

IN REPLY REFER TO:

NCPC File No. ZC 08-06A

Mr. Anthony Hood, Chairman
Zoning Commission of the District of Columbia
441 4th Street NW, Suite 210 South
Washington, DC 20001

RE: ZC Case No. 08-06A; Proposed Subtitle X, General Procedures, Chapter 2, Chancery Applications

Dear Mr. Hood:

On July 21, 2014, the United States Department of State, Office of Foreign Missions (OFM) submitted a letter to the Zoning Commission (ZC) advising that certain provisions of the proposed chancery regulations contained in Subtitle X, General Procedures, Chapter 2, Chancery Applications of the Zoning Regulation Rewrite are inconsistent with Section 4306 of the Foreign Missions Act (FMA).

To supplement OFM's letter, the General Council (GC) for the National Capital Planning Commission (NCPC) prepared a legal memorandum that supports and explains the rationale for the OFM position. A copy of that memorandum is attached to this letter for your review. As indicated in the memorandum, the primary concern of OFM and NCPC's GC is the proposed use of a square-based threshold test to screen and dismiss certain chancery applications with prejudice, which is contrary to the review and decision-making process specified by the FMA.

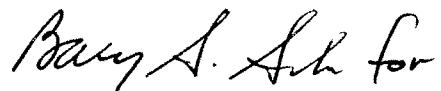
The NCPC is committed to working with the relevant stakeholders -- the OFM, the District Office of Planning, and the District Office of Attorney General -- to derive zoning regulations governing the location of chanceries that comply with the requirements of the FMA. We look forward to a successful outcome to these discussions.

Mr. Anthony Hood

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If you have any questions or comments concerning this legal opinion, please contact Anne R. Schuyler at (202) 482-7223 or anne.schuyler@ncpc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcel C. Acosta" with a stylized flourish at the end.

Marcel C. Acosta
Executive Director

Enclosure

cc: L. Preston Bryant, Jr.
Ellen McCarthy
Alan Bergstein
Cliff Seagroves

MEMORANDUM

Date: September 11, 2014**To:** Marcel C. Acosta, Executive Director**From:** Anne R. Schuyler, General Counsel **Subject:** Zoning Regulation Rewrite; Proposed Provisions of Subtitle X, General Procedures, Chapter 2, Chancery Applications**A. Issue**

I have been asked if the proposed Subtitle X, General Procedures, Chapter 2, Chancery Applications of the Zoning Regulation Rewrite (ZRR) is consistent with the requirements for the location of chanceries in the District of Columbia (District) set forth in the Section 4306 of the Foreign Mission Act (FMA). See, 22 U.S.C § 4306 (2013) and D.C. Code § 6-1306 (West 2014) (Copies attached). For the reasons set forth below, I concur with the findings expressed in the Department of State, Office of Foreign Missions (OFM) July 21, 2014 letter to the Zoning Commission (ZC) that certain provisions of Chapter 2 are inconsistent with Section 4306 of the FMA. See, Letter from Cliff Seagroves to Anthony Hood, (July 21, 2014) (copy attached). By means of this memorandum, I am highlighting the primary area of concern in anticipation of the ZC's formal referral of the adopted version of Chapter 2 to the National Capital Planning Commission (NCPC or Commission) for review and comment in accordance with the requirements of Section 8712(a)(1) of the National Capital Planning Act, and Section 4306(e)(2) of the FMA (codified at D.C. Code §§ 2-1006(a) and 6-1306(e)(2) (2014)) (copies attached).

B. Background

The location of chanceries is identified in Section 8712(a)(1) of National Capital Planning Act as a federal interest. See, D.C. Code § 2-1002(a)(1) (West 2014). The federal interest derives from the United States Government's international obligation to provide secure locations for foreign missions and international organizations in the District of Columbia (District). This assures that the United States receives reciprocal accommodations in foreign countries with which it maintains diplomatic relations. At the same time, in accordance with Section 4306 of the FMA, the Zoning Regulations of the District provide the regulatory framework for the location of chanceries on private land in the District. Such shared responsibility is not uncommon in the District, and requires a close and productive working relationship between the federal and local stakeholders.

The FMA provides for the location of chanceries in all zone districts subject to different review processes depending upon the specific zone district in question. See, 22 U.S.C. § 4306(b)) (2013) and D.C. Code § 6-1306(b) (West 2014). Specifically the FMA permits matter-of-right chancery use in areas zoned commercial, industrial, waterfront and mixed use (CR). See, 22 U.S.C. § 4306(b)(1) and D.C. Code § 6-1306(b)(1) (West 2012). In areas zoned medium-high and high density residential and in “any other area” which includes office and institutional uses at the time an application is made, chancery use is permitted subject to review in accordance with six enumerated criteria and disapproval by a specially constituted District Board of Zoning Adjustment (BZA). See, 22 U.S.C §§ 4306(b)(2)(A)-(B), 4306(d) and 4306 (i)(2) and D.C. Code §§ 6-1306(b)(2)(A)-(B), (d) and (i)(2) (West 2014).

Because the regulatory structure of 4603(b) is based upon zone districts, it is reasonable to infer that Section 4603(b)(2)(B) applies to the remaining zone district not enumerated in the preceding clauses, i.e. low, moderate and medium density residential zones, even though a specific reference to these districts is lacking. Thus, the FMA contemplates chancery use, within the medium-high to high density residential zone districts, the special purpose zone district (specifically referenced in Section (b)(2)(B)), and the low, moderate and medium density residential zone districts subject to BZA review and disapproval. See, 22 U.S.C §§ 4306(b)(2)(B) and D.C. Code §§ 6-1306(b)(2)(B) (West 2012). Within these later zones, the location of chanceries is further predicated on the presence of existing office and institutional uses.

It is important to note that the language of Section 4306(b)(2)(B) suggests the areas of mixed use requiring consideration need not be limited to mixed use areas located within the low, moderate and medium density residential zones. This interpretation results because Congress used the term “any other area” in Section 4306(b)(2)(B) to modify the phrase “determined on the basis of existing uses, which includes office or institutional uses”. . See, 22 U.S.C §§ 4306(b)(2)(B) and D.C. Code §§ 6-1306(b)(2)(B) (West 2012). This sentence structure is in direct contravention to that of the preceding clauses where the term “area” was immediately followed by a reference to a specific zone district. Based on rules of interpretation, one must assume Congress intended this alternative sentence structure to focus the analysis of mixed use areas on areas in proximity to the proposed chancery use regardless of whether the area is within or without the boundary of residential zone district at issue.

As noted, the FMA makes proposed chancery use authorized by Section 4603(b)(2)(A)-(B) subject to disapproval of the BZA. The use of the term disapproval means chancery use is presumed to be permitted within the areas designated by 4306(b)(2) unless or until this presumption is rebutted. This means the parties to the BZA proceeding must introduce evidence for the record in support of or to rebut the presumption. The BZA evaluates this evidence along

with all the other evidence introduced to reach a final determination as to whether the proposed chancery can or cannot locate in the specific zone district at issue.

C. Analysis

1. The Use of a Threshold Test is Inconsistent with the Requirements of the FMA.

I concur with the OFM that the determination as to whether chancery use is acceptable based on the presence of existing office and institutional uses as set forth in 22 U.S.C. § 4306(b)(2)(B) of the FMA is not intended, as proposed in Sections 201(4) and 201(6) – (7) of the ZRR, to be a threshold criterion to be used to screen and dismiss chancery applications with prejudice by the BZA. Such an approach is inconsistent with the language of the FMA.

A rebuttal of the presumption that chancery use within zone districts designated by Section 4603(b)(2)(A)-(B) as a preliminary matter and immediate dismissal of the application with prejudice ignores the language of section 4306(d). The FMA requires all chancery applications subject to BZA review to be evaluated according to six, enumerated criteria, and it obligates the BZA to reach a determination as to the suitability of a proposed chancery location based on these, and only these criteria. See, 22 U.S.C. § 4306 (d)(2013) and D.C. Code § 6-1306(d). Specifically, Section 4306(d) states, “Any determination concerning the location of a chancery under subsection (b)(2) of this section . . . shall be based **solely** on the following criteria . . . “ (Emphasis added). See also, D.C. Code § 6-1306(d) (West 2014). The use of a threshold test, such as that which is currently proposed in the ZRR, is contrary to this language. It creates a new criterion – the mixed use character of a certain defined area -- that is not enumerated in Section 4306(d) of FMA, and it elevates the stature of this criterion above the six referenced criteria. Such an approach is inconsistent with the review process mandated by the FMA.

If the FMA requires all BZA determinations concerning the location of chanceries to be based solely upon six enumerated criteria, it follows that the issue of the mixed use character of an area must be determined within the context of those six criteria. Such an approach is contemplated by the FMA which includes criteria addressing the municipal interest as determined by the Mayor and the federal interest as determined by the Secretary of State” See, 22 U.S.C. §§ 4306(d)(5)-(6) and D.C. Code §§ 6-1306(d)(5)(6) (West 2014). These criteria present a vehicle by which the use characteristics of an area can be addressed. Thus, for example, if the District Office of Planning (DCOP) believes a residential area for which a chancery is proposed is not characterized by mixed, office and institutional uses, it must introduce evidence in support of this position in order to rebut the presumption of suitability. If on the other hand, the OFM believes sufficient mixed uses exist to render the area suitable for chancery use, it must introduce evidence to uphold the presumption of suitability. Likewise, the applicant would be well advised

to present evidence consistent with the OFM position to build a record upon which the BZA can rely for its decision.

The discretion afforded the Mayor and the OFM to define the municipal and the federal interest respectively affords each party an opportunity to: (1) define the relevant area within which it wants to highlight existing mixed uses; and (2) apply whatever methodology it feels appropriate to evaluate or determine if the area selected is comprised of sufficient mixed uses to afford a finding of suitable or not suitable by the BZA. See, 22 U.S.C. §§ 4306(d)(5)-(6) and D.C. Code §§ 6-1309(d)(5)-(6). This discretion allows DCOP to apply a methodology such as that proposed in the inappropriate threshold test, e.g., focus upon uses within the square in which the chancery is proposed and a 50 percent test, or any other approach it wishes to use. To the contrary, the OFM can seek the broadest possible area within reason to define the area of mixed uses and numerical evaluations or other methods of quantifying the presence of office and institutional uses. However, as to which party presents the most convincing argument is a matter left to the discretion of the BZA, the entity charged with making the determinations required of Section 4306(d) and evaluating them to determine whether to disapprove the proposed chancery use. See, also D.C. Code § 6-1306(d) (West 2014).

