

September 15, 2014

VIA ELECTRONIC MAIL

Anthony J. Hood, Chairman  
Zoning Commission for the District of Columbia  
441 4th Street NW, Suite 201S  
Washington DC 20001

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**Reference Number**  
**029618.00001**

Re: Case No. 08-06A  
Zoning Regulations Review  
Comments of Sheridan-Kalorama Neighborhood Council Council Regarding Chanceries

Dear Chairman Hood and Members of the Commission:

On behalf of our client, the Sheridan-Kalorama Neighborhood Council ("SKNC"), we offer our support of the Office of Planning's Draft Text regarding Chanceries in Low- to Medium-Density Residential Zones as contained in the September 9, 2013 Draft ZRR Text. The proposed text addresses the concerns SKNC has long held regarding the tension between the obligations of the Foreign Missions Act and the protection of its low-density historic neighborhood.

You may recall that SKNC filed a Petition to Amend the Zoning Map to eliminate eight (8) squares within the Sheridan-Kalorama neighborhood from the Diplomatic Overlay in 2004 – which case has been pending and undecided since 2005. In that case (Number 04-21) the Zoning Commission tabled the map amendment and directed the Office of Planning to work with the applicant to codify the unwritten "1/3 – 2/3 Rule" for determining whether a square in a residential zone is suitable for chancery uses, or to eliminate the D Overlay in its entirety. *See* Zoning Commission Transcript for October 17, 2005, pp. 34-54. For nearly nine years since, SKNC has been regularly meeting with the Office of Planning to discuss potential changes to the Zoning Regulations that would codify this threshold question of whether a square is suitable for chancery uses by implementing a sound and accurate calculation of uses that are typical of (i.e., permitted as a matter of right in) a low-scale residential neighborhood and those that are not. SKNC has strenuously objected to the inclusion of schools, libraries, parks, home occupations, community centers, private clubs, and other uses that are permitted as a matter of right in the current R-1 and R-2 Zone Districts, in the category of non-residential uses that can tip the balance of a square from predominantly residential to 1/3 institutional, and thus suitable for chancery use. This "1/3 – 2/3 Rule" was the methodology the Zoning Commission used to initially determine which squares were eligible for the D Overlay – it was not intended as a means to identify every square within a residential zone in the District that might be suitable for use by a Foreign Mission. And it has created a local "Domino Effect" of eliminating the

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**ZONING COMMISSION**  
**District of Columbia**  
**CASE NO.08-06A**  
**EXHIBIT NO.887**

residential character of SKNC's neighborhood, which represents only a small percentage of the land area of the District, yet houses the vast majority of the Foreign Missions located within the District of Columbia.

SKNC has worked closely with the Office of Planning to fashion the proposed text and create a threshold that does not irreparably change the residential character of Sheridan-Kalorama and other similar neighborhoods throughout the District. We agree with the approach of Section 201.4 in Subtitle D of the Proposed ZRR Text (9/9/13 Draft) and the increased threshold of fifty-percent of a square in so-called "institutional" uses prior to the Zoning Commission determining that a square is suitable for a new or expanded chancery. However, we urge the Office of Planning and the Zoning Commission to further refine the list of "institutional" uses so that uses typical of an established residential neighborhood, such as Sheridan-Kalorama, are not used to make a case that a square has tipped to institutional use and is suitable for yet another chancery. Specifically, we urge the Zoning Commission to adopt new language that would treat churches, schools, private clubs, parks, and local government uses (such as libraries, police and fire stations, and public recreation centers) as "residential" rather than "institutional" for purposes of this calculation.

Additionally, SKNC does not support the exemptions contained in Subtitle X, Section 205, which directly contradict the use regulations for Residential House Zones found in Subtitle D Section 201.4. The October 1, 1982 date for grandfathering an existing chancery is based on an erroneous interpretation of the Foreign Missions Act, as described in the attached White Paper on Grandfathered Chanceries, which we prepared in connection with several BZA cases in which this subject was at issue, prior to filing the Map Amendment in Case 04-21.

In conclusion, we believe the changes the Office of Planning has proposed will go a very long way toward preserving low-scale residential neighborhoods such as Sheridan-Kalorama from the incremental degradation that occurs when chancery after chancery is allowed to located within these zones. We believe the changes OP has proposed and the changes advocated herein are consistent with the Foreign Missions Act and well within the power of the Zoning Commission to enact to protect the character of the District's residential neighborhoods. We thank the Office of Planning and the Zoning Commission for its tireless work in getting this issue right, and urge you to continue to carefully consider the language you adopt to regulate chanceries in our neighborhoods. This is not just an issue of critical importance for SKNC, but as the proposed text removes the D Overlay and provides the opportunity for chanceries to locate in any neighborhood in the District (subject to the 50% calculation), this will continue to be debated before the BZA and at the Office of Planning for cases throughout the District's residential neighborhoods.

