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D.C. OFFICE OF ZONING

Anthony J. Hood
Chairman, Zoning Commission
Office of Zoning
441 4th Street, N.W., Ste. 200-S
Washington, D.C. 20001

Re: ZRR – ZC Case No. 08-06A

Dear Chairman Hood:

The Department of State (Department) appreciates the opportunity to submit these public comments on the Zoning Commission's (ZC) proposed regulations, particularly Subtitle X, Chapter 2, Chancery Applications.

Congress enacted the Foreign Missions Act (FMA) (codified at 22 U.S.C. §§ 4301-4316) in 1982 to address, among other things, the location, replacement, or expansion of chanceries in the District of Columbia. 22 U.S.C. § 4306. Section 4306(e)(1) provides, in relevant part, that

> Regulations . . . of . . . the Zoning Commission for the District of Columbia . . . affecting the location, replacement, or expansion of chanceries shall be consistent with this section (including the criteria set out in subsection (d)) and shall reflect the policy of this chapter.

As drafted, proposed regulations Subtitle X §§ 201.4 and 201.5 do not comply with the mandate set forth in subsection 4306(e)(1) because they are not consistent with section 4306 and do not reflect the policy of the chapter (i.e., the FMA). The Department believes that any regulation that attempts to alter the congressionally mandated balance between federal and local interests set by Congress impinges upon the Secretary's ability to determine the treatment to be accorded a foreign mission as necessary to secure, on the basis of reciprocity, benefits for the United States. The proposed regulations currently at issue have such a negative impact. Both sections 201.4 and 201.5 impose an additional burden on the Secretary of State by creating certain presumptions as to the applicable area under consideration and the concept of mixed use. While the Board of Zoning Adjustment (BZA or FMA-BZA) has the discretion to disregard the problematic square and mixed use defaults established in the regulations, that only occurs after a request from the applicant, the Secretary of State, or the mayor of the District of Columbia and in the case of section 201.5 requires the submission of "credible evidence." These are additional burdens not contemplated by the FMA. Accordingly, the proposed regulations run afoul of the requirement in subsection 4306(e) that regulations concerning the location, replacement and expansion of chanceries shall be consistent with the section and shall reflect the policy of this chapter.

Zoning Regulations Must be Consistent with § 4306

For purposes of this comment letter, key subsections of section 4306 include subsections (b) and (d). Subsection (b) describes the matter of right areas in which a chancery may locate, as well as other permissible areas which are subject to disapproval by the BZA in accordance with section 4306. One of these permissible areas is "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 [the "D" overlay] or special purpose." § 4306(b)(2)(B). Subsection (d) provides that any determination concerning the location of a chancery under subsection (b)(2) shall be based solely on six enumerated criteria.

The FMA grants the BZA discretion to determine whether an area meets the requirements of subsection 4306(b)(2)(B) as well as the criteria in subsection 4306(d). The critical role of the BZA has been confirmed by the D.C. Court of Appeals, the District's Office of Corporation Counsel (OCC), the ZC, the BZA, and the U.S. Court of Appeals for the D.C. Circuit.[1] In 1987, shortly after the ZC modified the D overlay to include only squares with at least 1/3 non-residential uses, the D.C. Court of Appeals concluded that section 4306 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."[2] In light of this decision, the BZA requested the OCC to advise the BZA whether it had the authority to determine whether an area which is not within the D overlay could still be considered under subsection 4306(b)(2)(B).[3] 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 uses". . . . 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.

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[1] The FMA "gives the DCFMA-BZA exclusive jurisdiction over all proposals involving 'the location, replacement, or expansion' of a chancery." Sheridan Kalorama Historical Association v. Christopher, 49 F.3d 750, 757 (D.C. 1995).