2. The Proposed Regulations Addressing Three Year Discontinued Use or Vacancy, First Transfer and use of the Term Embassy are Inconsistent with the Requirements of the FMA.

While I have chosen to address in this memorandum the most significant inconsistency between the FMA and the proposed Subtitle X, General Procedures, Chapter 2, Chancery Applications, the OFM letter to the ZC raises several other problematic areas. These include the issue of three year discontinued use or vacancy contained in Section 204.3 and 2052(a) of the ZRR; the issue of first transfer in Section 200.3(a)(2) of the ZRR; use of the term “embassy” in various locations of the ZRR. See, Letter from Cliff Seagroves to Anthony Hood, pages 6-8 (July 21, 2014). I believe the interpretations offered by the OFM as to these issues are legally correct and changes to the proposed chancery regulations of the ZRR are advisable.

D. Conclusion

For the reasons stated in this memorandum, I maintain certain provisions of the proposed Subtitle X, General Procedures, Chapter 2, Chancery Applications, are not consistent with the requirements of Section 4306 of the FMA. To remedy this problem, I recommend follow-on engagement with the ZC, the DCOP, the District of Columbia’s Office of Attorney General and the OFM to ensure adoption of chancery regulations that are legally consistent with the requirements of the FMA.

If you have any questions or comments, please advise.

Enclosures

cc: L. Preston Bryant

vent the establishment of a foreign mission by a country which, on December 22, 1987—

(A) does not have a mission in the United States, or

(B) with respect to a city in the United States, did not maintain a mission in that city.

(Aug. 1, 1956, ch. 841, title II, § 205, as added Pub. L. 97-241, title II, § 202(b), Aug. 24, 1982, 96 Stat. 285; amended Pub. L. 99-93, title I, § 127(d), (e), Aug. 16, 1985, 99 Stat. 418; Pub. L. 100-204, title I, § 161, Dec. 22, 1987, 101 Stat. 1356; Pub. L. 103-236, title I, § 162(o)(5), Apr. 30, 1994, 108 Stat. 410.)

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-236, § 162(o)(5)(A), substituted “Secretary prior to” for “Director prior to” in introductory provisions.

Subsec. (c)(2). Pub. L. 103-236, § 162(o)(5)(B), struck out “authorize the Director to” before “dispose of”.

1987—Subsec. (d). Pub. L. 100-204 added subsec. (d).

1985—Subsec. (a)(1). Pub. L. 99-93, § 127(e), substituted “shall” for “may” and inserted “, including any mission to an international organization (as defined in section 4309(b)(2) of this title),” after “foreign mission” in first sentence, and substituted “The” for “If such a notification is required, the” in second sentence.

Subsec. (b)(3). Pub. L. 99-93, § 127(d), added par. (3).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-236 applicable with respect to officials, offices, and bureaus of Department of State when executive orders, regulations, or departmental directives implementing the amendments by sections 161 and 162 of Pub. L. 103-236 become effective, or 90 days after Apr. 30, 1994, whichever comes earlier, see section 161(b) of Pub. L. 103-236, as amended, set out as a note under section 2651a of this title.

§ 4306. Location of foreign missions in the District of Columbia

(a) Section as governing location, replacement, or expansion

The location, replacement, or expansion of chanceries in the District of Columbia shall be subject to this section.

(b) Acceptable areas; limitations and conditions

(1) A chancery shall be permitted to locate as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR).

(2) A chancery shall also be permitted to locate—

(A) in any area 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,

subject to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with this section.

(3) In each of the areas described in paragraphs (1) and (2), the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area.

(c) Filing of application with Board of Zoning Adjustment; publication of notice; public participation; final determination

(1) If a foreign mission wishes to locate a chancery in an area described in subsection

(b)(2) of this section, or wishes to appeal an administrative decision relating to a chancery based in whole or in part upon any zoning map or regulation, it shall file an application with the Board of Zoning Adjustment which shall publish notice of that application in the District of Columbia Register.

(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.

(3) A final determination concerning the location, replacement, or expansion of a chancery shall be made not later than six months after the date of the filing of an application with respect to such location, replacement, or expansion. Such determination shall not be subject to the administrative proceedings of any other agency or official except as provided in this chapter.

(d) Criteria for determination

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:

(1) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.

(2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.

(3) 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 such special security requirements as may be determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(4) The extent to which the area is capable of being adequately protected, as determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

(5) The municipal interest, as determined by the Mayor of the District of Columbia.

(6) The Federal interest, as determined by the Secretary.

(e) Consistency of regulations, proceedings, and other actions; review and comment by National Planning Commission

(1) Regulations, proceedings, and other actions of the National Capital Planning Commission, the Zoning Commission for the District of Columbia, and the Board of Zoning Adjustment affecting the location, replacement, or expansion of chanceries shall be consistent with this section (including the criteria set out in subsection (d) of this section) and shall reflect the policy of this chapter.

(2) Proposed actions of the Zoning Commission concerning implementation of this section shall be referred to the National Capital Planning Commission for review and comment.

(f) Rule-making nature of proceedings

Regulations issued to carry out this section shall provide for proceedings of a rule-making and not of an adjudicatory nature.

(g) Compliance with District of Columbia building and related codes

The Secretary shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States.

(h) Approval of Board of Zoning Adjustment or Zoning Commission not required

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—

(1) for the location, replacement, or expansion of a chancery to the extent that authority to proceed, or rights or interests, with respect to such location, replacement, or expansion were granted to or otherwise acquired by the foreign mission before October 1, 1982; or

(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.

(i) Membership on Zoning Commission and Board of Zoning Adjustment

(1) The President may designate the Secretary of Defense, the Secretary of the Interior, or the Administrator of General Services (or such alternate as such official may from time to time designate) to serve as a member of the Zoning Commission in lieu of the Director of the National Park Service whenever the President determines that the Zoning Commission is performing functions concerning the implementation of this section.

(2) Whenever the Board of Zoning Adjustment is performing functions regarding an application by a foreign mission with respect to the location, expansion, or replacement of a chancery—

(A) the representative from the Zoning Commission shall be the Director of the National Park Service or if another person has been designated under paragraph (1) of this subsection, the person so designated; and

(B) the representative from the National Capital Planning Commission shall be the Executive Director of that Commission.

(j) Application of other laws

Provisions of law (other than this chapter) applicable with respect to the location, replacement, or expansion of real property in the District of Columbia shall apply with respect to chanceries only to the extent that they are consistent with this section.

(Aug. 1, 1956, ch. 841, title II, § 206, as added Pub. L. 97-241, title II, § 202(b), Aug. 24, 1982, 96 Stat. 286.)

§ 4307. Preemption

Notwithstanding any other law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this chapter. Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law or governmental authority regarding zoning, land use, health, safety, or welfare, except that a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling.

(Aug. 1, 1956, ch. 841, title II, § 207, as added Pub. L. 97-241, title II, § 202(b), Aug. 24, 1982, 96 Stat. 288.)

§ 4308. General provisions

(a) Issuance of regulations

The Secretary may issue such regulations as the Secretary may determine necessary to carry out the policy of this chapter.

(b) Discharge of obligation; liability

Compliance with any regulation, instruction, or direction issued by the Secretary under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court or administrative proceeding for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued by the Secretary under this chapter.

(c) Use of employees from other Federal agencies; experts and consultants

For purposes of administering this chapter—

(1) the Secretary may accept details and assignments of employees of Federal agencies to the Department of State on a reimbursable or nonreimbursable basis (with any such reimbursements to be credited to the appropriations made available for the salaries and expenses of officers and employees of the employing agency); and

(2) the Secretary may, to the extent necessary to obtain services without delay, exercise his authority to employ experts and consultants under section 3109 of title 5 without requiring compliance with such otherwise applicable requirements for that employment as the Secretary may determine, except that such employment shall be terminated after 60 days if by that time those requirements are not complied with.

(d) Contracts and subcontracts for supplies and services; advertisement; factors considered

Contracts and subcontracts for supplies or services, including personal services, made by or on behalf of the Secretary shall be made after advertising, in such manner and at such times as the Secretary shall determine to be adequate to ensure notice and opportunity for competition, except that advertisement shall not be required when (1) the Secretary determines that it is impracticable or will not permit timely per-



1 of 5 DOCUMENTS

DISTRICT OF COLUMBIA OFFICIAL CODE
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*** Current through laws effective as of May 19, 2014, and through D.C. Act 20-306 ***

DIVISION I. GOVERNMENT OF DISTRICT
TITLE 6. HOUSING AND BUILDING RESTRICTIONS AND REGULATIONS
CHAPTER 13. REGULATION OF FOREIGN MISSIONS

GO TO DISTRICT OF COLUMBIA CODE ARCHIVE DIRECTORY

D.C. Code § 6-1306 (2014)

§ 6-1306. Location in District

(a) The location, replacement, or expansion of chanceries in the District of Columbia shall be subject to this section.

(b) (1) A chancery shall be permitted to locate as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR).

(2) A chancery shall also be permitted to locate: (A) in any area 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; subject to disapproval by the District of Columbia Board of Zoning Adjustment in accordance with this section.

(3) In each of the areas described in paragraphs (1) and (2) of this subsection, the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area.

(c) (1) If a foreign mission wishes to locate a chancery in an area described in subsection (b)(2) of this section, or wishes to appeal an administrative decision relating to a chancery based in whole or in part upon any zoning map or regulation, it shall file an application with the Board of Zoning Adjustment which shall publish notice of that application in the District of Columbia Register.

(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.

(3) A final determination concerning the location, replacement, or expansion of a chancery shall be made not later than 6 months after the date of the filing of an application with respect to such location, replacement, or expansion. Such determination shall not be subject to the administrative proceedings of any other agency or official except as provided in this chapter.

(d) 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:

(1) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital;

(2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks;

(3) 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 such special security requirements as may be determined by the Secretary, after consultation with federal agencies authorized to perform protective services;

(4) The extent to which the area is capable of being adequately protected, as determined by the Secretary, after consultation with federal agencies authorized to perform protective services;

(5) The municipal interest, as determined by the Mayor of the District of Columbia; and

(6) The federal interest, as determined by the Secretary.

(e) (1) Regulations, proceedings, and other actions of the National Capital Planning Commission, the Zoning Commission for the District of Columbia, and the Board of Zoning Adjustment affecting the location, replacement, or expansion of chanceries shall be consistent with this section (including the criteria set out in subsection (d) of this section) and shall reflect the policy of this chapter.

(2) Proposed actions of the Zoning Commission concerning implementation of this section shall be referred to the National Capital Planning Commission for review and comment.

(f) Regulations issued to carry out this section shall provide for proceedings of a rule-making and not of an adjudicatory nature.

(g) The Secretary shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States.

