

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17787 of the Republic of Uganda, pursuant to 11 DCMR § 1002, to permit the location of a chancery in the SSH/R-1- B Zone District, at premises 5909 16th Street, N.W., Square 2724, Lot 4.

NOTICE OF FINAL RULEMAKING

and

DETERMINATION AND ORDER

The Board of Zoning Adjustment (Board), pursuant to the authority set forth in section 206 of the Foreign Missions Act (FMA), approved August 24, 1982 (96 Stat. 283; D.C. Official Code § 6-1306 (2001)), and Chapter 10 of the Zoning Regulations of the District of Columbia, DCMR Title 11, hereby gives notice of the adoption of its determination not to disapprove the application of the Republic of Uganda (Applicant) to use the building located at 5909 16th Street, N.W., as a chancery.

PRELIMINARY MATTERS

The Application

On February 14, 2008, the Applicant filed a chancery application with the Board. (Exhibit 2) The application was filed by Stephen N. Gell, Esq., who was authorized to represent the Applicant before the Board. (Exhibit 6). Pursuant to 11 DCMR § 3134.7, the application was accompanied by a letter from the United States Department of State certifying that the Applicant had complied with the FMA and that the application could be submitted to the Board. (Exhibit 1)

Notice of Proposed Rulemaking

Notice of the filing of the application and a notice of proposed rulemaking were published in the *D.C. Register* on March 8, 2008 (53 DCR 682). In accordance with the Zoning Regulations, the Board provided written notice to the public more than 40 days in advance of the public hearing. 11 DCMR §§ 3113.13 and 3134.9(c). On February 14, 2008, the Office of Zoning provided notice of the filing of the application to the District of Columbia Office of Planning (“OP”), Advisory Neighborhood Commission (ANC) 4A, in which the subject property is located, the Single Member District member for ANC 4A07, the D.C. Councilmember for Ward 4, the District Department of Transportation (“DDOT”), and the United States Department of State.

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The Office of Zoning scheduled a public hearing on the application for June 24, 2008, and mailed a copy of the notice of hearing to the Applicant, ANC 4A, and all property owners within 200 feet of the subject property. In addition, on June 9, 2008, the Applicant posted notice on the property in plain view of the public in accordance with 11 DCMR § 3113. (Exhibit 33)

Government Reports

State Department

The State Department submitted a favorable report regarding the application (Exhibit 29), and Richard Massey appeared at the hearing on the Department's behalf. Mr. Massey testified that no security issues were associated with the establishment of a chancery at the property, and that the Republic of Uganda had been supportive of the United States when its embassy was built in Uganda.

Office of Planning (OP)

OP also submitted a favorable report (Exhibit 31), and Karen Thomas appeared at the hearing as OP's representative. During her testimony, Ms. Thomas reversed the position espoused in the OP report that the Applicant needed a use variance. She testified that the Applicant was required to meet applicable criteria under the FMA, but that a use variance was not required. She testified further that approval of the chancery would not result in any adverse impacts to neighboring property owners, and that approval of the application would be in the municipal interest.

Advisory Neighborhood Commission (ANC)

As stated above, ANC 4A was notified of the filing and was sent a copy of the application. (Exhibit 16). The ANC was also advised to file a written report detailing its issues and concerns, in accordance with 11 DCMR 3115 (Exhibit 16). The ANC did not appear at the public hearing and did not file a written report concerning the application.

Persons in Support

No persons appeared at the hearing in support of the application. However, the record contains a petition in support of the application that was signed by 13 nearby neighbors. (Exhibit 30, Tab B). The record also contains a copy of an email from the Sixteenth Street Heights Civic Association which, likewise, indicated support for the application. (Exhibit 30, Tab C).

Other Testimony

Ronald Mlotek presented testimony to the Board concerning the history of the FMA and the Zoning Commission proceedings that implemented its provisions, particularly those that resulted in the issuance of Zoning Commission Orders 509 and 509A. Mr. Mlotek is a retired attorney from the State Department who has 25 years of experience working in the Office of Foreign

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Missions. Mr. Mlotek made it clear that he was not taking any position as to the merits of the application itself. Rather he expressed his opposition to any Board decision to not disapprove a chancery application for a property located in an R-1 through R-5-C zone that was not also mapped in the Mixed Use Diplomatic (D) Overlay. It was his view that the determination of the suitability of “other areas” for chancery uses under Section 4306(b)(2)(B) of the FMA could only be made by the Zoning Commission and that the Commission made that determination only as to those properties mapped in the D overlay. He also indicated that any such determination could only be made using the same methodology set forth in Zoning Commission Order No. 509. As will be explained later, that Order arose from a map amendment proceeding that added certain properties to the D overlay.

