BEFORE THE
DISTRICT OF COLUMBIA
FOREIGN MISSIONS BOARD OF ZONING ADJUSTMENT

Rec'd.
OCT 24 2000

RESPONSE OF
THE UNITED STATES DEPARTMENT OF STATE
TO
DISTRICT OF COLOMBIA OFFICE OF PLANNING REPORT
IN FM-BZA APPLICATION NO. 16620
EMBASSY OF THE REPUBLIC OF AZERBAIJAN

INTRODUCTION AND RELIEF REQUESTED

The Department of State hereby submits its Response to the Office of Planning Report (hereinafter "OP Report") filed in this case. We do so with regret over the necessity of taking issue with the many serious deficiencies in the Report.

The Department of State takes pride in the productive working relationships it has been able to forge over the years with many District agencies having responsibility for various facets of property and land-use matters involving foreign missions, such as the Office of Zoning Administrator, the Historic Preservation Division, the Bureau of Parking Services, other divisions of the Department of Public Works, and the Office of Secretary of the District. These relationships redound to the mutual benefit of District residents, the diplomatic community, and the Federal government.

Nevertheless, the circumstances in the present case, and the Federal interests that are prejudiced by those circumstances, compel us to take strong and detailed issue with the numerous defects evident in the OP Report and in the process which produced it. FM-BZA cases are matters of high importance to the Federal interest which can affect the diplomatic relations of the United States. The Office of Planning has had at least five months of lead time to prepare and file its report.. The Applicant, along with a Department of State representative, met on the site with an OP planner as long ago as last May.

Given those defects – the errors of fact, misconstructions of law, and inordinate lateness, and given further the aggravating circumstance just described, the Department of State believes the FM-BZA would be fully justified in declining to waive its own established Rules of Procedure to accept the late OP Report.

BZA
Case No. 16620
Exhibit No. 52

Board of Zoning Adjustment
District of Columbia
CASE NO.16620
EXHIBIT NO.52

In support of our request we present the following arguments in rebuttal to the defects manifest in the OP Report. Our arguments are keyed to the relevant section headings of the Report to which they relate.

OP REPORT SECTION ENTITLED
"SUMMARY RECOMMENDATIONS"

I. THERE IS AN APPARENT TYPOGRAPHICAL ERROR IN "SUMMARY RECOMMENDATIONS". (PAGE 1, POINT #1)

The OP Report states that the applicant failed to adequately address the criterion (sic.) under 12 DCMR "Section 5-1206 (d)(2) and (4)." (Emphasis supplied.) However, Section (d)(2) is the requirement relating to historic preservation, and (d)(4) is the one relating to protective security. Neither of these criteria falls within OP's purview, and indeed the OP report later (pp. 8-9) concedes that these two criteria are satisfied. Accordingly, we presume that OP, at this point in its report, intended to refer to Sections (d)(3) (parking) and (d)(5) (municipal interest).

II. THE OP REPORT COMMITS SERIOUS ERRORS IN CHARACTERIZING THE NEIGHBORHOOD AS "CLEARLY RESIDENTIAL", A DESCRIPTION THAT IS CONTRADICTED BY THE INDISPUTABLE FACTS AS TO EXISTING USES IN THE AREA. (OP REPORT. (PAGE. 1, POINT #2.)

The following facts regarding the area or neighborhood surrounding the subject site are, we believe, incontravertable.

(1) The Zoning Square Itself: If "neighborhood" is taken to mean the zoning square in question, then it must be recognized: (a) that the subject site lies within a zoning square (No. 2122) containing only four other buildings (excluding garages, sheds, etc.), and (b) that two of the four are chanceries: Finland and the Holy See (The Vatican). This means that today, excluding the subject site, 50% of the existing structures just within the same zoning square alone, are chanceries. (Including the Azerbaijan building, 40% of the structures would be chanceries.) Further, the total staff size of each of the Finnish and Vatican chanceries surpasses the limit of 15 employees agreed to by the Azerbaijan Embassy. The Embassy of Finland's staff size surpasses 15 significantly. In addition, the Finnish Chancery is an imposing, institutional structure incapable of being mistaken for a residence. By contrast, the proposed Azerbaijan Chancery possess a clear residential appearance, one that the Embassy has no plan or intention to alter.

