdiction of the FM-BZA, the State Department fails to note that (1) the zoning regulations expressly limit the appeal (whether by appeal or application) to the FM-BZA to foreign missions, (2) the procedures before the FM-BZA do not allow for party status for individual citizens and (3) the cases cited by the State Department all involved a foreign government's attempt to invoke the jurisdiction of the Board.

The language of the zoning regulations pertaining to the jurisdiction of the FM-BZA is patently clear. It is limited to the "location, replacement or expansion of chanceries" upon application by a chancery or foreign mission. 11 DCMR § 3134.1. In matters before the FM-BZA, "no person shall have the standing of a party in a proceeding under this section." 11 DCMR § 3134.3. It is axiomatic that an individual citizen, who would have no party status under the rulemaking procedures of the Act or section 3134 *et seq.* of the zoning regulations, would have no authority to file an appeal with the FM-BZA. Clearly, the State Department would intervene if this

appeal were transferred to the FM-BZA and, subsequently, move to dismiss the appeal on the grounds of section 3134.3; thus depriving the Appellant of any means of recourse.

Just as the State Department's reliance on the zoning regulations and the Act is misplaced in arguing that the Board has no jurisdiction over this appeal, it's reliance on the cases cited in its brief is equally misplaced. Those cases cited by the State Department merely stand for the position that a foreign government does not have the authority to apply to the Board and that a foreign government's only recourse is to the FM-BZA. It is a very large leap of interpretation to say that such holdings preclude a private citizen from applying to the Board when a foreign mission is involved, especially in light of the fact that private citizens have no recourse before the FM-BZA.

Moreover, what has been appealed in this matter is the Zoning Administrator's failure to refer the transfer of the former Jordanian chancery to the Yemen government to the FM-BZA. If this Board agrees, then the Yemen government will be compelled to file an application with the FM-BZA and its application to locate its chancery at the property in question will be heard as a rule making procedure, as contemplated by the Act. Thus, this appeal does not violate the principal that all matters pertaining to the location of a foreign mission be heard by the FM-BZA.

II. DCRA'S PREHEARING STATEMENT.

DCRA, for the large part, offers the same arguments as set forth in the State Department's memorandum and, therefore, for the reasons stated above, fails.

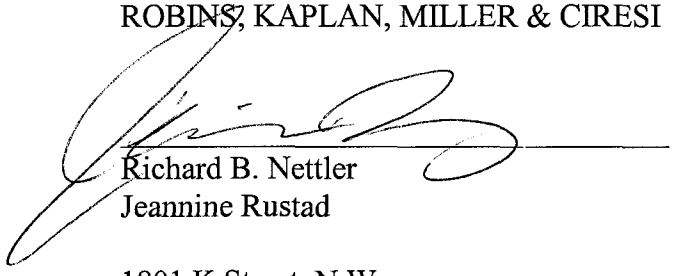
DCRA also attempts to justify the transfer of a chancery from one government to another by pointing out that an embassy – the "official residence of an ambassador" (11 DCMR § 199.1) – may be transferred as a matter of right in a residential district pursuant to section 201(j) of the zoning regulations. DCRA Brief at p. 5. Relying on this provision, DCRA stretches to say that a combined chancery/embassy use of a property could be transferred and implies that chancery uses, alone, can be transferred. However, this argument is completely nonsensical, as it ignores the obvious – residential use (*e.g.* embassy use) is permitted as a matter of right in a low density residential district! Clearly, then, an embassy may be transferred from one foreign government to another without review. Similarly, an embassy may be transferred from a foreign government to a private citizen, or from a private citizen to a foreign government for embassy use. To the extent a chancery and embassy were located on the same property, the transfer of the chancery use would require review by the FM-BZA. It is not so difficult to understand this concept as DCRA would have the Board believe. Nor is this concept contrary to the Act.

