GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17086 of the Sheridan 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, allowing the transfer of the Jordanian Chancery to the Yemeni Chancery without the approval of the Foreign Missions Board of Zoning Adjustment. The D/R-1-B zoned subject premise is located at 2319 Wyoming Avenue, N.W. (Square 2522, Lot 4).

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

ORDER

PRELIMINARY MATTERS

In 2001, the Republic of Yemen purchased the property at 2319 Wyoming Avenue, N.W. ("the subject property") from the Hashemite Kingdom of Jordan to be used as a chancery and an embassy. In September 2002, the Department of Consumer and Regulatory Affairs ("DCRA") issued a certificate of occupancy to the Republic of Yemen, thus sanctioning the transfer of the chancery/embassy use from Jordan to Yemen. Appellant Sheridan Kalorama Neighborhood Council ("Appellant") disputed with DCRA the validity of the transfer. In October 2002 and early 2003, DCRA issued building permits to the Yemeni chancery for interior and exterior renovations on the property. On April 8, 2003, Councilmember Jack Evans, on behalf of the Appellant, wrote to DCRA, disputing its ability to allow the transfer of the chancery use. In a responsive letter dated July 14, 2003, the General Counsel for DCRA upheld the validity of the transfer.

On September 12, 2003, the Appellant filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") alleging error in DCRA's July 14, 2003 decision[1] to allow the transfer of the Jordanian chancery to the Yemeni chancery. Appellant contended that DCRA did not have authority to allow the transfer, but that, pursuant to

[1]Although Appellant stylizes this action as an appeal of the decision of DCRA's General Counsel, it is really an appeal of DCRA's decision, as manifested by the issuance of the certificate of occupancy in September 2002, to allow the transfer of the chancery use from Jordan to Yemen as a matter-of-right. The July 14, 2003 letter from DCRA's General Counsel is a confirmation of DCRA's decision.

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the Zoning Regulations, the transfer had to go before the Board of Zoning Adjustment as constituted under the Foreign Missions Act.[2]

The BZA heard the appeal on January 17, 2004 and February 17, 2004. The Appellant and DCRA, as appellee, participated in the hearing. The Office of Foreign Missions of the United States Department of State ("DOS") participated in the appeal as an intervenor supportive of DCRA's actions.

At its April 16, 2004 public decision meeting, the BZA denied the appeal by a vote of 4-1-0.

FINDINGS OF FACT

The Subject Property and the Transfer of Use

1. The subject property is located in Square 2522, Lot 4, at address 2319 Wyoming Avenue, N.W.

2. The subject property is located in a D/R-1-B zoning district, therefore, it is located within the Mixed Use Diplomatic (D) Overlay District ("D Overlay" or "Diplomatic Overlay"), as well as within the low-density residential R-1-B district.

3. The Royal Hashemite Kingdom of Jordan took possession of the subject property on December 2, 1958, and has since continuously occupied it as a chancery and embassy.

4. The Republic of Yemen purchased the subject property from Jordan in October of 2001 for use as a chancery and embassy.

5. DCRA issued a certificate of occupancy to the Republic of Yemen in September 2002, thereby sanctioning the transfer of the chancery/embassy use from Jordan to Yemen.

6. The transfer of use was not presented to the BZA for its determination whether or not to disapprove the transaction.

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[2]When performing functions regarding an application by a foreign mission with respect to the location, expansion, or replacement of a chancery, the BZA has a slightly different composition. *See,* § 206(i)(2) of the Foreign Missions Act (sometimes referred to herein as the "FMA"), codified at D.C. Official Code § 6-1306(i)(2) (2001). For ease of reference, the BZA refers to itself in these circumstances as the Foreign Missions Board of Zoning Adjustment, or "FMBZA." (The FMA is found at Title II of the Department of State, International Communications Agency, and Board for International Broadcasting appropriations authorizations, Pub. L. No. 97-241, 96 Stat. 273, 282, 290 (1982), and is codified at both D.C. Official Code § 6-1301 *et seq.* and 22 USC § 4301, *et seq.)*

7. The chancery building is not being expanded in any way and nothing new is being constructed on or added to the property.