(2) 200 Foot Radius: If "neighborhood" is extended to mean an area within 200 feet of the subject site -- the area of required notification under BZA

Rules of Procedure – then the following facts must be recognized. The Chancery of Norway lies almost directly across 34th Street opposite the subject site. Proceeding northbound from the subject site, along its own side of 34th Street, the very next structure encountered is the Chancery of Belgium. Both the Norwegian and Belgian chanceries have staffs far larger than the 15-employee limit agreed to by Azerbaijan: the staff of each embassy exceeds 50 employees. In addition, both chanceries are substantial, institutional-appearing structures, not perceivable as residences. Within this same 200 feet radius there would have to be added the chanceries of Finland and the Vatican mentioned above. This produces a "neighborhood" containing four existing chanceries, all of them larger then the proposed Chancery of Azerbaijan in both staff size and physical plant, and three of the four larger by far (Norway, Belgium, and Finland).

The Department of State objects to any and all information in the OP Report regarding the facilities and activities at the Vatican Chancery, for the reasons stated by the Department at the October 17th hearing. The Vatican Chancery is a chancery use and must be fully treated as such. (See attached copy of the Department's Diplomatic List). For this reason and those stated elsewhere in this paper and during the hearing, the 18 percent figure for institutional uses in the Square cited by OP is clearly erroneous. Rather, the Board should credit the information contained in the June 21, 2000 letter of NCPC, citing a staff field investigation conclusion that the area meets the original standards used by NCPC in mapping the Diplomatic-overlay, that is the one-third/two thirds formula.

(3) 500 Foot Radius: If "neighborhood" is extended to encompass 500 feet from the proposed new chancery, then even more substantial non-residential uses interject themselves into the total picture. An additional chancery must be added: Cape Verde (3415 Massachusetts Avenue). A relatively large church is located at 3512 Massachusetts Avenue (The National Cathedral of the Orthodox Church in America). Even more dramatic institutional uses are located at the northern and southern portions of this 500 foot radius. At the northern end lie the grounds of the National Cathedral -- a complex hosting several large private schools in addition to the Cathedral itself. Between arriving and departing students, parents, tourists, and worshippers, the National Cathedral is a hub of intense, non-residential activity virtually every day of the year. Within 500 feet to the south of the Azerbaijan site lies the U.S. Naval Observatory complex, which contains a military presence.

These objective land-use facts indicate that OP's characterization of this neighborhood as "clearly residentialis defective.

III. OP'S OBJECTION TO THE PROPOSAL AS A "SHORT-TERM SOLUTION" IS BOTH FACTUALLY ERRONEOUS AND PROCEDURALLY OUT OF BOUNDS. (OP REPORT AT PAGE. 1, POINT #4; AND ALSO AT PAGE 13, UNDER "RECOMMENDATION.)

OP criticizes the Azerbaijan proposal as "a short-term solution without the potential for expansion or significant change in the future". (Id.) To make such an assertion falls outside the purview of OP.

As the diplomatic mission of a foreign sovereign state, the Embassy of Azerbaijan is entitled to conduct its internal deliberations and assessment of its own property needs. An embassy's property proposals clearly are subject to compliance with building and land-use codes, such as the requirement for FM-BZA review in this case. However, the wisdom of an embassy's land-use planning judgments cannot form the basis for formal opposition by any host-country governmental authority.

Here, the Embassy of Azerbaijan concluded that the subject property is the best available solution to its chancery property needs for the foreseeable future. Neither OP, nor the Department of State for that matter, should second guess this judgment The Department of State would vigorously resist any effort by a municipal government overseas to compel a U.S. Embassy to locate, or forego locating, in any given site or area based upon the municipality's planning preferences (as opposed to zoning requirements) or upon the municipality's assertion that the U.S. Government was considering only its short-tern needs.

