

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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FOREIGN MISSION
BOARD OF ZONING ADJUSTMENT

+ + + + +
PUBLIC HEARING

+ + + + +
TUESDAY, JUNE 24, 2008

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 9:30 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chairperson
MARC LOUD Vice-Chairperson
MARY OATES WALKER Board Member

ZONING COMMISSION MEMBER PRESENT:

PETER MAY

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLEY BAILEY Sr. Zoning Specialist

NATIONAL CAPITAL PLANNING COMMISSION STAFF PRESENT:

MORCEL AROSIA

OFFICE OF PLANNING STAFF PRESENT:

KAREN THOMAS

The transcript constitutes the minutes from the Public Hearing held on June

24, 2008.

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1 P-R-O-C-E-E-D-I-N-G-S

2 10:14 a.m.

3 CHAIRPERSON MILLER: Good morning.

4 This hearing will please come to order. This
5 is the June 24th, 2008 public hearing of the
6 Foreign Missions Board of Zoning Adjustment of
7 the District of Columbia.

8 My name is Ruthanne Miller; I'm
9 the chair. Joining me today is the Vice-
10 Chair, Mr. Marc Loud, to my right and next to
11 Mr. Loud is Mr. Peter May, representing the
12 National Park Service. And to my left is Mary
13 Oates Walker, BZA Member and Mr. Morcel Arosia
14 representing NCPD, National Capital Planning
15 Commission.

16 Copies of today's hearing agenda
17 are available to you and are located to my
18 left in the wall bin near the entrance door.
19 Please be advised that this proceeding is
20 being recorded by a court reporter and is also
21 web cast live. Accordinly, we must ask you to
22 refrain from any disruptive noises or actions

1 in the hearing room.

2 When presenting information to the
3 Board, please turn on and speak into the
4 microphone, first stating your name and home
5 address. When you're finished speaking,
6 please turn your microphone off so that your
7 microphone is no longer picking up sound or
8 background noise.

9 All persons planning to testify
10 either in support or in opposition are to fill
11 out two witness cards. These cards are
12 located to my left on the table near the
13 entrance door and on the witness tables. Upon
14 coming forward to speak to the Board, please
15 give both cards to the reporter sitting to my
16 right.

17 The order of procedure for a
18 foreign mission case is as follows: (1),
19 statement and witnesses of the applicant; (2),
20 Government reports including the United States
21 Secretary of State and District of Columbia
22 Office of Planning on behalf of the mayor; (3)

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1 reports or recommendations by other public
2 agencies; (4) report of the Advisory
3 Neighborhood Commission; (5) persons in
4 support; (6) persons in opposition.

5 Please note that requests of party
6 status in an FMBZA application are not
7 applicable.

8 The following time restraints will
9 be maintained: The applicant, including
10 witnesses, will be permitted 60 minutes to
11 present its case. Persons testifying, whether
12 in support or opposition, will be limited to
13 three minutes each, except an ANC.

14 These time constraints do not
15 include time used during questions from the
16 Board. The Board may place further reasonable
17 restriction on or permit additional time for
18 testimony as it deems appropriate.

19 Because this is a rulemaking
20 proceeding, there are no parties and therefore
21 there is no cross examination.

22 The record will be closed at the

1 conclusion of each case, except it will remain
2 open for any material specifically requested
3 by the Board. The Board and the staff will
4 specify at the end of the hearing exactly what
5 is expected and the date when the material
6 must be submitted to the Office of Zoning.
7 After the record is closed, no other
8 information will be accepted by the Board.

9 The Sunshine Act requires that the
10 public hearing on each case be held in the
11 open, before the public. The Board may,
12 consistent with its Rules of Procedure and the
13 Sunshine Act, enter executive session during
14 or after the public hearing on a case for
15 purposes of reviewing the record or
16 deliberating on the case.

17 The decision of the Board in this
18 legislative proceeding must be based
19 exclusively on the public record. To avoid
20 any appearance to the contrary, the Board
21 requests that persons present not engage the
22 Members of the Board in conversation.

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1 Please turn off all beepers and
2 cell phones at this time so as not to disrupt
3 these proceedings.

4 At this time the Board will
5 consider any preliminary matters. Preliminary
6 matters are those that relate to whether a
7 case will or should be heard today such as
8 requests for postponement, continuance or
9 withdrawal, or whether proper and adequate
10 notice of the hearing has been given.

11 If you're not prepared to go
12 forward with a case today, or if you believe
13 that the Board should not proceed, now is the
14 time to raise such a matter.

15 Does the staff have any
16 preliminary matters?

17 MS. BAILEY: Madam Chair, Members
18 of the Board, and to everyone, good morning.

19 Staff does not have any
20 preliminary matters.

21 CHAIRPERSON MILLER: Thank you.
22 Then let's proceed with the foreign missions

1 case on our agenda.

2 MS. BAILEY: Application No. 17787
3 of the Republic of Uganda to allow the
4 establishment of a chancery. That's offices
5 of a foreign mission in the SSH, 16th Street
6 Heights, R-1-B District at premises 5909 16th
7 Street, N.W., Squire 2724, Lot 4.

8 CHAIRPERSON MILLER: Good morning,
9 and would you introduce yourself for the
10 record when you're ready?

11 MR. GELL: Thank you, Madam
12 Chairman. My name is Stephen Gell. I'm a
13 zoning attorney representing the Embassy of
14 the Republic of Uganda. With me is Michael
15 Karugaba, who is the administrative officer of
16 the embassy. Also with us is Charles
17 Ssentongo, who is the deputy chief of mission
18 of the embassy.

19 CHAIRPERSON MILLER: Okay. I'm
20 going to let you present your case, but maybe
21 I'll ask you a few preliminary questions,
22 because I think there are some issues here

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1 with respect to certainly which regulations
2 apply and how they relate to the facts and the
3 history of this case.

4 And the first one is, you know,
5 whether or not approval is actually needed if
6 in fact this is the continued use of the
7 chancery. And I think that you cited that
8 regulation, at least 201(m)(1) in our own
9 regulations and then there are other
10 regulations -- I mean, other parts of the
11 Foreign Missions Act.

12 You may be planning to address
13 this anyway, but I wonder if you could
14 clarify, you know, the history here between
15 the two buildings, whether or not they
16 operated initially or for a long period of
17 time as one chancery, you know, with an annex
18 and a main office, or what happened when the
19 property at issue stopped being used for
20 office use. Was it used as a support facility
21 for the building, or was it in fact used as --
22 we weren't sure what you meant by private

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1 tenancy. You know, so, if you could address,
2 you know, that history a little bit, we could
3 kind of get it in context.

4 MR. GELL: Thank you very much. I
5 think perhaps it would be better to have Mr.
6 Karugaba testify, since he is familiar with
7 the facts of the case; I should really be
8 dealing more with the law. Then as we get
9 into some of the legal issues, I can jump
10 back.

11 MR. KARUGABA: Thank you very
12 much, Madam Chairperson. My name is Michael
13 Karugaba. I'm the administrative officer at
14 the Embassy of Uganda. We are located at 5911
15 16th Street, N.W.

16 Now the history of these two
17 properties is that, our country gained its
18 independence in 1962. And the following year,
19 one of the first countries we established
20 diplomatic relations with was the U.S. And at
21 that time, my government decided to buy some
22 property that would house the diplomatic

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1 mission of Uganda, and this is how we came
2 into ownership of the properties along 16th
3 Street. And there's another one, a third one,
4 along Loughboro Road, still in Northwest.

5 Now, in 1963, the chancery was
6 established in both properties along 16th
7 Street; that's 5911 and 5909. And actually,
8 the main chancery building was located at 5909
9 and 5911 was used as an annex of the main
10 chancery property. Now it was used for a long
11 time, up to 1994 when we had some financial
12 problems and at that point it was decided by
13 my government and the people that were in
14 charge that we concentrate all operations in
15 what was originally the annex and then lease
16 out the property on 5909 to try and generate
17 some revenue.

18 So we felt that we are moving into
19 an area that we couldn't sustain. So the idea
20 of having it leased out commercially was then
21 dropped. And since then, the property has
22 been largely under-used and what happens

1 occasionally is taht we get some members of
2 our staff who come on transition in that
3 property before they can acquire other
4 permanent residences. So basically, since
5 1995 it's been largely under-used, if used at
6 all.

7 So what I can add here is that we
8 have realized now that the office space that
9 we use is really very limited for the kind of
10 work that we do. Like I said, we moved into
11 an annex and we tended to share offices, and
12 we tend to again put a number of equipment in
13 some of the offices. For example, we actually
14 do not have a board room right now, as we
15 speak. And if we are to hold any meetings, we
16 have to gather into one of the office's rooms.

17 We've also had a problem with our
18 passport equipment. We do renew passports at
19 the embassy. Now that equipment actually sits
20 in my office, which office I actually share
21 with another officer. So you'll find that
22 everything is concentrated in a few offices.

1 And again, we, at the moment,
2 would like to basically spread out and go back
3 to the situation that we had at 1994 and
4 prior. And in this regard, we basically do
5 not intend to make any chnages, both regarding
6 the property's physical structure or the
7 parking that is already available to us. We
8 simply want to stretch out and be able to
9 operate in a more comfortable way.

10 Fortunately, we've been, I guess,
11 good neighbors and we are proud to report that
12 we've spoke to a number of our neighbors and
13 explained to them our situation. And we've
14 actually got petitions signed from 13 of our
15 closest neighbors supporting what we just
16 explained to them. And for those that were
17 unable to sign the petitions, they say it's
18 because we failed to get them on time, in
19 terms of having our times meeting with theirs,
20 their schedules. But largely, our neighbors
21 have been very supportive and we are proud to
22 say we are located in a very good community

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1 and we've lived very peacefully and
2 comfortably with them.

3 And again, I can state that
4 whatever change we're making, we do not expect
5 to impact negatively on the neighborhood. We
6 have adequate spacing in terms of parking and
7 we do not intend to make changes on the
8 grounds, on the exterior or the properties, on
9 the exterior.