Conclusion

The State Department and DCRA's arguments fail on many counts. They ignore the clear meaning of the Act, as well as the zoning regulations and, in some instances, ignore the zoning regulations. The State Department and DCRA attempt to usurp the Zoning Commission's obligation under the Act to implement the Act through the adoption of regulations by arguing that there erroneous interpretation and application of the Act govern over the plain meaning of the Act. Finally, the State Department attempts to deprive the Appellant of its one venue to challenge the erroneous transfer of the chancery in question from the Jordanian government to the Yemen government.

Respectfully submitted,

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Sec. 4303. - Authorities of Secretary of State

The Secretary shall carry out the following functions:

(1)

Assist agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a foreign mission may be entitled.

(2)

Provide or assist in the provision of benefits for or on behalf of a foreign mission in accordance with section 4304 of this title.

(3)

As determined by the Secretary, dispose of property acquired in carrying out the purposes of this chapter. (FOOTNOTE 1)

(4)

As determined by the Secretary, designate an office within the Department of State to carry out the purposes of this chapter. [1] If such an office is established, the President may appoint, by and with the advice and consent of the Senate, a Director, with the rank of ambassador. Of the Director and the next most senior person in the office, one should be an individual who has served in the Foreign Service and the other should be an individual who has served in the United States intelligence community.

(5)

Perform such other functions as the Secretary may determine necessary in furtherance of the policy of this chapter

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[1] See References in Text note below.

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Sec. 4305. - Property of foreign missions

(a) Proposed acquisition, sale, or other disposition

(1)

The Secretary shall require any foreign mission, including any mission to an international organization (as defined in section 4309(b)(2) of this title), to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action -

(A)

only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and

(B)

only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval.

(2)

For purposes of this section, "acquisition" includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

(b) Divesture

The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary -

(1)

not to have been acquired in accordance with this section;

(2)

to exceed limitations placed on real property available to a United States mission in the sending State; or

(3)

where otherwise necessary to protect the interests of the United States.

(c) Cessation of diplomatic, consular, and other governmental activities in United States; protecting power or other agent; disposition of property

If a foreign mission has ceased conducting diplomatic, consular, and other governmental activities in the United States and has not designated a protecting power or other agent approved by the Secretary to be responsible for the property of that foreign mission, the Secretary -

(1)

until the designation of a protecting power or other agent approved by the Secretary, may protect and preserve any property of that foreign mission; and

(2)

may dispose of such property at such time as the Secretary may determine after the expiration of the one-year period beginning on the date that the foreign mission ceased those activities, and may remit to the sending State the net proceeds from such disposition.

(d) Protection from future hostile intelligence activities in United States

(1)

After December 22, 1987, real property in the United States may not be acquired (by sale, lease, or other means) by or on behalf of the foreign mission of a foreign country described in paragraph (4) if, in the judgment of the Secretary of Defense (after consultation with the Secretary of State), the acquisition of that property might

substantially improve the capability of that country to intercept communications involving United States Government diplomatic, military, or intelligence matters.

(2)

After December 22, 1987, real property in the United States may not be acquired (by sale, lease, or other means) by or on behalf of the foreign mission of a foreign country described in paragraph (4) if, in the judgment of the Director of the Federal Bureau of Investigation (after consultation with the Secretary of State), the acquisition of that property might substantially improve the capability of that country to engage in intelligence activities directed against the United States Government, other than the intelligence activities described in paragraph (1).

(3)

The Secretary of State shall inform the Secretary of Defense and the Director of the Federal Bureau of Investigation immediately upon notice being given pursuant to subsection (a) of this section of a proposed acquisition of real property by or on behalf of the foreign mission of a foreign country described in paragraph (4).

(4)

For the purposes of this subsection, the term "foreign country" means -

(A)

any country listed as a Communist country in section 2370(f) of this title;

(B)

any country determined by the Secretary of State, for purposes of section 2405(j) of the Appendix to title 50, to be a country which has repeatedly provided support for acts of international terrorism; and

(C)

any other country which engages in intelligence activities in the United States which are adverse to the national security interests of the United States.

