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March 30, 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
Our File No. 092220.00000

Dear Mr. Griffis:

Per the Board's request at the close of the February 17, 2004 hearing, enclosed you will find twenty-one (21) copies of the proposed findings and facts and order of the Sheridan Kalorama Neighborhood Council.

Thank you for your attention to this matter.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)

Word 45651543.1

BZA
Case No. 17086
Exhibit No. 30

Board of Zoning Adjustment
District of Columbia
CASE NO. 17086
EXHIBIT NO. 30

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17086 of Sheridan Kalorama Neighborhood Council, pursuant to 11 D.C.M.R. §§ 3100 and 3101 of the July 14, 2003, decision of General Counsel for the Department of Consumer and Regulatory Affairs ("DCRA"), Karen Edwards, Esquire, allowing the transfer of the Jordanian Chancery at 2319 Wyoming Avenue, N.W. (Square , to the Yemeni Chancery (the Property") without the approval of the Foreign Mission Board of Zoning Adjustment ("FM-BZA") and the issuance of permits to the Yemeni Chancery.

HEARING DATES: January 13, 2004 & February 17, 2004
DECISION DATE: April 6, 2004

DECISION AND ORDER

The Sheridan Kalorama Neighborhood Council filed an appeal with the Board of Zoning Adjustment on September 12, 2003, challenging the July 14, 2003, decision of the General Counsel for the Department of Consumer and Regulatory Affairs ("DCRA"), Karen Edwards, Esquire, allowing the transfer of the Jordanian Chancery at 2319 Wyoming Avenue, N.W. (Square 2522, Lot 4) to the Yemeni Chancery (the Property") without the approval of the Foreign Mission Board of Zoning Adjustment ("FM-BZA") and the issuance of permits to the Yemeni Chancery. After a public hearing, the Board granted the appeal, reversing the approval of the permits and the transfer of the Chancery without prior referral to the Foreign Missions Board of Zoning Adjustment (FM-BZA).

Preliminary and Procedural Matters.

Parties. -- The appellant in this case, the Sheridan Kalorama Neighborhood Council ("SKNC"), is represented by Richard B. Nettler, Esquire and Jeannine Rustad, Esquire of Robins, Kaplan, Miller & Ciresi L.L.P. The appellee, Office of the General Counsel, Department of Consumer and Regulator Affairs ("DCRA"), is represented by Lisa A. Bell, Office of the General Counsel, Department of Consumer and Regulatory Affairs. The Office of Foreign Missions, U.S. Department of State ("Sate Department") appeared at the hearing and moved to dismiss the appeal on several grounds. So that the State Department could be heard on these oral motions, it was granted leave to intervene as a party to this matter, and is represented by Ronald Sol Mlotek, Legal Counsel of the Office of Foreign Missions.

Notice of Appeal and Notice of Public Hearing. By memoranda dated _____, the Office of Zoning advised ANC 2D, the Zoning Administrator, the ANC commissioner for the single-member district within which the property is located, the Ward 2 councilmember, and the D.C. Office of Planning of the filing of the appeal. The Board scheduled a public hearing on the appeal for January 13, 2004. Pursuant to 11 D.C.M.R § 31 12.14, the Office of Zoning, on _____, 2003, mailed SKNC, ANC 2D and the Zoning Administrator notice of hearing. Notice of hearing was also published in the D.C. Register on November 14, 2003, at 50 D.C. Register 9535.

Appellant's Case. SKNC, a District of Columbia Non-Profit Corporation, sought review of the July 14, 2003, decision of General Counsel for the Department of Consumer and Regulatory Affairs ("DCRA"), Karen Edwards, Esquire, allowing the transfer of the Jordanian Chancery at 2319 Wyoming Avenue, N.W., to the Yemeni Chancery (the Property") without the location of the Yemeni Chancery first having been approved by the Foreign Mission Board of Zoning Adjustment ("FM-BZA") and the issuance of permits to the Yemeni Chancery for its use of the Property. SKNC argued that the transfer of the chancery was in violation of the zoning regulations regarding the establishment of a chancery in the D/R-1-B zone district. Specifically, SKNC argued that, pursuant to the Foreign Missions Act (the "Act"), and the regulations adopted thereunder, each chancery seeking to locate in certain medium-high or high density residential areas, or in areas zoned diplomatic, within the District of Columbia must file an application with the Foreign Missions Board of Zoning Adjustment before being allowed to do so, D.C. Code § 6-1306(c)(1).1 SKNC further argued that Congress gave the Zoning Commission the explicit authority to adopt regulations to implement the Foreign Missions Act and that those regulations should have been applied by DCRA. Furthermore, SKNC argued that the regulations adopted by the Zoning Commission are not inconsistent with the Act, as suggested by DCRA, and that DCRA had no authority to refuse to apply those regulations. SKNC's case included testimony of Doug LaBossiere, a member of SKNC.