10 So basically, we hope that you
11 will agree with us for the above reasons and
12 therefore the embassy should be allowed to use
13 the property at 5909 for office purposes
14 again. Thank you.

15 MR. GELL: If I may ask a
16 question, make a comment. I would add to what
17 Mr. Karugaba said, that if you look at the
18 petition you'll note that David Wilson, who
19 lives diagonally across the street, also
20 signed. And while it's true that the ANC did
21 not have a quorum to take a vote, it's also
22 true David Wilson signed the petition and he

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1 is the single member representing the area.
2 So we think it's safe to say that there really
3 is no opposition in the neighborhood to the
4 change here.

5 Let me ask Mr. Karugaba if it's
6 fair to say that except for a few months
7 experimentation with trying to rent out the
8 embassy that for all this time, since '94, it
9 has really been used more as an adjunct to the
10 operations of the embassy, used to house
11 visiting diplomats for some period of time or
12 new employees until they could get a place to
13 live on their own. It's just really been
14 operated in that way rather than as a separate
15 rental unit.

16 MR. KARUGABA: Like I mentioned
17 before, that's actually what has happened.
18 With the exception of the very initial months
19 when this change was made in 1994 and I think
20 the initial part of 1995, from then onwards to
21 today, it's largely been used as an adjunct
22 really for transitioning diplomats and

1 visitors that we get. But the property
2 largely is unused, except for those few cases
3 that we get.

4 MR. GELL: Madam Chair, that's
5 really the testimony that we wanted to present
6 to you, but I understand that you had some
7 other questions.

8 CHAIRPERSON MILLER: Well, other
9 Board Members may as well. Just to finish at
10 least the area on the history of the use here,
11 do either of the buildings have a certificate
12 of occupancy?

13 MR. GELL: We included that in the
14 package. I believe there was a certificate
15 for the --

16 MR. KARUGABA: Yes, they do have a
17 certificate of occupancy.

18 CHAIRPERSON MILLER: What do they
19 say? Do they say the same for each of those
20 properties, or are they different?

21 MR. KARUGABA: I don't know.

22 MR. GELL: My recollection is that

1 there was a certificate for rental use, but I
2 don't believe the chancery needed a
3 certificate.

4 CHAIRPERSON MILLER: So the
5 property at issue has a C of O for rental use?

6 MR. GELL: I would have to check
7 that, too.

8 CHAIRPERSON MILLER: Because of
9 the 1994 use?

10 MR. GELL: That's right.

11 CHAIRPERSON MILLER: Okay.

12 MR. GELL: Because of their desire
13 to change.

14 CHAIRPERSON MILLER: And what was
15 that rental use? Who did the embassy rent to?

16 MR. KARUGABA: It was a private
17 individual. It was one individual and family.

18 CHAIRPERSON MILLER: Okay. It was
19 resident?

20 MR. KARUGABA: I don't have the
21 name off hand.

22 CHAIRPERSON MILLER: I don't need

1 names. I just wanted to know what kind of
2 rental there was.

3 MR. KARUGABA: It was a single
4 family rental.

5 CHAIRPERSON MILLER: Okay.

6 VICE-CHAIRPERSON LOUD: Just a
7 quick follow-on question to the Chair's
8 question. I was not clear on how long the
9 rental was in play at 5909. It sounded at one
10 point like the testimony was that it was two
11 months, but I wasn't clear. So that would be
12 one follow-on question.

13 MR. KARUGABA: I would have ot
14 check on the exact time, but it was just a few
15 months, perhaps six to eight months.

16 VICE-CHAIRPERSON LOUD: Okay.

17 MR. KARUGABA: Just a few months.

18 VICE-CHAIRPERSON LOUD: Okay. The
19 second question would be, for the period from
20 '94 to 2008 was the site used to store office
21 equipment? You mentioned that your own, what
22 had been the annex chancery is extreemly

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1 overcrowded. But has it just sat completely
2 vacant with no use at all?

3 MR. KARUGABA: You mean the
4 property in question being vacant?

5 VICE-CHAIRPERSON LOUD: That's
6 correct, 5909.

7 MR. KARUGABA: No, we still
8 retained a few things that we couldn't move.
9 But largely what was in the property
10 immediately after the change was the tenants'
11 property. But a few things, especially in the
12 garage we still stored a few things. But it's
13 just been largely vacant except for a few beds
14 that our guests would use.

15 VICE-CHAIRPERSON LOUD: All right.

16 MR. KARUGABA: It's been largely
17 vacant.

18 VICE-CHAIRPERSON LOUD: Okay.
19 Thank you.

20 CHAIRPERSON MILLER: Any other
21 questions on this topic? Okay.

22 Then do you want to proceed with

1 rest of your case?

2 MR. GELL: Yes. Essentially we
3 proceeded really on two tracks. This is the
4 first foreign missions case that I've had, and
5 I saw that the lot chnged with regard to
6 foreign missions in that certain areas were
7 designated for foreign missions and other
8 areas were presumably off limits. And while
9 the Uganda embassy was grandfathered for the
10 use that it had at the time, the fact that it
11 had appeared to have changed its use of one of
12 the buildings, it seemed to me, required us to
13 go forward and meet not only the criteria of
14 the Foreign Missions Act, which I think we did
15 meet, but also a variance procedure and
16 special exception procedure before the Board.

17 CHAIRPERSON MILLER: Let me
18 interrupt there. Before you go into that, I'm
19 wondering, you know, why you concluded that
20 you needed to meet the variance test when this
21 is a Foreign Missions Act and there are
22 specific criteria for evaluating the location

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1 of a foreign mission set forth in 4306 of the
2 Act, those criteria?

3 MR. GELL: That's right. But
4 there are other laws that say that foreign
5 missions can't be located outside of the
6 foreign missions area. And therefore, the
7 fact that we are asking --

8 CHAIRPERSON MILLER: Which would
9 have been?

10 MR. GELL: I would have to check
11 that.

12 CHAIRPERSON MILLER: Okay.
13 Because I don't really want to disrupt your
14 chain of thought too much, but 4306(b)(2)
15 says, "A chancery shall also be permitted to
16 locate (B) in any other area, determined on
17 the basis of existing uses, which includes
18 office or institutional uses, including but
19 not limited to any area zoned mixed-use
20 diplomatic or special purpose, subject to
21 disapproval by the District of Columbia Board
22 of Zoning Adjustment in accordance with this

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1 section."

2 Did you look at that section?

3 MR. GELL: Well, yes.

4 CHAIRPERSON MILLER: Okay.

5 MR. GELL: And this is a
6 residential neighborhood. Now it's true that
7 there are some other institutional uses in
8 that neighborhood, but I couldn't be sure that
9 the Board would view the area as an
10 institutional or even a mixed area. And
11 rather than go on on one track and find that
12 that one is closed off, I thought that we
13 really had to, at least in our application,
14 request all of the relief that we might
15 possibly need. It simply wasn't clear to me
16 that the Board was going to agree that even
17 though the Foreign Missions Act appeared to be
18 satisfied, that the Board was going to say no
19 variance would be required. And I'm perfectly
20 happy to agree with the Board that in fact no
21 variance is required if that's the way the
22 Board sees it, because it obviously doesn't

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1 require as great a proof.

2 The Office of Planning apparently
3 has come to that conclusion as well and we
4 have no problem with going along on that
5 track. There's no need for us to prove a
6 variance if it's not necessary. But we
7 thought we could as well if --

8 CHAIRPERSON MILLER: Well, let me
9 just read further in the Act. Under the
10 4306(d) criteria for determination, it says,
11 "Any determination concerning the location of
12 a chancery under Section (b)(2) of this
13 section," that's the section I just read, "or
14 concerning an appeal of an administrative
15 decision with respect to a chancery based in
16 whole or in part upon any zoning regulation or
17 map, shall be based solely on the following
18 criteria:" And then it lists the criteria
19 that are also set forth in our regulations.

20 Then the other provision is (j),
21 which says, "Application of others (other than
22 this chapter) applicable with respect to the

1 location, replacement or expansion of real
2 propety in the District of Columbia shall
3 apply with respect to chanceries only to the
4 extent that they are consistent with this
5 section."

6 I think maybe before you launch
7 into too much on the variance test and special
8 exception test even, I think I'm inclined, I
9 think the rest of the Board is too, but I'm
10 not going to speak for the Board yet, to
11 believe that it's these criteria that need to
12 be applied and not variances and special
13 exceptions under our regulations.

14 If you have anything else to say
15 on that, you know, we'd entertain it and then
16 we can go out of order and ask Office of
17 Planning if they want to comment.

18 MR. GELL: No, I'm fine with that.
19 We don't have to pursue the other.

20 CHAIRPERSON MILLER: Okay. Office
21 of Planning, would you like to weigh in at
22 this point on that initial question?

1 MS. THOMAS: Madam Chair, Karen
2 Thomas with the Office of Planning. After
3 further review, we do agree with the Act as
4 you just outlined and I agree that we erred
5 and it was incorrect to apply the variance
6 test.

7 CHAIRPERSON MILLER: Okay. Just
8 so that we don't spend a lot of time at this
9 hearing, if everyone is in agreement that
10 we're looking at the criteria set forth under
11 4306 and in our regulations, and not variances
12 and special exceptions.

13 One other legal question, Mr.
14 Gell. Did you look at 4306(b)(2) with respect
15 to what is meant by, "A chancery shall also be
16 permitted to locate (B) in any other area,
17 determined on the basis of existing uses?" I
18 don't know if you have it in front of you.

19 MR. GELL: I don't have it in
20 front of me.

21 CHAIRPERSON MILLER: Okay. I'll
22 read it again.

1 MR. GELL: But I had reviewed it
2 some time ago, yes.

3 CHAIRPERSON MILLER: Okay. I just
4 want to see how you think the Board should
5 deal with that provision, as opposed to the
6 criteria. We have specific criteria we're
7 supposed to apply in evaluating the location
8 and expansion of a chancery. Okay. Those are
9 set forth.