(h) Approval by the Board of Zoning Adjustment or the Zoning Commission or, except as provided in § 6-1305, by any other agency or official is not required:

(1) For the location, replacement, or expansion of a chancery to the extent that authority to proceed, or rights or interests, with respect to such location, replacement, or expansion were granted to or otherwise acquired by the foreign mission before October 1, 1982; or

(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.

(i) (1) The President may designate the Secretary of Defense, the Secretary of the Interior, or the Administrator of General Services (or such alternate as such official may from time to time designate) to serve as a member of the Zoning Commission in lieu of the Director of the National Park Service whenever the President determines that the Zoning Commission is performing functions concerning the implementation of this section.

(2) Whenever the Board of Zoning Adjustment is performing functions regarding an application by a foreign mission with respect to the location, expansion, or replacement of a chancery:

(A) The representative from the Zoning Commission shall be the Director of the National Park Service or if another person has been designated under paragraph (1) of this subsection, the person so designated; and

(B) The representative from the National Capital Planning Commission shall be the Executive Director of that Commission.

(j) Provisions of law (other than this chapter) applicable with respect to the location, replacement, or expansion of real property in the District of Columbia shall apply with respect to chanceries only to the extent that they are consistent with this section.

HISTORY: Aug. 24, 1982, 96 Stat. 286, Pub. L. 97-241, § 206.

NOTES: CROSS REFERENCES. --Application of construction code, see § 6-1403.

SECTION REFERENCES. --This section is referenced in § 6-1309 and § 6-1403.

PRIOR CODIFICATIONS. --1981 Ed., § 5-1206.

EFFECTIVE DATES. --For effective date of amendment made by title II of Pub. L. 97-241, Historical and Statutory Notes following § 6-1301.

DELEGATION OF AUTHORITY. --Delegation of authority under Law 97-241, see Mayor's Order 83-106, April 28, 1983.

ANALYSIS In general Judicial review Zoning regulation

IN GENERAL.

Foreign Missions Act applied to foreign embassy's application for special exception to construct 38-foot antenna tower at site of chancery in District of Columbia for operation of diplomatic radio station. D.C. Code 1981, § 5-424; D.C. Code 1987 Supp., §§ 5-1201 et seq., 5-1201(a), 5-1202(a)(2), 5-1206, 5-1206(i); Foreign Missions Act, §§ 201 et seq., 201(a), 202, 202(a)(2), 203, 206, 206(d, i), as amended, 22 U.S.C. §§ 4301 et seq., 4301(a), 4302, 4302(a)(2), 4303, 4306, 4306(d, i). *Embassy of People's Republic of Benin v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 310, 1987 D.C. App. LEXIS 507 (1987).

Language in Taiwan Relations Act, providing that United States laws would apply to Taiwan in same manner that they applied when two countries enjoyed full diplomatic relations, also governed instrumentalities of Taiwan; accordingly, instrumentality of Taiwan was not free to elect whether its variance application would be treated as one for "chancery" use. Taiwan Relations Act, § 4(a), 22 U.S.C. § 3303(a); Foreign Missions Act, § 202(a)(2), as amended, 22 U.S.C. § 4302(a)(2); D.C. Code 1981, § 5-1201 et seq. *Dupont Circle Citizens Asso. v. District of Columbia Bd. of Zoning Adjustment*, 530 A.2d 1163, 1987 D.C. App. LEXIS 435 (1987).

Determination of Secretary of State, that instrumentality established by People of Taiwan to represent Taiwan in this country would not occupy premises as "chancery" for purpose of zoning variance application, was not abuse of discretion, given lack of diplomatic relations between United States and Taiwan. Foreign Missions Act, § 202(a)(2), as amended, 22 U.S.C. § 4302(a)(2); D.C. Code 1981, § 5-1201 et seq. *Dupont Circle Citizens Asso. v. District of Columbia Bd. of Zoning Adjustment*, 530 A.2d 1163, 1987 D.C. App. LEXIS 435 (1987).

JUDICIAL REVIEW.

Decision by Foreign Missions Board of Zoning Adjustment (FM-BZA) was not rendered after contested case, and thus Court of Appeals lacked jurisdiction to review it. D.C. Code 1981, § 11-722. *United States v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 995, 1994 D.C. App. LEXIS 50 (1994).

ZONING REGULATION.

When dealing with proposed, or nonfinal decision, Zoning Commission may reopen record and hear further evidence. D.C. Code 1981, § 5-1206(b)(2). *Daro Realty, Inc. v. District of Columbia Zoning Com.*, 581 A.2d 295, 1990 D.C. App. LEXIS 251 (1990).

Zoning Commission properly exercised power specifically granted to it by statute to reopen record prior to final decision upon request of property owner and calling for comments on property owner's new proposal where Commission



United States Department of State

Washington, D.C. 20520

July 21, 2014

REF: 14-1284/L

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. 08-06

Dear Mr. Hood:

The Department of State (Department) understands that the proposed revisions to the zoning regulations have been discussed among many District offices for a number of years. However, my office only became aware of significant proposed revisions to the zoning regulations affecting chanceries in mid-October 2013. On November 4, I testified at a public hearing on the matter of Chapter 2 of Subtitle X. On November 13, two of my colleagues and I met with Shane Dettman and Anne Schuyler of the National Capital Planning Commission (NCPD), Jennifer Steingasser of the Office of Planning (OP), and Alan Bergstein of the Office of the Attorney General (OAG) to discuss the changes relevant to chanceries. On November 15, I sent a letter to the Zoning Commission (ZC) asking that it hold the record open until February 15, 2014. The ZC subsequently determined to leave the record open until September 15, 2014.

The Department is aware that the location of chanceries in the District of Columbia has been a point of contention between the Federal and District Governments for decades. Federal law, specifically section 206 of the Foreign Missions Act (codified at 22 U.S.C. § 4306), governs this process today. A comprehensive recounting of the history of the federal and local authorities for locating chanceries in the District, which led up to the enactment of section 206 in 1982, is available as an appendix to this letter.

This comment letter represents the views of the Department on the proposed revisions to the zoning regulations affecting chanceries. In particular, this letter explains the principal changes in our enclosed markup of the proposed regulations. The “old” section references correspond to the Office of Planning’s September 9, 2013 draft (“OP draft”). The “new” section references correspond to our markup of the draft (“DOS draft”).

Reorganization and Hearing Procedures

We have reorganized the proposed regulations so that all chancery-specific rules are combined in one chapter: Subtitle Y, Chapter 10, which was titled Chancery Applications but only contained a reference to Subtitle X, Chapter 2. This now includes all the provisions from OP draft Subtitle X, Chapter 2, and other applicable procedural rules which were scattered

throughout Subtitle Y. The structure of DOS draft Subtitle Y, Chapter 10 follows the actual lifecycle of the application and the general structure of Subtitle Y: general provisions, application requirements, pre-hearing and hearing procedures, review standards applied by the BZA at the hearing, and post-hearing procedures. The attached crosswalk shows the new location for each applicable provision in the OP draft, as well as the related provision in the regulations currently in effect.

Zones Subject to BZA Disapproval; Threshold Test; Review Standards

In DOS draft sections Y 1000.3 and 1000.4, we have added a definition for “Medium-High or High Density Residential Zones,” which are specified in subsection 206(b)(2)(A) of the FMA (preserving the Fulbright Act), and “Special Purpose Zones,” which are specified in subsection 206(b)(2)(B) of the FMA. For ease of reference, we have added both the old and new zone classifications for each. The location, replacement, or expansion of chanceries in either type of zone is subject to the disapproval of the BZA. Accordingly, DOS draft section Y 1000.5(a)(1) confirms that the BZA has the authority to review such applications pursuant to the provisions stating the six criteria from FMA section 206(d).

We have also added DOS draft section 1000.5(a)(2), which sets apart the BZA’s authority to review applications to permit the location, replacement, or expansion of chanceries in Low to Medium Density Residential Zones because these zones are subject to an initial determination for mixed uses, as described below.

We have not incorporated OP draft section X 201.2 into the DOS draft. That section applied the same burden of proof for chancery cases as for all other applications – specifically, on the applicant. However, as noted in FMA section 206(b)(2) and DOS draft section Y 1003.1, the BZA has the burden to show why an application must be disapproved.

We have replaced OP draft sections X 201.3 through X 201.8 with DOS draft sections Y 1003.2 through 1003.5. Under OP draft sections X 201.3 – X 201.8, if a foreign mission wishes to locate a chancery in a low to medium density residential zone, the BZA must conduct a determination prior to considering the merits of a chancery location application as to whether the “square” at issue is “currently suitable for a chancery use.” The OP draft regulations provide that a square is suitable for a chancery use only if at least 50% of the land area is devoted to certain non-residential uses. If the square meets the 50% test, then the BZA may determine the merits of the application. If the square does not meet the 50% test, then the BZA must dismiss the application with prejudice.

These OP draft provisions attempt to define the language in section 206(b)(2)(B) of the FMA, which provides that a chancery shall be permitted to locate “in any other area [other than matter of right areas or areas zoned medium-high or high density residential], determined on the basis of existing uses, which includes office or institutional uses” While the Department appreciates the general desire for certainty, we believe that the text and legislative history of the FMA provide sufficient guidance on this issue and leave the rest in the BZA’s discretion. FMA section 206(e)(1) provides that regulations of the ZC affecting the location, replacement, or expansion of chanceries shall be consistent with section 206 (including the criteria set out in subsection (d)). Therefore, by adding criteria not contemplated by the FMA and removing all

BZA discretion from this piece of the overall determination, OP draft sections X 201.3-201.8 violate section 206 of the FMA.

As illustrated by the extensive background in the appendix, the Department acknowledges its longstanding interest in allowing the location of chanceries in lower density residential neighborhoods and the District's longstanding interest in restricting chanceries from such areas. It was this very tension that led to the enactment of section 206 of the FMA, the intent of which Congress acknowledged was to better balance both the Federal and local interests in chancery location issues. To that end, section 206(d) is fairly broad, providing that “[a]ny determination concerning the location of a chancery under subsection (b)(2) [which is subject to disapproval by the BZA] . . . shall be based solely on the following criteria [(1)-(6)].”