In addition to being improper, however, OP's criticism is also, as a factual matter, wrong. Azerbaijan has already agreed to an employee cap of 15 and thus the specter of unmanaged growth will not occur.

Ambassador Pashayev told each of the two OP planners with whom he met that, in the event the need for an expanded diplomatic staff were to arise, and in the further event that Azerbaijan's financial condition were to improve to permit such expansion -- both unforeseeable speculations at present -- the Azerbaijan government would resort to the same solutions pursued by almost all other embassies in like circumstances: (a) acquire overflow space at an annex in another location; and/or (b) acquire a replacement chancery elsewhere. It was also explained to the OP representatives, as well as to the FM-BZA at the October 17 hearing, that Amb. Pashayev's search for a suitable chancery was lengthy and comprehensive. It was underscored, both to OP and this Board, that indeed Azerbaijan's first-choice location had been a property in Sheridan Kalorama, and

that the Embassy aborted the purchase out fears of opposition from the same group of residents that opposed the nearby Benin Chancery location.

IV. The Embassy has accepted the UNPRECEDENTED CONDITIONS THAT OP RECOMMENDS IMPOSING ON IT.

The OP Report recommends disapproval of the Azerbaijan application. The report, however, also enumerates seven conditions that OP believes the Board should impose in the event it elects not to disapprove. Thus far in this case, one of the most highly significant aspects derives from the fact that the Applicant immediately accepted these conditions in their entirety.

As the Department of State's representative noted at the FM-BZA hearing on October 17, it is highly improbable that any United States embassy overseas would accept the imposition by a municipal authority of limitations on the number of representational events it could hold over the course of a year, the number of motor vehicles the mission could operate, and the number of personnel that could be present on-site at a given time. While diplomatic missions, including this country's, are required to respect local zoning and land-use requirements (e.g. location; height, density, and setback; historic preservation; architectural design controls; etc.), it is an extreme measure to intrude into the realm of their internal operations and impose specific limitations thereon, most especially when the motivating purpose for such limitations does not relate to interests involving national security or diplomatic reciprocity, but rather to zoning. We believe , moreover that no chancery in the District of Columbia ever agreed to the number and range of conditions in a prior zoning case – either before or subsequent to the Foreign Missions Act of 1982.

The fact that the Embassy of Azerbaijan in the District of Columbia is prepared to accept limitations that the U.S. Embassy in Azerbaijan would not accept is a notable gesture of good faith and compromise. We urge the FM-BZA to accord it full weight in its balancing of criteria in this case.

REPORT SECTION ENTITLED
SITE AND AREA DESCRIPTION (Pages 2-3)

V. OP'S DESCRIPTION OF THE AREA LACKS OBJECTIVITY AND IS FATALLY FLAWED IN THAT IT OMITS THE NUMEROUS AND SUBSTANTIAL NON-RESIDENTIAL USES EXISTING IN THE AREA.

Under our Point #II above, the Department of State has amply documented the numerous defects the OP Report contains as regards the Report's attempt at describing existing land uses in the area. That material will not again be set forth,

but is incorporated here by reference. Suffice it here merely to reiterate that no planning report containing errors and omissions of this number and magnitude with respect to objective land use facts should be accorded any serious weight by this Board.

OP REPORT SECTION ENTITLED
"EXISTING ZONING AND RELIEF REQUESTED" (PAGES 5-6)

VI. The OP Report Seriously Misconstrues the Substantive Law Controlling the Central Issues In This Case, I.E. the Foreign Missions Act.

Throughout its Report, the OP refers to the one-third/two-thirds institutional/residential ratio as an "established standard" or legal prerequisite for chancery location. Such a use of the one-third ratio is inconsistent with the clear language and objectives of the Foreign Missions Act and is impermissible.