Closing of the Record

The record closed at the conclusion of the public hearing on the application, except for additional material requested by the Board; namely, filings from the Applicant and OP as to whether a suitability determination by the Board must use the same methodology employed by the Zoning Commission in 1987 when it added properties to the D overlay through Order No. 509.

Post-Hearing Submissions

The Board accepted filings from the Applicant (Exhibit 37) and from OP (Exhibit 36). The Applicant argued that the Board is not bound by the methodology referenced in Zoning Commission Order No. 509. OP’s submission stated that the question presented was a legal question, and that it would defer to the Office of the Attorney General and to the Board. Although the Board had not requested additional filings from the State Department, the Board waived its rules to accept a filing from the Department in which it asserted that the formula set forth in Zoning Commission Order No. 509 is advisory, but not determinative in chancery location cases.

THE PROPOSED CHANCERY USE

The Republic of Uganda proposes to use the building located at 5909 16th Street, N.W. for chancery purposes. The history of this building is unusual in that it was used as a chancery by the Republic of Uganda beginning in 1963, but since that time the use has lapsed. In 1994, chancery operations were consolidated in the adjacent building at 5911 16th Street. However, it was determined sometime in 1995 that the 5909 building was no longer needed for chancery purposes and, since then, the 5909 building has either been held for residential use or has been vacant. At this time the 5911 building is overcrowded, and the Applicant wishes to again use the 5909 building for its current employees. Thus, the present application was filed for approval for a new chancery at the 5909 building.

The application also sought a use variance. (Exhibits 2, 4, 30, and 31), but such relief is inapplicable to this application. A use variance may be granted to permit a use other than that prescribed by a zoning regulation in a particular district. Location of a chancery is specifically

permitted in this zone district in areas determined to be suitable under the FMA, subject to the Board's disapproval. As will be explained later, even where a chancery is not permitted by right in a particular location, the Board has the authority to "not disapprove" the chancery use, either because the property is located in the D Overlay, or because the Board has determined that the surrounding area is suitable for the use.

DETERMINATION

I. Authority of the Board to Not Disapprove a Chancery Application for an "Other Area" Property not Mapped in the D Overlay

Based upon Zoning Commission Orders 509 and 509A, Mr. Mlotek challenges the Board's authority to "not disapprove" the location of this chancery. He notes that the proposed chancery site is zoned R-1-B, but is not located in the D overlay. This status signifies that no determination has been made as to the suitability of the surrounding area for chancery uses pursuant to § 206 (b)(2)(B) of the FMA. In his testimony, Mr. Mlotek points out that the word "'determined" is "in the passive voice unfortunately, it doesn't say who is to determine it." Tr. at 51.¹ However, according to Mr. Mlotek, "the Zoning Commission expressly said that 'determined' meant determined by the Zoning Commission in promulgating the map." Tr. at 52.

Mr. Mlotek also asked the Board to consider

what does "area" mean[?] So ... even if ...one were correct in saying "determined" is vague and it's therefore the FMBZA's² job to make the determination, you still would have [to] try to get around the word "area." And there the Zoning order [No. 509] by your Zoning Commission is explicitly clear ... that "area" meant zoning square....

Tr. at 63.

He further asserts that in accordance with Order No. 509, a square may only be deemed suitable if more than 1/3 of its land area is occupied by non-residential uses. Although Mr. Mlotek stated that he was not opposed to this particular application, he did concede, in response to a Board member's question that the "problem in this case" was that he did not think "this site could meet that definition, because that square is just solidly residential". Tr. at 80-81.

For the reasons stated below, and consistent with past precedent, the Board finds that it can both make the FMA suitability determination for this property, and that its analysis of area suitability

¹ The pagination references are as shown on the transcript available through the Office of Zoning website (www.docoz.dc.gov) and may differ from the hard copy version.

² The acronym FMBZA stands for "Foreign Missions Board of Zoning Adjustment". There is no such legal entity identified in the FMA, but it has been customary to refer to the Board of Zoning Adjustment with the membership as set forth in 4306 (i) of the FMA as the FMBZA when it hears chancery applications.

