

Board of Zoning Adjustment, D. C.

PUBLIC HEARING--October 21, 1964

Appeal #7964 W. Gazelle, appellant.

The Zoning Administrator, District of Columbia, appellee.

On motion seconded and carried with Messrs. Scrivener and McIntosh dissenting and Mr. Clouser dissenting in part, the following Order was authorized on December 1, 1964, and formally entered on January 13, 1965.

ORDERED:

That the appeal of W. Gazelle for permission to transfer the use of the building at 2490 Tracy Place, N.W., lots 22 and 809, square 2505, from the chancery of the Government of Thailand to a chancery for the Government of the Polish Peoples' Republic, be granted.

As the result of an inspection of the property by the Board and from the records and the evidence adduced at the hearing the Board finds the following facts:

1. The subject property, which has a frontage of 100 feet on Tracy Place and contains an area of 12,500 square feet, is improved with a detached building which was erected for and used as a dwelling for a number of years. The property is now a part of the R-1-B District. About 12 years ago title thereto was transferred to the Royal Siamese Government (now The Royal Thai Government) and for the past 12 years continuously, and until sometime between June 30, 1964 and September 30, 1964, was used as a chancery by that Government. On June 30, 1964 title was transferred to the appellant in this proceeding.

2. On October 2, 1964 the above captioned appeal was filed with and accepted by this Board for processing and public hearing under Paragraph 3101.410 of the Zoning Regulations which provides that a chancery is permitted in any residentially zoned district under the following conditions:

"Chancery, provided all other appropriate provisions of these regulations are complied with and provided further that the proposed use and building in which the use is to be conducted are compatible with present and proposed development of the neighborhood. In determining compatibility the Board shall find that:

(a) The size and scope of the operation will not be objectionable because of noise, traffic, or the number of persons employed;

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- (b) The amount and arrangement of parking spaces and loading berths are adequate; and,
(c) The architectural design and arrangement of all structures are in keeping with the character of the neighborhood."

This filing was required as a de novo proceeding since this Board had previously ruled in Appeal No. 7149, decided on March 27, 1963, that the transfer of a chancery located in a residence district from one government to another is not permitted as a matter of right, as a chancery use is not construed to be a normal nonconforming use which runs with the land but a matter of privilege or comity which requires a public hearing on the merits of each application.

3. After due notice, public hearing on the appeal was set for October 21, 1964. However, on October 13, 1964, the Congress of the United States enacted an amendment to the 1938 District of Columbia Zoning Law (Public Law 88-659, 78 Stat. 1091), which permits this Board to establish new chanceries by foreign governments in two residential districts only, these being the R-5-C and R-5-D Districts which are otherwise known as medium-high and high-density apartment house districts.

Section 4 of the amended law provides for the transfer from one foreign government to another foreign government of chanceries located in any residential district. This section under which this appeal must now be adjudicated reads as follows:

"After the date of enactment of this Act, no building or chancery being used by a foreign government in the District of Columbia shall be transferred to or used by another foreign government unless such use is in accordance with Section 6 of the Act of June 20, 1938, as amended (D.C. Code, sec. 5-418), or unless such use was in accordance with applicable law at the time of this enactment."

Under the first section of the amended law (Paragraph (e) (2)) a chancery is defined as follows:

"Chancery means a building containing business offices of the chief of a diplomatic mission of a foreign government where official business of such government is conducted, and such term shall include any chancery annex, and the business offices of attaches of a foreign

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government who are under the personal direction and superintendence of the chief of mission of such government. Such term shall not include business offices of nondiplomatic missions of foreign governments such as purchasing, financial, education, or other missions of comparable nondiplomatic nature."

4. The evidence establishes that the subject property was vacant on the date of hearing and that some furniture and other equipment belonging to the Government of Thailand had not then been removed; that the Thai Government when last in occupancy had a diplomatic staff of 16 persons plus 5 other persons who have lived on the property; and that paved off-street parking spaces for about 15 automobiles exist on the property, most of which are located in the rear of the structures and several of which are in front of the building. The office use was that of a chancery as defined in Public Law 88-659.

5. The staff of the Government of the Polish Peoples' Republic which will occupy the property consists of 12 persons, including two who will reside on the property. All off-street parking will be provided at the rear of the building.

6. The activity to be conducted by the Government of the Polish Peoples' Republic is a chancery activity within the meaning of the definition in the new law. While the evidence on this point is conflicting the weight of the evidence is that although the Economic Counselor and his staff who will occupy the property report directly to Warsaw, they are under the direction and control of the Ambassador and engage in diplomatic activities.

The Economic Counselor and his staff in Appeal No. 6796, for permission to occupy premises 2719-21 Connecticut Avenue, N.W., were held by the Department of State, United States Government, to be engaged in chancery activities within the meaning of the definition of the term "chancery" as then embodied in the Zoning Regulations of the District of Columbia. This definition was essentially identical to the definition contained in the new law.

7. Objection to the granting of this appeal was registered at the public

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hearing. In addition to jurisdictional questions, which will be discussed in the Board's Opinion, it was the contention of objectors that the proposed chancery use will have a greater adverse impact upon single-family development within the neighborhood than did that of the previous Government in occupancy. This contention is not supported by the evidence.

8. In the case at bar we have been requested to interpret Section 4 in several ways, with interpretations urged as follows:

(a) The Congress did not intend to permit the transfer of a chancery located in a residential district (other than R-5-C or R-5-D) for chancery use to a second foreign government under any condition as the Congressional intent is ultimately to eliminate these uses from all other residential districts.