Section 206 of the FMA establishes "acceptable areas" for the "location" of chanceries. Section 206(b); D.C. Code 5-1206(b). Chanceries can locate "as a matter of right" in any area zoned "commercial, industrial, waterfront, or mixed-use (CR)." Id. (b)(1). Chanceries can also permissibly locate, subject to disapproval by the FM-BZA in accordance with section 206(d), in any area zoned medium-high or high-density residential (id. (b)(2)(A)) or:

> "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." Id. (b)(2)(B).

Under the statute, the only limitation in the location of chanceries in the District (other than pursuant to the criteria of section 206(d)) is that the location be determined "on the basis of existing uses, which includes office or institutional uses, including but not limited to any area zoned mixed-use diplomatic...." Importantly, by repealing the Chancery Act of 1964 and stating that the FMA permits chanceries to locate in *any area*, determined *on the basis of the uses* present in the area, *at the time of the chancery application ("existing uses")*, the Congress evidenced its clear intent that the location of chanceries under the FMA be governed by actual uses present in an area rather than upon the underlying zoning or any mapping.

Thus, contrary to the position of the Office of Planning, the underlying zoning classification of a site, and inclusion or exclusion of the site from the Diplomatic-overlay map, do not govern whether a chancery can locate in that area under FMA section 206(b)(2)(B). To the extent that the District's zoning regulations (quoted in the OP Report), are inconsistent with this interpretation, they are clearly contrary to the language and purposes of the FMA and are therefore invalid.

In its Diplomatic-overlay map, NPCP intended merely to "generally indicate" the permitted locations for chanceries in the District. The NCPC map, prepared in 1983, is only a snapshot of existing uses in an area at one point in time. Thus, the NCPC map provides merely a starting point or general guide for chancery location. By comparison, the FMA requires the FM-BZA to examine actual "existing uses" at the time of a pending application. Indeed, in this case, a NCPC staff field investigation conducted in June 2000 demonstrates that the area in which the Azerbaijan chancery is proposed to be located meets the original one-third standard used by the Commission in mapping the Diplomatic-overlay. If the map were redrawn today, the proposed Azerbaijan chancery site would in fact be included within the overlay.

However, even were this not the case, the Department underscores that it is the long-standing position of the United States Government that, in accordance with FMA section 206(b)(2)(B), chanceries may locate in "any" area of the District, including an area outside of the Diplomatic-overlay and outside of areas meeting the one-third/two-thirds formula, on the basis of "existing uses, which includes office or institutional uses." Significantly, the FMA does not state that chanceries may locate "in any other area ... limited to any area zoned mixed-use diplomatic...." Rather, the FMA states precisely the contrary: "a chancery shall also be permitted to locate ... in any other area ...*including but not limited to* any area zoned mixed-use diplomatic...." (emphasis added). Thus, location of chanceries outside of the Diplomatic-overlay is expressly envisioned under the Foreign Missions Act, based on existing uses and subject to disapproval by the FM-BZA in accordance with criteria enunciated under section 206(d).

The one-third/two-thirds ratio was devised by NCPC based on the average non-residential/residential mix in areas included within the Diplomatic-overlay map in use prior to the Foreign Missions Act. An *average* ratio means that about one-half of the areas in the pre-FMA Diplomatic-overlay map had ratios *below* one-third institutional uses. The FMA should not be interpreted to allow use of the one-third ratio as a floor – or a legal prerequisite – rather than as an average, as it was before. This would reduce the areas available for chancery location, a result directly at odds with statutory intent. Rather, section 206 of the FMA was enacted to balance federal and municipal interests in chancery location and to allow location in "any area" of the District based on existing uses. It may be recalled that the FMA repealed the Chancery Act of 1964, which severely limited chancery location in residentially zoned areas.

Additionally, use of the one-third/two-thirds formula to preclude a chancery location would run foul of FMA section 206(b)(3). That provision states a rule of non-discrimination: "the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area."