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can extend beyond the property's square.

Background

The D overlay was first mapped through Order Nos. 236 and 237, which were combined into a "Statement of Reasons" dated September 14, 1978. The D overlay was created in response to a request by the National Capital Planning Commission that the Zoning Commission adopt regulations consistent with the recently adopted Foreign Missions and International Agencies Element of the Federal Elements of the Comprehensive Plan. NCPC also provided recommended criteria and maps, which were not based upon the 1/3 – 2/3 methodology discussed later in this order. The Commission adopted these criteria and mapped squares within the D District if located in

the city's two traditional "Embassy Row" areas along portions of Sixteenth Street, N. W., and its immediate adjacent vicinity, and along portions of Massachusetts Avenue, N. W. and its vicinity. Some of the (D) District areas were mapped along side of existing R-5-C District areas where chanceries are permitted in accordance with the Chancery Act of 1964 and the zoning text. Location is also based upon the presence in or near the affected areas of existing chanceries, embassies, and other institutional and commercial uses which demonstrate an existing mixed-use character of the mapped area.

Statement of Reasons at 29.

The regulations adopted by the Commission in the same proceeding "provided that chanceries could be located in the D District after a careful review by the Board of Zoning Adjustment to assure compatibility with affected neighborhoods" Statement of Reasons at 1. Chanceries were matter of right uses in all other areas.

The Foreign Missions Act was enacted by Congress in 1982. Among other things, the Act restricted the BZA inquiry to the consideration of six factors and mandated that its hearings be conducted as rulemakings. As to the actual location of chanceries, section 206 (b)(2)(1) of the Act continued to permit chancery uses "as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR)."

Section 206 (b)(2) made the location of a chancery subject to the disapproval of the BZA

(A) ... [I]n 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.

(Emphasis added).

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Using the list of zone districts and corresponding densities set forth at 11 DCMR § 105, there is no dispute that the reference to “any other areas” means what is now the R-1 through R-5-C zone districts.

Thus, in order for properties located in an R-1 through R-5-C zone (“other area properties”) to be eligible to be not disapproved, it must first be determined that the area surrounding the proposed chancery use is suitable based upon the extent to which it is already occupied by office and institutional uses. The more such uses exist, the more likely it is that the area would be considered suitable.

As noted by Mr. Mlotek, the FMA did not specify who should make that determination or how that determination should be made. And, as will be explained below, neither has the Zoning Commission.

In May of 1983, the Zoning Commission adopted Order No. 400. Among other things, Order No. 400 revised the provisions of the D overlay to be consistent with the FMA and permitted chanceries subject to disapproval by the BZA in R-5-C, R-5-D, SP, and D overlay Districts.³ This still left one other aspect of the “not disapproval” process to be determined. In Order No. 509 (effective April 1987) the Commission noted:

The key portion of the Foreign Mission Act which was not implemented at that time was Section 206 (b) (2) (B). Section 206 (b) (2) (B) permits chanceries, subject to BZA disapproval, "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".

Order No. 509 at 2.

The Commission already knew which properties were zoned mixed use diplomatic (D) and special purpose (SP). The question became how the “other areas” were to be determined. As explained in pages 2 and 3 of the Order, the Commission decided to use a city square as the “area unit” for analysis purposes. A District computer system was used to ascertain the “average mixed-use ratio for the city squares containing lots zoned ‘Diplomatic’.” This was found “to approximate a ratio of 2/3 residential-type land uses and 1/3 office, institutional and other land uses.” This ratio was then applied to all other city squares zoned R-1 through R-5-B.⁴ Any squares that exceeded this ratio “were determined to be consistent with the provisions of Section 206 (b)(2)(B) of the Act, and included as chancery areas subject to disapproval by the Board of Zoning Adjustment.” The Commission also decided to include any portion of an institution that was zoned R-1 through R-5-C. As a result of this analysis, 26 institutional areas and five squares (or portions thereof) were added to the overlay.

³ Although R-5-C properties are now included with the “other area” category, at the time the Order was issued, an R-5-C district was equivalent to what an R-5-D district is now.

⁴ See footnote number 2.

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The State Department challenged the Commission's authority to make this suitability determination, believing that this analysis was subsumed within the "not disapproval" process in the FMA. In response, the Commission concluded that "it was not the intent of Congress to require that the BZA consider such applications without the *guidance* of the Zoning Commission which this rulemaking will provide." Order No. 509 at 7 (emphasis added).

