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November 28, 2000

DISTRICT OF COLUMBIA
00 NOV 28 A 9:09

VIA HAND DELIVERY

Ms. Sheri Pruitt
Office of Zoning
441 4th Street, N.W.
210 South
Washington, D.C. 20001

Re: BZA No. 16620; Proposed Chancery,
Republic of Azerbaijan

Dear Ms. Pruitt:

Enclosed please find the Applicant's proposed order in the above-referenced case. Please also allow this letter to serve as a notice of a change of address for the undersigned.

Sincerely,

Cynthia A. Giordano

Enclosure

BZA
Case No. 16620
Exhibit No. 61

Board of Zoning Adjustment
District of Columbia
CASE NO.16620
EXHIBIT NO.61

Application No. 16620 of the Embassy of the Republic of Azerbaijan, pursuant to Section 206(b) of the Foreign Missions Act and Subsection 1001.1 of the Zoning Regulations to permit the location of a chancery in an R-1-A District at premises 2741 34th Street, N.W. (Square 2122, Lot 27).

HEARING DATE: October 17th and 24th, 2000

Decision Date: December 5, 2000

DISTRICT OF COLUMBIA
2000 NOV 28 A 9:30

DETERMINATION AND ORDER

The Embassy of the Republic of Azerbaijan filed an application with the Foreign Missions — Board of Zoning Adjustment (Board) to locate a chancery in an R-1-A zoning district. After public hearing, the Board determined not to disapprove the application, provided that the Embassy complies with certain conditions that address community concerns, including limiting large social functions at the chancery, providing additional off-site parking for such functions and restricting changes to the exterior of the subject property ensure compatibility with nearby residential uses.

PRELIMINARY AND PROCEDURAL MATTERS

On July 26, 2000, the owner of the subject property, the Republic of Azerbaijan, filed an application with the Board to permit the location of a chancery for the Republic of Azerbaijan in an R-1-A zoning district at premises 2741 34th Street, N.W. (Square 2122, Lot 27). Azerbaijan was represented in these proceedings by Cynthia A. Giordano of Arnold & Porter.

The application was filed pursuant to Section 206 of the Foreign Missions Act, approved August 24, 1982 (92 Stat. 286, D.C. Code § 5-1206 (1994 Repl.)), 22 U.S.C.A. § 4306 (1990), and 11 DCMR § 1002.1 (1995). Under Section 206(b)(2)(B) of the Foreign Missions Act, 22 U.S.C.A. § 4306(b)(2)(B), D.C. Code § 1206(b)(2)(B), a chancery is permitted to locate in areas determined on the basis of existing uses, which include office or institutional uses, including but not limited to any area zoned mixed-use diplomatic or special purpose, subject to disapproval by the Board in accordance with certain criteria.

The Board's rules of practice and procedure relating to chancery applications are found in 11 DCMR § 3134, 46 DCR 7853 (1999). Under Section 206(f) of the Foreign Missions Act, 22 U.S.C.A. § 4306(f), D.C. Code § 5-1206(f), and 11 DCMR §§ 1102.3 and 3134.2, proceedings before the Board on a chancery application are of a rulemaking and not of an adjudicatory nature.

Pursuant to 11 DCMR § 3134.7, the application was accompanied by a letter from the United States Department of State, dated July 25, 2000, certifying that the Embassy of the Republic of Azerbaijan has complied with Section 205 of the Foreign Missions Act, 22 U.S.C.A. § 4305 (1990), relating to the property of foreign missions.

On August 17 and 23, 2000, and September 7, 2000, the Board referred the application to the Office of Planning; United States Department of State, Office of Foreign Missions; the Historic Preservation Review Board; Commission of Fine Arts; the Zoning Administrator, Department of Consumer and Regulatory Affairs; and ANC-3C, which is the ANC for the area within which the proposed chancery site is located. *See* 10 DCMR §§ 1002.5 – 1002.7, 3113.7, 3134.10. By letter dated August 23, 2000, the Commission on Fine Arts indicated that the subject property does not fall within its jurisdiction. Exh. 26.

Notice of the filing of the application was published in ___ DCR ___ (Sept. 1, 2000); and notice of proposed rulemaking was published in 46 DCR 8839 (Sept. 1, 2000). Notice of the public hearing, set for October 17 2000, was published in ___ DCR ___ (_____, 2000).

