

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17886 of the Republic of South Africa, pursuant to 11 DCMR §§ 201.1 and 1001, and § 206 of the Foreign Missions Act, to permit the renovation and expansion of an existing chancery use in the D/NOPD/TSP/R-1-A District, at premises 3101 Massachusetts Avenue, N.W. (Square 2145, Lot 826).

HEARING DATE: January 13, 2009
DECISION DATE: February 10, 2009

NOTICE OF FINAL RULEMAKING
AND
DETERMINATION AND ORDER

The Board of Zoning Adjustment (“BZA” or “Board”), pursuant to the authority set forth in § 206 of the Foreign Missions Act (“FMA”), approved August 24, 1982 (96 Stat. 283; D.C. Official Code § 6-1306),¹ and Chapter 10 of the Zoning Regulations of the District of Columbia (11 DCMR), hereby gives notice of the adoption of its determination not to disapprove the application of the Republic of South Africa (“Applicant”) to renovate, partially replace, and expand its existing chancery, located at premises 3101 Massachusetts Avenue, N.W. (Square 2145, Lot 826) (“subject property”).

Procedural Background

On September 15, 2008, the Applicant filed a chancery application with the Board, requesting that the Board not disapprove the proposed renovation, partial replacement, and expansion of its existing chancery. Pursuant to 11 DCMR § 3134.7, the application was supported by a letter from the United States Department of State, also dated September 15, 2008, certifying that the Applicant had complied with § 205 of the FMA (D.C. Official Code § 6-1305) and that the application could be submitted to the Board.

In accordance with the Zoning Regulations, the Board provided written notice to the public more than 40 days in advance of the public hearing. 11 DCMR §§ 3113.13 and 3134.9(c). The Board

¹Section 206 of the FMA is codified at both 22 U.S.C. § 4306 and D.C. Official Code § 6-1306. For ease of reference, the D.C. Code section will be cited herein.

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also published a notice of proposed rulemaking in the September 26, 2008 edition of the *D.C. Register* at 55 DCR 10029.

On September 16, 2008, the Office of Zoning sent a copy of the Applicant's filings to the U.S. Department of State. On September 24, 2008, the Office of Zoning provided notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 3C, the ANC within which the subject property is located, the member for Single Member District 3C08, and the Council Member for Ward 3.

The Office of Zoning subsequently scheduled a hearing on the application for January 13, 2009, and on October 24, 2008, mailed a copy of the notice of hearing to the Applicant, ANC 3C, and all property owners within 200 feet of the subject property. Notice of the hearing was also published in the *D.C. Register* on October 31, 2008, at 55 DCR 11312, and posted in the Office of Zoning. In addition, on December 22, 2008, the Applicant posted on the subject property a zoning placard, in plain view of the public, affording notice of the hearing, in accordance with 11 DCMR § 3113. The notice given to the public complied with the requirements of 11 DCMR § 3134.9.

The Subject Property

The property that is the subject of this application is located at 3101 Massachusetts Avenue, N.W., in an R-1-A zone district. The subject property is also located within three zoning overlay districts – the Diplomatic Overlay, the Naval Observatory Precinct Overlay, and the Tree and Slope Protection Overlay – as well as within the Massachusetts Avenue Historic District. To the north and west, the property is bounded by Normanstone Park. To the east of the property is the now-vacant former Iranian Embassy, and to the south of the property is Massachusetts Avenue.

On the subject property is one building, which fronts on Massachusetts Avenue and presents as one long limestone façade. The building appears as two wings joined together by a central connecting bridge. This bridge area is smaller than the two wings and is recessed from their facades. It has a second and third story, but an open archway in what would be its first story, through which is provided vehicular access to the rear of the building. The western wing of the building was constructed in 1935 and is a contributing resource to the Massachusetts Avenue Historic District. Until June, 2007, it contained the South African Embassy, *i.e.*, the ambassador's residence, and now contains rooms used for entertainment and official programs. The eastern wing of the building and the connecting bridge were both constructed in 1964, and are not contributing resources to the Massachusetts Avenue Historic District. These two latter sections of the building currently house chancery uses.

All three sections of the building have a similar appearance, with a rusticated first floor on both wings, and a series of vertically-oriented windows running the length of all three sections on the second and third floors. Both the western and eastern wings also have mansard roofs with three

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dormers containing fourth floor windows. The western wing is somewhat more architecturally detailed than the eastern wing, presenting a more refined appearance.

The subject property contains approximately 24,600 square feet of land area and the building currently has approximately 36,074 square feet of gross floor area. The building is approximately 49 feet high, with four stories and a cellar, and provides nine surface parking spaces in its rear and 21 parking spaces in a garage at the cellar level.

