United States Department of State

*Office of Foreign Missions*
*Washington, D.C. 20520*

March 6, 2015

Anthony J. Hood
Chairman, Zoning Commission

VIA E-MAIL

Dear Mr. Hood:

The Office of Foreign Missions (OFM) has had an opportunity to review OP's proposed draft regulations affecting the location of chanceries dated March 4, 2015. The following are OFM's comments on the provisions in that draft which would apply, as a default rule, a two-step process with a fifty percent non-residential use threshold to a square for chancery applications in low- to medium-density residence zones.

Section 206 of the Foreign Missions Act (FMA) (codified at 22 U.S.C. § 4306) was enacted in 1982 to better balance both the Federal and local interests in chancery location issues. A number of provisions in § 206 are relevant here. Subparagraph (b) describes the acceptable areas for chanceries, with subparagraph (b)(2)(B) providing that a chancery shall be permitted to locate "in any other area [other than (b)(1) matter of right areas or (b)(2)(A) areas zoned medium-high or high density residential], determined on the basis of existing uses, which includes office or institutional uses . . . ." Subparagraph (d) provides that "[a]ny determination concerning the location of a chancery under subsection (b)(2) . . . shall be based solely on the following [six] criteria." Subparagraph (e) provides that "[r]egulations . . . affecting the location . . . of chanceries shall be consistent with [§ 206] and shall reflect the policy of [the FMA]."

We continue to stand by the argument and proposed regulations we put forth on July 21, 2014. Specifically:

1) There should be no default definition of "area" in § 206(b)(2)(B).
2) OFM supports a non-zero threshold to identify existing uses which include office or institutions uses in low- to medium-density residence zones. The tall 50% threshold proposed in OP's draft regulation section 201.5 – that is, an area is suitable for locating a chancery only if more than 50% of the land within the area is devoted to certain non-residential existing uses – has no foundation in the FMA.
3) Regulations must be consistent with § 206, which uses six criteria to strike a balance between federal and municipal interests. OP's draft regulations violate the FMA by significantly skewing the determination in the District's favor.

This letter elaborates on each of these points. The bottom line is that the text and legislative history of the FMA provide sufficient guidance on the issue of locating a chancery and leave the rest in the discretion of the Board of Zoning Adjustment (BZA). OP's draft regulations go too far by adding new criteria to the BZA's determination and creating additional burdens for the applicant to overcome.

**1. Congress did not intend to restrict an "area" to a "square" in all cases.**

The first question is what constitutes an "area" for purposes of § 206(b)(2)(B), which is not a term of art in the zoning regulations. OP draft regulation 201.4 defaults to the rule that "the area shall be the square within which the proposed chancery is located." The term "square" does not appear in § 206 or its legislative history. This association appears to have originated with the creation of the D overlay in 1978. We later learned that the NCPC decided to define area as a square "primarily because of the logistic capacity to locate and manage the development of a square, based on municipal records."[1] While this may have been a useful tool for creating the D overlay map, it is an inadequate basis on which to interpret an undefined term in Federal law. If Congress intended to restrict an area down to a "square" in all cases, it would have had an opportunity to do so in light of the District's general opposition to § 206. Rather, "area" remains a vague term the interpretation of which was intended to be left to the discretion of the BZA.

**2. OFM supports a non-zero threshold to identify existing uses for § 206(b)(2)(B), not a tall 50% threshold.**

Subsection 206(b)(2)(B) provides that a chancery is permitted to locate in an area other than the areas enumerated in (b)(1) (i.e., matter of right areas) or (b)(2)(A) (i.e., areas zoned medium-high or high density residential), determined on the basis of existing uses, which includes office or institutional uses. This is, in essence, with support in the 1982 FMA conference report, a question of whether an area that is zoned low- or medium-density residential contains any mixed uses. OFM has proposed the "existing uses" inquiry as an impartial non-zero test: does the area in question actually include office or institutional uses (that is, does it contain mixed uses?), or is it "essentially a residential use area?"[2] If the BZA finds that the area in question actually contains mixed uses, meaning that it currently includes any office or institutional uses, then such area should be entitled to the same presumption as the areas enumerated in (b)(2)(A): that a chancery is permitted to locate there, subject to the disapproval by the BZA, to be determined based solely on the six criteria in § 206(d). By virtue of the specific references in (b)(2)(B), areas zoned "D" or "SP" would already be entitled to such presumption. (These zones, by their nature, contain mixed uses, which the ZC itself noted in 1978.)

This "existing uses" inquiry involves no judgment on the suitability of the area in question for the location of a particular chancery. As such, the OP's 50% test (or the uncodified 1/3-2/3 test previously been used by the OP but not binding on the BZA) has no place in that inquiry. The question of suitability of a (b)(2)(B) area for a chancery location cannot and should not be distinguished from the determination involving the merits of a particular application. If the foreign mission wishes to locate its chancery in a (b)(2)(B) area and the BZA finds that that area is entitled to the presumption described above, the BZA will inherently determine whether

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[1] ZC Order No. 509, at 5 (Feb. 9, 1987).