Relevant Foreign Mission Act Provisions and Zoning Regulations

8. The Foreign Missions Act permits chanceries as a matter of right in any area that is zoned commercial, industrial waterfront, or mixed-use. FMA § 4306(b)(1); D.C. Official Code § 6-1306(b)(1) (2001).

9. The FMA establishes two categories of chanceries that may be located or expanded subject to the disapproval of the BZA. The first is chanceries in areas zoned medium-high and high-density residential. The second is chanceries in any other areas "determined on the basis of existing uses, which includes office or institutional uses." FMA § 4306(b)(2); D.C. Official Code § 6-1306(b)(2) (2001).

10. The Zoning Commission established The D Overlay in 1983 (Order No. 400) in order to implement the above-referenced section of the FMA. As to the first category of chanceries, the D Overlay was mapped to include all areas zoned medium-high and high-density residential (*i.e.* R-5-D and R-5-E). For the second category, the Zoning Commission included areas zoned R-1 through R-5-C districts which included a certain percentage of existing institutional uses. 11 DCMR §1000.

11. Section 1001.1 provides that "[A] chancery shall be a permitted use in the Diplomatic Overlay, subject to disapproval by the Board of Zoning Adjustment, based on the criteria in this section."

12. The FMA provides that the continuing use of a chancery by a foreign mission is not subject to approval by the BZA provided the chancery was used by a foreign mission on October 1, 1982. See FMA § 4306(h); D.C. Official Code § 6-1306(h).

13. On February 23, 1990, the Zoning Commission promulgated 11 DCMR § 201.1(m), which "grandfathered in," as *limited* matter-of-right uses, all chanceries existing on September 22, 1978 in R-1 through R-5-C districts, but not within the D Overlay. These are limited matter-of-right uses because their use is specifically conditioned in the regulations. Of particular relevance to this appeal is the provision which limits the matter-of-right continued use of the chancery to the government lawfully occupying the chancery on February 23, 1990. *See,* 11 DCMR § 201.1(m)(1).

CONCLUSIONS OF LAW

Procedural Issues

Composition of the Board

The DOS moved to dismiss this appeal on the basis that it could only be heard by the BZA as constituted under the FMA, *i.e.,* the representative from the Zoning Commission must be the Commissioner representing the National Park Service and the BZA member representing the National Capital Planning Commission must be its Director. The Appellant, however, countered that since the FMA does not address the procedures for third party appeals of administrative zoning decisions related to foreign missions, such appeals remain subject to the provisions of the Zoning Act of 1938, which authorizes such appeals to be heard and decided by the regular BZA membership. The Board agrees with the Appellant.

Section 8 of the 1938 Zoning Act established the Board of Zoning Adjustment and authorized it "to hear and decide appeals where it is alleged ... that there is error in any order, requirement, decision, determination, or refusal made by ... any ... administrative officer or body in the carrying out or enforcement" of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001). While the FMA describes the procedures to be followed and standards to be utilized for applications and appeals filed by a foreign mission itself, it does not expressly address third-party appeals of zoning decisions involving chanceries. *See,* FMA § 206; D.C. Official Code § 6-1306 (2001).

To infer that the FMA intended to also have its procedures apply to third party appeals would constructively repeal one of the most important remedial provisions of the Zoning Act. Such a result would be judicially disfavored; instead the Board must attempt to harmonize the FMA and the Zoning Act. *See, e.g., Morton v. Mancari,* 417 U.S. 535, 551 (1974) ("When there are two acts upon the same subject, the rule is to give effect to both if possible." (citation omitted)); *Brown v. CONRAIL,* 717 A.2d 309, 312 (D.C. 1998). The Board thus concludes that the FMA does not apply to appeals brought by aggrieved third-parties alleging errors in administrative zoning decisions that pertain to a chancery use.[3] That being the case, the BZA's composition and its standard of review remain those set forth in section 8 of the Zoning Act for the purposes of hearing and deciding this appeal.