By letters dated September 7, 2000, the Office of Zoning mailed the notice of hearing to the applicant and the affected ANC-3C. Exhs. 23-24. The Office of Zoning also mailed letters of notice to all individuals and entities listed on the applicant's list of owners of all property within 200 feet of the boundaries of the subject property. *See* Exhs. 8, 22, 25. In addition, on October 2, 2000, the Applicant posted a zoning notice on the front door of the property, as well as the two street frontages of the property, in plain view of the public. Exh. 39.

The Board held a public hearing on the application on October 17, 2000. The Board considered two preliminary matters at the outset of the hearing.

First, the Board considered two requests for party status: one from a residential neighbor of the proposed chancery and the other from a group of neighbors called the Neighbors of 274 34th Street, N.W. The Board denied the requests explaining that under the Board's rules of procedure and the Foreign Missions Act, 22 U.S.C.A. 4306(f) chancery applications are rulemaking proceedings and in such proceedings person(s) may not have the standing of a party. (11 DCMR 3340.3).

Second, the Board considered a request made by counsel for the Applicant to waive the standard application fee which is required to be paid by an applicant for the processing of an application by the Board and its staff. Counsel explained that the Applicant previously filed the same substantive application (BZA No. 16589) with the Board on April 1, 2000, and then subsequently withdrew it on June 29, 2000, to allow additional time to implement certain treaty issues between the United States Government and the Republic of Azerbaijan. Counsel indicated that the withdrawal was actually in the nature of a continuance, but that a continuance was precluded in this case by the

Foreign Missions Act (22 U.S.C.A. § 4806(v)(3)) and the BZA rules (11 DCMR § 1002.10) which require the BZA to decide and dispose of chancery applications within six months of the initial filing of the application. The Board granted the Applicant's request for a wavier of the filing fee based upon the fact that the Applicant had already paid the fee upon filing of the initial application (BZA No. 16589) and the fact that the initial application was subsequently withdrawn based upon extenuating circumstances related to requirements of the federal government.

Following the preliminary matters, the Board's staff indicated that a report from the Office of Planning, recommending denial of the application, had been received late, only one day in advance of the hearing, instead of the required seven-day advance submittal.

Legal counsel for both the Applicant and the Department of State objected to the late filing asserting that the State Department and the Applicant were prejudiced thereby. Counsel stated that the report contained information obtained by a last-minute investigation of another diplomatic mission (*i.e.,* the Apostolic Nunciature also known as the Vatican Chancery which is located around the corner from the subject property) without coordination with the State Department which is responsible for foreign missions or counsel for the Applicant. According to the State Department, the lack of such coordination resulted in the inclusion in the OP report of inaccurate information and errors in law which the State Department and the Applicant were not able to address with OP prior to the hearing. The Board decided, in accordance with the suggestion of the State Department, that the Board should take under advisement the issue of the late filing of the OP report and make a decision as to whether or not to accept the report at the conclusion of the proceedings. The State Department indicated that it would be submitting a written statement addressing alleged defects the OP report.

Once the hearing got underway, the Applicant presented statements by Ms. Giordano, Hafiz Pashayev, Ambassador of the Republic of Azerbaijan to the United States; and Osborne George, a traffic and transportation expert.

Ronald S. Mlotek, Chief Legal Counsel to the Office of Foreign <Missions, U.S. Department of State, Theodore Strickler, Deputy Assistant Secretary for the Office of Foreign Missions, and Gilda Brancato, Attorney-Adviser in the Department's Office of the Legal Adviser participated in the hearing on behalf of the State Department in support of the application.

The Board ultimately decided to accept the report of the Office of Planning into the record since the hearing did not conclude on October 17th and another hearing was scheduled and conducted on October 24th. This provided the Applicant and the State Department with additional time to address the issued raised by the Office of Planning in its report. In its report dated October 17th , and revised and resubmitted on October 20th, the Office of Planning recommended denial of the application based on a determination that the proposed chancery site does not meet the standard of 1/3 or more of the land uses on the City square being office and/or institutional uses. In its report OP further indicated

that if the Board determined that is standard had been met, OP recommended denial for additional reasons related to the potential for a negative impact on the residential character of proposed chancery site and vicinity. Arthur Jackson, community planner, and Ellen McCarthy, Deputy Director, represented the Office of Planning at the hearing.

ANC-3C, the affected ANC, filed a report, Exh. 31, dated October 6, 2000. The ANC opposed the application based on concerns related to parking and maintenance of the residential character of the neighborhood. Rosalyn Doggett, ANC-3C, appeared at the hearing on behalf of the ANC.