Subsection 206(b)(2) includes subsection (b)(2)(B), which requires a determination of whether an area other than the areas enumerated in (b)(1) (i.e., matter of right areas) or (b)(2)(A) (i.e., areas zoned low to medium density residential) is an area with mixed uses, based on whether it currently includes office or institutional uses. This is a preliminary determination that does not actually concern the location of a chancery. Rather, the “existing uses” inquiry operates more fairly 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?”¹ If the BZA determines that the area in question actually contains mixed uses, meaning that it currently includes 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 section 206(d). By virtue of the specific references in subsection (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 threshold inquiry involves no judgment on the “suitability” of that area for a chancery location. As such, the OP draft’s 50% test (or the uncoded 1/3-2/3 test that has previously been used by the OP)² has no place in this initial inquiry. Contrary to the OP draft regulations, any so-called “suitability” determination (which, incidentally, is a term not found in the FMA or its legislative history) cannot and should not be distinguished from the determination involving the “merits of the application.” If the foreign mission wishes to locate its chancery in “any other area . . . which includes office or institutional uses,” and the BZA determines that that area is entitled to the presumption described above, the BZA will inherently determine whether

¹ H.R. Rep. No. 97-693, at 41 (1982).

² The NCPC, on page 36 of its planning report for the revised Foreign Missions element of the comprehensive plan, dated July 28, 1983, suggested a methodology for identifying additional squares in lower density residential zones that were sufficiently similar to the existing “D” squares (i.e., that approximated a ratio of 2/3 residential type land uses and 1/3 office, institutional and other land uses) and that would satisfy the criteria of section 206(b)(2)(B) (i.e., that contained an existing office or institutional use). ZC Order No. 509 (Feb. 9, 1987), with the support of the OP, used that same methodology to include additional squares into the D Overlay District. The OP has since then used this 1/3-2/3 test, which has never been codified into the zoning regulations and which has been non-binding on the BZA, to offer its views on the suitability of “any other area” for the location of a chancery. In both its 2003 report “Foreign Missions in the District of Columbia – Future Location Analysis,” and its 2004 Foreign Missions Element, NCPC signaled a move away from the 1/3-2/3 test. The 2014 Foreign Missions Element, adopted by NCPC on July 10, eliminates this method altogether.

that area is suitable for the location of the proposed chancery, but section 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.

We repeat here what is stated in the appendix: Congress noted that chanceries are not permitted to be located “in any area which is essentially a residential use area.”³ The Department does not advocate otherwise. That is the purpose of the “existing uses” inquiry – to look beyond the zoning classification at the actual uses for certain non-residential uses. Given that the BZA should retain the discretion to determine whether “any other area” includes office or institutional uses, lower density residential zones that actually contain mixed uses should come into play, as Congress anticipated they would,⁴ even if such areas would fail the immutable precision of the OP draft 50% test. Accordingly, we propose to modify OP draft D § 1601.2(d), which imposes conditions not articulated in the FMA on chancery uses in lower density residential zones, to: “Chancery, subject to disapproval by the Board of Zoning Adjustment pursuant to Y Chapter 10.”

A further issue is what constitutes an “area” for purposes of section 206(b)(2)(B), which is not a term of art in the zoning regulations. The OP draft regulations suggest that an “area” can only mean a “square.” The term “square” does not appear in section 206 or its legislative history; therefore, the Department does not agree that this is what Congress meant by “area” in all cases. The genesis of this association appears to be in the NCPC’s 1983 Planning Report, when the NCPC used a city square as the area unit for the analysis which led to the 1/3-2/3 test.⁵ The Executive Director of the NCPC later advised the ZC 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.”⁶ While this may have been a useful tool for modifying 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 section 206. Rather, “area” remains a vague term the interpretation of which was intended to be left to the discretion of the BZA. The smallest “area” should be that within the zoning district boundaries in which the property is located, but even that should not be the defining criterion in all instances.

The BZA retains the authority to define the area and make the non-zero threshold determination. Furthermore, the ZC’s authority to promulgate binding, substantive guidance in this context is significantly limited. Not only are these views apparent from the plain language of the FMA (especially subsections 206(b)(2), (c)(1), and (e)(1)), they have 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 adopted the 1/3-2/3

³ H.R. Rep. No. 97-693, at 41 (1982).

⁴ *Id.*

⁵ NCPC Planning Report, at 36 (1983).

⁶ ZC Order No. 509, at 5 (1987).

test, 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.”⁷ 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).⁸ 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 (September 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.”⁹

Most recently, the BZA exercised this authority in its orders not disapproving applications from the Embassies of Hungary, Uganda, and Serbia.¹⁰ In reviewing the application from the Embassy of Hungary, the BZA noted that the square “as well as the surrounding area” were primarily characterized by diplomatic and institutional uses. With respect to the “surrounding area,” the BZA noted what was located across each of the streets that abutted the lot. The BZA did not reference the 1/3-2/3 test. In reviewing the application from the Embassy of Uganda, the BZA stated that “consistent with past precedent,” which included its order on Hungary, it found that its analysis of the area could extend beyond the property’s square. In particular, the BZA considered the surrounding area to include the square occupied by the property, the closest square, and other properties in nearby squares. Again, it declined to use the 1/3-2/3 test. Finally, in reviewing the application from the Embassy of Serbia, the BZA again looked at the “surrounding area” of the square and did not reference the 1/3-2/3 test.

⁷ Embassy of the People’s Republic of Benin v. D.C. Board of Zoning Adjustment, 534 A.2d 310, 321-22 (D.C. 1987).

⁸ BZA Order No. 14820 (Sep. 7, 1988).

⁹ Sheridan Kalorama Historical Association v. Christopher, 49 F.3d 750, 757 (D.C. 1995).

¹⁰ BZA Order No. 17481 (Dec. 1, 2006); BZA Order No. 17787 (Feb. 23, 2009); BZA Order No. 18242 (Oct. 24, 2011).

In accordance with our proposed non-zero threshold inquiry for “any other area,” the Department supports the OP draft’s proposed elimination of the D overlay. Although the D overlay was an illustration of the potential acceptability of lower density residential zones that actually contained mixed uses, it was a snapshot of two earlier evaluations (in 1978 and 1987) that essentially obviated the BZA’s discretion in later determinations. To that end, the Department supports the general principle in the OP draft that “any other area” be determined on the basis of existing uses at the time of the application rather than pre-ordained by an overlay.

Congress acknowledged that the chancery location rules in place prior to the enactment of the FMA were “restrictive.”¹¹ To rectify this situation, it enacted 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)¹² – 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. The relative ambiguity of the FMA (compared to the OP draft’s 50% test) is the only way to maintain the crucial balance between Federal and local interests in these determinations. Both the OP draft’s 50% test and the use of a “square” as the relevant “area” unhinge the crucial and delicate balance between the Federal and local interests by effectively reinstating the restrictions that Congress had rejected three decades ago.

This change requires conforming edits by deleting OP draft sections X 202.5(i), (k), and (l), and modifying OP draft section X 202.5(j) (DOS draft section Y 1001.5(i)).

Three-Year Discontinued Use or Vacancy

We strike OP draft sections X 204.3(b), 204.4, and 205.2(a). OP draft section X 204.3(b) provided that any chancery use established by an order of the BZA would expire if the chancery use is discontinued for any reason for any period of three (3) or more years. Striking OP draft section X 204.4 is a conforming deletion. OP draft section X 205.2(a) provided that even if a chancery was established before October 1, 1982, BZA review would be required for the continuing use of a chancery if the property was continuously vacant for a period of at least three years. While the term “discontinued” is somewhat unclear, in both cases, the fact that a property is not used as a chancery for three years would lead to the property losing a benefit to which it would otherwise be entitled under U.S. and international law. Although this concept may be appropriate for the regulation of nonconforming uses, it is not appropriate for chanceries.

A chancery property should retain such benefits for as long as the Department authorizes the use of such property for diplomatic purposes. The Department is the sole agency that determines whether and when it is appropriate to withdraw such authorization. This significant decision is informed by considerations of international relations and reciprocity (i.e., how the

¹¹ S. Rep. No. 97-283, at 14 (1982).

¹² 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.”).

United States expects its foreign property to be treated by the host government), which are the sole provinces of the Department. The mere fact that a chancery property is vacant does not constitute an abandonment of that property. Accordingly, the Department does not withdraw its authorization solely because a chancery property has been vacant for three years. If and when the Department no longer authorizes the use of a chancery property for diplomatic purposes, such property would no longer constitute a chancery use and would lose other benefits typically enjoyed by a foreign mission, such as tax exemption or inviolability.

We are happy to discuss this issue further with the District.

“First Transfer”

We strike OP draft section X 200.3(a)(2), which provides that the BZA has the authority to review applications to “[p]ermit the first transfer of a chancery use from one government to another in any Low to Medium Density Residence Zone when the chancery use was not established pursuant to an order of the [BZA].”

This provision violates section 206(h)(2) of the FMA, which provides that approval by the BZA is not required 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.” (The principle of section 206(h)(2) is captured in OP draft section X 205.1(b), which has been moved to DOS draft section Y 1000.6(b).) Section 206(h)(2) provides grandfather rights for chancery uses that existed as of the effective date of the FMA so that such issues did not need to be reopened.¹³

A chancery use in any Low to Medium Density Residential Zone that was not established pursuant to an order of the BZA would have existed on October 1, 1982. (Since that date, all proposed chancery uses in such zones are subject to the disapproval of the BZA pursuant to section 206(b)(2)(B) of the FMA.) Accordingly, the continuing use of such chanceries would be grandfathered in under section 206(h)(2) of the FMA, and BZA approval would not be required for a transfer of the chancery use to another foreign mission. On the other hand, a transfer of a chancery use that had been established after October 1, 1982 would be treated as a location of a chancery.

References to “Embassy”

We propose to strike the definition of “Embassy” in Subtitle B, section 100.3 and any other references to “embassy” in the OP draft regulations. The Department does not refer to a chief of mission residence as an “embassy.” Furthermore, no substantive or procedural rules apply to embassies as defined here but distinguished from other residences. Therefore, this term is not needed in the regulations. We propose deleting the part of the definition of chancery in Subtitle B, section 201.7(b) that refers to an “embassy,” and we propose replacing the term “embassy” with “foreign mission” in Subtitle I, sections 808.3(b), 809.3(a), and 810.3(a).

¹³ H.R. Rep. No. 97-693, at 42 (1982).

Summary of Deleted or Modified Provisions

Consistent with the proposals described above and the attached markup, we propose to delete the following: **Subtitle X, Chapter 2; Subtitle Y, sections 201.3, 405.7, 410, 603.3, 604.3, 604.4, and 604.13**. These provisions apply to chancery applications and have been moved to Subtitle Y, Chapter 10. As described above, we also propose deleting **Subtitle B, section 100.3**.