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[3]This holding is limited to third party appeals, and is therefore not inconsistent with the suggestion made in the District of Columbia Court of Appeals' decision in *Embassy of the People's Republic of Benin v. D.C. BZA,* 534A.2d 310, 321 (D.C. 1987), that appeals by a foreign mission are governed by the FMA.

Mootness

The DOS also moved to dismiss the appeal on grounds of mootness. Based on its interpretation of § 4306(h)(2) of the FMA (D.C. Official Code §6 -1306(h)(2) (2001)), the DOS contends that it does not matter whether or not DCRA was correct in issuing the certificate of occupancy, because the chancery use on this site, whether by Jordan or Yemen, does not require one. The Board finds that the DOS's contention is not an issue of mootness, but a legal argument as to why the appeal should be denied. The real question here, which is not moot, is not whether a certificate of occupancy is required, but whether § 201.1(m) of the Zoning Regulations disallows the matter of right transfer of a lawfully established chancery use in the D Overlay from one government to another and whether the transfer is subject to the disapproval of the BZA pursuant to 11 DCMR §1000 where the chancery has been in continual use as a chancery by a foreign mission since October 1, 1982. For the reasons explained below, the Board holds that the transfer of the chancery use is a matter of right not subject to the disapproval of the BZA.

The Merits of the Appeal

Appellant contends that the transfer of the chancery use cannot proceed as a matter of right, but is subject to disapproval by the BZA. Appellant bases this contention on its interpretation of § 201.1(m) of the Zoning Regulations, which states, in pertinent part:

201.1 The following uses shall be permitted as a matter of right in R-1 Districts:

...

(m) Chancery existing on September 22, 1978; provided, that the following requirements are 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.

The Appellant interprets this provision to mean that if the chancery is located in the D Overlay, any transfer of the use is subject to the disapproval of the BZA, based on the criteria in that section. The Board finds that 201.1 does not apply to the facts in this case, but rather that this chancery is governed by Chapter 10 of the Zoning Regulations. The Board concludes that § 201.1(m) of the Zoning Regulations only applies to those chanceries located in an R-1 through R-5-C zone district that are *not* also mapped in the D Overlay. Chapter 10 of the Zoning Regulations governs chanceries in the D Overlay. 11 DCMR §1001.1. While 11 DCMR §1001.1 subjects chancery use to disapproval by the BZA, §4306 (h) of the FMA sets forth a grandfathering exception to 11 DCMR §1001.1, specifically excluding from review those chanceries that have been continuously

used as a chancery by a foreign mission since October 1, 1982. Section 4306(h) of the FMA (D.C. Official Code § 6-1306(h)) states, in pertinent part:

> "Approval of Board of Zoning Adjustment or Zoning Commission 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."

Further, it should be noted that Subsection 1002.1 of that Chapter provides that application to the BZA must be made in order to "locate, replace, or expand a chancery ...in the D Overlay District." That provision does not include a transfer of ownership or use from one chancery to another. Because the chancery at issue is located in the D Overly, it is subject to Chapter 10 of the Zoning Regulations. Because it was used continuously as a chancery since 1958, it is exempt from review under Chapter 10. Finally, the transfer of the chancery from one country to another was not subject to BZA review because such transfers are not encompassed in the BZA's review authority under Chapter 10.

For the reasons stated above, the Board concludes that the Appellant did not meet its burden of demonstrating that DCRA erred in issuing a Certificate of Occupancy to the Republic of Yemen and thus sanctioning the transfer of the chancery use from Jordan to Yemen as a matter-of-right, without any BZA or FMBZA non-disapproval. Therefore, it is hereby **ORDERED** that this appeal be **DENIED.**

VOTE: **4-1-0** (David Zaidain, Ruthanne G. Miller, Curtis L. Etherly, Jr. and John G. Parsons to deny; Geoffrey H. Griffis, to grant.)

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 13 2006

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 § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.