The Ambassador of Norway and the Apostolic Nuncio (the Ambassador of the Vatican) both submitted letters in support of the application, in their capacities as residents of the area. Exhs. 44 and 49. Two additional residents of the 2800 block of 34th Street, N.W., one block from the proposed chancery site, also submitted letters in support of the application. Exhs. 48 and 59 two additional persons testified in support of the application at the hearing. In addition, two other residents of the District, though not of the immediate neighborhood, testified in support of the Embassy. The latter pointed out the need for the District to act as an accommodating host to foreign diplomatic missions and also underscored the importance of Azerbaijan to United States interests in the world.

Several individuals and a group of residents identifying themselves as the Neighbors of 2741 34th Street, N.W. submitted written comments and testified at the hearing in opposition to the application. The Board received a petition, Exh. 43, signed by a number of residents opposing the chancery proposed based on concerns relating to parking and traffic congestion and the potential for adverse impacts on the residential character of the neighborhood.

The Board held its decision meeting on December 5, 2000. The Board, voting ____, determined not to disapprove the application, subject to certain conditions designed to address community concerns relating to preservation of the residential character of the neighborhood, traffic, and parking.

THE PROPOSED CHANCERY LOCATION

The proposed chancery location, 2741 34th Street, N.W. (Square 2122, Lot 27), is a 13,386 square foot corner lot located on the south side of 34th Street, N.W., at the intersection of 34th Street and Fulton Street, and one-half block to the east of Massachusetts Avenue, N.W. The site is zoned R-1-A. It is one lot removed from a Diplomatic Overlay zone which includes all of the properties in Square 2122 except the subject property and the house located immediately to the west of the subject property which is owned by the Apostolic Nunciature (Vatican Chancery), and used to house mission employees. The Diplomatic zone is also mapped in Square 1939, located directly across 34th Street from the subject property. On the east, the site is bordered by Fulton Street. To the southeast is Normanstone Park, which is federal parkland.

It was uncontested during the proceedings that, notwithstanding its R-1-A zoning and its generally residential character, there are numerous non-residential uses both in the subject square as well as the surrounding area. The Apostolic Nunciature (the Vatican Chancery), which contains both the chancery offices of the Vatican and the residences of several Vatican officials, is located to the west of the subject site at the corner of 34th Street and Massachusetts Avenue, in the same zoning square. Also in the same square is a large chancery, the mission of Finland. Almost directly across 34th Street from the subject site corner is another large chancery, that of the Norway. Further east, across Fulton Street, is still another large chancery, the Embassy of Belgium, at the corner of 34th and Garfield Street, N.W. Further west, across Massachusetts Avenue, is the Vice-President's residence and the Naval Observatory. Finally, the National Cathedral complex, which includes several large private schools, and which is a major magnet for tourism to the city is located only two blocks from the subject site, at 34th and Garfield Streets.

The subject site is currently improved with a two-story single-family consisting of twelve rooms and a two-car garage. Access to the property is available from both 34th Street and Fulton Street. On 34th Street, two existing curb cuts access on existing semi-circular driveway. Access is also provided to the rear of the property from Fulton Street via driveway which leads to a two-car garage and adjacent parking pad. The property is heavily landscaped and surrounded by a metal picket fence and masonry wall.

The Government of the Republic of Azerbaijan purchased the subject property to relocate its chancery operation to the site from currently leased office space located at 927 15th Street, N.W. Azerbaijan's objective is to relocate from its leased space in a high-rise Downtown office building to a free-standing, signature building which will provide more presence for its diplomatic mission in the United States. Azerbaijan considered several sites for the possible location of a new chancery before ultimately selecting the subject site. The small size of the subject property, its affordability, and its location near other diplomatic missions and Massachusetts Avenue's "Embassy Row" were key factors in choosing the subject property.

THE PROPOSED CHANCERY USE

As proposed by the Embassy of Azerbaijan, its new chancery use would be a small diplomatic mission consisting of a total of twelve employees, including the Ambassador. The Applicant has agree to limit the number of employee to 15 persons, as a condition of favorable BZA review. The proposed chancery would keep normal business hours from approximately 8:00 a.m. to 6:00 p.m. Monday-Friday. For the most part, there will be no activity at the site on the weekends or in the evening.

During the workweek, the Applicant testified that very few visitors are expected to come to the site. The Chancery's visa and consular business is primarily conducted electronically, by fax and email with occasional delivery service to the site. According to

the Ambassador, 3 to 4 persons a day will visit the proposed chancery, and the majority of these trips will be made by other diplomats who will come to the site by taxi or private drivers.