The Applicant's Proposal

The Applicant proposes to renovate the entire building, both its interior and exterior, replace the bridge with new infill construction, and add an addition to the rear of the building. The Applicant proposes to remove the residential use from the western wing and expand chancery uses into this area, so as to obviate the need for a chancery annex it currently maintains at a different site, at 4301 Connecticut Avenue, N.W. It is contemplated that once all proposed construction is complete, the building will have approximately 40,480 square feet of gross floor area, all devoted to chancery and chancery-support uses, 4,398 square feet of which will be new floor space.² The new floor space will be contained in the new infill portion of the building replacing the bridge, and in a fourth floor addition at the rear of the western wing. Limited demolition of an elevated terrace in the eastern side yard is also proposed to provide access to the rear parking area from the below-grade garage. The only addition to the building which will be visible from Massachusetts Avenue will be the infill construction replacing the connector bridge.

The Applicant proposes to retain the nine rear surface parking spaces and to increase the number of parking spaces in the below-grade garage from 21 to 27, for a total of 36 parking spaces on site.

The Applicant is also proposing to erect a decorative metal security fence, 8 feet, 2 inches tall, with masonry pillars 8 feet, 10 inches tall, along the Massachusetts Avenue frontage of the building. This new fence, at least part of which will be installed in public space, will wrap around the corners of the site and continue partially along its sides. The rear of the property is already enclosed by a fence 8 feet tall.

The Hearing

At the hearing on the application, held on January 13, 2009, and by a report of the same date, OP recommended partial non-disapproval and partial disapproval of the application. OP recommended non-disapproval of all aspects of the application except the erection of the fence, subject to the condition that the Applicant continue to work with the Historic Preservation Office

²These two gross floor area numbers were taken from Applicant's Prehearing Submission, Exhibit No. 29. The Office of Planning Report of January 13, 2009, Exhibit No. 31, has slightly different numbers – total floor area after addition of 40,755 sq. ft., with new floor area of 4,681 sq. ft. – but these numerical differences are irrelevant for the purposes of the Board's decision on this application.

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(“HPO”), particularly on the design of the infill addition. OP’s recommendation of disapproval of the fence was, in reality, a recommendation to defer a decision with regard to the fence until a security assessment was presented to the Board to justify the proposed height of the fence. Near the conclusion of the proceedings in this case, OP filed a Supplemental Report, dated February 5, 2009, reiterating its overall recommendation of non-disapproval, but strengthening its condition to require the Applicant to implement the changes deemed necessary by HPO. In its Supplemental Report, OP takes no position on the fence, but by the time of the submission of that report, a security assessment had already been done and submitted to the Board by the State Department.

ANC 3C filed a resolution with the Board on December 17, 2008 also recommending non-disapproval of the application, without any conditions.

At the hearing, the Applicant’s representative, architect, and architectural historian testified on behalf of the application.³ These individuals discussed the actual operations of the chancery use, for example, the hours of operation, the number of visitors to the chancery and how they arrive there, and the number of special events and how transportation issues are handled for such events. The architect walked the Board through the plans and explained the project in some detail. The architectural historian also explained at length the history and varying architectural relevance of the three sections of the building. Both the architectural historian and the South African representative repeatedly emphasized that the infill replacement of the current bridge area represented the “new” South Africa. They stressed that much thought had gone into designing the infill replacement in a more modern vein than the two wings, in an attempt to symbolize that South Africa, while respecting the past, is moving on to a bright future free of the political strife that characterized the country’s recent history.

Both the design of the infill replacement of the bridge and the height and location of the security fence were contentious issues during the hearing. The fence, because it will be located in public space, would normally fall within the jurisdiction of the D.C. Department of Transportation, with permission to erect it given by DDOT’s Public Space Committee. This application, however, is for the expansion and partial replacement of a chancery. In these circumstances DDOT did not object to the Board’s consideration of public space issues that were ancillary to the proposal and the Board concludes that it has the jurisdiction to consider the proposed uses of public space that are intrinsically related to other aspects of a chancery application pursuant to the FMA, D.C. Official Code §§ 6-1306(a), (e)(1), and (j). Therefore, the Board received and considered evidence on the need for the fence, particularly at the requested 8-foot, 10-inch height.