We also propose modifying the following: **Subtitle B, section 201.7(b)** (striking the reference to embassy), **Subtitle D, section 1601.2(d)** (imposing only the condition of being subject to disapproval by the BZA); **Subtitle D, section 1602.2(b)** (changing the reference to Y Chapter 10); **Subtitle Y, sections 300, 300.6(b)(3), 300.7(d)** (striking the reference to chancery), **Subtitle I, sections 808.3(b), 809.3(a), 810.3(a)** (replacing embassy with chancery); and **Subtitle E, section 1102.2(b)** (updating the reference to Subtitle Y, Chapter 10).

Thank you for your consideration of these comments and proposals from the Department of State. We welcome the opportunity to discuss these with you and to address any questions or concerns.

Sincerely,



Cliff Seagroves
Director, Diplomatic Property, Tax,
Services & Benefits
Office of Foreign Missions

cc: District of Columbia Office of Planning
National Capital Planning Commission

Enclosures: Crosswalk (OP draft – DOS draft – Current)
Appendix: History of Authority for Locating Chanceries in the District
DOS draft regulations – Subtitle Y, Chapter 10 (Chancery Applications)

CROSSWALK

Section (OP draft)	Section (DOS draft)	Section (Current)
X 200.1	Y 1000.1	
X 200.2	Y 1000.2	
X 200.3	Y 1000.5	11-1002.1, 1002.2
X 200.3(a)(1)	Y 1000.5(a)(1), (a)(2)	
X 200.3(a)(2)	--	
X 200.3(a)(3)	--	
X 200.3(b)	Y 1000.5(b)	
X 201.1	Y 1003.1	11-1001.1, 1002.4
X 201.2	--	
X 201.3	Y 1003.2	
X 201.4	Y 1003.4	
X 201.5	--	
X 201.6	--	
X 201.7	Y 1003.5	
X 201.8	Y 1003.4	
X 201.9	Y 1003.6	11-1001.2-.8
X 201.10	Y 1003.7	11-1001.4, 1002.8
X 202.1	Y 1001.1	11-3113.3
X 202.2	Y 1001.2	11-3113.4
X 202.3	Y 1001.3	11-3113.4
X 202.4	Y 1001.4	11-3134.7
X 202.5	Y 1001.5	11-1002.9
X 202.6	Y 1001.6	
X 202.7	Y 1001.7	
X 202.8	Y 1001.8	
X 202.9	Y 1001.10	11-3113.9
X 202.10	Y 1001.11	11-3113.8
X 202.11	Y 1001.12	11-1002.5-.7
X 203.1	--	
X 203.2	Y 1004.4	11-1002.10, 3134.16(c)
X 203.3	Y 1004.10	
X 203.4	Y 1004.11	
X 204.1	Y 1004.6	
X 204.2	Y 1004.7	
X 204.3(a)	Y 1004.8(a)	
X 204.3(b)	--	
X 204.3(c)	Y 1004.8(b)	
X 204.5	Y 1004.9	
X 205.1	Y 1000.6	
X 205.2(a)	--	
X 205.2(b)	Y 1000.7	
Y 300.2	Y 1001.9	11-3113.6

Y 403.4	Y 1002.1	11-3134.3
Y 405.7	Y 1002.3	11-3134.10
Y 410.1	Y 1002.4	
Y 410.2	Y 1002.5	11-3134.13
Y 410.3	Y 1002.6	
Y 410.4	Y 1002.7	11-3134.12
Y 410.5	Y 1002.8	11-3134.12
Y 410.6	Y 1002.9	11-3134.15
Y 603.3	Y 1004.2	11-3134.14
Y 604.3	Y 1004.3	
Y 604.4	Y 1004.4	11-1002.10
Y 604.13	Y 1004.5	11-3134.17

APPENDIX

History of Authority for Locating Chanceries in the District of Columbia

Chanceries were exempt from District zoning regulations until 1958, when, in an apparent response to the increase of newly-independent African countries desiring to establish chanceries, the ZC classified chanceries as commercial establishments and therefore not permitted to locate in residential neighborhoods without a special exception.¹⁴ From June 1958 to March 1963, 46 foreign governments requested special exceptions from the BZA to establish chanceries in residential neighborhoods.¹⁵ The BZA granted 32 and denied nine (five were withdrawn).¹⁶ Although the regulations provided some general principles to guide the BZA (e.g., compatibility with the neighborhood by looking at size, scope, parking, and design),¹⁷ the Department was dissatisfied with the lack of a clear set of criteria to govern such decisions.¹⁸

In 1962, the Senate Committee on Foreign Relations passed a bill that would have prohibited future construction of chanceries in single-family detached dwelling residential areas (i.e., R-1 zoning districts).¹⁹ The Department agreed with that position but wanted to allow chanceries to locate in other residential districts predominantly occupied by apartments, row houses, and semidetached homes, provided it could be shown that such areas were not already overcrowded.²⁰ This bill did not pass the Senate because the Committee on the District of Columbia had not had an opportunity to consider it.²¹

Fulbright Act (1964)

Senator J. William Fulbright introduced a similar bill in the following year which was referred to the Committee on the District of Columbia. Although the Department generally supported the introduction of guidelines, it preferred an alternative that would allow a chancery to locate in any residential area if it met a set of specific criteria.²² The Department had consulted with the D.C. Board of Commissioners and the ZC to draft regulations that would adopt a similar set of criteria to determine compatibility with the neighborhood.²³ The proposed

¹⁴ S. Rep. No. 88-360, at 2 (1963).

¹⁵ *Hearing Before the Subcomm. on Business and Commerce of the S. Comm. on the District of Columbia*, 88th Cong. 19 (1963) (statement of Sen. Fulbright, Chairman, S. Comm. on Foreign Relations).

¹⁶ *Id.*

¹⁷ *Hearing Before Subcomm. No. 3 of the H. Comm. on the District of Columbia*, 88th Cong. 29 (1963) (letter from the D.C. Board of Commissioners to the H. Comm. on the District of Columbia, quoting para. 3101.410).

¹⁸ S. Rep. No. 88-360, at 2 (1963).

¹⁹ S. Rep. No. 87-1925, at 2 (1962).

²⁰ *Id.*

²¹ *Hearing, supra* note 15, at 4 (statement of Sen. Monroney, Member, S. Comm. on Foreign Relations).

²² *Id.* at 37-38 (statement of Pedro Sanjuan, Director of Special Protocol Services, Dept. of State).

²³ *Hearing, supra* note 17, at 18 (statement of Irving Bryan, D.C. Office of Corporation Counsel).

regulation would have required the BZA to consider the number of parking spaces, the height of the building, the size of the site, the proximity to other chanceries, the architectural design, and the anticipated volume of traffic.²⁴

Congress disregarded the proposed regulations and instead passed P.L. 88-659 (78 Stat. 1091) (“Fulbright Act”) on October 13, 1964, which adopted the suggestion of many D.C. citizens that chanceries should be prohibited from locating in all residential districts.²⁵ However, in what appeared to be a compromise to alleviate some of the Department’s concern that such a restriction “would be harmful to the national interest,”²⁶ the law did provide a limited exception for certain residential areas that incorporated some of the criteria proposed by D.C. and the Department:

(d) ... a foreign government shall be permitted to construct, alter, repair, convert, or occupy a building for use as a chancery within any district or zone restricted in accordance with this Act to use for *medium-high density apartments* or *high density apartments* if the [BZA] shall determine after a public hearing that the proposed use and the building in which the use is to be conducted are compatible with the present and proposed development of the neighborhood. In determining compatibility the [BZA] must find that—

- (1) [sufficient off-street parking spaces in medium-high density apartments districts]; and
- (2) [sufficient off-street parking spaces in high density apartments districts]; and
- (3) the height of the building does not exceed the maximum permitted in the district or zone in which it is located; and
- (4) the architectural design and the arrangement of all structures and off-street parking spaces are in keeping with the character of the neighborhood.

The House noted that the legislation met “an urgent immediate need” but was not “a long-range desirable solution” to the problem at hand.²⁷ To that end, it stated that District and Federal government representatives were “exploring the possibility of establishing some special area which will be particularly suitable for the location of chanceries in the District of Columbia.”²⁸

²⁴ *Id.*, at 28 (letter from the D.C. Board of Commissioners to the H. Comm. on the District of Columbia, quoting proposed para. 3101.410).

²⁵ See S. Rep. No. 88-360, at 1 (1963); H.R. Rep. No. 88-1727, at 3 (1964). New subsection (c) of the Act read, in relevant part: “except as otherwise provided in subsection (d) of this section, no foreign government shall be permitted to construct, alter, repair, convert, or occupy a building for use as a chancery where official business of such government is to be conducted on any land, regardless of the date such land was acquired, within any district or zone restricted in accordance with this Act to use for residential purposes.”

²⁶ *Hearing*, *supra* note 17, at 61 (letter from Frederick Dutton, Dept. of State, to House Comm. on the District of Columbia).

²⁷ H.R. Rep. No. 88-1727, at 5 (1964).

²⁸ *Id.*

Home Rule Act (1973)

In 1952, Congress had charged the NCPC with preparing and adopting a comprehensive plan for the National Capital, which would include the NCPC's recommendations or proposals for both Federal and District developments and projects.²⁹ On December 24, 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), which delegated the preparation and implementation of the District elements to the Mayor, but explicitly stated that "[t]he Mayor's planning responsibility shall not extend to federal or international projects and developments in the District, as determined by the [NCPC]."³⁰ The Home Rule Act preserved some oversight for the NCPC, by allowing it to review the District elements with regard to their impact on the interests or functions of the federal establishment in the national capital and providing that if the NCPC finds that such impact would be negative, such elements would not be implemented.³¹ Furthermore, the Home Rule Act also provided that zoning maps and regulations "shall not be inconsistent with the comprehensive plan" for the national capital.³²

In 1978, the ZC confirmed its understanding of these provisions that planning for the location of chanceries in the District is within the jurisdiction of the NCPC, and that the ZC is required to implement such plan elements through amendments to the zoning regulations.³³

NCPC's Foreign Missions Element (1977)

On October 6, 1977, the NCPC adopted a Federal element of the comprehensive plan entitled "Foreign Missions and International Agencies." The objectives of the element were to select new locations for chanceries "in areas of compatible land uses . . . with special care given to protecting residential areas," "in reasonable proximity to federal offices and other foreign missions," and to "encourage foreign missions . . . to locate on sites and in structures that reflect the prestige and dignity of their functions and, at the same time, contributed to the overall design of the National Capital."³⁴

To meet these objectives, the NCPC stated that "new, expanded, or relocated chanceries . . . shall be permitted to locate only in areas: (1) designated . . . for (a) predominantly office use . . . , (b) mixed uses, including commercial, office and institutional, or (c) high density residential

²⁹ P.L. 82-592; 66 Stat. 781, § 4(a).