(b) The section permits chanceries hereafter established in the R-5-C and in the R-5-D Districts and those which exist in other residential districts in accordance with applicable law at the time of the enactment of the new legislation to be transferable from one foreign government to another foreign government as a matter of right.

(c) Chanceries of foreign governments which are not located in R-5-C or R-5-D Districts, but which are located in other residential districts are not nonconforming uses and therefore their chancery use does not run with the land, nor vest in any subsequent purchaser (not a chancery) the right to transfer such chancery use to a foreign government.

(d) Any transferee of a chancery owned by a foreign government, who is not another foreign government, shall not have the right to subsequently transfer such use to a foreign government for chancery purposes as such transfer would violate the clear language of Section 4.

(e) The transfer of title of a chancery under the second portion of Section 4 to other than another foreign chancery constitutes per se an abandon-

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ment of the previous chancery occupancy.

(f) The disjunctive clause at the end of Section 4 applies to a validly existing chancery which does not conform to the first Section of the new Act, and such a chancery is a nonconforming use which runs with the land and which may be transferred as a chancery to another foreign government when approved by the Board of Zoning Adjustment.

OPINION:

We are of the opinion that the first part of Section 4 applies only to chanceries which will be hereafter established with the approval of this Board in accordance with the first Section of the amended Act and that such chanceries may be transferred to another foreign government only if approved by the Board after further public hearing.

We find also:

(1) That a chancery use which is lawful at the date of enactment of the amending legislation and which is not in accordance with the limiting conditions specified in the first section of the bill is a nonconforming use which runs with the land regardless of the residential zone in which it is located,

(2) That such a chancery use may be transferred from one foreign government to another foreign government only with the approval of this Board, and

(3) That such a chancery use may be transferred from any purchaser (who has not abandoned such use after purchase) to a different foreign government for use as a chancery. (Also when approved by this Board)

In arriving at this conclusion the Board has reviewed carefully all available legislative background, including discussions on the floors of the House and Senate and House of Representatives Report No. 1727. In this Report we note that the language of Section 4 is identical to the House version of the bill and that on page 7 of the Report Section 4 is analyzed as follows:

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"This section permits the transfer of use of a chancery from one foreign government to another foreign government if the continued use is in conformity with the provisions of section 5-41C of the District of Columbia Code (sec. 6 of the Act of June 20, 1938) as amended by this act. This enables the Board of Zoning Adjustment to prevent enlarged use of an existing chancery in circumstances which would make the present use more incompatible with the residential area. Thus, existing legal uses are preserved and the District of Columbia retains control to keep the existing use at least as compatible as it is at the present time."

We are further of the opinion that mere vacancy or sale of a nonconforming chancery does not, in and of itself and without more, constitute a legal abandonment of such nonconformance. We believe that abandonment can only arise when there is a clear intent to abandon accompanied by an overt act, such as the establishment of some use of the property which would be permitted as a matter of right under normal application of regulations governing the particular district in which located. These are not the facts in the case at bar.

In arriving at the foregoing opinion concerning nonconformance the Board notes that the Congress has not seen fit to incorporate direct guiding standards for Board use. We therefore conclude that guidelines set forth in the analysis made in the House of Representatives Report No. 1727 will be determining factors in considering transfer cases filed under the terms of Section 4. On the basis of the evidence it is our finding that the chancery use proposed by the Government of Poland, being less intensive than the chancery use which previously existed, meets the test of compatibility as outlined in the House of Representatives Report No. 1727.

By Mr. Clouser dissenting: It is my view in interpreting the specific language of Section 4, regardless of the analysis contained in House of Representatives Report No. 1727, that a transfer of a chancery from one foreign government to another foreign government for use as another chancery is permitted thereunder as a matter of right. The fact that the statute provides for a transfer of the same use and not for the substitution of one nonconforming

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use to another is stressed as consistent with due process, and I believe with express Congressional intent. I agree, however, with the majority opinion, where such uses are found to be nonconforming in fact, that the nonconformance runs with the land and is not lost by mere vacancy or transfer to an individual.

By Mr. Scrivener dissenting: The date of enactment of the statute is October 13, 1964. Prior to the date of enactment the owner of the property, the Government of Thailand, sold the property to appellant, executed and delivered a deed and was in the process of moving out. The testimony adduced at the hearing establishes that the deed was recorded prior to the date of enactment of the statute.

The proposed occupancy by the Government of Poland can be permitted by the statute only if it complies with the last clause of Section 4 thereof which, as applicable to the present case, reads as follows:

"No building or chancery being used by a foreign government --- shall be transferred to or used by another foreign government --- unless such use (use by the Government of Thailand) was in accordance with applicable law at the time of this enactment."

I believe that with the execution, delivery and recording of the deed from the Government of Thailand to appellant, and the beginning of the process of moving out, all of which occurred prior to the date of enactment, legal use of the property as a chancery ceased, so that on the date of enactment there was not the legal use under applicable law which the statute requires as a condition to a valid transfer. On the date of enactment the only legal use which could have been made of the property would have been in accordance with the applicable R-1-B zoning. On that date Mr. Gazelle, the owner, could only have made R-1-B use of the property, and the clear statutory requirement that there be a legal chancery use on the date of enactment, as a condition precedent to a valid transfer was therefore not met.

I also wish to comment on the decision of the majority that the proposed

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use is a chancery use. It is my view that Section 4 does not require that the transferees use be that of a chancery. The specific language of Section 4 is "a transfer to or used by another foreign government." This language does not require that the transferee use be that of a chancery and I do not believe that the Board should construe the language in such a way as to add a specific limitation to the broad language of Section 4 which, we must assume, was intended by Congress.

Mr. McIntosh concurring.

Note:--(Words underscored in Zoning Regulations quoted are defined)