The BZA first considered its authority to hear a chancery application concerning "other area properties" not included in the D overlay in *Application No. 14820 of Defense Procurement Division on behalf of the Coordinating Council for North American Affairs*. Based upon an opinion from the Office of the Corporation Counsel (now the Office of the Attorney General) the Board concluded that such authority existed. Since then, the Board has continued to hear applications to locate new chanceries on "other area properties" not mapped in the D overlay. See *Application No. 16620 of the Embassy of the Republic of Azerbaijan* (2000). The Board's most recent exercise of this authority occurred as part of its decision to not disapprove *Application No. 17481 of the Republic of Hungary*, 53 DCR 9740, 9745 (2006).

Merits of Procedural Arguments

The arguments advanced by Mr. Mlotek question the Board's existing authority to determine the suitability of the location of chanceries for properties located in R-1 through R-5-C properties that are not also mapped within the D-Overlay. Mr. Mlotek's position is exactly opposite to the position he took in *Application No. 16620 of the Embassy of the Republic of Azerbaijan*, in which he went so far as to suggest that the Zoning Commission had no authority to map the D Overlay at all. According to the Board's order, Mr. Mlotek contended that under the FMA:

[T]he authority to determine whether existing uses in an area make that area appropriate or inappropriate for chancery location rests solely with this Board, to be exercised on a case-by-case basis. Such authority could not, he contended, be exercised by the Zoning Commission or any other body, through promulgation of a map or otherwise.

BZA Order No. 16620 at 8.

With respect to how the determination of suitability is to be made, the Board concludes that Order No. 509 did not and could not establish a city square as the "area unit" to be used in all future suitability determinations or require that the 1/3 - 2/3 test be used in all such instances. The mere fact that the Commission utilized this approach as part of a map amendment proceeding did not create binding precedent. A mandate of that kind would be considered a "rule" under the District of Columbia Administrative Procedure Act because it would represent an "agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the ... agency." D.C. Code § 2-502 (6)(A). Pursuant to the DCAPA, the "Mayor and each independent agency shall, prior to the adoption of any rule ... publish in the District of Columbia Register ... notice of the intended action." D.C. Official Code § 2-502.

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And no non-emergency rule may become effective unless published in the Register. D.C. Official Code § 2-558 (b). Neither of these prerequisites to establishment of the 1/3 - 2/3 test occurred.

Nor did the Commission suggest in Order No. 509 that its one-time use of the test was to be binding upon the Board but rather, as noted, characterized its mapping exercise as providing “guidance only. The Commission provided further guidance in Commission Order No. 509A [effective February 23, 1990] in which it concluded that Congress intended the word “area” under the FMA “to indicate an area of sufficient size to have significance and import for the purposes of land use regulation.” Order No. 509A at 2.

The Commission also acknowledged the non-binding effect of Order No. 509 for future mapping cases when, in Case No. 04-21, it declined to utilize the 1/3 – 2/3 test in considering a petition to eliminate properties from the D overlay. Instead, it deferred consideration of the petition until the Office of Planning provided a proposed text amendment to identify how the Commission, the BZA, or both should make the general suitability determination. The Commission expressed no preference for any particular approach including the use of a formula to be used in all instances or the utilization of a case-by-case approach. Transcript of Zoning Commission October 17, 2005 public meeting at 50-52.

The Board has used such a case-by-case approach in the past, looking to the nature and extent of office and institutional uses within the “surrounding area” of the proposed chancery use. *See Application No. 17481 of the Republic of Hungary*, 53 DCR at 9746 (2006). For the instant application, the Board considered the surrounding area to include the square occupied by the property (*i.e.* square 2724), the closest square (2724W), and other properties in nearby squares on 16th Street.

II. The Surrounding Area is Suitable for Chancery Use

As stated, the proposed location for the chancery use is at 5909 16th Street, N.W., Lot 4 in Square 2724. Under § 206 (b)(2)(B) of the FMA, the Board must decide whether the surrounding area is suitable for chancery use, “determined on the basis of existing uses, which includes office or institutional use.” The Board concludes that the area contains a sufficient amount of non-residential uses to allow for the addition of this new one.