Finally, application of the one-third/two-thirds formula as a strict test for chancery location is impermissible because it would engraft onto section 206(d) a *seventh* and *completely dispositive* criterion. This criterion is not found in that section and would contravene the *exclusive* nature of the six factors identified by Congress as the "*sole...criteria*" for "*location of a chancery under subsection (b)(2).*"

The Department underscores that the relevant "area" to be examined under FMA section 206(b)(2)(B) is the area *surrounding* the proposed site. It would be illogical to examine remote sites, several blocks distance from the proposed location, while ignoring uses directly abutting and nearby the proposed site. Indeed, Congress's reference to chancery location based on "existing uses" shows an intention that the surrounding uses be examined to determine the appropriateness of a new chancery location.

OP REPORT SECTION ENTITLED
"ANALYSIS" (PAGES 5-7)

VII. THE REFERENCES TO NCPC AND THE COMPREHENSIVE PLAN ARE LEGALLY INCORRECT AND FACTUALLY INACCURATE (PAGES 10-11.)

The OP report states, at p. 10, that "[t]he Comprehensive Plan . . . *is* the legal basis for zoning in the District. This is legally incorrect, both as a general matter and as regards foreign missions in specific.

OP REPORT SECTION ENTITLED
RECOMMENDATION (Page 13)

VIII .The OP Report Makes An Argument Inconsistent With the Controlling Federal Statute When It Contends That the Application Must Be Denied For Failure To Meet the So-Called "One-Third/Two-Thirds Test". (Page 13)

The *Office of Planning Report* recommended "denial based [on] a determination that this location does not meet the requirements under Section 5-1206(d)(1)(B[sic (b)(2)(B)] under Title 5 of the DCMR, according to the established standard of 1/3 or more of the land uses on the City square being office and/or institutional uses."

As the Department has amply demonstrated above (*see* Section VI), this recommendation is inconsistent with the express text and objectives of FMA section 206 and is legally flawed. The Foreign Missions Act expressly permits the FM-BZA to examine existing uses outside the D-overlay and find a specific area appropriate for chancery location notwithstanding that it lies outside. Thus the recommendation cannot stand.

Conclusion

In a well-known previous chancery location case (Embassy of Benin, BZA), opponents complained that there were too many chanceries located in the neighborhood in question. They maintained their opposition notwithstanding that the Benin location did, in fact, meet the "one third/two thirds" test that OP touts in its present Report. In Benin, it will be recalled, OP initially submitted a report endorsing this view that there could be too many chanceries with a D-overlay area. Today, the Office of Planning again joins community opponents to a chancery location, but this time argues that there are too few chanceries present to allow another to move in. The entire weight of OP's Report rests on the argument that this is "a clearly residential" neighborhood, and therefore the location of the Azerbaijan chancery at the subject site would constitute an non-residential intrusion, which would disrupt the neighborhood's character.

As amply demonstrated above, however, it cannot in truth be said that there are too few chanceries in this "neighborhood", no matter how the last term is defined. As shown above under Section II, a fair and accurate tally of the "existing uses" evidences the fact that there are two existing chanceries within the zoning square, four chanceries within 200 feet of the proposed site, and five chanceries within 500 feet. These existing chanceries are in addition to the National Cathedral, a Russian Orthodox cathedral, and the Naval Observatory complex. In sum, the neighborhood surrounding the proposed chancery site is an appropriate area for the small mission of Azerbaijan. After being prevented by the Department for seven years from acquiring a new chancery until Azerbaijan satisfied the United States reciprocity concerns, Azerbaijan now deserves the chance to locate its new chancery at the subject site.