10 There is this provision that says,
11 which it appears that this chancery probably
12 falls in, because it's not in a Diplomatic
13 Overlay and it's not in a commercial area or
14 medium/high-residential district. It says, "A
15 chancery shall also be permitted to locate (B)
16 in any other area, determined on the basis of
17 existing uses, which includes office or
18 institutional uses, including but not limited
19 to any area zoned mixed-use diplomatic or
20 special purpose, subject to disapproval by the
21 District of Columbia Board of Zoning
22 Adjustment in accordance with this section."

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1 I'm just wondering if you have any
2 thoughts at all as to how that provision
3 should be applied with respect to the
4 determination that's referenced in that
5 provision.

6 MR. GELL: Well, of course my
7 druthers are to say that the phrase
8 "consistent with other uses" would cover this
9 chancery in that there are some other
10 institutional uses in that neighborhood. It
11 was not an interpretation I felt that I could
12 comfortably make with the same finality that
13 you can. But if that's the way the Board
14 views it, then I would say by all means, that
15 being that there other institutional uses that
16 this would fall within that.

17 CHAIRPERSON MILLER: Okay. Just
18 for the record, I wasn't indicating that the
19 Board viewed this provision in any particular
20 way. I was just wondering how you thought
21 that fit into the analysis. It's very clear
22 to me that under (d), criteria for

1 determination, we go through the specific
2 criteria and they're there. And you all have
3 addressed them and Office of Planning has
4 addressed them. I just was wondering if you
5 had any thoughts on that particular provision.

6 MR. GELL: Well, yes, that's why I
7 gave the list of uses taht were within a few
8 blocks, at least, of the existing chancery.
9 There were several others I thought were
10 perhaps a bit further away and couldn't be
11 reasonably considered to be part of the
12 neighborhood. But that was the purpose of
13 putting that list there, was in fact to say
14 that if that language can be interpreted to
15 permit the chancery use, that we certainly
16 wanted to take advantage of that
17 interpretation.

18 CHAIRPERSON MILLER: And legally
19 are you asking for an expansion of chancery
20 use from 5911 to 5909?

21 MR. GELL: Well, it's either an
22 expansion or a reestablishment of the use.

1 Either way I think it falls within the ambit.

2 CHAIRPERSON MILLER: If it's
3 reestablishment though; this is just a
4 technicality, but you know, it was a chancery
5 but now the other building's a chancery.
6 Right?

7 MR. GELL: Well both were a
8 chancery.

9 CHAIRPERSON MILLER: They were
10 both one chancery?

11 MR. GELL: Yes.

12 CHAIRPERSON MILLER: Okay. Well I
13 mean, would they both be one chancery again?
14 That's kind of my question. Would this be an
15 expansion of --

16 MR. GELL: Yes, I think that's a
17 fair statement. They're going to be operated
18 together by one country, obviously by one
19 ambassador, one DCM, and the uses will be very
20 integrated, one with the other in terms of the
21 use of the interior as well as the use of the
22 parking spaces on both lots. So if you view

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1 it as an expansion, I certainly wouldn't argue
2 that it's an expansion. But I think expansion
3 doesn't bring in the other element; that is,
4 that it had been expanded at one time and had
5 been contracted and now we're re-expanding.

6 MEMBER OATES WALKER: Mr. Gell,
7 you mentioned before that the building at 5909
8 was an annex when both buildings were being
9 used. So would we --

10 MR. GELL: It's the other way
11 around.

12 MEMBER OATES WALKER: -- have one
13 building that's a chancery and the other
14 building that's an annex there too, or would
15 they both be considered the main chancery
16 building?

17 MR. GELL: Well, I think
18 originally 5909 was the main building and 5911
19 was the annex. I'm not sure there's a
20 distinction here that really makes a
21 difference, but one might say that wherever
22 the ambassador's office is might be considered

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1 the proper main building and the other would
2 be an annex. But I'm not sure how they're
3 going to reconfigure the building later on,
4 how they're going to change the office use.
5 Obviously some people are going to be moving
6 from place to the other. So it's a little
7 hard at this point to say for all time that
8 one is the main building and the other is the
9 annex. They're both going to be operated
10 together as one chancery.

11 CHAIRPERSON MILLER: I just want
12 to bring to everyone's attention that there is
13 a definition for chancery under the Foreign
14 Missions Act at 4302(a)(2): "'Chancery' means
15 the principala offices of a foreign missions
16 used for diplomatic or related purposes, and
17 annexes to such offices (including ancillary
18 offices and support facilities), and includes
19 the site and any building on such site which
20 is used for such purposes."

21 So my understanding is that if the
22 application is not disapproved then it would

1 be one chancery.

2 MR. GELL: That's correct.

3 CHAIRPERSON MILLER: And to the
4 best of your knowledge, the site, is that
5 affected by lots or anything like that, whether
6 or not the buildings are on separate lots?

7 MR. GELL: Well, I would say that
8 the use of the word "site" shows that they
9 were careful not to try to deal with whether
10 they're separate lots or all one lot. "Site"
11 seems to me can incorporate more than one lot
12 and that would be the case here.

13 CHAIRPERSON MILLER: Are there
14 other questions?

15 Do you want to address anything
16 else further, the criteria or anything like
17 that?

18 MR. GELL: No, I think we made
19 that case and I think the Office of Planning
20 has done as well. So I don't know that it's
21 necessary to go through it again. I may have
22 something to add after the Office of Planning

1 has a turn.

2 CHAIRPERSON MILLER: Okay.

3 MR. GELL: Thank you.

4 CHAIRPERSON MILLER: Mr. Loud?

5 VICE-CHAIRPERSON LOUD: Just one
6 quick follow-on question.

7 Given your client's testimony that
8 both locations were part of a single
9 integrated chancery, do you have a take or a
10 position on this being the continuing use of
11 a chancery? I'm just asking for your opinion
12 on that.

13 MR. GELL: Continuing?

14 CHAIRPERSON MILLER: The
15 continuing use of a chancery that had been in
16 existence from 1963 say to 1994, had a brief
17 period of interruption the latter part of
18 1994, maybe early part of 1995, but now in
19 2008 you are continuing its historic use as a
20 chancery. Just a reaction or response to
21 that, had you thought through in those terms.
22 And if not, that's fine.

1 MR. GELL: It's really a question
2 of what that interruption did legally to the
3 chancery. I can certainly make an argument
4 that it's a continuing use and that a brief
5 change for a very short period of time really
6 shouldn't mean that it had no longer been a
7 chancery or no longer qualify. I think we're
8 here because we really need the Board to say
9 that either it's a continuation or that it's
10 a reestablishment and that it's perfectly all
11 right. So I would find it hard to say that it
12 has been in continual use as a chancery
13 because there was a very brief interruption.
14 But others might just minimize that. A few
15 months, you know, maybe doesn't mean an
16 interruptoin.

17 VICE-CHAIRPERSON LOUD: Okay.
18 Thanks. Just wanted to get your take on that.

19 MEMBER OATES WALKER: And just a
20 follow-up question about that interrupton for
21 Mr. Karugaba.

22 Were the people to whom the

1 building was rented for that brief six to
2 eight-month period affiliated with Uganda in
3 any way, or were they completely different,
4 just a private entity that rented the house?

5 MR. KARUGABA: No, they were just
6 private entity, private citizens.

7 MR. GELL: As I understand, there
8 was some diifficulty with collecting rent.
9 So, one might even question whether it was a
10 rental property if people just lived in it for
11 a little while. It might have been considered
12 an act of charity rather than a change of use.

13 MEMBER OATES WALKER: Was there a
14 lease?

15 MR. KARUGABA: Yes. Yes. Yes,
16 there was.

17 CHAIRPERSON MILLER: Okay.
18 Anything else?

19 Then why don't we turn to the
20 Office of Planning?

21 MS. THOMAS: Good morning, Madam
22 Chair, again. I'm Karen Thomas with the

1 Office of Planning. OP is recommending
2 approval of the request to allow the chancery
3 use in the R-1-B as it complies with the
4 Foreign Missions Act and Section 1001 of the
5 Zoning Regulation. We view thta the deviation
6 from the parking requiremenst has been
7 demonstrated not to be detrimental to the
8 neighborhood or the Zone Plan and meets the
9 requirement of the municipal interests.

10 As previously stated, upon further
11 review for relief through a use variance we
12 believe that this was not correct at this time
13 and as the use is permitted on the basis of
14 existing uses which has been submitted by the
15 applicant, shown in their report. On page 3
16 of their report, they listed approximately
17 seven uses, seven institutional uses in and
18 around that neighborhood on 16th Street.

19 So all in all we believe that this
20 complies with the requirements of the Foreign
21 Missions Act and we recommend approval. Thank
22 you.

1 CHAIRPERSON MILLER: Thank you. I
2 was wondering if you have an opinion on that
3 provision 4306(b)(2)(B) which talks about a
4 chancery being permitted to locate in any
5 other area determined on the basis of existing
6 uses. Do you have that provision?

7 MS. THOMAS: Actually I just got
8 it late yesterday afternoon.

9 CHAIRPERSON MILLER: Okay.

10 MS. THOMAS: And I think that made
11 the case for not requiring a use variance.
12 And if I had seen --

13 CHAIRPERSON MILLER: The fact that
14 it's permitted in these areas?

15 MS. THOMAS: Yes.

16 CHAIRPERSON MILLER: Okay.

17 MS. THOMAS: Absolutely.

18 CHAIRPERSON MILLER: Did you use
19 that at all in your evaluation for instance
20 with respect to language talking about
21 "determined on the basis of existing uses?"
22 Or do you think you don't need to? I mean,

1 it's clear that there were the criteria set
2 forth under (d). And then there's this other
3 provision. I was just wondering if you looked
4 at that.

5 MS. THOMAS: Apparently the report
6 didn't stress that, but for the record I would
7 state that that should be included. And we do
8 support that it applies in this case.

9 CHAIRPERSON MILLER: Okay. And I
10 think Mr. Gell said that the applicant put
11 some evidence in the record about other
12 existing uses.