The Applicant stated that only minimal exterior alterations to the subject site will be necessary for the proposed chancery use. Only a small brass plague and the national flag of Azerbaijan will indicate the presence of the chancery. No additional exterior lighting or large antennae will be installed. Portions of the interior of the building, however, will be remodeled and refurbished for office use.

DETERMINATION

The Board's adjudication of an application to locate a chancery is governed by Federal statute, namely the Foreign Missions Act, 22 U.S.C. §4301 et seq. ("the Act"). It is also codified as D.C. Code 5-1201, et seq. Within the Act, the provisions found at 22 U.S.C. §4306, D.C. Code 5-1206, specifically control the Board's review of such matters. Under these provisions, the Board must subject the relevant facts pertaining to an application such as Azerbaijan's to a two-step test.

As a first step, under 22 U.S.C. §4306(b)(2), D.C. Code 5-1206(b)(2), the Board must determine whether the area of the proposed chancery location is an area deemed acceptable for such location under the statute. Depending upon the zoning classification of the site in question, one of two separate subsections of the above provision will apply: §4306(b)(2)(A) or (b)(2)(B); D.C. Code 5-1206(b)(2)(A) or (b)(2)(B). The first subsection, (b)(2)(A), applies to areas zoned medium-high or high-density residential. Proposed chancery locations in such areas are automatically deemed acceptable by operation of law. *Id.* Proposed locations in "any other area" of the District are controlled by the second subsection, (b)(2)(B). In these areas, this Board must first determine, as a threshold matter, whether any chancery location, as a general matter, is appropriate "on the basis of [other] existing uses" in the area. 22 U.S.C. §4306(b)(2)(B), D.C. Code 5-1206(b)(2)(B). The present application, by virtue of its location, is subject to this threshold inquiry.

If the proposed location passes this first test pertaining to area's general appropriateness for any chancery location, the focus of the Board's inquiry then shifts to the specific factual merits of the application at hand, under the Act's provisions at 22 U.S.C. §4306(d); D.C. Code at 5-1206(d).. Such specifics might include: the nature and size of the proposed chancery operation; number of employees and vehicles involved; the specific configuration of the subject site in relation to neighboring residential uses and the potential negative impact thereon, if any; the nature and extent of construction or renovation that the chancery is proposing to undertake, if any; and any other unique, site-specific factual attributes that may apply. Under the Act, the Board's weighing of these specific merits is to be based solely upon the six factors set forth at 22 U.S.C. §4306(d)(1)-(6); D.C. Code 5-1206(d)(1)-(6).

It should be noted that, in contrast to the first statutory test discussed above, this second test involves a review by the Board which the Act stipulates be in the nature of a disapproval process rather than one of approval. 22 U.S.C. §4306(b)(2)(b); D.C. Code 5-1206(b)(2)(B). In other words, once the Board has determined, under the first test, that the subject area is appropriate for chancery location as a general matter, the specific chancery proposal in question gains a presumption of appropriateness which may be overcome only in the event the Board can identify from the record specific grounds for disapproval.

The present chancery application will now be analyzed according to the Act's two-fold test just described.

Appropriateness of the Area In General

By both written submission and oral testimony at the hearing, various parties and persons in opposition to the Azerbaijan application have submitted evidence and argumentation which it is claimed demonstrates that the area in question is inappropriate under the Act. For example, in a resolution adopted unanimously by ANC 3-C on September 25, 2000, the following points are made: that the subject site is located outside the Mixed Use Diplomatic district (i.e. outside the "D-overlay"); that since area in which the site is located is zoned R-1-A, any form of commercial or office use, including chancery use, is prohibited; that the Board's review of a chancery location pursuant to the six statutory criteria contained in 22 U.S.C. §4306(d), D.C. Code 5-1206(d) may apply solely to sites located within the "D-overlay" and to those outside thereof; and that "office use does not predominate within the R-1-A zone" in which the site is located.

Similarly, the District's Office of Planning, which is a party in this case, stated in a report dated October 17, 2000, that "Establishment of the proposed use, in a clearly residential neighborhood, is contrary to the goals of the [D.C.] Comprehensive Plan." OP Report at p. 1. Looking at the specific zoning square in which the site is located (Square 2122), the Office of Planning concludes, through a series of elaborate calculations of residential to non-residential square footage, that the level of existing, nonresidential uses in that square is insufficient to warrant the Board's finding that this area would constitute an appropriate one for location of a chancery. *Id.* At pp. 6-8.