Office of the General Counsel, Department of Consumer and Regulatory Affairs Case. It is DCRA's position that the Foreign Missions Act, 22 U.S.C. §§ 4301 (2003), *et seq.*, codified also at D.C. Official Code §§ 6-1301 (2001 ed), et seq., allows the transfer of properties from one foreign mission to another foreign mission without the approval or review of the FM-BZA. DCRA relied on the fact that the Building and Land Regulation Administration ("BLRA") of DCRA has previously allowed chancery transfers without FM-BZA approval. DCRA asserted that the Zoning Administrator ("ZA") was not only charged with interpreting and applying the zoning regulations, but could interpret other regulations and laws, such as the Act, in the performance of his or her duties.

The State Department's Position.

At the outset of the hearing, the State Department moved to dismiss the appeal or, in the alternative, to refer the matter to the FM-BZA, on the grounds that only the FM-BZA had jurisdiction over matters involving foreign missions. The State Department also moved to dismiss the case on the grounds that it was moot. The State Department argued that, under § 4306(h)(2) of the Foreign Missions Act (22 U.S.C. § 4306(h)(2)), the use of the property was grandfathered and, therefore, did not require approval from the FM_BZA or any other D.C. agency or official. It was the State Department's position that it is the use of a property, and not the foreign mission located at the property, that is grandfathered.

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1 The zoning regulations also provide that continued use of a chancery in a non-Diplomatic, residential district is limited to the government that lawfully occupied the chancery as of February 23, 1990. *See* 11 D.C.M.R. § 201.1(m).

In subsequent pleadings, the State Department argued that if a property was utilized for chancery purposes as of the date of the Act's enactment (October 1, 1982), that property may continue to be used for chancery purposes by any foreign government. In addition, the State Department argued that the Act's "non-discrimination clause" prohibits the District of Columbia from denying a chancery any zoning benefit or right that would accrue to any other institutional user in the same zone. In this regard, the State Department stated that non-conforming uses in the underlying "R" zone may be continued by subsequent similar users.

Finally, the State Department alleged that it was the sole entity charged with administering the Act and, in this capacity has always taken the position that a foreign mission can sell its property to another foreign mission without any FM-BZA review regardless of where the property is located. In support of this contention, the State Department alleged that all District of Columbia Zoning Administrators have, since 1982, 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 sites. Upon the Board's request, the State Department offered a list of chancery locations transferred between foreign missions pursuant to its interpretation of the Act as a post-hearing submission.

The State Department acknowledged at the hearing on this appeal, that it was aware that the Zoning Commission had adopted, over the State Department's objection, regulations which restricted the use of properties in which chanceries were located to only the chancery located there, but the State Department decided that, rather than challenge the validity of the Zoning Commission's regulation, it would refuse to follow them.

Findings of Fact

1. On December 12, 2002, SKNC was notified by the staff of the Historic Preservation Division of the Office of Planning that Yemen had filed permit applications for the Property. Upon receipt of this notice, SKNC confirmed with DCRA that the Property had been transferred from the Jordanian to the Yemen foreign mission and that the transfer had taken place without any resort to the FM-BZA. SKNC requested that DCRA refrain from issuing any building permits pending review of whether resort to the FM-BZA was necessary.

2. According to District, Yemen purchased the Property from Jordan in 2001 and, some time thereafter, obtained permits for some modifications to the Property.

3. Ms. Faye Ogguneye, Zoning Chief, who testified on behalf of the District, stated that it is the District's position that the use of a property as a chancery runs with the land, not the user. However, when questioned on this matter, Ms. Ogguneye acknowledged that section 1000.2 of the zoning regulations requires FM-BZA review of any chancery that seeks to "locate, replace *or* expand a chancery in a . . . . D District . . ." February 17, 2004 Transcript at p. 168-169 & 172.

4. Doug LaBossiere testified on behalf of SNC. Mr. LaBossiere testified that the neighborhood was originally made aware of the proposed changes to the Property on December 12, 2002. Upon learning of the transfer SKNC made inquiries to DCRA as to whether an application had been filed with the FM-BZA for approval of the transfer and, if so, why no notice had been sent to the neighbors. DCRA eventually informed SKNC that no application had been filed. In response, SKNC made numerous attempts to have DCRA stop work. However, Mr. LaBossiere testified that DCRA simply responded that it was conferring with its general counsel regarding the matter. Unable to get a response from DCRA, SKNC contacted Councilmember jack Evans' office to assist in setting up a meeting with the Director of DCRA. Conference calls were held with DCRA general counsel on April 2 and 18, 2003.