13 MS. THOMAS: Yes.

14 CHAIRPERSON MILLER: But in fact
15 Office of Planning's main role in this type of
16 hearing is determining the municipal interest,
17 right?

18 MS. THOMAS: Yes.

19 CHAIRPERSON MILLER: Okay. So you
20 didn't find any adverse impacts on the
21 neighbors and the neighborhood, is that
22 correct, with respect to this particular

1 building being reestablished as chancery use?'

2 MS. THOMAS: No, not at all.
3 We looked at it through the request for --
4 through parking, the parking requirements and
5 we determined that it seemed innocuous and
6 there was no need to provide any more parking
7 or anything like that. So there was no
8 adverse impact with respect to parking.

9 CHAIRPERSON MILLER: Okay. And as
10 I understand it, the use isn't really changing
11 that much. They're just pretty much making
12 use of the building. They're not increasing
13 their staff really. They're not going to be
14 having special events on the site.

15 MS. THOMAS: Yes, absolutely. And
16 it's just actually moving office equipment
17 into that space at this time. So we saw no
18 adverse impact to the neighbors with respect
19 to, you know, any building expansion,
20 expanding the footprint of any of the
21 building, so no light and air issues arose.

22 CHAIRPERSON MILLER: Okay. Thank

1 you.

2 Any other questions?

3 Okay. Is there anybody here from
4 the Department of State?

5 Good morning.

6 MR. MASSEY: Madam Chairman and
7 Members of the Board, my name is Richard
8 Massey. I'm the office director in the Office
9 of Foreign Missions for Real Estate. I'm here
10 to represent the Department in support of the
11 application of Uganda to reuse, basically, the
12 property at 5909 16th Street.

13 As far as the federal criteria go
14 in the Foreign Missions Act, we believe the
15 embassy has certainly met them and we support
16 them. It's our international obligation for
17 them to have adequate facilities. This is
18 something they need now and have realized that
19 they made a mistake, I think, back in 1994.

20 Also of course there are no
21 security issues that we should be concerned
22 about. And also Uganda, from a federal

1 interest point of view, has been very
2 supportive of the United States in Uganda when
3 we wanted to build a new chancery there a few
4 years ago and they were -- and zoning and land
5 use sides supported us. And we appreciate
6 that and we would like to see favorable
7 treatment given to them on this rather unique
8 situation, I think, which I don't think we've
9 ever had before where a country has owned a
10 property for many, many years, used as a
11 chancery and then on its own continued to own
12 it but decided to lease it out. They did come
13 to us and told us about it. We warned them of
14 the consequences, which of course now they're
15 involved with. But they're just going back,
16 I think, to use it once again for what they
17 had for years and years ago.

18 So I think this is a very unusual
19 case and we don't want to see them penalized
20 for, I think, a lapse in judgment at the time.

21
22

That's the extent of my

1 presentatin.

2 CHAIRPERSON MILLER: Thank you.
3 So, am I correct that it's your opinion that
4 the fact that they leased out the property for
5 a few months disqualifies them for being
6 considered a continued use?

7 MR. MASSEY: Technically I would
8 have to probably say yes. Yes, because
9 actually we wrote to the city and told them
10 that property was not chancery use, so I don't
11 think we could say continuing it.

12 CHAIRPERSON MILLER: And do you
13 have any comments on that provision
14 3406(b)(2)(B) which talks about how they can
15 locate in any other area determined on the
16 basis of existing uses, da, da, da, you know?
17 You're familiar with that provision?

18 MR. MASSEY: I was hoping you were
19 not going to ask me that question. But no, I
20 believe a case --

21 CHAIRPERSON MILLER: Well, you
22 don't have to answer it.

1 MR. MASSEY: I believe a case
2 could have been made under that provision if
3 it needed to, but I don't think thta that was
4 something that was investigated or pushed by
5 them. But it's an interesting legal question.
6 I think the answer would be yes, they could.

7 CHAIRPERSON MILLER: Okay. Any
8 questions for Board Members?

9 Okay. Thank you very much. And
10 we also have in the record a letter from the
11 State Department in support of this
12 application. Thank you.

13 Are there any other public
14 agencies represented here today?

15 Okay. And is there anybody here
16 from the ANC today?

17 Okay. Any preson who wishes to
18 testify in support of the application? Not
19 seeing anyone.

20 Any person who wishes to testify
21 in opposition?

22 Okay. You have to come on

1 forward. Good morning.

2 MR. MLOTEK: Good morning, and may
3 it please the Honorable Board; I am Ron
4 Mlotek. Resides in Ward 4 at 8149 East Beach
5 Drive, N.W., very close to 16th Street.

6 I am now retired from the
7 Department of State. I think most of you up
8 there know that. And you also know that prior
9 to that I had served as legal counsel to the
10 Office of Foreign Missions. And for 25 years,
11 ever since the FMBZA was established, I
12 represented the Department in every single
13 case but one for which I had to recuse myself
14 because of personal interests. The property
15 directly abutted -- the proposed chancery
16 property directly abutted my home.

17 It's a little awkward for me here
18 and somewhat painful to be appearing and
19 testifying in essence contrary to the opinions
20 and the interests of my former employer, the
21 Government. But having been before the Board
22 in virtually 100 cases, foreign missions

1 cases, and having felt extreme respect and
2 admiration for the way the Board has handled
3 these cases, even when the Board has ruled
4 against us, I have appeared before every one
5 of your predecessors, Madam Chair, going back
6 all the way to Carrie Thornhill, and even when
7 we lost cases, which we did, I always felt
8 that the Board had acted respectfully and
9 listened to us, even if we didn't agree.

10 And for this reason I feel I have
11 something of an obligation today to come here
12 and to explain, provide some information and
13 background that the Board apparently is not
14 aware of in terms of how the Board itself in
15 the past and the District government and the
16 Zoning Commission, and the Office of
17 Corporation Counsel, I think we -- the
18 Attorney General, sorry; still using the old
19 terminology, have viewed these issues in the
20 past.

21 The bottom line, Madam Chair, is
22 this. I have no brief one way or the other

1 and no personal interest one way or the other
2 in terms of the Embassy of Uganda being
3 premitted to use this property. It will not
4 affect me in any detrimental way and obviously
5 the neighbors themselves believe it will not
6 negatively affect them in any way. And that's
7 good. And it's a very positive thing and an
8 encouraging thing to hear. However, at the
9 same time, this Board of course is governed by
10 the Zoning Regulations as promulgated by the
11 Zoning Commission, in addition to the Foreign
12 Missions Act. It's also governed by its own
13 precedence. And my main purpose in appearing
14 before you today is to explain that if the
15 Board were to approve this, it would establish
16 a precedent which it has never established and
17 never come close to establishing in 25 years,
18 in which the District government, as a
19 government, including all of its various
20 components, the Office of Planning, the
21 Attorney General's Office and its predecessor,
22 the Zoning Commission and this Board have

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1 firmly taken the view of; namely that, if a
2 chancery proposes to locate or expand,
3 whichever way you want to view it, outside the
4 areas that are mapped as diplomatic, they
5 cannot be permitted to do so.

6 So you never get -- in other
7 words, it is a two-pronged test. If you go
8 back and look at the previous decisions of the
9 Board, this Board, you will see that that is
10 generally the way the Board itself has
11 interpreted it. You go to the 206(b) part
12 first, and only if you meet the criteria there
13 do you go to the six criteria in 4306(d).

14 In this case, there was a break in
15 continuity. And I notice that the Board
16 focused very carefully on the issue of how
17 long this rental to unaffiliated parties went
18 on. But I would respectfully submit that
19 that's not the only issue. The regulations
20 and the Foreign Missions Act itself, in the
21 definitional section that the Chair referred
22 to before, 4303, very specifically makes it a

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1 distinction between a chancery and an embassy.
2 A chancery is a place where you conduct office
3 activities. And embassy is a place where you
4 reside.

5 So, the issue of whether it
6 qualifies for grandfathering or continuing
7 uses, the language goes, is not limited to the
8 question of how many months. Was it two
9 months? Was it six months? Was it a very
10 brief period? Can we overlook it? Can we
11 pretend it doesn't exist? But you heard the
12 gentleman from the Embassy of Uganda on the
13 record state that even after the unaffiliated
14 tenancy was broken, the embassy used the
15 property for residential purposes. Now
16 residential purposes clearly under the law are
17 not chancery purposes. So that period of time
18 cannot be simply ignored. Even though the
19 people who lived there were affiliated.
20 Because a residential use by a diplomat is
21 permitted as a matter of right, just like any
22 other residential use virtually anywhere in

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1 the District, R-1 through R-5, anywhere. So
2 one cannot count as chancery use, continuing
3 chancery use, the fact that people who were
4 affiliated, albeit with the embassy, resided
5 there because it's not chancery use. So the
6 period in which the chancery use was broken,
7 the continuity, extends beyond this period of
8 rental which was the focus of many questions
9 here.

10 The major precedent that's
11 involved in the interpretation specifically of
12 that phrase in 4306(b)(2)(B), determined on
13 the basis of existing uses. And if the Board
14 were to consult the Zoning Commission's own
15 orders, specifically 509 and 509(a), you will
16 see that the Zoning Commission itself,
17 supported very strongly by the Office of the
18 Attorney General, at that time the Corporation
19 Counsel's Office, and supported very strongly
20 by the Office of Planning, took the view that
21 the word "determined" -- it's in the passive
22 voice unfortunately, it doesn't say who is to

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1 determine it and many people argued, including
2 the State Department and including the
3 attorney sitting before you now, argued that
4 "determined" meant determined by this Board.
5 But this Board never accepted -- in fact we
6 never had a case where it had to.

7 The Zoning Commission expressly
8 said that "determined" meant determined by the
9 Zoning Commission in promulgating the map.
10 That is what determines. And if there's any
11 question about it, I think the question is
12 very easily answered in the Act itself when it
13 -- the Chairperson was very correct in citing
14 4306(j) where it says "Provisions of law
15 applicable with respect to the location,
16 replacement, expansion shall apply only to the
17 extent they are consistent with this section."
18 And it is true that the majority of the
19 section has to do with the Board of Zoning
20 Adjustment, the Foreign Missions Board of
21 Zoning Adjustment, this body.