RM - Ronald S. Mlotek

Ronald S. Mlotek
Chief Legal Counsel
Office of Foreign Missions, Dept. of State

United States Department of State

Diplomatic List

Summer 2000

HAITI

Embassy of the Republic of Haiti
Chancery: 2311 Massachusetts Avenue, NW 20008
202-332-4090, (FAX 202-745-7215)

Mr. Louis Harold JOSEPH
Minister-Counselor (Charge d'Affaires ad interim)

Mrs. Denise JEAN-LOUIS; Mr. Robert Jean-Louis
Minister-Counselor

Mr. Raymond VALCIN; Mrs. Marie Claude L. Valcin
Minister-Counselor

Mr. Antoine H. ELIACIN; Mrs. Dylia M. Eliacin
Counselor (Consular)

Mr. Lionel Leonard LAVIOLETTE
Counselor (Cultural and Information)

Mrs. Madeline Altagrace PIERRE DUPITON
Counselor (Economic and Financial)

Ms. Claude AMBROISE
First Secretary

Mrs. Gisele DEPESTRE
First Secretary (Consular)

Mrs. Marie Claude MALEBRANCHE; Mr. Claude Malebranche
First Secretary (Commercial)

Mr. John Herve PIERREMONT; Mrs. Dominique Pierremont
First Secretary (Cultural)

Mrs. Raymonde PREVAL BELOT
First Secretary

Commercial Attache Office
2311 Massachusetts Avenue, NW 20008.
202-332-4090, 91, 92

Consular Affairs Office
2311 Massachusetts Avenue, NW 20008.
202-332-4090, 91, 92

Military Attache Office
2311 Massachusetts Avenue, NW 20008.
202-332-4165

THE HOLY SEE

Apostolic Nunciature
3339 Massachusetts Avenue, NW 20008
202-333-7121

His Excellency The Most Reverend Gabriele MONTALVO
Apostolic Nuncio

Most Reverend Renato Raffaele MARTINO
Minister

Monsignor Francis CAO MINH DUNG
Counselor

Monsignor Nicola GIRASOLI
Counselor

Reverend Peter Gerard MAGEE
Counselor

HONDURAS

Embassy of Honduras
Chancery: 3007 Tilden Street, NW Suite 4-M, 20008
202-966-7702, (FAX 202-966-9751)

His Excellency Dr. Hugo NOE PINO; Mrs. Vivian Noe
Ambassador Extraordinary and Plenipotentiary

Mr. Jose Benjamin ZAPATA; Mrs. Susan Mary Zapata
Minister (Deputy Chief of Mission)

Mr. Ramon CUSTODIO; Mrs. Mei Ling Lavecchia**
Minister

Mr. Salvador E. RODEZNO; Mrs. Elizabeth R. Rodezno**
Minister (Political)

Mr. David HERNANDEZ; Mrs. Xochitl Noemi Salgado Alvarez
Counselor (Political)

Ms. Rina MENJIVAR
Counselor

Mr. Sergio MONCADA
Counselor (Tourism)

Ms. Cynthia MCKECHNIE
First Secretary

Ms. Yolanda MEMBRENO
First Secretary (Consular)

Colonel Rafael RIVERA TORRES; Mrs. Sandra Rivera
Defense, Military, Naval and Air Attaché

Consular Section
1612 K Street, NW Suite 310, 20005.
202-223-0185, (FAX 202-223-0202)

HUNGARY

Embassy of the Republic of Hungary
Chancery: 3910 Shoemaker Street, NW 20008
202-362-6730, (FAX 202-966-8135)

His Excellency Dr. Geza JESZENSZKY; Mrs. Edit Jeszenszky
Ambassador Extraordinary and Plenipotentiary

Mr. Jozsef TOTH; Mrs. Maria Tothne Urbanszki
Minister (Deputy Chief of Mission)

Dr. Zsolt HORVATH; Dr. Julianna Horvath
Minister

Mr. Laszlo BAGI; Mrs. Laszlone Bagi
Counselor and Consul

Mr. Andras DEKANY; Mrs. Eszter Dekanyne Deak
Counselor (Political)

Mr. Pal KERTESZ; Mrs. Palne Kertesz
Counselor (Commercial)