³⁰ P.L. 93-198, 87 Stat. 774, § 203(a) (codified at D.C. Code § 2-1002(a)(2)).

³¹ *Id.* Section 423 of the Home Rule Act, codified at D.C. Code § 1-204.23, contains much of the same language, as does 40 U.S.C. §§ 8712, 8721.

³² § 492(b)(1) (codified at D.C. Code § 6-641.02). See also P.L. 82-592, § 8(a); 40 U.S.C. § 8724(a) (NCPC "may make a report and recommendation to the [ZC] . . . on the relation, conformity, or consistency of proposed amendments of the zoning regulations and maps with the comprehensive plan for the National Capital.").

³³ ZC Statement of Reasons accompanying Cases No. 77-45 and 77-46, at 15 (1978).

³⁴ ¶¶ 313.311, 313.312, 313.313.

use [intended to be the same as ‘medium-high density’ and ‘high density’ as used in the Fulbright Act], or (2) along or in close proximity to arterial streets in which existing chanceries . . . are concentrated.”³⁵ Other criteria concerned the availability of public transit to reduce parking requirements, the availability of adequate public facilities, and the ability to be adequately protected by the relevant protective services.³⁶ The NCPC also created a map that indicated which areas in the District met these criteria.³⁷

Introduction of Mixed Use Diplomatic District and Overlay (1978)

As required by law, the NCPC asked the ZC to implement these criteria through the zoning regulations and zoning maps.³⁸ On December 15, 1977, the ZC issued an emergency order (No. 199) stating that, while the ZC considered such conforming amendments, no building would be used and no building permit or certificate of occupancy would be issued for a chancery in any areas in the District not designated for such use on the NCPC’s new map.³⁹ At the time of the order, the zoning regulations provided that chanceries could locate as a matter of right in all commercial, industrial, mixed use, and waterfront zone districts (C, M, CM, CR, and W) provided such facilities did not exceed the height, density, and other requirements of those zones. The regulations also permitted chanceries as special exceptions in medium-high and high density residential zone districts (as provided in the Fulbright Act)⁴⁰ and special purpose (SP) zone districts. Chanceries were not permitted to locate in R-1, R-2, R-3, R-4, R-5-A, and R-5-B zone districts.

On September 14, 1978, the ZC issued Orders No. 236 and 237, amending the zoning regulations and map to establish a new Mixed Use Diplomatic (D) District to be mapped in combination with other districts at various locations in the District of Columbia. The ZC believed that the new D district would not adversely impact the quality of residential life in such areas.⁴¹

The new regulations permitted a chancery to locate in areas mapped D, R-5-C, R-5-D, or SP, provided the BZA determines that the proposed chancery is not incompatible with the present and proposed development of the neighborhood. The standards by which the BZA would make such a determination considered the architectural design, off-street parking spaces, height of the building, percentage of lot occupancy, floor area ratio, and traffic conditions. The

³⁵ §§ 313.41, 313.411.

³⁶ §§ 313.412, 313.413, 313.414.

³⁷ § 313.42.

³⁸ § 313.82.

³⁹ On February 9, 1978, the ZC issued Order No. 209, which slightly modified Order No. 199, to permit the Government of Finland to expand its facilities outside the NCPC mapped area. In support of this order, the ZC noted that the NCPC staff had clarified that the Foreign Missions element did intend to allow the expansion of existing chanceries outside the NCPC mapped area.

⁴⁰ R-5-C and R-5-D in 1977 (R-5-D and R-5-E today).

⁴¹ ZC Statement, *supra* note 33, at 10.

ZC noted that this review was based on the BZA review for compatibility prescribed by the Fulbright Act of 1964.⁴² The new regulations also reaffirmed a foreign mission's right to locate a chancery in a waterfront district (W), industrial district (CM, M) or certain mixed use and commercial districts (CR, C-2-B, C-3, C-4, C-5) without a review by the BZA.

Finally, the ZC issued a list of squares located in lower density residential and commercial districts (including R-1-A, R-1-B, R-3, R-5-B, and C-2-A) that were designated as part of the D district, which the ZC described as a "qualified matter-of-right."⁴³ These squares were so designated because of their proximity to existing R-5-C district areas, the presence or nearness of existing chanceries, and other institutional and commercial uses which demonstrated an existing mixed-use character of the mapped area.⁴⁴

The ZC supported the location of chanceries in certain non-commercial areas by noting that chanceries are less like commercial establishments, but "are in their character and operation comparable to the types of professional and institutional uses which are now permitted, along with residential uses, in the mixed-use SP zone."⁴⁵ In fact, the ZC likened the new D district to the SP district which was created in 1958 to classify areas in which residential, commercial, and semi-commercial uses existed side by side.⁴⁶

D.C. Location of Chanceries Act and Congressional Disapproval (1979)

Many D.C. citizens and citizen organizations argued that the new regulations and maps contravened the Fulbright Act by permitting chanceries in residential areas of low to medium density.⁴⁷ The ZC and the District's Corporation Counsel disagreed, finding that the D districts were in reality mixed-use zone districts.⁴⁸

Those citizens sought relief through the City Council, which passed Act 3-120 on November 9, 1979 ("Location of Chanceries Act").⁴⁹ This act reaffirmed the Fulbright Act by prohibiting the location of chanceries in lower density residential neighborhoods, even if such areas had been mapped in the D district.⁵⁰ On December 20, 1979, pursuant to the review power retained under the Home Rule Act, Congress adopted a concurrent resolution disapproving of the Location of Chanceries Act (Congress' first concurrent resolution disapproving of any District

⁴² *Id.*, at 2-3.

⁴³ *Id.*, at 2, 29-56.

⁴⁴ *Id.*, at 29.

⁴⁵ *Id.*, at 7.

⁴⁶ *Id.*, at 8.

⁴⁷ *Id.*, at 57.

⁴⁸ *Id.*, at 58.

⁴⁹ S. Rep. No. 96-533, at 3 (1979); H.R. Rep. No. 96-728, at 3 (1979).

⁵⁰ *Id.*

act).⁵¹ Although Congress took no position as to whether the NCPC and the ZC violated the Fulbright Act,⁵² it concluded that the District did not have the authority under the Home Rule Act to legislate in the area of international projects and developments.⁵³ Rather, Congress confirmed that under the Home Rule Act, jurisdiction over Federal issues, including the location of chanceries, was reserved for the NCPC to be implemented by the ZC.⁵⁴

Foreign Missions Act (1982)

Given the ongoing uncertainty and restrictions involving the location of chanceries in the District, the Department pushed Congress to seek ways to resolve the tension between the Federal and District governments and better balance both interests. On July 22, 1980, the House Committee on Foreign Affairs held a hearing on the substance of the Diplomatic Reciprocity Act (S. 2866), a bill that had been introduced by the Senate Committee on Foreign Relations.⁵⁵ The bill, a precursor to the Foreign Missions Act, would, among other things, give the NCPC the authority to determine the location of foreign missions.⁵⁶ The Department supported this provision, noting that it would better balance Federal and local interests, and offering to recommend criteria that would clarify the Federal interest in this regard.⁵⁷ In particular, the Department highlighted its obligation to provide security for foreign missions and the resulting need to locate such missions “in proximity to each other and in areas of lesser density, usually areas of mixed institutional and lower scale residential use.”⁵⁸ This bill did not come up for a vote, but bills with similar language were introduced by both the Senate Committee on Foreign Relations (S. 854) and House Committee on Foreign Affairs (H.R. 3518) in April and May 1981, respectively. The Department acknowledged that it supported the bills and had contributed to the drafting of various provisions.⁵⁹

Like the Diplomatic Reciprocity Act of 1980, the new bills would give the NCPC the authority to determine the location of chanceries in order to ensure a balance of Federal and

⁵¹ S. Con. Res. 63, 96th Cong. (1979); H.R. Con. Res. 228, 96th Cong. (1979).

⁵² The Senate Committee on Governmental Affairs did state that the interpretation of the Fulbright Act suggested by the District was “unpersuasive [because] there was no reason to believe that Congress intended to freeze the zoning of certain neighborhoods in perpetuity regardless of any changes which might occur in subsequent years.” S. Rep. No. 96-533, at 6 n.14 (1979).

⁵³ *Id.*, at 4, 6.

⁵⁴ *Id.*, at 4-5.

⁵⁵ *Hearing Before the Subcomm. on Int’l Operations of the H. Comm. on Foreign Affairs*, 96th Cong. 2 (1980) (statement of Thomas Tracy, Dept. of State).

⁵⁶ *Id.*, at 5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Hearing Before the H. Comm. on the District of Columbia*, 97th Cong. 61 (1981) (letter from Richard Fairbanks, Dept. of State, to Senate Subcomm. on Governmental Efficiency and the District of Columbia).

District interests and participation by all interested parties.⁶⁰ The bills would also repeal the Fulbright Act. The NCPC's determination of the location of chanceries would be based solely on criteria that were largely drawn from the criteria in the NCPC's 1977 foreign missions element: the Federal interest, historic preservation, the availability of public transit, the adequacy of public facilities, the ability to be adequately protected, the municipal interest, and notably:

the chancery is in an area (A) of predominantly office use, (B) of mixed use, including residential, commercial, office, or institutional use, (C) of medium or high density residential use, or (D) in reasonable proximity to streets on which existing chanceries are concentrated.

The Department interpreted this provision as requiring determinations on chancery locations to be based on a survey of actual existing land uses, rather than relying purely on the primary zoning labels.⁶¹ It noted, for example, that some areas, including "Embassy Row" along Massachusetts Avenue, were zoned "for lower density residential use, but also permit and in fact contain a substantial number of institutional or other nonresidential uses such as churches, schools, chanceries and non-profit institutions."⁶²

The House Committee on the District of Columbia believed that giving authority to the NCPC usurped the home rule principle and worked to achieve a compromise that would give the District a heavier hand in this process.⁶³ On October 29, 1981, the House passed a bill that contained the following version of section 206, in relevant part, which had been a compromise between the House Foreign Affairs and District of Columbia Committees:⁶⁴

- (c) The Foreign Missions Commission shall--
 - (1) establish areas within which chanceries may be located as a matter of right, and
 - (2) establish additional areas within which chanceries may be located.
 Limitations on chancery uses shall not exceed those applicable to any other nonresidential use in the areas so established.
- (d) ...

⁶⁰ H.R. Rep. No. 97-102, Pt. 1, at 34 (1981).

⁶¹ *Hearing Before the Subcomm. on Governmental Efficiency and the District of Columbia of the S. Comm. on Governmental Affairs*, 97th Cong. 118-119 (1982) (letter from Powell Moore, Dept. of State, to Senator Mathias).