The design and materials of the infill replacement are much more modern than those of the two building wings, and could appear inconsistent or disharmonious with the two wings. At the time of the public hearing, the D.C. Historic Preservation Office was strongly opposed to the infill addition, calling its proposed glass curtain and mesh screen “a sharply discordant element” that would “disrupt the harmony of the complex.” Exhibit No. 31, at 5. HPO went so far as to opine

³The Applicant’s traffic engineer was also present at the hearing, but did not testify.

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that the façade treatment of the infill addition was “[n]either successful [n]or appropriate to the historic context.” *Id.*

This Board is the ultimate arbiter of whether an addition to a chancery is compatible with a historic district and whether such addition substantially complies with applicable historic preservation regulations. *See*, D.C. Official Code § 6-1306(d)(2). But the Board can be guided by the expert advice provided by HPO. Board members also expressed their own misgivings concerning the compatibility of the infill addition. The Board did not decide this application at the conclusion of the hearing, but instead, requested that the Applicant work further with HPO to achieve a more acceptable and harmonious design for the infill addition. The Board requested further filings concerning any changes made to the design of the infill addition, as well as new plans depicting such changes, and set a decision date of February 10, 2009.

The Applicant worked with HPO and made significant changes to the infill addition, including, in the words of the Applicant’s architect:

[t]he vertical band [on either side of the addition] was proposed to be new stone; instead two and a half feet in width of the existing masonry wall of the hyphen [i.e., the existing bridge area] will be retained at HPO’s request. To create a more prominent entry and stronger focal point, the entry vestibule has been deleted and the first floor entry recessed. The first floor of the infill addition will be structural glazed to achieve an ultra clear look at the ground level and recall the void of the existing arch. In addition, a metal panel has been added at the infill addition to align with an existing masonry band at the top of the rusticated base. The sunscreen has also been lowered to the height of the existing cornice, will turn under, and continue through the lobby to create a more volumetric appearance and further reinforce the entry.

Exhibit No. 36, Attachment B. The only significant request of HPO that the Applicant’s new design did not comply with was retention of the existing cornice across the infill addition. The Applicant’s architect explained why retention of this cornice would be aesthetically unsuitable and technically very difficult. *See*, Exhibit No. 36, Attachment B. The architect concluded that “[t]he placement of the contemporary intervention” between the two wings of the building “is subtle and respectful to the existing buildings and the [historic] district.” *Id.* The HPO agreed to a certain point, stating that the changes made subsequent to the hearing, “are clear improvements.” Exhibit No. 39, incorporated HPO recommendation.

Moreover, the Applicant’s expert in historic preservation discussed, in the context of this application, each of the 12 District of Columbia Historic Preservation Guidelines prepared by the HPO and adopted by the D.C. Historic Preservation Review Board, which appear in the HPO publication “Additions to Historic Buildings.” The expert’s analysis specifically addressed the features of the infill addition in the context of the guidelines that were developed by HPO itself, and explained why the addition satisfied each of these guidelines. After setting forth the analysis

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for each guideline, the expert drew the conclusion that the Applicant's project was, in each case, compatible with the Massachusetts Avenue Historic District. Overall, the expert opined that the design as a whole met the FMA's test of substantial compliance with applicable historic preservation regulations. *See*, Exhibit No. 36, Attachment C.

Evaluation of the Application

Subsection 406 (d) of the FMA, D. C. Official Code § 6-1306 (d) directs the Board to consider six factors when analyzing a chancery application. For certain of these factors, the provision also indicates who is to make the relevant finding. These six factors are:

- (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*.
(Emphasis added).

Factor 1 -- International Obligation of the United States

The Board agrees with the Secretary of State and the Office of Planning that favorable action on the application will fulfill the international obligation of the United States to facilitate the acquisition of adequate and secure facilities by the Republic of South Africa for its diplomatic mission in the United States. The Secretary's representative testified in favor of various aspects of the application during the hearing, including the height of the proposed fence.

Factor 2 -- Historic Preservation (as determined by the BZA)

The Board must determine whether this addition “substantially complies” with applicable historic preservation regulations in order to ensure compatibility with the Massachusetts Avenue Historic District. While “substantial compliance” is not defined in the FMA, or the Zoning Regulations, in *Sheridan-Kalorama Historical Ass’n. v. Christopher*, 49 F.3d 750, 311 U.S. App. D.C. 16 (D.C. Cir. 1995), the United States Court of Appeals for the District of Columbia Circuit noted that “‘compliance’ with these laws, in this case at least, is not as much a matter of meeting any specific standard as it is of submitting the proposal to the appropriate regulatory body or bodies for review and comment,” 49 F.3d at 759, 311 U.S. App. D.C. at 25. In that case, the court found substantial compliance through the referral of the application to the Mayor’s Agent for Historic Preservation. At present, the Mayor has made the Director of the Office of Planning his agent for carrying out his historic preservation responsibilities and, as noted, notice of this Application was provided to that Office. In addition, at the conclusion of the hearing, the Board invited further filings from the HPO. Therefore, substantial compliance has occurred.