22 However, the Act also very clearly

1 forsees a role of the Zoning Commission. If
2 you look at 4306(i), it says, "Membership on
3 the Zoning Commission and the Board of Zoning
4 Adjustment." So clearly and it specifies who
5 shall serve on the Zoning Commission -- the
6 ZC, not the BZA. It says, "Whenever the
7 Zoning Commission is performing functions
8 concerning the implementation of this
9 section." So the position of the District of
10 Columbia -- I mean, it's an odd position for
11 me to be in, having been an attorney for the
12 U.S. Government, not for the District of
13 Columbia, to be pointing out what the District
14 of Columbia's positions ahve been, but I feel
15 because there has been so much turnover in the
16 membreship of the Board and of the staff and
17 of the Office of Planning, that people may not
18 recall this. But that has been the
19 undeviating, the undeviating view of all
20 relevant components and departments of the
21 Distrct government.

22 So if the Board were to go ahead

1 now and say that section (b) (2) (B),
2 4306 (b) (2) (B) means that it is the Board that
3 determines what are the other uses, the
4 exisitng other uses, non-residential uses in
5 an area, that would be a huge precedent that
6 was set. And I do not see, I am sorry, I do
7 not see any way in which the Board could
8 establish such a precedent today, first of all
9 consistent with the Zoning Commission's
10 regulations and its orders in 509 and 509(a),
11 but even more importantly in terms of
12 precedent in the future. In other words,
13 there are many churches, there are many houses
14 of worship, there are many schools all up and
15 down 16th Street, but none of it is mapped by
16 the Zoning Commission. None of it is mapped
17 in the diplomatic area.

18 So if the Board were to proceed
19 today and to say that, well, we think this is
20 an appropriate area, we don't care what the
21 Zoning Map established by the Zoning
22 Commission says, how then would you in a

1 subsequent case say if a chancery wanted to
2 locate, you know, between two churches let us
3 say, which there are many, or two synagogues,
4 or whatever you have on 16th Street, or two
5 schools, that that would be permitted. And we
6 must not only think of 16th Street, but the
7 other areas including Sheraton-Kalorama, whose
8 representatives and ANC have a very firm
9 position on what this language means.

10 And then finally, the issue of
11 area. You have heard testimony here today
12 from Mr. Gell representing Uganda that there
13 are other institutional uses in the area.
14 Some are across the street, some are a few
15 blocks away. But the Zoning Commission's
16 order, which I believe is binding on the Board
17 of Zoning Adjustment, I don't feel that the
18 Board of Zoning Adjustment itself, even the
19 Foreign Missions Board of Zoning Adjustment,
20 has the authority, on its own, to depart from
21 what the -- it's the Zoning Commission that
22 promulgates regulations; it's the Board of

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1 Zoning Adjustment that applies and interprets
2 and implements them. And the very clear
3 statement of the Zoning Commission in order
4 509 and 509(a) states that area has a very
5 specific meaning; and that is, the zoning
6 square or the tax square. So if there's an
7 institutional use across the street, that
8 doesn't count. Taht's not the area.

9 There has been extreme discussion
10 over the last five or six years with the
11 Office of Planning, with the NCPC and the
12 State Department about whether this process
13 should change, but no agreement has yet been
14 reached. So we are still operating under the
15 -- and in order to change it, there would have
16 to be a change in the -- there would have to
17 be Zoning Commission action as well. The idea
18 would be at the end of the day everyone would
19 support that. But at the present that has not
20 occurred, so we're stuck, we are left with the
21 definition that your Zoning Commission has made
22 in orders 509 and 509(a) that area means the

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1 square, not a block away, not across the
2 street. You know, if there are five churches
3 across the street, that is not within the area
4 as it is used in 4306(b)(2)(B). One has to
5 look only at the square. There are many cases
6 that the BZA has handled where they have done,
7 the Office of Planning has gone out and done
8 a survey property-by-property. I think that
9 the Azerbaijan case for example, which was
10 contested and it was alleged that it was not
11 within the diplomatic map, but when it was
12 actually tested out and based on going down to
13 the infinite detail of square footage of other
14 institutional uses, most of which were
15 chanceries actually, that it was determined it
16 was really within the diplomatic map. It met
17 that criteria. It was merely a technical
18 error and oversight on the part of the Zoning
19 Commission that it didn't get mapped. That's
20 a special situation.

21 But this situation, if you look
22 only at the area that in my opinion you are

1 permitted to look at under the existing
2 regulations, under the Zoning orders, you are
3 limited to looking at the square. And if you
4 look at that square in question, you will not
5 find that there are two thirds institutional
6 uses there, which is what the curent
7 requirement is. And the Zoning Regulations
8 themselves finally specifically state if you
9 look at them in the DCMR 201(m) it
10 specifically says that in those areas that are
11 outside the diplomatically mapped areas, there
12 is no authority to approve a chancery.

13 So these are the basic issues that
14 are before you. Obviously, if the Board
15 wishes to break with precedent, I presume that
16 the Board has the right to do that, although
17 I'm sure that perhaps the Zoning Commission or
18 some other ANCs might have views that are
19 contrary to that. It is an open question
20 whether the Board does have the right to do
21 that in certain cases. My understanding,
22 however, is that the Office of the Attorney

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1 General has said that it does not, that it is
2 bound. In other words, even if the Board were
3 to conclude in its own discretion and it's own
4 legal analysis that all of the things that I
5 have mentioned, the two Zoning orders by the
6 Zoning Commission, the Zoning Regulation which
7 was promulgated pursuant thereto in DCMR 11
8 201(m), that they do not comply with the
9 Foreign Missions Act, that they're not
10 consistent with the Foreign Missions Act.
11 Even if you were to conclude that, some could
12 say, and I personally now as a private citizen
13 of the District of Columbia for 30 years I've
14 lived here, so I have some interest, vested
15 interest in how these things get interpreted,
16 one could say, and I would say, that that's a
17 matter that the courts have to address and not
18 the Board of Zoning Adjustment. The Board of
19 Zoning Adjustment, I mean, it's like we were
20 all taught in law school, hard cases make bad
21 law.

22 This is a hard case. You've heard

1 my former colleague from the Department of
2 State say that the embassy made a mistake.
3 It's unfortunate. They broke the chain of
4 chancery use. They are therefore required to
5 come before and go through this proceeding.
6 That is unfortunate, but in my humble and most
7 respectful view, I think that the Board has to
8 focus not just on this one case, but on what
9 happens in precedential cases because it has
10 never occurred -- this is the first time in 25
11 years of the existence of the FM Board, the
12 Foreign Missions Board of Zoning Adjustment,
13 that the Board of Zoning Adjustment would
14 authorize, however you want to characterize
15 it, an expansion or a location, or a
16 relocation, doesn't matter really under the
17 regulations, of the chancery outside the
18 diplomatically-zoned areas. It's never
19 occurred before.

20 I'll be happy to take any
21 questions.

22 I do have one very slight

1 procedural technical note regarding the
2 composition of the Board, which is also
3 specified in the Act. And do I understand
4 that Mr. Arosia is the director?

5 You are the acting director of
6 NCPC? Okay. That's fine. That's something
7 I didn't know, because the Act very clearly
8 specifies that it has to be the director or
9 the acting director, or specific delegate in
10 the case of the Department of Interior.

11 That's all I have unless there are
12 questions. Thank you.

13 CHAIRPERSON MILLER: Thank you.
14 Just a couple points. I mean, I found that
15 language somewhat unusual and that's why I was
16 asking people to comment on that, "to be
17 determined." It doesn't say who determines.
18 You know it's very vague.

19 In any event, so we will look at
20 the Zoning orders that you've referenced.
21 We're familiar with the Zoning Regulations.

22 Am I correct that 509 and 509(a),

1 I would guess, don't reference 4306(a)(2)(B)
2 specifically?

3 MR. MLOTEK: Oh yes they do,
4 specifically.

5 CHAIRPERSON MILLER: Specifically?

6 MR. MLOTEK: Specifically. Yes.
7 This has been a debate that has gone on.
8 You're absolutely correct, Madam Chair. The
9 wording is not perfect and one could very well
10 argue either case. And in fact, I, in my role
11 in the Department of State for 25 years,
12 argued the other case. In other words, the
13 case that would favor the applicants here;
14 that is, that this Board should make the
15 decision.

16 But all I'm here to tell you is
17 that regardless of what I think, or what I
18 think now as opposed to what I thought before,
19 or what the applicants believe or what the
20 State Department believes, I am simply here to
21 try to inform you, to help you, to be a friend
22 of the Board, if you will, an amicus curiae,

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1 to inform you that regardless of what anyone
2 in this room thinks, there is no one else in
3 the District government in all the past 25
4 years who has believed that. The positions
5 have always been very clear. The District
6 government uniformly has adhered to the
7 position, and udner very strong -- if you read
8 the orders, you'll see that the ANCs weighed
9 in in a very big way. And of course the other
10 ANCs such as, you know, Sheraton-Kalorama or
11 Georgetown, they weren't here today. They
12 really weren't following this case; one can't
13 blame them. But back in the 1980s when those
14 cases -- 1990s, early 1990, when Zoning
15 Commission Order 509 and 509(a) were being
16 considered and adopted, they weighed in very
17 heavily; that's very clear from reading the
18 order, and the District government, in all of
19 its components, OP, Zoning Commission,
20 Attorney General's Office, all agreed the view
21 of the ANCs that that admittedly vague
22 terminology determined -- does't say

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1 determined by whom, that that meant determined
2 by the Zoning Commission, not by the Board of
3 Zoning Adjustment.

4 And that furthermore, secondarily
5 to that, regardless of who is determining it,
6 that area -- it says based on other uses in
7 the area. So in other words, you've got two
8 problems in this case really. Number one,
9 it's the question of who determines what the
10 area is. And the view of the District
11 government has been that's the job of the
12 Zoning Commission in promulgating the Act.
13 Then you have the second question of what does
14 "area" mean. So I mean even if, even if, you
15 know, one were correct in saying "determined"
16 is vague and it's therefore the FMBZA's job to
17 make the determination, you still would have
18 ot try to get around the word "area." And
19 there the Zoning order by your Zoning
20 Commission is explicitly clear and they go
21 through it very clearly in the order. They
22 note the different positions taht were taken.