⁶² *Id.* An earlier version of the letter substituted "more than 50%" for "a substantial number." *Id.*, at 217.

⁶³ *Hearing, supra* note 59, at v (preface by Rep. Ronald Dellums, Chairman, House Comm. on the District of Columbia). In May and June 1981, the Committee introduced a bill (H.R. 3714) proposing an alternative procedure for locating chanceries in the District (giving primary authority to the BZA and ZC) and also voted to strike section 206 from H.R. 3518 (which would have left the then-existing procedures intact). *Id.*, at vi.

⁶⁴ 127 Cong. Rec. 20878 (Sep. 17, 1981) (statement of Rep. Fascell). The new version created an independent agency of the District of Columbia, called the D.C. Foreign Missions Commission, which consisted of the five members of the ZC, the Chairman of the NCPC, and the Secretary of Defense. The District Government opposed this compromise as well. S. Rep. No. 97-329, at 15 (1982).

- (e) Any determination by the Foreign Missions Commission with respect to chanceries pursuant to this section, including the establishment of areas in accordance with paragraphs (1) and (2) of subsection (c), shall be based solely on the following criteria:
- (1) The obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.
 - (2) The chancery is in or adjacent to an area, determined on the basis of existing or planned uses, of (A) commercial use, or (B) mixed uses, including residential, commercial, office, or institutional use.
 - (3) Historic preservation . . .
 - (4) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation . . .
 - (5) The extent to which the area will have adequate public facilities . . .
 - (6) The extent to which the area is capable of being adequately protected . . .
 - (7) The municipal interest, as determined by the Mayor of the District of Columbia.
 - (8) The Federal interest, as determined by the Secretary.

The Department supported this compromise.⁶⁵ Subsection (c) required the Commission to establish areas in which chanceries may locate as a matter of right, as well as other permitted areas. With respect to this provision, Congress noted that “[s]ecurity, representation and related factors necessitate that chancery uses be located in lesser density areas and generally in proximity to each other where possible.”⁶⁶ Subsection (e) lists the criteria by which the Commission would both establish areas and determine the location of chanceries. Congress noted that subsection (e)(2) reflected the need to continue to locate chanceries in existing mixed-use areas, in which current uses already include institutions, commercial, or governmental activities, and residential uses.⁶⁷ Furthermore, the provision ensured that areas in which the Commission determined current uses were entirely residential would not become available for chancery use, except for medium-high density or high-density apartment zones.⁶⁸

The Senate-passed version of the bill did not contain any FMA provisions, so the final version would be worked out in conference. Senator Percy, the Chairman of the Foreign Relations Committee, who introduced the Foreign Missions Act a year earlier, introduced a substitute section 206 which would essentially become the enacted version. Although there were

⁶⁵ *Hearing, supra* note 61, at 6 (statement of Thomas Tracy, Dept. of State).

⁶⁶ 127 Cong. Rec. 26075-26076 (Oct. 29, 1981) (statement of Rep. Fascell); S. Rep. No. 97-283, at 12-13 (1981); S. Rep. No. 97-329, at 13-14 (1982). The Senate passed S.1193 (the State Department authorization bill, which contained no FMA provisions) in June 1981. The House inserted the FMA language into S.1193 and passed it in October 1981 (H.R. 4814). The Senate agreed to a conference on this bill.

The Senate Committee on Foreign Relations later incorporated the House-passed FMA language into S. 854 and reported it favorably out of committee (as did the Senate Committee on Governmental Affairs). In April 1982, the Senate passed S. 854 after agreeing to strike section 206. 128 Cong. Rec. S4034-S4040 (daily ed. Apr. 27, 1982). Two days later, the conference began on S. 1193.

⁶⁷ *Id.*

⁶⁸ *Id.*

some key differences from the House-passed version (notably, eliminating the Foreign Missions Commission), the underlying goals were largely the same: allowing foreign missions “a reasonable prospect of locating in an area where other non-residential uses are permitted,” either as a matter of right or with approval of the BZA, using criteria that would balance the federal and public interest.⁶⁹ The enacted section 206 provides, in relevant part:

- (b) Acceptable areas; limitations and conditions
 - (1) A chancery shall be permitted to locate as a matter of right in any area which is zoned commercial, industrial, waterfront, or mixed-use (CR).
 - (2) A chancery shall also be permitted to locate--
 - (A) in any area 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,
 subject to disapproval by the [BZA] in accordance with this section.
 - (3) In each of the areas described in paragraphs (1) and (2), the limitations and conditions applicable to chanceries shall not exceed those applicable to other office or institutional uses in that area.
- (c) ...
- (d) Criteria for determination

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:

 - (1) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.
 - (2) Historic preservation . . .
 - (3) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation . . .
 - (4) The extent to which the area is capable of being adequately protected . . .
 - (5) The municipal interest, as determined by the Mayor of the District of Columbia.
 - (6) The Federal interest, as determined by the Secretary.

The conference report explained that section 206(b)(2) permits chanceries to locate (A) in areas zoned medium-high or high density residential (separately stated to preserve then-existing law (the Fulbright Act)),⁷⁰ as well as (B) “in other areas which include office and institutional uses, including mixed-use diplomatic and special purpose districts.”⁷¹ The intent behind subsection (b)(2)(B) is to “not permit chanceries to be located in any area which is essentially a

⁶⁹ Transcript of Joint Conference, markup of S. 1193, at 89-91 (Jun. 22, 1982) (James Michel, Office of Legal Advisor, Dept. of State).

⁷⁰ Transcript of Joint Conference, markup of S. 1193, at 62 (Jul. 21, 1982) (James Michel, Office of Legal Advisor, Dept. of State).

⁷¹ H.R. Rep. No. 97-693, at 41 (1982).

residential use area.”⁷² A former Corporation Counsel attorney present at the conference suggested that subsection (b)(2)(B) captured the principle used by the ZC to map the D overlay zone in 1978.⁷³

Furthermore, the conference report broadly explains that the criteria listed in section 206(d) are “to be applied in the determination of chancery issues.”⁷⁴ One of the conferees understood that these criteria would be applied even under subsection (b)(2)(B): “[T]he act allows the chanceries to locate . . . in any other residential area which includes office or institutional use, subject to disapproval by the [BZA]. The [BZA] must, however, use criteria defined in the act in reviewing these uses.”⁷⁵ These criteria would be “used by the [BZA] to determine which additional locations may be used for chanceries.”⁷⁶

This detailed history behind section 206 demonstrates that Congress has consistently emphasized the significant federal interest inherent in the location of chanceries in the District of Columbia.

⁷² *Id.*

⁷³ Transcript, *supra* note 70, at 61-62 (Lou Robbins, attorney in private practice retained by the Dept. of State).

⁷⁴ H.R. Rep. No. 97-693, at 41 (1982).

⁷⁵ *Hearing, supra* note 59, at vii (preface by Rep. Ronald Dellums, Chairman, House Comm. on the District of Columbia, written August 1982).

⁷⁶ *Id.*, at viii.

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CHAPTER 10 CHANCERY APPLICATIONS

1000 GENERAL PROVISIONS

- 1000.1 This chapter provides regulations and instructions for the chancery application (including appeal) processes that are set forth in the Foreign Missions Act, D.C. Official Code Section 6-1306. To the extent that there is any inconsistency in the language and interpretation of this chapter and the Foreign Missions Act, the Foreign Missions Act shall govern.
- 1000.2 For the purposes of this Chapter, the term “Low to Medium Density Residential Zones” means the R, RF and A-1, A-2, A-3, A-6, A-7, A-8 and A-9 zones (formerly R-1 through R-5-C).
- 1000.3 For the purposes of this Chapter, the term “Medium-High or High Density Residential Zones” means the A-4, A-5, A-10, A-11, and D-1 zones (formerly R-5-D and R-5-E).
- 1000.4 For the purposes of this Chapter, the term “Special Purpose Zones” means the M-1, M-2, M-16, M-17, M-24, and D-2 zones (formerly SP-1 and SP-2).
- 1000.5 Subject to the procedures and criteria established in § 206 of the Foreign Missions Act, D.C. Official Code § 6-1306, and in the pertinent provisions of the Zoning Regulations:
- (a) The Board has the authority to review applications to:
 - (1) Permit the location, replacement, or expansion of chanceries in the Medium-High or High Density Residential Zones and Special Purpose Zones, pursuant to the provisions of Y § 1003.6;
 - (2) Permit the location, replacement, or expansion of chanceries in the Low to Medium Density Residential Zones, pursuant to the provisions of Y 1003.2 through 1003.6;
 - (3) Appeal an administrative decision relating to a chancery based in whole or in part upon any zoning map or regulation.
 - (b) The Board, when reviewing an application to locate, replace, or expand a chancery may grant permission to construct or otherwise locate improvements in the public space.
- 1000.6 Board review is not required:
- (a) For the location, replacement, or expansion of a chancery to the extent that authority to proceed, or rights or interests, with respect to such location,

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replacement, or expansion were granted to or otherwise acquired by the foreign mission before October 1, 1982; or

(b) 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.

1000.7 The exemptions in § 1000.6 are no longer applicable if the property is occupied by another non-chancery use with an approved Certificate of Occupancy.

1000.8 Except as specifically incorporated in this chapter, the remaining provisions of this subtitle shall not apply to applications under this chapter.

1000.9 The provisions of §§ 102, 103, 104, 105, 200, 202, 204, 205, and 206 apply to applications under this chapter, except no person shall have the standing of a “party” in a proceeding under this section.

1000.10 The following subsections apply to applications under this chapter: §§ 100.1, 100.6, 101.1, 101.2, 101.4, and 203.2 through 203.6.

1001 APPLICATION REQUIREMENTS

1001.1 The owner of property for which a chancery application is sought, or an authorized representative, shall file an application with the Board.

1001.2 The application of an authorized representative shall include a letter signed by the owner authorizing the representative to act on the owner’s behalf with respect to the application.

1001.3 The Board may at any time require additional evidence demonstrating the authority of the representative to act for the owner.

1001.4 An application shall contain a letter or other transmittal from the United States Department of State indicating that the Office of Foreign Missions has reviewed the application as required by § 205 of the Foreign Missions Act, D.C. Official Code § 6-1305 and has approved the application for the purposes of filing and processing by the Board.

1001.5 Each application shall be made on the appropriate form provided by the Director. In addition to the information required by this section relating to appearance and representation, the applicant shall furnish all information required by the application form at the time of filing the application, including, as applicable:

(a) A plat, drawn to scale and certified by a survey engineer licensed in the District of Columbia or by the D.C. Office of the Surveyor

Comment [cae1]: Remove references from Y 300, 300.6(b)(3), 300.7(d)

Delete Y 201.3

Fee?