5. By letter dated April 8, 2003, the Councilmember Jack Evans disputed the validity of the permit on the basis that approval by the FM-BZA was first required before any transfer of chancery use from the Jordanian chancery to the Yemeni chancery and asked DCRA to reconsider its action.

6. By letter dated July 14, 2003, General Counsel for DCRA, Karen Edwards, Esquire, denied that the zoning regulations, which required such review, was of any legal effect and, instead, stated that the chancery use could be transferred under the Foreign Missions Act, a statute that DCRA has no authority to implement or interpret. Accordingly, the instant appeal was filed.

7. Both DCRA and the State Department have provided evidence of numerous approvals by both agencies of the transfer of a chancery from one foreign mission to another without referral of the establishment of the new chancery by the FM-BZA. However, it became clear that many of the transfers took place in commercial zones, which, by statute do not require any FM-BZA approval, and that other transfers were in areas that even the State Department recognized were explicitly precluded by 11 D.C.M.R. § 201.1(m).

CONCLUSIONS OF LAW AND OPINION

The Board Has Jurisdiction Over the Appeal.

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 5-424(g)(l) (1994)), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map. This appeal is properly before the Board pursuant to 11 D.C.M.R §§ 3100.2, 3101.5 and 3200.2. The notice requirements of 11 D.C.M.R § 3112 for the public hearing on the appeal have been met.

The State Department moved to dismiss the instant appeal on the basis that the Board has no jurisdiction over matters involving foreign missions. However, the State Department fails to

note that (1) the zoning regulations, and the Foreign Missions Act, 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 limited to the "location, replacement or expansion of chanceries" upon application by a chancery or foreign mission or any appeal, by a foreign mission, of a decision involving the application of the zoning regulations. 11 D.C.M.R § 3134.1. In matters before the FM-BZA, "no person shall have the standing of a party in a proceeding under this section." 11 D.C.M.R § 3134.3. Because an individual citizen would have no party status under the rulemaking procedures of the Act or §§3134 et seq. of the zoning regulations, citizens have no authority to file an appeal with the FM-BZA. To deny the appellant jurisdiction before the Board would be to deny the appellant any recourse.

The appeal does not violate the Act, as it is an appeal of the Zoning Administrator's failure to refer the transfer of the former Jordanian chancery to the Yemen government to the FM-BZA by private persons and entities. If granted, the Yemen government will simply 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 provided by the Act. Even if the Board were to deny the appeal, the Zoning Administrator's decision to allow the transfer will be upheld. In either event, this appeal does not violate any provision of the Foreign Missions Act which rests consideration of foreign mission applications before the FM-BZA.

Congress Delegated the Task of Implementing Section 4306 of the Act to the Zoning Commission.

It is the Zoning Commission to which Congress delegated the task of implementing § 4306 of the Act, including the adoption of regulations to carry out that section, not the State Department or, for that matter, DCRA. Rather, the State Department's responsibilities are limited to the

duties set forth in § 4305 of the Act.[2]

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[2] 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.
>
> (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,

With regard to the grandfathering provision at issue, 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 § 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, as set forth in the zoning regulations, not to how the State Department, or DCRA, have interpreted the statute.

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

Section 4306(h)(2) of the Act 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.

Under this section, it is the specific foreign government that occupies a property as a chancery that is grandfathered and not the use of a property as a chancery. 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 specific foreign mission in existence as of October 1, 1982. This conclusion is supported by the structure and framework of the relevant provisions of the Act.

The starting point for review here is the language of § 4306(b), which provides that all 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 disapproval of the FM-BZA in accordance with the criteria set forth in § 4306(d) ("[a]ny 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

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> 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.

. . ."). Subsection 4306 (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]."

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 U.S.C. §§ 4306(d)(1) -- (6) and 11 D.C.M.R. §§1001.2 through 1001.8), sought to protect existing governments occupying chanceries in underlying zones that did not allow chanceries as a matter of right. That is, the grandfathering provision was meant to preclude the foreign government of an existing chancery from having to go before the FM-BZA to prove that it satisfied the criteria set forth in § 4306(d).

In a situation such as that presented by this case, where a property to be used as a chancery is being transferred from one foreign government to another, even if the chancery in question is in a diplomatic zone, the new foreign government has to comply with the six criteria set forth in § 4306(d). There is no exemption in the Act for a new foreign government seeking to locate its chancery in such a zone from the application of the six criteria.

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 are consistent with the Act.

Matter of Right. One circumstance the zoning regulations address is 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 U.S.C §4306(b)(1), *accord.*, 11 D.C.M.R §§ 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 § 4306(d).