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

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

The ZC summarized this guidance in its Order No. 555 (July 1, 1988). The BZA quoted and concurred with this advice, noting that it was "constrained . . . to exercise its authority and responsibility" as provided in the FMA and was therefore not bound by a rule that limited permissible areas to squares with at least 1/3 nonresidential uses.[4] Most recently, the BZA has continued to exercise this authority in its orders where it uses an area larger than a square and does not impose a minimum requirement of 1/3 nonresidential uses.[5]

Zoning Regulations Must Reflect the Policy of the FMA

One essential policy of the FMA is to enable the United States "to support the secure and efficient operation of United States missions abroad." § 4301(b). In order to do so, the Department needs flexibility that will enable it to tailor treatment of foreign missions in the United States to address considerations of reciprocal treatment and other foreign policy issues that would not be applicable to any other entity. Congress advised: "The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States." § 4301(c).

However, mindful of the municipal interest of the District and its residents, Congress enacted section 4306 in the FMA to govern the location, expansion, replacement and other matters relating to the physical structures of chanceries located in the District. Congress determined how the municipal interests would be taken into account through a carefully designed scheme. In particular, the criteria to be considered include historic preservation, availability of parking and public transportation, and the municipal interest. See § 4306(d)(2), (3) and (5). The FMA also requires notice to the public to ensure that the view of the neighbors can be heard, and states that the Secretary shall require substantial compliance with the District's building and related codes. § 4306(c)(3) and (g). It further provides for a specially constituted board that includes District of Columbia and federal representation to make the ultimate decisions regarding the location, expansion or replacement of chanceries in certain areas. Through the FMA, Congress decided the appropriate scope and avenues for local participation in this decision making – including the extent of local participation in the question of the location of chanceries in the District.

We wish to note that, prior to approving a foreign mission's acquisition of property for its chancery (and prior to permitting the foreign mission to put forward its application to the BZA), the Department works very closely with the mission to ensure that the desired location for the chancery will take into account all of the criteria in section 4306(d), given the expected volume of chancery operations. This includes ensuring that the mission will make appropriate and

[4] Id.

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

necessary accommodations for neighborhood interests, such as off-street parking, traffic control, and historic preservation issues.

The FMA imposes the guidance and constraints that BZA must follow in its decision making and it is inappropriate for the ZC to attempt to impose additional criteria or constraints upon the BZA's determination whether a particular area is mixed-use. The FMA was intended to remove the historical barriers to locating chanceries in the certain areas of the District, barriers which could result in reciprocal restrictions being imposed on the United States.

Proposed regulations Subtitle X §§ 201.4 and 201.5 have effectively replaced those barriers. Both sections begin with new rules that denote whether an area is a "mixed-use area." First, the proposed regulations provide that the "area" shall be the square within which the proposed chancery is to be located (with discretion to use a larger area under certain conditions), and second, that area shall be considered a mixed-use area if more than 50 percent of the zoned land within the area is devoted to uses other than residential uses.

Proposed Regulation Subtitle X § 201.4

The Office of Zoning defines a square as "a unit of land defined by the D.C. Surveyor that normally consists of a single city block and contains record and tax lots." See Zoning Map Glossary. A square is a uniform measurement that has nothing to do with the use of the properties within it. This fact renders the use of a square in this context arbitrary. We recognize that Subtitle X § 201.4 allows the BZA to "use a larger area" than a square if the BZA "finds the larger area provides a more accurate depiction of the existing mix of adjacent uses." We agree that the BZA should identify the area that provides the most accurate depiction of the existing mix of adjacent uses. First, an area larger than a square will undoubtedly provide a more accurate depiction of the existing mix of adjacent uses. But more importantly, the ZC's attempt to guide the BZA's decision making process by making the square the default and requiring an additional finding in order for the BZA to exercise its discretion to determine the appropriate area for consideration is simply not consistent with policy of the FMA.

To minimize the impact on the requirements and policy of the FMA, we propose the following language for § 201.4 to provide minimal guidance to the BZA in identifying an area, but to not dictate a default area:

> For the purposes of the Subtitle X § 201.3 determination, the "area" shall be the area that the BZA determines most accurately depicts the existing mix of uses adjacent to the proposed location of the chancery.