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- (b) A site plan showing the boundaries and dimensions of the existing and proposed structures and accessory buildings and structures;
- (c) Architectural plans and elevations in sufficient detail to clearly illustrate any proposed structure to be erected or altered, landscaping and screening, and building materials, and where applicable, parking and loading plans;
- (d) A detailed statement of existing and intended use of the structure, or part thereof;
- (e) A detailed statement of how the application meets the review standards for chancery uses specified in Y § 1003;
- (f) Three (3) or more color images, not to exceed letter-size (8½ x 11 inches), showing the pertinent features of the structure, and property involved (front, rear, and sides, if possible and applicable);
- (g) The names and addresses of the owners of all property located within two hundred feet (200 ft.) of the subject property and self-stick labels printed with their names and addresses;
- (h) The name and address of each person having a lease with the owner for all or part of any building or structure located on the property involved in the application;
- (i) If the application is for the location of a chancery located in a Low to Medium Density Residential Zone, a written statement by the applicant describing the area to be considered and the existing uses within that area that correspond to those listed in Y § 1003.4.

- 1001.6 Except as provided in Y 1001.9 with respect to traffic and transportation reports, all statements, information, briefs, reports (including reports and statements of experts and other witnesses), plans, photographs, or other exhibits that the applicant may wish to offer in evidence at the public hearing shall be filed at the time of filing the application.
- 1001.7 At the time of filing the application, the applicant shall also file a copy of the resume of any expert witness who will be testifying in the case.
- 1001.8 If a map, plan, or other document is readily available to the general public, in lieu of filing a copy of the document, the applicant need only provide a complete citation to the source of the document and indicate where the public may view the document.
- 1001.9 No later than thirty (30) days before the date of the public hearing on the application, the applicant shall file with the Board any traffic or transportation

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reports to be submitted in support of the application. All such reports shall include the resume of the expert who prepared the report. At or before the time of filing the traffic or transportation report with the Board, the applicant shall serve a copy of the report on the ANC for the area within which the property is located, the Office of Planning, and the District Department of Transportation.

- 1001.10 No later than twenty-one (21) days before the date of the hearing for the application, the applicant shall file with the Board any additional statements, information, briefs, reports (including reports or statements of expert and other witnesses), plans, or other material that the applicant may wish to offer into evidence at the hearing. Any map, plan, or other document, or matter readily available to the general public need only be fully referenced and the source given by the applicant in place of filing a copy.
- 1001.11 The Board shall make the following referrals:
- (a) To the Office of Planning for review and comment, and shall specifically request a determination of the municipal interest,
 - (b) To the Secretary of State for review and comment, and shall specifically request a determination of the federal interest, as set forth in Y § 1003.6(f); special security requirements, as set forth in Y § 1003.6(c); and the extent to which the site is capable of being adequately protected, as set forth in Y § 1003.6(d); and
 - (c) To the Historic Preservation Office if the application would require the construction, demolition, or alteration of a building located in a historic district, the alteration or demolition of a historic landmark or property listed or eligible for listing in the National Register of Historic Places, or the construction of a building or structure on the site of a historic landmark or property listed or eligible for listing in the National Register of Historic Places. If the property is located in the Old Georgetown District described in D.C Official Code § 6-1201 it shall also be referred to the Commission of Fine Arts for Board and Commission to report as to whether the substantive criteria of Y § 1003.7 have been met.
- 1001.12 Any reports or advice received as a result of the Board referring the application under Y § 1001.11 shall not be individually or collectively binding on the Board, but shall be used by the Board to assist in making a determination based upon the criteria in Y § 1003.6.

1002 **PRE-HEARING AND HEARING PROCEDURES**

- 1002.1 No person shall have the standing of a party in a proceeding under this section.

Comment [cae2]:
Delete 405.7 (move to 1002.3)
Delete 410 (move to 1002.4 et seq)

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- 1002.2 The following subsections apply to applications under this chapter: §§ 400.1 through 400.6, 402.1, 402.2, 405.5, 405.6, 406.1, 406.3, and 408.1.
- 1002.3 If a chancery application is referred in advance of the public hearing to the Mayor, the United States Secretary of State, and the Historic Preservation Review Board for recommendation, any report and recommendation from those agencies shall be filed with the Board at least eight (8) days prior to the date set for the hearing.
- 1002.4 All chancery proceedings shall be of a rulemaking nature.
- 1002.5 The order of procedure at the hearing shall be as follows:
- (a) Call to order and opening statement by the presiding officer;
 - (b) Consideration of pending motions and procedural matters;
 - (c) Applicant's case;
 - (d) Reports or statements by the Secretary of State and the Mayor;
 - (e) Reports or recommendations by other government agencies;
 - (f) The ANC for the area within which the property is located;
 - (g) Individuals and organization representatives in support of the application; and
 - (h) Individuals and organization representatives in opposition to the application.
- 1002.6 Failure of groups or persons to appear in opposition shall not relieve the applicant of the responsibility of demonstrating the merits of the application.
- 1002.7 Any person may appear at a hearing in a chancery application proceeding and present evidence, testimony, or argument that is relevant and not unduly repetitious within such time limits as the Board may determine.
- 1002.8 Nothing in this subtitle shall preclude members from questioning witnesses in hearings before the Board.
- 1002.9 Notice of a further hearing, plus a designation of the issues, shall be forwarded to any person who appeared and participated in the earlier hearings at least ten (10) days prior to the date set for the further hearing.
- 1003 REVIEW STANDARDS**

Comment [cae3]: Add through 402.11?

Comment [cae4]: Add 405.1, 405.2?

Comment [cae5]: Add 407, 408.2 through 408.5? ... except that no person shall have party status...

Subtitle Y - OFM Markup (1/7/14)

- 1003.1 The Board will determine whether to “not disapprove” or “disapprove” chancery applications according to the standards of this section.
- 1003.2 For applications requesting to locate, replace, or expand a chancery in any Low to Medium Density Residential Zone, before applying the criteria set forth in Y 1003.6, the Board of Zoning Adjustment shall determine whether the proposed location is in an area, determined on the basis of existing uses, which includes office or institutional uses.
- 1003.3 The Board of Zoning Adjustment shall determine on a case-by-case basis what constitutes an area for purposes of the proposed location, replacement, or expansion. The Board shall consider the opinions of the applicant, Department of State, and the District of Columbia. The area shall not be smaller than that within the zoning district boundaries in which the property is located.
- 1003.4 If the Board finds that the area currently **contains any of the following uses**, the BZA shall then determine the merits of the application in accordance with this chapter:
- (a) Chancery;
 - (b) Education;
 - (c) Government;
 - (d) Medical Care;
 - (e) Institutional; or
 - (f) **Office**.
- 1003.5 If the Board finds that the area does not contain any of the uses described in Y § 1003.4, it shall disapprove the application.
- 1003.6 The Board’s determination of the merits of all chancery applications, including requests for relief or deviations from the regulations of any District of Columbia government agency, including the Zoning Regulations, and for improvements in public space, shall be based solely on the following:
- (a) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation’s Capital;
 - (b) Historic preservation, as determined by the BZA in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations

Comment [cae6]: Add consideration of proximity to area with such uses? Is this beyond the language of the FMA? Couldn't the BZA just define the "area" broadly?

Comment [cae7]: Add hotel, retail, etc?

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governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks;

- (c) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking needs, subject to such special security requirements as may be determined by the Secretary of State, after consultation with federal agencies authorized to perform protective services;
- (d) 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;
- (e) The municipal interest, as determined by the Mayor of the District of Columbia; and
- (f) The federal interest, as determined by the Secretary of State.

1003.7 For the purposes of Y § 1003.6(b), the Board's determination on historic preservation shall take into consideration:

- (a) Substantial compliance with District of Columbia and federal regulations governing historic preservation, which shall be deemed to be satisfied if the referral required by Y § 1002.11(c) is made;
- (b) The compatibility of any demolition, alteration, or new construction with adjacent and nearby historic landmarks and properties listed or eligible for listing in the National Register of Historic Places with regard to scale, mass, materials, and views; and
- (c) Recommendations received from the Historic Preservation Office as a result of the Board's referral of the application, as applicable.

1004 POST-HEARING PROCEDURES

1004.1 The following subsections apply to applications under this chapter: §§ 600.2, 602.1, 602.4, 602.6, 602.7, 604.2, 604.5 through 604.8, and 604.11.

1004.2 The record in a chancery proceeding shall consist of:

- (a) Every written statement, document, or tangible thing filed in the case;
- (b) Oral testimony offered at the public hearing; and

Comment [cae8]:

Delete 603.3 (move to 1004.2)
Delete 604.3 (move to 1004.3)
Delete 604.4 (move to 1004.4)
Delete 604.13 (move to 1004.5)

Comment [cae9]: Add 601.2, 601.5, 602.5, 603.2, 604.10? (except that no person shall have party status)

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(c) The Foreign Missions Act, the Zoning Act, and the Zoning Regulations (including appendices and the official Zoning Maps), which shall be a part of the record of every chancery proceeding before the Board.

- 1004.3 A vote on a chancery application by the Board shall be either to not disapprove or disapprove the application.
- 1004.4 A final determination on a chancery application shall be made not later than six (6) months after the filing of the application.
- 1004.5 A decision of the Board on a chancery application is final upon publication in the D.C. Register. The decision shall become effective ten (10) days after having become final.
- 1004.6 Following the publication of a notice of final rulemaking giving notice of the Board's decision to not disapprove an application, the applicant may file an application for a building permit with the proper authorities of the District of Columbia.
- 1004.7 The Zoning Administrator shall not approve a permit application unless the submitted construction plans conform to the plans not disapproved by the Board in its final decision, **as those plans may have been modified by any guidelines, conditions, or standards that the Board may have applied.**
- 1004.8 Any chancery use established by an order of the Board shall expire if a certificate of occupancy for a different use is issued after approval.
- 1004.9 A chancery use shall not expire if there is objective proof of a continuing use or of affirmative steps taken to resume the use during the period of time identified by the Zoning Administrator when revoking an existing certificate of occupancy or denying an application for a replacement certificate of occupancy.
- 1004.10 If a chancery use expires, any subsequent use shall conform to the regulations of the district in which the use is located.
- 1004.11 The Board's determination shall not be subject to administrative proceedings of any other District agency.
- 1004.12 The owner of a property for which a chancery application that has been disapproved shall not institute a new application on the same facts within one (1) year from the date of the order upon the previous application.

Comment [DS10]: This isn't clear and needs to be reworded. I think it is trying to say that the plans should reflect any guidelines, conditions, or standards imposed by the Board. Can the Board impose conditions?