In terms of the substantive preservation issues raised in the Application, the Board notes that the Applicant substantially revised the design of the infill addition to accommodate HPO’s requests, and made essentially all the modifications requested except one – retention of the existing limestone cornice. The Board concludes that this redesign is consistent with the relevant purpose stated in the District’s historic preservation law relating to properties located in historic districts; namely the revised design will “assure that alterations of [the] structure [is] compatible with the character of the historic district”. D.C. Official Code § 6-1101(b)(1)(B) (2001). While the term “compatible” is also not defined in the FMA or the Zoning Regulations, Webster’s Unabridged Dictionary defines “compatible” as “capable of existing together without discord or disharmony.”⁴ The Board notes that other nearby chanceries in the historic district, such as the Brazilian chancery, have modern features distinct to their national character. The South African chancery’s expression of its break with the past through its architectural design is tempered by the accommodations the applicant made to the HPO and is compatible with the diverse chanceries in the historic district. Finally, HPO does not anywhere cite a specific historic preservation regulation or guideline with which the Applicant’s final design does not comply.

Factor 3 -- Adequacy of Parking (subject to such special security requirements as may be determined by the Secretary)

The chancery use will have adequate parking on-site and is served by several major bus routes. The Secretary of State has determined that there are no special security requirements related to parking at the subject property.

⁴ Section 199.2(g) of the Zoning Regulations states that “[w]ords not defined in this section shall have the meaning given in Webster’s Unabridged Dictionary.”

Factor 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, the Secretary of State has determined that the subject property and the area are capable of being adequately protected. Personnel from the State Department's Bureau of Diplomatic Service performed a security survey of the chancery site at the subject property and recommended that the Applicant be permitted to construct the requested fence at the requested height for security purposes. Moreover, the height of the proposed security fence has been mandated by the South African government for all its embassies/chanceries and is lower than the 9-foot high security fences constructed for all U.S. Embassies. *See*, Hearing Transcript at 122, lines 9-13. In fact, the State Department representative acknowledged that the U.S. had recently been granted permission by the South African authorities to construct a 9-foot fence, higher than usually permitted, around the newly-constructed U.S. Consulate General Building in Cape Town. *Id.* at 122-123, lines 19-22 and 1-5. The Board concludes that the erection of the proposed fence, at the requested height, and at the requested location, is appropriate and necessary.

Factor 5 -- The Municipal Interest (as Determined by the Mayor)

The Director of the Office of Planning, on behalf of the Mayor of the District of Columbia, has determined that favorable action on this application is in the municipal interest and is generally consistent with the Comprehensive Plan for the Nation's Capital and the Zoning Regulations. OP's requested condition – that the Applicant implement the changes deemed necessary by HPO – has been met by the Applicant's revised design of the infill addition and substantial compliance with historic preservation guidelines and regulations. With regard to OP's stance on the fence, the Board received the security assessment recommended by OP, and has determined that the fence is permissible.

Factor 6 -- The Federal Interest (as determined by the Secretary)

The Secretary of State has determined that a favorable decision on this application will serve the federal interest. The Republic of South Africa has been very cooperative and helpful to the United States with the zoning and land-use needs of the U.S. Embassy in Pretoria, as well as its consular posts in Cape Town and Johannesburg.

Accordingly, it is hereby **ORDERED** that this application is **NOT DISAPPROVED**.

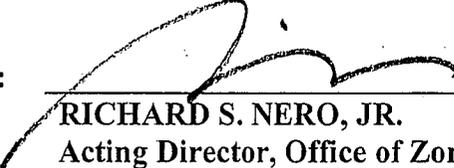
Vote of the Board of Zoning Adjustment taken at its public meeting on February 10, 2009, to **NOT DISAPPROVE** the application:

VOTE: **5-0-0** (Ruthanne G. Miller, Marc D. Loud, Mary Oates Walker, Marcel A. Acosta, and Peter G. May to not disapprove)

BY THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

FINAL DATE OF ORDER: MAR 12 2009

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on MARCH 12, 2009 , a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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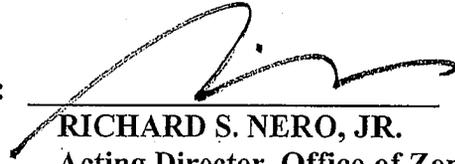
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TWR