At the heart of the arguments advanced by the Office of Planning and the other opposing persons and parties are issues revolving around the Diplomatic or "D-overlay". The Application's opponents contend that, since it the subject site falls outside, albeit just outside, the boundaries of the D-overlay as it is mapped at this location, the Board has no choice under the first of the two tests mentioned but to determine that that the site fails to qualify under §4306(b)(2)(B) as acceptable chancery location based upon other uses existing in the area. In specific, OP stresses that the ratio of non-residential to residential uses today existing within sq. 2122 falls short of the 1/3-to-2/3 ratio which was the prerequisite for inclusion into the D-overlay district. It was uncontested during the proceedings that the subject site indeed does not fall within the D-overlay", although much if not of the subject zoning square itself, does in fact lie within it. No authoritative

reason was presented to the Board explaining why, in mapping sq. 2122, the Zoning Commission should have departed from its standard procedure of calculating and mapping the non-residential/residential ratio on the basis of a complete square.

Notwithstanding the status of the D-overlay as it relates to this site. the Applicant and the Department of State for their part contended, in oral presentations and written submissions, that the absence of the D-overlay here could not automatically be seen as compelling the Board's determination that the subject site was, *per se*, inappropriate for any sort of chancery location. The Department's representative, Mr. Mlotek, argued during his presentation that regarding the D-overlay as dispositive as to the first of two tests discussed above (i.e. the inquiry under §4306(b)(2)(B)) would be inconsistent with the Act. Mr. Mlotek emphasized this view constituted the longstanding position not only of the Department of State, but also the U.S. Government as a whole, having been adopted by the Department of Justice. Likewise, he noted, this Board, along with the District's Corporation Counsel, had also concurred in this view in the past. As a feature of the chancery zoning process, he stressed, the "D-overlay" was nowhere specifically authorized or even mentioned within the Act. Accordingly, he argued, the presence or absence of the overlay from a given site could, at very most, be regarded by this Board as a guide or a rebuttable presumption as to the appropriateness of that area for chancery location based upon "existing uses". Under the Act, Mr. Mlotek concluded, the 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. Applicant's counsel, Ms. Giordano, argued in a similar vein.

In resolving these opposing positions, the Board must act in accordance with its precedent and with what we believe is the clearly correct construction of the provisions contained in §4306(b)(2)(B). As this Board determined in Application No. 14820 (the Mission of Taiwan), a chancery location outside the D-overlay is not precluded as a matter of law, regulation, or policy. The question of the appropriateness of such a location is be determined by this Board in each case. In the present case, we find that the proposed location is appropriate, given the abundant presence of other non-residential uses both within sq. 2122 itself as well in the immediately surrounding area.

As regards the subject square itself, we find that by any reasonable application of the well-known 1/3-2/3 test, that square would qualify for inclusion into the D-overlay if it were being remapped today. On this score we agree with the land-use analysis in the record that was undertaken by NCPC and disagree with that done by the Office of Planning. In this regard the following factors are material and dispositive.

First, as testified by the Department of State, and as is confirmed by the Department's official, published *Diplomatic List*, the building registered as the chancery of the Vatican, formally known as the Apostolic Nunciature, is the sole and exclusive diplomatic office maintained by the Vatican in the District. While some of the mission's staff do clearly reside in the building, this fact does not support the opponents' conclusion that the majority of the Nunciature's square footage is in fact utilized for residential purposes. Without challenge from any party, the Department of State testified that the large reception areas of the building were utilized as the principal location for the mission's official meetings and functions. Such uses cannot reasonably be seen as related or ancillary to the buildings residential uses. They are clearly official and hence non-residential in nature.

Second, as a matter of law, the Vatican's chancery is entitled, without any further approval by any party, to be utilized immediately for non-residential use in its entirety. *See* the Act at 22 U.S.C. §4306(h)(2). Hence, although the building appears to lack an actual certificate of occupancy per se, it in essence enjoys such a certificate by operation of Federal statute, and the nature of the use authorized by such an occupancy certificate is clearly chancery in nature.

In sum, we cannot agree with the Office of Planning that the meaning of "existing uses" as the term is used in the Act can be deemed to require that a specific census count of building occupants must be performed by District officials and reviewed by this Board in any chancery location application falling outside the D-overlay. Indeed, if one were to agree that such a census was called for outside the overlay, it would be difficult not to agree that one would be required *inside* the overlay as well. After all, the current D-overlay was mapped in the mid-1980's. Certainly many of the then "existing-uses" are far different today, even inside the overlay.