Proposed Regulation Subtitle X § 201.5

Proposed section 201.5 sets up a standard for what constitutes a mixed use area: "An area shall be considered to be a mixed-use area if as of the date of the application more than fifty percent (50%) of the zoned land within the area is devoted to uses other than Residential Uses as defined in Subtitle B, Chapter 2." We recognize that Subtitle X § 201.5 allows the BZA to find that an area with 50 percent or less of non-residential uses is a mixed-use area based on "credible evidence" as may be submitted by the applicant, Secretary of State, or the Mayor of the District of Columbia. However, the proposed regulation impermissibly places a burden on the Secretary of State by setting up a presumption that less than 50 percent is not mixed-use and only then allows discretion by the BZA based on a request supported by credible evidence. Section 201.5 is even more problematic than 201.4 because it is confusing and provides no guidance as to what the applicant must demonstrate to the BZA in order to pass the mixed-use area threshold. It is unclear what would constitute "credible evidence," or what the applicant is providing such evidence to show. The proposed regulation leaves uncertain whether a showing of 35 percent non-residential use will qualify the area as "mixed-use" as it has in the past. Also uncertain is what further showing of mixed-use an applicant would be expected to make if the BZA has already determined that the area is 40 percent non-residential. In any event, the proposed changes are inconsistent with the statutory requirement that the determination of whether it is appropriate to locate a particular chancery in a particular location under section 4306(b)(2) must be made using the criteria in section 4306(d).

The language of subsection 4306(b)(2)(B) along with the legislative history indicates Congress expected the BZA to consider requests based on the criteria in subsection (d) unless the proposal was to locate a chancery in an "essentially" or "entirely" residential area. See H.R. Conf. Rep. No. 97-693, at 39 (1982) (the FMA "sets forth the mechanism and criteria under which issues relating to the location of foreign missions in the District of Columbia are to be decided"); *id.* at 41(the FMA's section 206(b)(2) "will not permit chanceries to be located in any area which is essentially a residential use area"). Further, Congress affirmatively anticipated that the FMA's provisions would balance Federal-municipal interests. *Id.* at 41 (the FMA's "section 206(d) sets forth the criteria to be applied in the determination of chancery issues, which are intended to balance the municipal and Federal interests"). The intent in the FMA, as explicitly stated in subsection (d), is to use the six criteria as the sole basis on which the BZA should make a determination concerning the location of a chancery. The BZA is given wide discretion to disapprove an application under subsection (d) whereas an applicant needs to make only a minimal showing for purposes of subsection (b)(2)(B) that there are some non-residential uses. Therefore, creating a presumption that an area with 49 percent non-residential uses is not a "mixed-use area" is indefensible.

While the Department would prefer to leave the determination of mixed-use entirely to the BZA ,the Department agrees that the only reasonable conclusion that can be drawn when an area has more than 50 percent non-residential uses is that it is a mixed-use area within the meaning of the FMA. Thus, to minimize the impact on the requirements and policy of the FMA, we would be willing to accept the following language for § 201.5:

> An area shall be considered to be a mixed-use area if as if the date of the application more than fifty percent (50%) of the zoned land within the area is devoted to uses other than residential uses as defined in Subtitle B, Chapter 2. In addition, the Board of Zoning Adjustment may find that an area with less than or equal to 50 percent of non-residential uses is a mixed-use area upon a showing of non-residential uses, as may be submitted by the applicant, Secretary of State, or the Mayor of the District of Columbia.

In summary, we believe that sections of the regulations discussed above, as currently drafted, are inconsistent with Foreign Missions Act. We would urge the Zoning Commission to make changes as set forth in this letter.

Thank you for your consideration of these comments.

Sincerely,

Patrick F. Kennedy

Copy to:
L. Preston Bryant, Jr.
Chairman, National Capital Planning Commission