**Arent Fox**

Anthony J. Hood,  
Chairman  
September 15, 2014  
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Sincerely,

A handwritten signature in black ink, appearing to be 'Kinley R. Bray', with a long horizontal line extending to the right.

Kinley R. Bray

Enclosure

Cc: Sheridan-Kalorama Neighborhood Council  
Office of Planning

## White Paper on Grandfathered Chanceries

Section 4306(h)(2) of the Act states that:

Approval by the Board of Zoning Adjustment or the Zoning Commission or, except as provided in section 4305 of this title, by any other agency or official is not required –

(2) for continuing use of a chancery by a foreign mission to the extent that the chancery was being used by a foreign mission on October 1, 1982.

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

The starting point for review here is the language of § 4306(b), which provides that all governments seeking to locate their chancery in a non-matter-of-right zone district – whether it be in the Diplomatic Overlay, high density residential zone districts or special purpose zone districts - are subject to the disapproval of the FM-BZA in accordance with the criteria set forth in § 4306(d) (“[a]ny determination concerning the location of a chancery under subsection (b)(2) of this section, or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, shall be based solely on the following criteria . . .”). Subsection 4306 (b)(2) applies to a chancery locating in, *inter alia*, the Diplomatic Overlay and specifically provides that such location of a chancery shall be “subject to disapproval by the [FM-BZA].”

Under the Foreign Missions Act, there are zone districts in which a chancery is allowed as a matter of right. These zone districts include commercial, industrial, waterfront, or mixed-use (CR) zone districts. 22 U.S.C §4306(b)(1), *accord.*, 11 D.C.M.R §§ 601.1(r)(allowing a chancery, embassy or international organization to locate in the mixed use (CR) zone districts as a matter of right), 701.6(e), 721.1, 741.1, 751.2(a), 761.1 and 801.2 (allowing a chancery to locate in the C-1, C-2, C-3, C-4, C-5(PAD) and the industrial (C-M) zone districts, respectively, as a matter of right). To locate in any one of these zone districts, a chancery does not have to obtain any approvals or satisfy the criteria of section 4306(d).

Second, there are zone districts in which chanceries are permitted to locate, subject to the disapproval of the FM-BZA based on the criteria of 4306(d). *See* 22 U.S.C § 4306(b)(2). This provision is broken down into two distinguished areas:

(A) areas 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.

22 U.S.C § 4306(b)(2)(A)&(B) *accord*. 11 D.C.M.R §§ 1000.6 (providing that the “criteria and procedures set forth in this chapter [pertaining to the Diplomatic Overlay] shall also apply to chancery uses in R-5-D, R-5-E and SP districts.”); *see also* 11 D.C.M.R §§ 350.6, 503.1 (providing that “a chancery shall be a permitted use in R-5-D or R-5-E [or SP] districts [respectively], subject to disapproval by the Board of Zoning Adjustment in accordance with the requirements of chapter 10 of this title”) and 501.3 (providing that “general office use, including chancery, shall be permitted in an SP District as a replacement for office use for international organization, non-profit organization, labor union, architect, dentist, doctor, engineer, lawyer, or similar professional person existing and approved by the Board of Zoning Adjustment or the Zoning Commission or authorized by a validly issued certificate of occupancy prior to January 29, 1999”). Thus, for chanceries seeking to locate in the high density residential neighborhoods (R-5-D or R-5-E), special purpose zone districts, or in the Diplomatic Overlay, they are subject to the disapproval of the FM-BZA and must satisfy the criteria of section 4306(d).

Third, there are foreign governments with existing chanceries, or foreign governments that had obtained the rights to locate their chancery, prior to the adoption of the Act (*i.e.*, prior to October 1, 1982). It is for these two (2) circumstances that section 4306(h) was adopted. This section applies both to chanceries within the Diplomatic Overlay, as well as those outside the overlay, which are often referred to as “outlier chanceries” – or chanceries in non-Diplomatic, low density residential zone districts. As stated above, there was a recognized need to protect governments of these existing chanceries from being subjected to the criteria set forth in section 4306(d) of the Act. Section 4306(h), therefore, grandfathers the chanceries of such governments. As set forth above, all other governments seeking to locate their chanceries in the Diplomatic Overlay (or the R-5-D, R-5-E or SP zone districts) are subject to disapproval of the FM-BZA.