Instead, it is the Board's position that, in the event a chancery zoning case requires "existing-uses" to be examined, the outcome should be governed by the actual certificates of occupancy relating to the relevant properties and, in the case of grandfathered, pre-1982 chanceries, the occupancy permit that is implied in law. In the Nunciature's case, since the building, as a matter of law, possess the equivalent of a certificate of occupancy for chancery use of the structure in its entirety, the entire space must be regarded as chancery use. In that event, the D-overlay 1/3-2/3 test is clearly fulfilled here, given the added presence of the large Finnish chancery in the same square.

However, the Board also notes that, even if in this case the land use within square 2122 fell slightly short of the 1/3 non-residential ratio, the Board would have difficulty in concluding that the existing uses in the area were so exclusively residential as to preclude a chancery location. This difficulty would arise by virtue of the many other substantial, non-residential uses in the near vicinity that were identified above, including the Belgian, Finnish, and Norwegian chanceries, together with the Naval Observatory and National Cathedral complexes.

Determination Relating to the Specific Proposal

As the second of the two tests established in the statute, Section 206(d) of the Foreign Missions Act, 22 U.S.C.A. § 5306(d) (1990), D.C. Code § 5-1206(d) (1994 Repl.), establishes six criteria upon which the Board must base its determinations regarding the specific merits of a particular chancery location, once the first test regarding the area's general appropriateness has been met. The chancery use criteria are also set forth in 11 DCMR § 1001 (1995). After extensive public hearings and having carefully and fully reviewed the record, the Board has determined as follows with respect to each of the criteria:

1. International Obligation of the United States

Under 11 DCMR § 1002.1, the Board must consider "the international obligation of the United States to facilitate the provision of adequate and secure facilities to foreign missions in the Nation's Capital." By letter dated October 6, 2000, and by testimony presented at the hearing, Department of State representatives argued that favorable action on the application would fulfill the international obligation of the United States to facilitate the acquisition of adequate and secure premises for the diplomatic mission of Azerbaijan. It was noted that, in the present case, the obligation was made particularly compelling by virtue of the reciprocal implementation of this obligation by the Government of Azerbaijan in favor of the United States Embassy in that country.

The Board believes that, taking into account all facts and circumstances, the consideration to be accorded this criterion in the present case is particularly weighty.

2. Historic Preservation

Under 11 DCMR § 1001.3, and 1001.4 the Board must "consider historic preservation, as determined by the Board in carrying out this section." The historic preservation criteria are not relevant in this chancery application since the subject property is not a designated historic landmark and it is not located in a historic district.

3. Adequacy of Parking

The chancery use criteria in 11 DCMR § 1001.5 include parking considerations:

The Board shall consider the adequacy of off-street or other parking, and the extent to which the area will be served by public transportation to reduce parking requirements, subject to any special security requirements that may be determined by the Secretary of State, after consultation with federal agencies authorized to perform protective services.

Many of the witnesses in opposition to the proposed chancery as well as the Office of Planning questioned whether the proposed chancery would provide adequate parking.

The Applicant's witnesses testified that up to seven parking spaces can be provided on the subject property. Four of these spaces will be used by the fleet of four vehicles owned by the Applicant. These vehicles, which include two mini vans, which are used to carpool the chancery employees to and from work. The two-car garage and adjacent parking pad accessed off of Fulton Street will be used to provide parking for the chancery employees. Such access is located behind the proposed Chancery building and out-of-sight of the residential homes located across 34th Street from the subject property.

The Applicant further stated that the chancery has very few visitors since most of the chancery's visa and passport business is conducted electronically and by mail. Most visitors to the site will be other diplomats and business persons who will be dropped off and picked up from the site by professional drivers or taxi. The semi-circular drive located in front of the proposed chancery site can be used for such drop-offs and pick-ups and for short term visitor parking. The applicant agreed not to request diplomatic parking along 34th Street in front of the proposed chancery building.

Regarding the anticipated frequency of social events at the proposed chancery, the Ambassador testified that most large social functions will be held at area hotels. The Ambassador agreed to a restriction on the proposed chancery uses which would limit chancery entertaining to no more than four large events, for up to 50 people, per calendar year.

Osborne George, the applicant's expert on traffic and transportation matters, provided a written report and testimony in support of the application. After conducting field inventories and surveys of the parking usage in the vicinity of the proposed chancery location, Mr. George concluded that the proposed chancery use will not create adverse traffic and parking conditions. Mr. George determined that onsite parking at the chancery site will be adequate to accommodate demand given the Chancery's carpooling practices and the anticipated number of visitors to the site. Further, substantial available on-street parking, within the adjacent street blocks is provided. Finally, Mr. George advised that the chancery's commitment to arrange for use of the parking lot of the Belgium Chancery for major social functions will further ensure that the impacts are insignificant.