[2] H.R. Rep. No. 97-693, at 41 (1982).

that area is suitable for the location of the proposed chancery, but § 206(d) explicitly instructs it to do so based solely on the six criteria (and consequently within the context of the entire application). As part of that determination, the District may wish to argue that the "municipal interest" (criterion #5) is not served if the area in question is devoted 50% to residential uses, but that is merely one of six criteria.

**3. By skewing the determination in the District's favor, the proposed regulations are not consistent with the FMA.**

The FMA lays out the guidelines by which the location of a chancery is to be determined, and the ZC's authority to dictate the terms of regulations in this context is significantly limited. Not only is this view apparent from the plain language of the FMA (especially §§ 206(b)(2), (c)(1), and (e)(1)), it has been confirmed by the D.C. Court of Appeals, the Office of Corporation Counsel, the ZC, the BZA, and the U.S. Court of Appeals for the D.C. Circuit. In 1987, nine months after the ZC used the 1/3-2/3 test to modify the D overlay, the D.C. Court of Appeals concluded that section 206 is "the exclusive procedure available to chanceries in the District of Columbia" and that the interpretation of the FMA as it applies to a chancery application "involves the exercise of judgment which Congress viewed as best made by the FMA-BZA."[3] In light of this decision, the BZA requested the Corporation Counsel to advise the BZA whether it had the authority to determine whether an area which is not within the D overlay can still be considered under subsection (b)(2)(B).[4] In an April 8, 1988 memorandum, the OCC advised:

> Notwithstanding the D zone district, the [FMA] permits a chancery to be located in areas based on existing uses, which includes office or institutional uses, subject to the disapproval of the FMA-BZA. . . . [T]he FMA-BZA must apply criteria contained in the [FMA] before reaching its final determination. . . . In order to make a final determination through a rule-making procedure, . . . the FMA-BZA must interpret "any other area, determined on the basis of existing uses, which includes office or institutional use". . . . The FMA-BZA must define the relevant area, identify the existing office and institutional uses within the area, determine whether the amount of such uses would qualify the area as within the language of the statute and then, if the finding is in the affirmative, determine on the basis of the six criteria whether the chancery should be permitted to locate there.

The ZC summarized this guidance in its Order No. 555 (July 1, 1988). The BZA quoted and concurred with this advice in its Order No. 14820 (Sept. 7, 1988), noting that it was "constrained . . . to exercise its authority and responsibility" as provided in the FMA and was therefore not bound by the 1/3-2/3 test. Six years later, the U.S. Court of Appeals for the D.C. Circuit also concluded that the FMA "gives the DCFMA-BZA exclusive jurisdiction over all proposals involving 'the location, replacement, or expansion' of a chancery."[5] Most recently, the BZA has continued to exercise this authority in its orders not disapproving applications from the

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[3] Embassy of the People's Republic of Benin v. D.C. Board of Zoning Adjustment, 534 A.2d 310, 321-22 (D.C. 1987).

[4] BZA Order No. 14820 (Sep. 7, 1988).

[5] Sheridan Kalorama Historical Association v. Christopher, 49 F.3d 750, 757 (D.C. 1995).

Embassies of Hungary, Uganda, and Serbia.[6] In each case, it defined the area as broader than a square and did not use the 1/3-2/3 test.

Congress acknowledged that the chancery location rules in place prior to the enactment of the FMA were "restrictive."[7] To rectify this situation, it enacted § 206, a set of broad rules that would enable interested parties – especially the Federal Government, the District Government, and the public (including residents, ANCs, and neighborhood associations)[8] – to present their views on the merits of a chancery application. Accommodating such wide and active participation of these various parties requires the BZA to retain significant discretion in considering all viewpoints within the parameters of the six criteria of § 206(d). The relative ambiguity of the FMA (compared to the OP's 50% test) is the only way to maintain the crucial balance between Federal and local interests in these determinations. Although OP's draft regulations allow the presumption of the 50% test and the use of a "square" as the relevant "area" to be rebutted, these additional burdens effectively create new criteria on top of the six in the FMA in violation of federal law. The draft regulations take a step backwards by effectively reinstating the restrictions that Congress had rejected three decades ago and in so doing, unhinge the crucial and delicate balance between the Federal and local interests.

Thank you for your consideration of these comments. I will be in attendance at the March 9 meeting and would welcome the opportunity to address questions or concerns.

Sincerely,

Cliff Seagroves
Director (Acting)

cc: National Capital Planning Commission

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[6] BZA Order No. 17481 (Dec. 1, 2006); BZA Order No. 17787 (Feb. 23, 2009); BZA Order No. 18242 (Oct. 24, 2011).

[7] S. Rep. No. 97-283, at 14 (1982).

[8] *See* 22 U.S.C. § 4306(c)(2) ("Regulations issued to carry out this section shall provide appropriate opportunities for participation by the public in proceedings concerning the location, replacement, or expansion of chanceries.").