(5)

As used in this section, the term "substantially improve" shall not be construed to prevent the

establishment of a foreign mission by a country which, on December 22, 1987 -

(A)

does not have a mission in the United States, or

(B)

with respect to a city in the United States, did not maintain a mission in that city

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Sec. 4306. - Location of foreign missions in the District of Columbia

(a) Section as governing location, replacement, or expansion

The location, replacement, or expansion of chanceries in the District of Columbia shall be subject to this section.

(b) Acceptable areas; limitations and conditions

(1)

A chancery shall be permitted to locate as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR).

(2)

A chancery shall also be permitted to locate -

(A)

in any area which is zoned medium-high or high density residential, and

(B)

in any other area, determined on the basis of existing uses, which includes office or institutional uses, including but not limited to any area zoned mixed-use diplomatic or special purpose,

subject to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with this section.

(3)

In each of the areas described in paragraphs (1) and (2), the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area.

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(c) Filing of application with Board of Zoning Adjustment; publication of notice; public participation; final determination

(1)

If a foreign mission wishes to locate a chancery in an area described in subsection (b)(2) of this section, 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 which shall publish notice of that application in the District of Columbia Register.

(2)

Regulations issued to carry out this section shall provide appropriate opportunities for participation by the public in proceedings concerning the location, replacement, or expansion of chanceries.

(3)

A final determination concerning the location, replacement, or expansion of a chancery shall be made not later than six months after the date of the filing of an application with respect to such location, replacement, or expansion. Such determination shall not be subject to the administrative proceedings of any other agency or official except as provided in this chapter.

(d) Criteria for determination

Any determination concerning the location of a chancery under subsection (b)(2) of this section, or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, shall be based solely on the following criteria:

(1)

The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.

(2)

Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.

(3)

The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking requirements, subject to such special security requirements as may be determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(4)

The extent to which the area is capable of being adequately protected, as determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(5)

The municipal interest, as determined by the Mayor of the District of Columbia.

(6)

The Federal interest, as determined by the Secretary.

(e) Consistency of regulations, proceedings, and other actions; review and comment by National Planning Commission

(1)

Regulations, proceedings, and other actions of the National Capital Planning Commission, the Zoning Commission for the District of Columbia, and the Board of Zoning Adjustment affecting the location, replacement, or expansion of chanceries shall be consistent with this section (including the criteria set out in subsection (d) of this section) and shall reflect the policy of this chapter.

(2)

Proposed actions of the Zoning Commission concerning implementation of this section shall be referred to the National Capital Planning Commission for review and comment.

(f) Rule-making nature of proceedings

Regulations issued to carry out this section shall provide for proceedings of a rule-making and not of an adjudicatory nature.

(g) Compliance with District of Columbia building and related codes

The Secretary shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States.

(h) Approval of Board of Zoning Adjustment or Zoning Commission not required

Approval by the Board of Zoning Adjustment or the Zoning Commission or, except as provided in section 4305 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.

(i) Membership on Zoning Commission and Board of Zoning Adjustment

(1)

The President may designate the Secretary of Defense, the Secretary of the Interior, or the Administrator of General Services (or such alternate as such official may from time to time designate) to serve as a member of the Zoning Commission in lieu of the Director of the National Park Service whenever the President determines that the Zoning Commission is performing functions concerning the implementation of this section.

(2)

Whenever the Board of Zoning Adjustment is performing functions regarding an application by a foreign mission with respect to the location, expansion, or replacement of a chancery -

(A)

the representative from the Zoning Commission shall be the Director of the National Park Service or if another person has been designated under paragraph

(1) of this subsection, the person so designated; and

(B)

the representative from the National Capital Planning Commission shall be the Executive Director of that Commission.

(j) Application of other laws

Provisions of law (other than this chapter) applicable with respect to the location, replacement, or expansion of real property in the District of Columbia shall apply with respect to chanceries only to the extent that they are consistent with this section

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