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1 They note the position that the State
2 Department took. It was yours truly sitting
3 here. They note the position that the
4 National Capital Planning Commission took,
5 which were opposed. And they denied those
6 views and took the view that "area" meant
7 zoning square, or more appropriately it's a
8 tax -- squares are determined on the basis of
9 the tax system.

10 And so according to your own
11 precedents and your own regulations that are
12 binding upon you, you cannot go across the
13 street. You cannot go down the block. Now
14 there, as I said, and I emphasize again, there
15 has been a lot of activity in recent years in
16 trying to change that, because there are views
17 on both sides. I mean, there are even some
18 people who are -- I don't want to use the word
19 "anti-chancery," but feel there are, as the
20 people in Sheraton-Kalorama feel, that their
21 area is "over-saturated" with chanceries.
22 Even some of those people believe that area

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1 should not be square, just be allowed to be
2 square. Because what that allows is then a
3 spillover into the back yards. You know, I
4 mean, if you have a chancery fronting on Mass.
5 Avenue, Embassy Row, and you determine it on
6 the basis of a square, well then you could
7 start going down the side street.

8 So I concede that there are other
9 ways that one could define area, and in fact
10 there has been an enormous amount of
11 discussion going back over five years. There
12 was a foreign missions task force, as Mr.
13 Arosia very well knows and participated in,
14 which looked at this. And in fact, the
15 National Capital Planning Commission came out
16 expressly in its report saying that we should
17 abandon this view. But in order to do that it
18 would require -- everyone agrees would require
19 Zoning Commission action, and that has never
20 been done. So, for better or worse we are
21 stuck with "area" meaning "square." And
22 there's no way that in this particular case

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1 the square, if you look just to the non-
2 residential uses in this square, that it could
3 qualify.

4 CHAIRPERSON MILLER: Are you
5 familiar with the Republic of Hungary case?

6 MR. MLOTEK: Yes.

7 CHAIRPERSON MILLER: That seems to
8 have addressed the issue contrary to the way
9 you're suggesting.

10 MR. MLOTEK: I don't think if you
11 read the order that it did. Because in the
12 Republic of Hungary case, you had a lot of
13 other factors that are, you know, factual
14 circumstances which are not applied here.
15 First of all, the Republic of Hungary case was
16 clearly grandfathered. You know, their entire
17 property was in continual chancery use. Now
18 you could get into some very esoteric debates
19 about whether, you know, the garden, which had
20 nothing built upon it and was a separate lot,
21 was also part of the chancery. But clearly it
22 was. It was all fenced and it --

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1 CHAIRPERSON MILLER: I just think
2 to the point that it did involve an area that
3 was outside the areas that are governed by the
4 regulations and would fall into the same kind
5 of area. So I'm just saying I think there is
6 some precedent. But I think what we ought to
7 do is take a look at those Zoning orders, you
8 know, and see how that fits into the picture.

9 MR. MLOTEK: Right. And the
10 Hungary case, too. And read the order very
11 clearly, as I have. Because, you know, it was
12 also a planned unit development, if you
13 recall. It was established -- the Embassy of
14 Hungary was established as a planned unit
15 development originally in the 1970s, which
16 made a very, very big difference in that
17 entire area. So one could argue in the case
18 of Hungary, just as in the case of Azerbaijan,
19 that the failure to include that little yard
20 which was directly adjacent, it was abutting,
21 and had never been used for anything other
22 than the Embassy of Hungary, chancery of

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1 Hungary's purposes, that that also may have
2 been an oversight. I mean, the mapping
3 process was not absolutely 100 percent perfect
4 and we know here and there they included
5 things they shouldn't have included and they
6 omitted things that they shouldn't have
7 omitted.

8 But the Embassy of Hungary case, I
9 would very respectfully beg to differ with
10 you, I do not think that that's a precedent
11 you can hang your hat on. Because number one,
12 the use was absolutely continuous, without
13 interruption and it was part of a planned unit
14 development which was a Zoning Commission
15 action, obviously. And it predated the
16 Foreign Missions Act. And it clearly approved
17 the entirety. I mean, basically the only
18 technical defect in the Hungarian case, if you
19 want to look at it that way, was that they
20 failed to do a single lot of record. They
21 maybe should have. But those were in the
22 days, remember, where embassies didn't even

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1 get building permits. So there was no use,
2 there was no need. I mean, if it were today,
3 they would have gone down to apply for a
4 building permit and they would have said well,
5 we can't give you a building permit because we
6 need a single lot of record. And they didn't
7 have a single lot of record. But again, this
8 was in the '70s. There was no Foreign
9 Missions Board of Zoning Adjustment, there was
10 no Foreign Missions Act. And in fact, the
11 existing Board of Zoning Adjustment was not
12 even hearing chancery cases in the '70s
13 because of restrictive legislation. You
14 couldn't get an approval at that point and
15 that's one of the reasons the Foreign Missions
16 Act came through.

17 So throughout the '70s every
18 chancery that was built in the '70s, and there
19 weren't that many, because it was a very
20 restrictive environment, every chancery that
21 was built in the '70s was done as a planned
22 unit development. You had Hungary, you had

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1 the Czech embassy, Czechoslovakian embassy at
2 that time across the street and there were
3 three other embassies which were approved but
4 never built.

5 CHAIRPERSON MILLER: Okay.

6 MR. MLOTEK: Indonesia, Poland and
7 one other.

8 CHAIRPERSON MILLER: Well, thank
9 you very, very much.

10 MR. MLOTEK: You're very welcome.

11 CHAIRPERSON MILLER: Any other
12 questions? Yes, Mr. Loud?

13 VICE-CHAIRPERSON LOUD: Couple of
14 quick questions.

15 In this case, Mr. Mlotek, the 5911
16 property --

17 MR. MLOTEK: Right.

18 VICE-CHAIRPERSON LOUD: -- that's
19 in that square, correct?

20 MR. MLOTEK: Correct.

21 VICE-CHAIRPERSON LOUD: Would that
22 be considered an office or institutional use?

1 MR. MLOTEK: 5911 is the current
2 chancery. Yes, that would be included. Yes.

3 VICE-CHAIRPERSON LOUD: Okay.

4 MR. MLOTEK: That would count.

5 VICE-CHAIRPERSON LOUD: Now what
6 about 5909?

7 MR. MLOTEK: Well, it wouldn't,
8 because it wasn't -- you've heard my colleague
9 from the State Department say that we removed
10 it from the tax exemption. It did not even
11 have diplomatic status. And in fact, if they
12 were using it for any -- I mean, you've asked
13 several times, you know, trying to find if
14 there was some hook that you could hang your
15 hat on, well, did you store stuff there? Were
16 you using it as any kind of ancillary or annex
17 use? But if they were, it would have been
18 unauthorized. Because the property was not
19 authorized to be used for any, for any
20 chancery use.

21 So you could not, Mr. Loud, in
22 response to your question, you could not count

1 5909 as part of it. And as far as I know, in
2 that square, and I've walked around it several
3 times, in that particular square there's only
4 one non-institutional -- I'm sorry, one non-
5 residential use, and that is the chancery of
6 Uganda.

7 VICE-CHAIRPERSON LOUD: 5911.
8 Okay. And just so I kind of understand how
9 the regulations would flow, in this case the
10 foreign mission would have gone, based on your
11 interpretation and 509, they would have gone
12 to the Zoning Commission which would have made
13 the determination as regards to the uses in
14 the square?

15 MR. MLOTEK: They could have made
16 a petition to remap. But just to make it
17 clear, the Zoning Commission could not have
18 given them the permission -- the permission to
19 use a property as a chancery can come only
20 from this body. That's been established by
21 courts.

22 VICE-CHAIRPERSON LOUD: From the

1 BZA. All right. So that's also in section
2 4306?

3 MR. MLOTEK: Right. But they
4 could have gone to the Zoning Commission and
5 say could you remap this area as being inside
6 the Diplomatic Overlay, as it's called, the D
7 Overlay. They could do that.

8 VICE-CHAIRPERSON LOUD: Okay. But
9 before we get to that, I'm just sort of trying
10 to get a better understanding and taking
11 advantage of your expertise while you're on
12 the witness stand to further my understanding,
13 the sole purpose of their having gone to the
14 Zoning Commission would have been for the
15 Zoning Commission to take a look at the square
16 and to tell them whether or not there were
17 office or institutional uses on that square.

18 MR. MLOTEK: Yes, or I presume
19 that the Zoning Commission would also have
20 more plenary power to just say, well, even
21 though there aren't, we deem it sufficient.
22 I mean, the Zoning Commission basically has a

1 lot more leeway since they are the ones who
2 adopt the regulations and promulgate the map,
3 they could -- I mean, it would be a more
4 complicated process.

5 VICE-CHAIRPERSON LOUD: So they
6 could --

7 MR. MLOTEK: They would have to
8 amend --

9 VICE-CHAIRPERSON LOUD: -- play
10 iwth the one-third, two-third ratio a little
11 bit?

12 MR. MLOTEK: Sure. They could
13 play with it. They could throw it out
14 altogether. And, you know, I mean if NCPC's
15 recommendation is accepted and everyone, all
16 the parties go along with it; that is, the
17 District through Office of Planning, the State
18 Department, my former agency -- if everyone
19 goes along with it, the idea would be we
20 weould go together jointly, consensually to
21 the Zoning Commission and ask them to revise,
22 rescind, whatever Zoning Order 509 and 509(a)

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1 and adopt a new test. The trouble is it has
2 been taking so many years because nobody can
3 figure out the methodology. I think that is
4 the term we've used, Mr. Arosia's staff has
5 used for this, the methodology of how you
6 determine what should or shouldn't be in the
7 -- and I must say that Mr. Arosia's staff has
8 done just incredibly detailed and wonderful
9 work in analyzing this. They've published all
10 sorts of reports. They've done historic
11 analyses going back to the '70s and '60s as to
12 how this one-third/two-thirds test arose.

