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March 30, 2004

Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
of the District of Columbia
441 4th Sreet, NW
Suite 220-S
Washington, DC 20001

In Re: Appeal of Sheridan Kalorama Neighborhood Council - No. 17086

Dear Mr. Griffis:

The Department of State is of the view, expressed both orally and in written submissions to the BZA in this case, that the BZA lacks jurisdiction to decide the matter presented in this appeal. We have therefore enclosed a Proposed Findings of Fact and Conclusions of Law that dismisses the case on jurisdictional grounds. However, in order to address the contingency that the BZA reaches the merits of this appeal, enclosed as well is a Proposed Findings of Fact and Conclusions of Law that addresses the merits of the claim itself. As indicated on the Attached Certificate of Service, I have transmitted the enclosed to Counsel for Appellant and counsel for Appellee.

Sincerely,

Susan R. Benda
Attorney Adviser
United States Department of State
202-647-0308
bendas@state.gov

BZA
Case No. 17086
Exhibit No. 29

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 29

Before the
Board of Zoning Adjustment
of
The District of Columbia

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Submitted by
The Office of Foreign Missions
United States Department of State

Appeal No. 17-086 of Kalorama Neighborhood Council, pursuant to 11 DCMR 3100 and 3101, from the administrative decision of Karen Edwards, General Counsel, Department of Consumer and Regulatory Affairs ("DCRA") allowing the transfer of the Jordanian Chancery to the Yemeni Chancery without the approval of the Foreign Mission Board of Zoning Adjustment ("FMBZA"). The D/R-1-B zoned subject premises are located at 2319 Wyoming Avenue, N.W. (Square 2522, Lot 4.)

Hearing Dates: January 13, 2004 & February 17, 2004
Decision Date: April 6, 2004

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On September 12, 2003, the Sheridan Kalorama Neighborhood Council ("SKNC") filed an appeal of the "administrative decision" of DCRA General Counsel that 22 U.S.C. 4306(h) "affords the Zoning Administrator the ability to approve transfers of chanceries where the site had been used as a chancery by another foreign mission ... [and applied to] the Jordan-Yemen transfer" of 2319 Wyoming Avenue. On January 13, 2004 the Board of Zoning Adjustment ("BZA") held a hearing on that appeal.

At the hearing, the Department of State, as a preliminary matter, challenged the jurisdiction of the BZA, arguing that the case pertained exclusively to a foreign mission and thus the FMBZA had exclusive jurisdiction. In order to entertain the Department's motion to dismiss on jurisdictional grounds, the Board admitted the Department of State as a party at the January 13 hearing. Upon denying the Department of State's motion, the Board continued the hearing until February 17, 2004 and ordered all parties to present memoranda on the Appeal by February 3, 2004 with final reply submissions due on February 10. The hearing took place on February 17, as scheduled.

FINDINGS OF FACT:

1. The subject property is located at 2319 Wyoming Avenue, Washington, D.C. The Royal Hasemite Kingdom of Jordan took possession of the property on December 2, 1958 and occupied it continuously as a chancery until its sale to the Republic of Yemen. (The Embassy is located at Square 2422, Lots 4&5 and is in an R-1-B District.) The Republic of Yemen purchased the property for chancery use from Jordan in October 2001. The Government of the District of Columbia issued a Certificate of Occupancy (CO 40628) for chancery use to Yemen in September 2002.

2. On April 8, 2003 the SKNC raised concerns about the transfer or the Jordanian Chancery to the Yemeni chancery.

3. On July 14, 2003 General Counsel to the DCRA issued a letter in which she opined that the transfer of the Jordanian chancery to the Government of Yemen for use as a chancery did not require the approval of the decision of FMBZA.

4. On September 12, SKNC filed an appeal, citing 11 DCMR 3100 and 3103, of what it described as "the administrative decision" reflected in the General Counsel's April 8th letter.

CONCLUSIONS OF LAW AND OPINION:

Although the BZA determined at the January hearing that it had jurisdiction to hear this appeal, upon review of the written submissions filed after that hearing and the case law cited therein, the BZA has concluded that the FMBZA has exclusive jurisdiction over the issues raised by the SKNC appeal.

The conclusion that the FMBZA has exclusive jurisdiction over all cases pertaining to chanceries is compelled by the terms of the Foreign Missions Act itself, its legislative history and the decisions of the federal courts that have reviewed the issue. In 1995, the U.S. Court of Appeals for the District of Columbia

determined that the FMA "gives the [FMBZA] 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 F.3d 750, 757 (D.C. Cir. 1995). 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 FMBZA "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 statutory provision was somewhat ambiguous, the most plausible reading of the statute was that FMBZA jurisdiction is exclusive not only as regards the "location" of a chancery (as plaintiff had contended), but that it also extends to the "replacement" or "expansion" of chanceries. In so doing, the Circuit Court quoted a D.C. Court of Appeals decision, which 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.

In *Benin,* the Court ruled that the BZA had incorrectly concluded that the FMA did not apply to the Embassy's petition for a special exception to allow it to construct a large antenna tower at the site of the chancery. In so concluding, the Court noted that the legislative history of the FMA reflected an understanding that decisions about chancery issues could have a substantial impact on U.S. interests abroad and therefore Congress intended to ensure that the FMA incorporate a balance of federal and local interests and provide for expeditious resolution of chancery issues. *Benin*, 534 A.2d at 315-16. The *Benin* Court 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.)

The Courts have clearly and repeatedly concluded that the FMBZA 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 applications by foreign missions, it also states that 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). The Court decisions on the matter are clear and we must agree that the FMA should not be read narrowly to

defeat its fundamental premise and purpose, i.e., that all chancery decisions should be heard in the FMBZA.

Thus, we conclude that the FMBZA alone has jurisdiction to hear all zoning claims pertaining to chanceries.

For the reasons state above, it is hereby **ORDERED** that the appeal of Sheridan Kalorama Neighborhood Council is **DISMISSED** without prejudice.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR 31295.9, THIS ORDER WILL BEOMCE EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

CERTIFICATE 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 30th day of March, 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:

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