FM-BZA Approval. 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 U.S.C § 4306(b)(2)), are broken down into two distinguished areas:

> (1) areas which is zoned medium-high or high density residential; and
>
> (2) 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 U.S.C §§ 4306(b)(2)(A)&(B), *accord.*, 11 D.C.M.R §§ 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 D.C.M.R §§ 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, 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, are subject to the disapproval of the FM-BZA and must satisfy the criteria of § 4306(d).

Existing Chanceries. The final category addressed by the zoning regulations 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 these existing chanceries from being subjected to the criteria set forth in § 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), whether in new locations or at the locations of existing chanceries are subject to disapproval of the FM-BZA.

Three sections of the zoning regulations are illustrative of the fact that a foreign mission seeking to locate in a Diplomatic Overlay is always 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.

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 § 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) is subject to review by the FM-BZA. What is not subject to review is the continued use of an existing chancery by the same foreign government (*eg*, had Jordan not sold the Property, it could have continued to use the Property as its chancery without review of the FM-BZA). *See* 11 D.C.M.R § 201.1(m)(1).

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 legislative history of the Act also makes it clear that the grandfather clause only applies to the existing government occupying a chancery. In the House Conference Report No. 97-693 on the Foreign Missions Act, at p. 704, the Conference Report states that section 206(h) (codified as 22 U.S.C § 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**" (emphasis added). The Senate Report No. 97-329 states that the provision (§ 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 ignore the application of the criteria adopted under § 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.

And, the provision adopted by Congress merely reflected a policy adopted by the National Capital Planning Cpmmission in 1979 as part of the Foreign Missions and International Agencies Element of the Comprehensive Plan for the Nations Capital. The provision (§ 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.

Section 201.1(m) of the Zoning Regulations.

Section 201.1(m) of the zoning regulations, whether it applies or not, is not, as alleged by the State Department contrary to the Act. The Zoning Commission, in adopting this provision, rejected the State Department's position that the provision was contrary to the Act. 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). Accordingly, chapter 11 of the zoning regulations, as well as § 3134, was adopted by the Zoning Commission. Subsequently, in 1990, the Zoning Commission adopted § 201.1(m), making it clear that, in low density residential districts, the property of a foreign mission in occupancy at the time of the adoption of that provision cannot be transferred to another foreign mission. 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 D.C.M.R §201.1(m). 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.

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 § 4306 of the

Act. The Zoning Administrator has no authority to reject application of any regulation adopted by the Zoning Commission.

And, 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. 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.

The State Department's post-hearing submissions of approvals of transfers of properties to be used as chanceries from one foreign government to another demonstrates a total disregard for the Act and the regulations and a willful failure to comply with the applicable laws. By way of example, the State Department approved the transfer of (1) 2535 Belmont Road, N.W. (D/R-1-B zone district) from the French government to the Oman government for chancery purposes in 1985; (2) the lease of space at 1717 Massachusetts Avenue (DC/R-5-E zone district) for chancery purposes by the governments of Turkey and Saint Vincent and the Grenadines in 1990 and 1991; (3) the transfer of 2343 Massachusetts Avenue, N.W. (D/R-1-B zone district) from the government of Austria to the Croatian government for chancery purposes in 1992; and (3) the transfer of 2134 Kalorama Road, N.W. (D/R-1-B zone district) from the Embassy of Ethiopia to the Embassy of Yugoslavia for chancery purposes.

As the Act Carves Out Special Treatment for Chanceries, 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 rulemaking procedures and, as such, no person may have standing as party. 22 U.S.C. §4306(f); 11 D.C.M.R §§ 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, §§ 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 § 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 FM-BZA. 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 D.C.M.R §§ 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 § 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 D.C.M.R § 2003.5. Clearly, a chancery does not fit these descriptions.

ORDER

For the reasons stated above, the Board concludes that the appellant has met its burden of proving by a preponderance of the evidence that the Zoning Administrator and the Office of the General Counsel of DCRA erred in approving the issuance of the building permits and the transfer of the Jordanian Chancery at 2319 Wyoming Avenue, N.W. to the Yemeni Chancery without the approval of the Foreign Mission Board of Zoning Adjustment. It is hereby **ORDERED** that the appeal is **GRANTED**. Pursuant to D.C. Code § 5-424(g)(4), the Zoning Administrator of Office of General Counsel's decisions to approve the transfer of the property in question from the Jordanian government to the Yemeni government for use as a chancery is REVERSED and any permits issued to the Yemeni Government are hereby vacated.

VOTE: 5 - 0 - 0 (Geoffrey Griffis, Ruthanne Miller, Curtis Etherly, Jr., David Zaidain and John Parsons, to grant).