13 VICE-CHAIRPERSON LOUD: Let me
14 just take you back though for a minute to help
15 me again understand what the process would
16 entail. I have not read 509, so I'm not
17 convicted one way or the other. But they
18 would go to the Zoning Commission. The Zoning
19 Commission would give them a take on the
20 square, the particular square and the office
21 or institutional uses on the square. Then
22 they'd come back to BZA.

1 MR. MLOTEK: Right.

2 VICE-CHAIRPERSON LOUD: Right?

3 Under subsection 11.

4 MR. MLOTEK: Right.

5 VICE-CHAIRPERSON LOUD: Then BZA
6 would go through the six-point analysis that's
7 in section (d).

8 MR. MLOTEK: Correct.

9 VICE-CHAIRPERSON LOUD: So the
10 Zoning Commission could not approve it.

11 MR. MLOTEK: That's correct.

12 VICE-CHAIRPERSON LOUD: That's the
13 Zoning Commission. It would still have to
14 come back here?

15 MR. MLOTEK: Absolutely correct.
16 Which is why no one has done it. I mean,
17 again I want to be clear. The reason this
18 case is so absolutely historically important
19 is that you've never had one before. And the
20 reason, there's a reason you've never had one
21 before, Mr. Loud, and that is that because it
22 is so complex and challenging, you know, once

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1 attorneys have sat down with the embassy and
2 explained to them what they would have to go
3 through, they back off. Or in some cases, the
4 State Department has just disapproved and said,
5 you know, that the State Department doesn't
6 want to go through with all this.

7 VICE-CHAIRPERSON LOUD: In 509 was
8 there some articulation of why the Zoning
9 Commission was thought to have much more
10 expertise just in reviewing the square and
11 determining office and institutional uses on the
12 square?

13 MR. MLOTEK: I believe there was
14 and I cannot swear that it's recorded in the
15 order or if was in the transcript of the
16 hearing, the meeting. But as I recall, one of
17 the major arguments, which at that time NCPC
18 subscribed to because it should be recalled the
19 whole idea of squares be the area and the idea
20 of having a one-third/two-third tests be the
21 determinator came originally from NCPC, from
22 the professional planner who said, look, there

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1 has to be some degree of guidance for the
2 BZA. There has to be some sort of
3 predictability. In other words, when
4 embassies are going out to look for a
5 chancery, there ought to be some areas of the
6 city that they should know they have a very
7 good chance of locating in and there should be
8 other areas of the city where they know better
9 not try to go there because it would be
10 impossible, extremely expensive legal fees,
11 etcetera and so forth. And that was one of
12 the primary rationales why it was felt there
13 had to be a map. And of course, as you know,
14 traditionally in this kind of a zoning system
15 that we have in D.C., a BZA and a ZC, it's the
16 Zoning Commission that promulgates the maps;
17 BZA doesn't do mapping. And so that's why to
18 the best of my knowledge and recollection,
19 that is how that came about, Mr. Loud.

20 VICE-CHAIRPERSON LOUD: But if it
21 met the one-third/two-thirds ratio, it would
22 already be in the map, right?

1 MR. MLOTEK: Oh, sure. Oh, I
2 would say if this square already met the one-
3 third/two-thirds test, then I think the Board
4 would be authorized to do what it did in the
5 Azerbaijan case, which was to say, you know,
6 it really should have been in the mpa; it's
7 only a technical error. In other words, you
8 wouldn't be directly taking; I don't want to
9 use the usurp, but you wouldn't be directly
10 treading upon the jurisdiction of the Zoning
11 Commission. You would simply be saying, well,
12 you know, they made a mistake and why make
13 everyone, including the Zoning Commission,
14 have to go through a whole, you know, public
15 notice and all this stuff just to correct a
16 mistake? It clearly should have been in. And
17 that's how the Azerbaijan case was
18 established.

19 The problem in this case, however,
20 is I very strongly do not think based on
21 having gone to the site many times that this
22 site could meet that definition, because that

1 square is jsut solidly residential aside from
2 this one chancery building, 5911.

3 VICE-CHAIRPERSON LOUD: Thank you,
4 Mr. Mlotek.

5 Madam Chair, as I was asking
6 questions I heard -- I'm sorry, I saw Mr.
7 Massey indicate that he wanted to weigh in on
8 the discussion regarding some of the legal
9 analysis. Yyes? No? I would benefit
10 greatly --

11 MEMBER OATES WALKER: Well, before
12 we do that, Madam Chair, I have one question
13 for Mr. Mlotek before we move on.

14 VICE-CHAIRPERSON LOUD: Okay.
15 Okay.

16 MEMBER OATES WALKER: I am just
17 curious as to your opinion of whether the
18 building at 5909 could be considered an annex
19 to the chancery at 5911.

20 MR. MLOTEK: Right. Well, Ms.
21 Walker, I heard your discussion before about
22 annex and I would just point out that as Ms.

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1 Miller pointed out in referencing the
2 definitions in the Foreign Missions Act and as
3 the State Department has -- I mean, I can't
4 speak for the State Department anymore; let me
5 make it clear, but as I recall having worked
6 there for 30 years, there is no distinction
7 really. So from a legal point of view,
8 whether somethign is an annex, under
9 international law and annex, chancery, they're
10 all the same. There's no difference. You
11 know, and sometmes people say where the
12 ambassador sits is the chancery, but there are
13 even exceptions to that. I mean, there have
14 been some exceptions where the ambassador sat
15 in a very, very small building which was
16 clearly not the main chancery and eveyrone
17 else sat.

18 So, the fact that it was an annex
19 or it may have been an annex, or it's going to
20 be an annex today really, in my opinion, is
21 not a material consideration for your analysis
22 here, because it really doesn't matter.

1 Chancery is a chancery. Regardless of whether
2 it's a chancery annex, principal chancery, law
3 makes no distinction. Even the Zoning
4 Regulations make no distinction, the federal
5 law makes no distinction and international law
6 makes no distinction. But there is a
7 distinction between the chancery and a
8 residence, even if there are diplomats living
9 in the residence.

10 MEMBER OATES WALKER: But we have
11 the location of a chancery at 5911. So, if it
12 makes no difference, a chancery is a chancery,
13 we wouldn't be locating or relocating a
14 chancery at 5909. It would be an expansion of
15 chancery at 5911.

16 MR. MLOTEK: That may be, but I
17 don't think it changes. With respect, I think
18 it's a difference that makes no distinction,
19 or a distinction that makes no difference,
20 whichever the way it goes. Because the regs
21 themselves refer to expansion as well. In
22 other words, you cannot expand an existing

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1 chancery outside the diplomatic map and you
2 cannot locate it. It's both. So that's not
3 a way out. Because replacement, expansion and
4 location are the three terms that are used and
5 they're all under the D.C. regs and the
6 interpretations that the District government
7 has made of the Foreign Missions Act, they're
8 all the same. If you're outside the
9 diplomatic area, the diplomatic-mapped area,
10 you can't do it.

11 MEMBER OATES WALKER: Thank you.

12 CHAIRPERSON MILLER: Thank you
13 very much.

14 MR. MASSEY: Members of the Board,
15 I was not aware that my former colleague would
16 be testifying here today. It was very
17 interesting. I just want to make a couple
18 points.

19 One is, I think we also have to
20 focus on the situation of Uganda and the fact
21 this is a unique situation. I don't think
22 this idea that if you vote in favor of them

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1 today that you're creating a terrible
2 precedent is the case, because I don't think
3 you will have a situation where a country has
4 owned a property since 1960s used as a
5 chancery for 30 years and then did break the
6 use, and then wants to come back again and use
7 the same property as a chancery once again.
8 There's never been a case that I'm aware of.
9 I can't imagine there will be very many cases
10 you'll ever have. And so this idea that if
11 you approve this today that you will be -- all
12 the legal issues that Mr. Mlotek brought up
13 will be -- you'll be setting a terrible
14 policy, I don't think necessarily are. It's
15 a very unique and unusual situation.

16 And I do think we should be
17 crediting the government of Uganda for coming
18 here, as they did to us when they did a use.
19 I think they could have easily probably
20 started using it again and nobody would have
21 even noticed very much. But they have
22 cooperated, they have hired the attorneys.

1 They came to the Department of State both
2 times, in '94 and in 2007, to get permission
3 on both of these situations. And also there's
4 a very strong federal interest in supporting
5 them because of what they've done for us. So
6 I don't want the Board to be totally
7 immobilized by technical or legal concerns,
8 and I don't think that it would be harmed in
9 any major way in this particular because it's
10 so unique, the circumstances are so unique.
11 That's all I wanted to add. Thank you.

12 CHAIRPERSON MILLER: Do you have
13 an opinion on the Zoning Commission orders,
14 509?

15 MR. MASSEY: You know, Ron
16 definitely is the world's expert on those
17 particular orders, so I'm not going to
18 challenge him right here. But if I'd known
19 this was going to be coming up, why we
20 certainly would have reserched it in our
21 legal department, but I can't comment today.

22 CHAIRPERSON MILLER: Okay. Thank

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1 you very much.

2 MR. MASSEY: Yes.

3 CHAIRPERSON MILLER: Are there
4 other questions?

5 How about the Office of Planning?
6 Do you have a comment on the Zoning Commission
7 orders that are being referenced?

8 MS. THOMAS: Like Mr. Mlotek, I
9 don't have those orders in front of me,
10 especially 509, is it? I'm not aware of it
11 right this time.

12 CHAIRPERSON MILLER: Okay. We
13 don't have them in front of us, either.

14 Okay.

15 MR. GELL: Madam Chair?

16 CHAIRPERSON MILLER: Yes, I think
17 it's your turn.

18 MR. GELL: Well like Mr. Massey, I
19 was very surprised at a couple of things this
20 morning. One was that Ron, whom I've known
21 for many, many years, actually retired from
22 the State Department, although I think at one

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1 of our chats he talked about the possibility
2 that he might be retiring at some point. I'm
3 not sure what date that was effective.