The Board concurs with the Applicant and finds that the parking proposed to be provided on the chancery site will be adequate to meet the demand created by the chancery usage. Further, as conditioned by this Order, the requirement that the chancery utilize the Belgium chancery parking lot for major social functions will ensure that the proposed chancery use will not have an adverse parking impact on neighboring residential uses.

Further, the Deputy Assistant Secretary of State for Foreign Missions has determined on behalf of the Secretary that there are no special security requirements related to parking in this case. Exh. 36. Based on the above, the Board concludes that the parking considerations specified in 11 DCMR § 1001.5 do not furnish grounds for disapproval of the application.

4. **Security**

Under 11 DCMR § 1001.6, the Board must "consider the extent to which the area is capable of being adequately protected, as determined by the Secretary of State, after consultation with federal agencies authorized to perform protective services." The Deputy Assistant Secretary of State, after consultation with the federal agencies authorized to perform protective services, has determined on behalf of the Secretary that the subject site and area are capable of being adequately protected. Exh. 32. The Board finds accordingly that security concerns do not present grounds for disapproval of the application.

5. **The Municipal Interest**

Under 11 DCMR § 1001.7, the Board must "consider the municipal interest, as determined by the Mayor." The Mayor of the District of Columbia has delegated authority to the Office of Planning to determine the municipal interest for purposes of Section 206 of the Foreign Mission Act. *See* Mayor's Order 83-106 (Apr. 28, 1983). In this case, the Office of Planning questioned whether the proposed chancery was in the municipal interest, indicating that it had concerns that the proposal would impair the integrity of the District zoning plan since the existing R-1 zoning "is designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes." As discussed in detail above, the subject area is a mixed-use area with numerous large chancery (i.e., office uses) and other institutional uses. Further, in its report (p. 4) OP concedes that the law permitting chanceries to locate in any other areas which include office or institutional uses "preempts any otherwise applicable section of the Zoning Regulations". Finally, with the conditions imposed by this Order relative to maintaining the residential appearance of the building, limiting the size of the chancery staff and requiring that any alterations to the building and grounds or expansion of the building shall be subject to further review by the Board, the Board is of the opinion that the proposed chancery will not adversely impact the residential uses in the area.

6. **The Federal Interest**

Pursuant to 22 U.S.C. § 4306(d)(6), 11 DCMR § 1001.8, the Board is required "to consider the federal interest as determined by the Secretary of State." As with the municipal interest criterion above, while it is not for the Board to determine the Federal

interest, it is the Board's duty to weigh the determination of that interest by the Secretary, in balancing it against another criterion that may be conflicting, as is the case here.

The Department of State in this case underscored to the Board, in written and oral submissions, and in other ways, that the Federal interest in this case was particularly acute. In order to highlight this fact, the Department's usual presentation by Office of Foreign Missions Legal Counsel was augmented at the hearing by the testimony at the October 17 hearing from Deputy Assistant Secretary of State Theodore Strickler, who serves as Deputy Director of the Office of Foreign Missions. Mr. Strickler described the critical program being pursued by the Department to enhance the security of American embassies overseas. A vital feature of this program, he noted, was to ensure that in all new chancery acquisitions there would be major set-back of the building from surrounding roadways in order to mitigate the risks posed by car bombs, which had already been directed at U.S. embassies in the past with tragic consequences, most recently in Kenya and Tanzania.

In Baku, Azerbaijan, Mr. Strickler explained, the United States had long sought to obtain such a security buffer by acquiring an apartment building abutting the U.S. Embassy compound. The acquisition of this building from the Azerbaijan government, he testified, was a complex and lengthy matter, given the fact that the building's tenants had legal rights to assert in resisting the eminent domain condemnation of their building. The Azerbaijan authorities were exceedingly helpful in facilitating the U.S. Embassy's pursuit of this property, including personal intervention by the President of Azerbaijan on behalf of the United States. These factors, the Department of State's representatives argued, placed the United States government in particular debt to the Government of Azerbaijan when it came to the question of Azerbaijan's reciprocal acquisition of chancery property here, to an extent even greater than usually present in other chancery zoning cases.

The Board believes that it cannot, having heard such testimony, fail to assign in this case an increased weight to the importance of the Federal interest criterion. The Board recognizes that reciprocity interests alone, even compelling ones as here, cannot in themselves justify the Board in taking a decision which would severely prejudice the interests of District residents in the peaceful enjoyment of their homes and communities. At the same time, the presence of such a weighty Federal interest criterion must and does create an equally weighty burden upon the opponents of the proposed chancery location to show specific and tangible proof of injury likely to result to residential interests by virtue of the proposed location.