Although the immediate area is mostly residential, there are many institutional uses in the surrounding area (within a few blocks), including two in the subject square 2724, six in square 2724W, and several in nearby squares. Those non-residential uses include:

- The Chancery of the Republic of Uganda, 5911 16th Street, N.W., Square 2724;
- City Gate, 5917 16th Street, N.W., Square 2724 – a religious institution operating church programs;

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- Sufism Reoriented, Inc., Square 2724W including buildings at: 1615 Manchester Lane, N.W., 5916 16th Street, N.W., 5906 16th Street, N.W., 1630 Missouri Avenue, N.W., 1612 Missouri Avenue, N.W., and 1608 Missouri Avenue, N.W.;
- Iglesia Evangelica Apostoles y Profestas, 1409 Manchester Lane, N.W.;
- The Baha'is of Washington D.C. Centre, 5713 16th Street, N.W.;
- Associated Mechanical, Inc., 5716 16th Street, N.W.;
- Property of the Royal Thai Embassy, 5600 16th Street, N.W.;
- Carter Barron Fourth Church of Christ, Scientist, 5510 16th Street, N.W.;
- Office of Procurement, Embassy of Egypt, 5500 16th Street, N.W.;
- The Embassy of Liberia, 5201 16th Street, N.W.

(See, Exhibit 37)

Based upon the existing institutional uses in the surrounding area, including the adjacent chancery use at 5911 16th Street, N.W., the Board concludes that the area is suitable for the location of a chancery use.

III. The Proposed Chancery Use Should not be Disapproved

The FMA § 206 (d) establishes six exclusive criteria upon which the Board must base its determination regarding the specific merits of a particular chancery location. As will be explained below, the Board has determined that the Project should not be disapproved because it meets all of these criteria.

Criteria 1 -- International Obligation of the United States

As asserted by the State Department, favorable action on the application will fulfill the international obligation of the United States to facilitate the acquisition of adequate and secure facilities by the Republic of Uganda for its diplomatic mission in the Nation's Capital. (Exhibit 29).

Criteria 2 -- Historic Preservation (as determined by the BZA)

The Property is not located in an historic district and it is not a historic landmark. Accordingly, District and federal regulations governing historic preservation are not applicable in this case.

Criteria 3 -- Adequacy of Parking (subject to such special security requirements as may be determined by the Secretary)

Parking at the chancery will not technically comply with the Zoning Regulations. However, the Board finds that the parking will be adequate. The chancery has operated at the adjacent building (5911 16th Street) since the early 1960s with no adverse impact on parking in the area. This application contemplates only use of the 5909 building to alleviate the overcrowded

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conditions in the 5911 building, with no anticipated increase in activity, and staffing levels remaining roughly the same. (Exhibit 30). The State Department has determined that no special security requirements exist relating to parking. (Exhibit 29).

Criteria 4 -- The Extent to which the Area is Capable of being adequately Protected (as determined by the Secretary)

The Department of State has determined that the Property is capable of being adequately protected. (Exhibit 29).

Criteria 5 -- The Municipal Interest (as Determined by the Mayor)

The Office of Planning, on behalf of the Mayor, has determined that approval of the project will be in the municipal interest. As noted above, OP concluded that the chancery would result in no adverse impacts to neighboring property owners. While the proposed chancery will not comply with parking requirements in the Zoning Regulations, OP concluded that the deviation would not be detrimental.

Criteria 6 -- The Federal Interest (as determined by the Secretary)

The State Department has determined that approval of this application would serve the federal interest because the Government of Uganda has assisted with the zoning and land-use needs of the U.S. Embassy in Uganda. This cooperation allowed the State Department to successfully complete the construction of a new embassy compound in February of 2001 and most recently, the construction of a new facility for the U.S. Agency for International Development.

Accordingly, it is hereby **ORDERED** that this application is **NOT DISAPPROVED**.

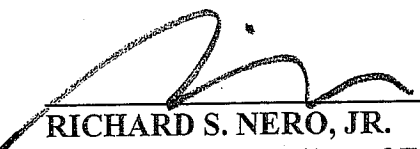
Vote of the Board of Zoning Adjustment constituted in accordance with the Foreign Missions Act taken at its special public meeting on July 28, 2008, not to disapprove the application:

VOTE: **5-0-0** (Ruthanne G. Miller, Marc D. Loud, Mary Oates Walker, Peter G. May and Marcel A. Acosta, Acting Executive Director of the National Capital Planning Commission, all voting to not disapprove)

BY THE BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

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FINAL DATE OF ORDER: FEBRUARY 23, 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **FEBRUARY 23, 2009**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY:



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TWR