4 I do know that at every step of
5 the way I discussed fully with Mr. Mlotek the
6 way we were approaching the case, sent him
7 copies of all of the submissions that we made,
8 asked for his input, fully expected his input,
9 in fact; perhaps I should not have, but I did,
10 and only to come here this morning and hear a
11 whole lot of things that I had never heard
12 before.

13 Quite apart from the personal
14 problem that that presents to me, and
15 obviously I can't comment on a lot of the
16 legal issues that he raises and would welcome
17 the opportunity to research them, it seems to
18 me that if he's right, then he could have
19 persuaded the State Department that that was
20 the view they should take, and he didn't. As
21 far as I know he made no effort to do so. And
22 so I have to assume that the State Department

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1 doesn't agree with his interpretations. He
2 certainly has the closest association with
3 many of the activities that led to the
4 regulations that the Zoning Commission
5 adopted. But I'm not sure that necessarily
6 means that he speaks for everyone who
7 participated in those regulations.

8 I would also say that the Board's
9 role is not just to implement the Zoning
10 Regulations. The Board is charged with trying
11 to take care of those circumstances in which
12 the regulations that are adopted for broad
13 areas of the city and have to be adopted for
14 broad areas of the city, that they are applied
15 in a way that takes care of those
16 circumstances where the equities are such and
17 the impact on the neighborhoods are such that
18 it makes sense and it's appropriate for the
19 Board to do grant some relief. I too was not
20 absolutely sure about the interpretations of
21 some of these things and therefore tried to
22 point out that in fact if the Board was

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1 inclined to do so, it could grant a variance
2 or a special exception; I think a couple of
3 things would be variances and a couple would
4 be special exceptions, in order to permit the
5 embassy to do that, even if some of the other
6 language in the regulations were against them.

7 I mean, what is a variance? I
8 mean, if you look at the Zoning Code, there
9 are three kinds of actions. There are those
10 that are specifically permitted by regulation,
11 there are those that are permitted only with
12 permission, and those are special exceptions,
13 and everything else is a variance. Everything
14 else. I mean, anything that's not
15 specifically permitted can be brought in as a
16 variance. And then there are tests to
17 determine whether it meets the test of equity
18 such that it ought to be granted. And these
19 are very tough tests; I'm not downplaying
20 them, but in act the Board does have some
21 leeway.

22 Without researching it in the

1 context of this case, my general understanding
2 is that the Zoning Commission cannot do spot
3 zoning, can't just plunk out one lot from an
4 entire city and say from now on we're going to
5 interpret a general law differently for this
6 lot than for others. And it has to make some
7 sense in the context of the overall planning.
8 But under no conditions could the Zoning
9 Commission have anticipated when it adopted
10 that broad rule a circumstance where, as Mr.
11 Massey just summed up, 30 years it was used as
12 an embassy, for some years, 14 years, it has
13 not been used as an embassy, but it has only
14 very briefly been used for residential
15 purposes and had been operated by the embassy,
16 owned by the embassy and used for staff of the
17 embassy and now wants to resume it under those
18 circumstances, very special, couldn't have
19 been anticipated. The BZA was constituted to
20 deal with those kinds of facts and I think
21 that they're not prevented from doing so in
22 this case as well.

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1 It would not be setting a
2 precedent. I doubt anybody else would ever be
3 able to come in with the same set of facts, or
4 anything even close.

5 I'm not going to go into the
6 regulations. I don't think at this point I
7 should do so, without looking at them much
8 more carefully and reviewing the testimony.
9 But I would strongly urge the Board to
10 consider fulfilling its usual function, which
11 is to straighten out the crooked lines that
12 were left by the broad reach of Zoning
13 Regulations and to grant the embassy what it
14 seeks. And granted also that the State
15 Department has some very strong interests in
16 this and obviously has taken a different view;
17 I hope they will continue to do so after
18 they've reviewed it, has taken a different
19 view. Thank you very much.

20 CHAIRPERSON MILLER: Thank you.
21 Okay. I think what I'd like to recommend that
22 htis Board do is put this case for decision

1 making and so that we have a chance to take a
2 look at the Zoning Commission order or two,
3 509 and 509(a), and perhaps give the parties
4 an opportunity to -- oh, there no parties?
5 Give the participants an opportunity to brief
6 that at all as to what impact that should have
7 on the decision in this case.

8 So seems to me that our next
9 decision meeting would be too soon for that to
10 happen, so perhaps we should put this off to
11 our July decision meeting, our last decision
12 meeting. I don't have the calendar in front
13 of me.

14 MR. MOY: That would be July 29th,
15 Madam Chair.

16 CHAIRPERSON MILLER: Okay. Thank
17 you.

18 MR. AROSIA: Madam Chair?

19 CHAIRPERSON MILLER: Yes.

20 MR. AROSIA: May I ask, if this is
21 possible, if we could get as part of the
22 supplemental information that we receive that

1 the Office of Planning and the applicant
2 submit their analysis of the one-third/two-
3 thirds square test just so we have those as
4 facts to consider as we're reviewing this
5 matter?

6 CHAIRPERSON MILLER: To help us
7 evaluate the Zoning Commission order in that
8 context?

9 MR. AROSIA: Yes, the issue of
10 area.

11 CHAIRPERSON MILLER: Okay.

12 MR. AROSIA: And the impacts of
13 that.

14 CHAIRPERSON MILLER: Anything else
15 that Board Members would like in this case?

16 Mr. Gell, looks like July 29th is
17 our last decision meeting before the summer.
18 So we could put this on the agenda for then
19 and that seems to be several weeks to address
20 the Zoning Commission orders. Do you have a
21 comment on this before we set a schedule?

22 MR. GELL: It is. I'm not quite

1 sure how long it's going to take and I'd like
2 to see also what the State Department comes up
3 with and be in touch with Mr. Massey on that.
4 In addition, which I have another decision on
5 that same date which we're working toward as
6 well.

7 CHAIRPERSON MILLER: I mean, we
8 can make it after the summer. It's your case.

9 MR. GELL: I should ask the --

10 CHAIRPERSON MILLER: The Board
11 hasn't seen this order either and this just
12 seems to be a question mark that's
13 outstanding. And we just wanted to give you
14 the opportunity to address it, if you'd like.

15 MR. GELL: All right. We'll stick
16 with the 29th of July.

17 CHAIRPERSON MILLER: I mean, I
18 guess what we anticipate is a filing by
19 certainly the Office of Planning on this
20 question and the applicant. I don't know if
21 the State Department -- I believe Mr. Massey's
22 saying no, they may not do it. So, it's not

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1 a command performance. So it looks like it's
2 just you and the Office of Planning at this
3 point. We've heard from Mr. Mlotek; he put on
4 the table.

5 Are simultaneous filings okay with
6 you, or do you want to see Office of Planning
7 first for some reason? They weren't pushing
8 this issue either. We just would like to hear
9 from you all if you have something to say on
10 it.

11 MR. GELL: I'd like to and I
12 obviously would have to look at the
13 transcripts and it'll take a few days to get
14 those. And I don't know if the Attorney
15 General's Office is going to weigh in on this
16 as well; I would assume so. And they would
17 probably need our submissions.

18 CHAIRPERSON MILLER: Well, I was
19 going to say, I think that we would like
20 probably more than the normal just Thursday
21 before to look at this, because it sounds like
22 this may be precedential or whatever. So I

1 guess if we could have it, you know, a week
2 earlier than we normally get it, perhaps? Is
3 three weeks sufficient for you, or do you need
4 more than that?

5 MR. GELL: Well, I do have some
6 other obligations out of town during that
7 time.

8 CHAIRPERSON MILLER: Yes. Okay.
9 Four weeks?

10 MR. GELL: And I'm going to be
11 pressed. I'll do my best.

12 CHAIRPERSON MILLER: All right.
13 So is simultaneous filings all right, though?
14 I mean, there's nothing to prevent you from
15 talking with the Office of Planning as well.

16 So looking at the calendar, to
17 give us enough time to give this fair
18 consideration, let's see, and to give you
19 enough time though with your other
20 commitments. July 22nd would be a week ahead.
21 Can we go back a little bit more to the
22 previous Thursday, or is that cutting it too

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1 close for you?

2 MR. GELL: What is -- July 17th?

3 CHAIRPERSON MILLER: What would
4 that Thursday be?

5 MR. MOY: 17th of July, I believe.

6 MR. GELL: Yes, why don't we do it
7 then?

8 MEMBER DETTMAN: Okay. And I
9 think it's a fairly concise issue, just you
10 know, look at the orders and see to what
11 extent you think they're controlling on this
12 proceeding. And if so, how.

13 Okay. Anythign else?

14 All right. Ms. Bailey, do you
15 want to read those dates, please?

16 MS. BAILEY: Madam Chair, prior to
17 reading the date, I wasn't clear of the date
18 of the Office of Planning, when you wanted the
19 Office of Planning to file their submission.
20 I understand the July 17th date was for the
21 applicant's assessment, but what was the date
22 for the Office of Planning?

1 CHAIRPERSON MILLER: Well, I think
2 we were going to have simultaneous filings,
3 unless that's a problem.

4 MS. BAILEY: Okay.

5 CHAIRPERSON MILLER: And I don't
6 hear that it is, so let's do that.

7 MS. BAILEY: The applicant and the
8 Office of Planning submissions are due on July
9 17th. And then the Board will consider the
10 application at its July 29th public meeting
11 for a decision.

12 CHAIRPERSON MILLER: Okay. Thank
13 you very much.

14 MR. GELL: Thank you.

15 CHAIRPERSON MILLER: Okay. I'm
16 going to be adjourning this hearing and the
17 Board is going to take a quick break until
18 about 12:15 and then come back and I'll call
19 the regular hearing of the Board of Zoning
20 Adjustment.

21 So this hearing is adjourned.

22 (Whereupon, the hearing was

1 concluded at 11:56 p.m.)