In the present case, given (1) the character of the neighborhood which includes three other large chanceries and four chanceries in total; (2) the presence of two other chanceries in the subject square alone; (3) the relatively small size of the proposed Embassy operation and staff; and (4) the fact that no construction is being proposed that would alter the subject building's residential character; and (5) the extensive list of use restrictions to which the Embassy has agreed as a condition of any BZA order, the Board does not believe that the opponents have succeeded in meeting their burden to

demonstrate specific, tangible harm that would result to the legitimate interests of residents in the area, sufficient to outweigh the Federal interests and international obligations palpable in this case.

THE ANC RECOMMENDATION

The subject site is located within the boundaries of Advisory Neighborhood Commission (ANC)-3C. By letter dated October 6, 2000, the ANC reported that a duly-noticed public meeting with a quorum present, the ANC, by a vote of 6:0, recommended denial of the application on the grounds that the proposed chancery site is located outside the mixed-use Diplomatic (D) overlay district and instead is located within an R-1-A low density, single-family district in which office and commercial uses are prohibited. These concerns have been addressed elsewhere in the Board's determination, particularly sections – and relating to – and the municipal interest. The Board is required to give "great weight" to the affected ANC's recommendations. The Board has carefully and thoroughly considered the ANC's recommendations, but for the reasons set forth below and elsewhere in this determination, does not find the recommendations persuasive.

First, the Foreign Missions Act and D.C. law permit the location of chanceries outside the D overlay zone in cases where other office and institutional uses are present. The subject site is zoned R-1-A but much of the surrounding area to the west of the site is also mapped with the D overlay. In fact, in the subject square, only the subject property and the single family abutting the subject property to the west (this house is owned by the Vatican Chancery) are not included in the D overlay. Further, contrary to the ANC's assertions, there are several, prominent existing chancery uses located in the subject 2700 block of 34th Street, N.W., including the Chancery of Norway which fronts on 34th Street and the Vatican Chancery which has frontage on both Massachusetts Avenue and 34th Street, N.W. Adjacent to the Vatican Chancery on Massachusetts Avenue is the Chancery of the Republic of Finland. Further, within the one block from the proposed chancery site, in the 2800 block of 34th Street, N.W. is the Belgium Chancery. As a result, the Board does not agree with the ANC's assertion that the subject area is predominately residential. The Board finds that the area contains a mix of residential and office uses and, as conditioned by this Order, is an appropriate area in which to locate the proposed chancery which is a small diplomatic mission. In particular, the Board finds that the restrictions contained in this order regarding the maximum number of Chancery employees who can occupy the site, the maintenance of the exterior residential appearance of the property, and limitations on the number and size of social functions at the site, and the restriction on the use of diplomatic parking in front of the property adequately address the ANC's concerns and will mitigate any potential impacts on neighboring residential uses.

While the Board has given great weight to the recommendations of the ANC, for the reasons stated above and throughout this determination, the Board has determined that the application should not be disapproved, subject to conditions designed to address community concerns.

ORDER

For the reasons stated above, the Board has determined that this application satisfies the chancery use criteria set forth in 11 DCMR § 1001. Accordingly, it is **ORDERED** that this application is **NOT DISAPPROVED**, subject to the following conditions:

1. The Embassy of the Republic of Azerbaijan will retain and maintain the residential appearance of the premises, the chancery presence; no significant exterior changes to the property indicating chancery use are permitted. A brass plaque not to exceed 18 by 16 inches identifying the chancery and the national flag are permitted; no additional exterior lighting or large antennae may be installed.

2. The number of mission officials and employees on-site at any one time shall not exceed fifteen.

3. The number of vehicles on-site for use or driven by embassy officials and staff shall not exceed seven (or arrangements shall be made for additional off-street parking at another location).

4. The applicant shall not request diplomat parking along 34th Street, N.W.

5. The number of persons invited to major chancery activities at this facility shall not exceed fifty and the number of major social events will not exceed four per calendar year.

6. The chancery shall only be used for activities of the Azerbaijan government.

7. Additional off-site parking for the four major social events referenced above will be provided at the Belgium Chancery located at the corner of Garfield and 34th Streets, N.W., within two blocks of the proposed chancery site.

8. Variations from the referenced conditions, alteration of the existing landscaping and grounds, and redevelopment or expansion of the existing building shall be subject to further BZA review in accordance with Section 1002 under Title 11 of the District of Columbia Municipal Regulations (DCMR) Zoning.