The provisions of the zoning regulations, as with the Act, do not say that the provisions do not apply to a foreign mission seeking to locate a chancery in a property previously used by another foreign mission as its chancery. Rather, they require that the location of a chancery, without exception, be subject to review by the FM-BZA. Or, in accordance with § 1002.1 of the zoning regulations, the replacement of a chancery is subject to review by the FM-BZA. What is not subject to review is the continued use of an existing chancery by the same foreign government. *See* 11 D.C.M.R § 201.1(m)(1).

Thus, the structure and progression of the relevant provisions of the Act makes it clear that the grandfathering provision of section 4306(h) only applies to the governments of existing chanceries and not to governments seeking to take over a chancery. *See* 2A Sutherland Statutory Construction § 47:01 (2000 rev. 6<sup>th</sup> ed.)(stating that “the starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.”) That is, the starting point of the Act, as set forth in section 4306(b), is

that **all** governments seeking to locate their chancery in a non-matter of right zone district – whether it be in the Diplomatic Overlay, high density residential zone districts or special purpose zone districts - are subject to the Act and, therefore, the zoning regulations adopted in accordance with the Act. Specifically, section 4306(d) provides that:

*Any* determination concerning the location of a chancery under subsection (b)(2) of this section, or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, *shall be* based solely on the following criteria . . .

(Emphasis added). Once again, subsection (b)(2) applies to a chancery locating in, *inter alia*, the Diplomatic Overlay and specifically provides that such location of a chancery shall be “subject to disapproval by the [FM-BZA].” Clearly, had Congress intended the grandfathering provision of subsection 4306(h) to apply to **any** foreign mission it would have used the word “any”, as it did in section 4306(d). This distinction in the use of terms by Congress was not accidental but, rather, reinforces Congress’s position that the location of all chanceries must be reviewed by the FM-BZA.

When Congress incorporated a grandfather provision into the Foreign Missions Act it did so in order to protect only the existing government occupying a chancery. At the time the Act was adopted, there already existed a Diplomatic Overlay. Recognizing this, the Act, in addition to spelling out the criteria that new chanceries would be subjected to (see 22 U.S.C. §§ 4306(d)(1) -- (6) and 11 D.C.M.R. §§1001.2 through 1001.8), sought to protect existing governments occupying chanceries in underlying zones that did not allow chanceries as a matter of right. That is, the grandfathering provision was meant to preclude the foreign government of an existing chancery from having to go before the FM-BZA to prove that it satisfied the criteria set forth in § 4306(d).

In the House Conference Report No. 97-693 on the Foreign Missions Act, at p. 704, the Conference makes it clear that section 206(h) (codified as 22 U.S.C § 4306(h)) is merely a grandfather provision for the foreign mission which occupied an existing site and nothing more, “so that such issues [as to its particular location and use] need not be reopened.” The Senate Report No. 97-329 states that the provision (section 206.l in the Senate Bill) was “necessary to protect rights and uses which were acquired prior to enactment of this section.” It was never viewed as a provision that provided future chanceries (or uses of a site by different foreign missions) with the opportunity to ignore the application of the criteria adopted under section 206(b)(1). Thus, when the Zoning Commission adopted regulations to govern the application of the Foreign Missions Act, it correctly limited the application of the provision to only existing chanceries and the governments which occupied them and, as with other grandfathering rules in zoning, required new users to seek relief from the Board under the criteria or to preclude the location of a new chancery to the site where the site did not meet the institutional use requirements.

The provision reflected a policy adopted by NCPC in 1979 as part of the Foreign Missions and International Agencies Element of the Comprehensive Plan for the Nations Capital. The

provision (section 313.63) provided that existing chanceries may be retained but, under 313.62, new chanceries had to meet the criteria established elsewhere in the Plan.

### **Section 201.1(m) of the Zoning Regulations.**

Section 201.1(m) of the zoning regulations, subsequently adopted by the Zoning Commission, is not contrary to the Act. Indeed, the Zoning Commission, in adopting this provision, rejected the State Department's position that the provision was contrary to the Act. The Zoning Commission, with review and comment by the National Capital Planning Commission, was charged with the adoption of regulations consistent with the Act. 22 U.S.C. § 4306(e)(2). Accordingly, chapter 11 of the zoning regulations, as well as § 3134, was adopted by the Zoning Commission. Subsequently, in 1990, the Zoning Commission adopted § 201.1(m), making it clear that, in low density residential districts, the property of a foreign mission in occupancy at the time of the adoption of that provision cannot be transferred to another foreign mission. Specifically, section 201.1(m)(1) states:

Chancery existing on September 22, 1978; provided, that the following requirements shall be met:

(1) After February 23, 1990, the continued use of the chancery shall be limited to the government that lawfully occupied the chancery on that date;

11 D.C.M.R §201.1(m). This section is consistent with the Act, as illustrated by the legislative history of the Act and constitutes the Zoning Commission's explicit interpretation of the section of the Act.<sup>1</sup>

This regulation does not discriminate against Chanceries. The Act carves out special treatment for chanceries, which special treatment has been incorporated into the zoning regulations. Most notably, applications for chanceries are considered rulemaking procedures and, as such, no person may have standing as party. 22 U.S.C. §4306(f); 11 D.C.M.R §§ 3134.2 & 3134.3. Moreover, the nondiscrimination clause, by its very terms, does not grant chanceries exceptional relief that exceeds those applicable to other office or institutional uses. 22 U.S.C. § 4306(b)(3).

As set forth above, §§ 1000.6, 1001.1 and 1002.1 of the zoning regulations require the review of the FM-BZA for the location (or replacement) of chanceries in the Diplomatic Overlay, as well as in the R-5-D, R-5-E and SP zone districts. Furthermore, in accordance with § 1002.1, reconstruction of "an existing chancery that is destroyed in an R-1, R-2, R-3, R-4, R-5-A, R-5-B or R-5-C district" requires review of the FM-BZA. There is no distinction given to properties that have been used as a chancery for a different foreign government. Thus, chapter 20 of the zoning regulations does not

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<sup>1</sup> Although the Zoning Commission referenced the date of February 23, 1990, instead of the 1982 date provided in the Foreign Missions Act, this served to broaden the grandfather protections afforded chanceries since it permitted chanceries not protected by the statutory date in the Act to receive grandfather protections under the new zoning regulations.

apply to the transfer of a property for chancery use from one foreign mission to another. See also, 11 D.C.M.R §§ 201.1(m)(1)(restricting the continued use of a property as a chancery to the foreign mission that existed as of February 23, 1990) and 201.1(m)(providing that the reconstruction of a chancery destroyed by fire, etc., shall not be subject to the requirements of chapter 20). Even if chapter 20 applied, it would not allow the transfer of a property for chancery use from one government to another, as § 2003.5 provides that, if a nonconforming use in a residential district is changed, it must be changed to “either a dwelling, flat, apartment house, or a neighborhood facility.” 11 D.C.M.R § 2003.5. Clearly, a chancery does not fit these descriptions.

It must be remembered that it is the Zoning Commission to which Congress delegated the task of implementing section 4306 of the Act, including the adoption of regulations to carry out that section, not the State Department or, for that matter, DCRA. It is not the State Department’s duty to implement section 4306 but, rather, the State Department’s authority, with regard to the transfer of chancery property in the District of Columbia, is limited to the duties set forth in section 4305.<sup>2</sup>

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<sup>2</sup> Section 4305 provides, in relevant part:

(a) Proposed acquisition, sale, or other disposition

(1) The Secretary shall require *any* foreign mission, including any mission to an international organization (as defined in section 4309(b)(2) of this title), to notify the Secretary prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application, or other action required for the proposed action -

(A) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and

(B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval.

(2) For purposes of this section, "acquisition" includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

(b) Divestiture. The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary -

(1) not to have been acquired in accordance with this section;

(2) to exceed limitations placed on real property available to a United States mission in the sending State; or

(3) where otherwise necessary to protect the interests of the United States.

Thus, Congress has spoken on the issue as to whom the grandfathering provision applies. Specifically, the plain language of the Act makes it clear that the grandfather provision of section 4306(h) only applies to the existing governments occupying a foreign mission, not to the chancery use itself. To the extent, the language of the Act is not clear; one must then look to the Zoning Commission's interpretation of the Act, as set forth in the zoning regulations.

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(Emphasis added.) Additionally, the State Department's duties, as set forth in section 4303 of the Act, are related to foreign missions:

The Secretary shall carry out the following functions:

- (1) Assist agencies of Federal, State, and municipal government with regard to ascertaining and according benefits, privileges, and immunities to which a *foreign mission* may be entitled.
- (2) Provide or assist in the provision of benefits for or on behalf of a *foreign mission* in accordance with section 4304 of this title.
- (3) As determined by the Secretary, dispose of property acquired in carrying out the purposes of this chapter.
- (4) As determined by the Secretary, designate an office within the Department of State to carry out the purposes of this chapter. [1] If such an office is established, the President may appoint, by and with the advice and consent of the Senate, a Director, with the rank of ambassador. Of the Director and the next most senior person in the office, one should be an individual who has served in the Foreign Service and the other should be an individual who has served in the United States intelligence community.
- (5) Perform such other functions as the Secretary may determine necessary in furtherance of the policy of this chapter.