

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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FOREIGN MISSIONS  
BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY, JULY 29, 2008

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The Public Meeting convened in Room 220 South, 441 4<sup>th</sup> 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 D. LOUD, Vice Chairman  
MARY OATES WALKER, Board Member

ZONING COMMISSION MEMBER PRESENT:

PETER MAY, Commissioner  
(NPS)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
BEVERLEY BAILEY, Sr. Zoning Specialist

NATIONAL CAPITAL PLANNING COMMISSION:

MARCEL A. ACOSTA

This transcript constitutes the minutes from the Public Meeting held on July 29, 2008.

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

2 9:45 a.m.

3 CHAIRPERSON MILLER: Good morning,  
4 ladies and gentlemen. This meeting will,  
5 please, come to order. This is the July 29,  
6 2008 meeting and we're going to be starting  
7 off with the Board as constituted as the  
8 Foreign Missions Board of Zoning Adjustment.

9 And with us on that is to my --  
10 well, I'm Ruthanne Miller, I'm the Chair. And  
11 here to my right is Mr. Marc Loud, he is our  
12 Vice Chair. And next to him is Peter May from  
13 the National Park Service. To my left is Mary  
14 Walker and then Marcel Acosta from NCPC.

15 Copies of today's meeting agenda  
16 are available to you and are located to my  
17 left in the wall bin near the door. We do not  
18 take any public testimony at our meetings  
19 unless the Board asks someone to come forward.

20 Please, be advised that this  
21 proceeding is being recorded by a Court  
22 Reporter and is also webcast live.

1 Accordingly, we must ask you to refrain from  
2 any disruptive noises or actions in the  
3 hearing room. Please, turn off all beepers  
4 and cell phones.

5 Does the staff have any  
6 preliminary matters?

7 MR. MOY: No, Ma'am, we can take  
8 that on a case-by-case basis.

9 CHAIRPERSON MILLER: Yes, okay.  
10 So why don't we start off with the one meeting  
11 on our agenda for the FMBZA.

12 MR. MOY: Yes, good morning, Madam  
13 Chair and Members of the Board. That  
14 application is Chancery Application No. 17787  
15 of The Republic of Uganda, pursuant to 11 DCMR  
16 201.1 and 1000.1, to allow the establishment  
17 of a chancery, offices of a foreign mission,  
18 in the SSH/R-1-B District. This is at  
19 premises 5909 16<sup>th</sup> Street N.W., which is in  
20 Square 2724, Lot 4.

21 As the Board will recall on June  
22 24, 2008, the Board completed public

1 testimony, closed the record and scheduled its  
2 decision on July 29<sup>th</sup>. The Board requested  
3 additional information to supplement the  
4 record from both the applicant and the DC  
5 Office of Planning.

6 The applicant made its filing and  
7 that filing is identified as Exhibit 35 in  
8 your folders. The office is also in receipt  
9 of a filing from the Office of Planning and  
10 that is identified as Exhibit 36 in your  
11 folders.

12 Finally, there is a filing also  
13 from the applicant. I should say in the  
14 earlier filing, as I mentioned, Exhibit 35  
15 that's a filing from the State Department.  
16 And finally the last filing is from the  
17 applicant and is identified as Exhibit 37.

18 The Board is to act on the merits  
19 of the application. Staff's, I guess, final  
20 note is that the -- in the State Department's  
21 filing, that was not one of the requests from  
22 the Board, but I'll leave that at the Board's

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1 discretion. And that completes the staff's  
2 briefing, Madam Chair.

3 CHAIRPERSON MILLER: Thank you,  
4 Mr. Moy. Yes, I think that the State  
5 Department raised in its pleading whether or  
6 not we could waive the rules to allow  
7 acceptance of their pleading, because it was  
8 not one of the documents that we left the  
9 record open for. And I believe the only  
10 reason we didn't specifically leave the record  
11 open for this was because, at the hearing,  
12 they didn't indicate that they wanted to file  
13 something.

14 So I would suggest that we  
15 certainly waive the rules and accept this into  
16 the record, that we certainly want to hear  
17 from the State Department on this issue. Do  
18 others have any objection? Okay. So that's  
19 in then.

20 I think what I would like to do is  
21 just recap a little bit what happened at the  
22 hearing and then where we are just to bring us

1 up to this point.

2 We have here property that was  
3 used as a chancery by Uganda in 1963 and in  
4 conjunction with another property at 5911 16<sup>th</sup>  
5 Street and in 1994 operations were  
6 consolidated into 5911, pending renovation of  
7 5909. And then what happened was 5909 stopped  
8 being used for a chancery and for a period of  
9 time has been either vacant or used by staff  
10 or others as a temporary residence.

11 They would like to use this  
12 building to provide additional office space  
13 for their current employees, not to do any  
14 additional increase in the staff or anything.  
15 And these properties have always been under  
16 Ugandan ownership.

17 We looked at the question as to  
18 whether or not this chancery even needed to  
19 come before the Board or whether it could be  
20 grandfathered as it had been in existence  
21 previously as a chancery and it was still  
22 under the same ownership, etcetera.

1                   But at the hearing, I think it was  
2 pretty convincing that, particularly testimony  
3 from the State Department, the chancery use  
4 lapsed when the building was changed from  
5 chancery use to residential use. They even  
6 wrote the city a letter stating that the  
7 property was no longer a chancery use.

8                   So I think it's the consensus of  
9 this Board then that we would consider this  
10 under the Foreign Missions Act, section 4306,  
11 as a new application.

12                   And when we looked at 4306, it was  
13 at that point that Mr. Mlotek who used to work  
14 as an attorney for the State Department argued  
15 that this chancery application did not meet  
16 the 4306(b)(2)(b) provision, which had to be  
17 met as a threshold issue before we get into  
18 the criteria for analyzing location of a  
19 chancery.

20                   And 4306(b)(2)(b) was the issue.  
21 As a regulation, I want to read that, that is  
22 at issue. It says "A chancery shall also be

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1 permitted to locate in any other area  
2 determined on the basis of existing uses,  
3 which includes office or institutional uses,  
4 including, but not limited to, any area zoned  
5 mixed-use, diplomatic or special purpose  
6 subject to disapproval by the District of  
7 Columbia Board of Zoning Adjustment in  
8 accordance with this section."

9 Mr. Mlotek has argued that  
10 determined on the basis of existing uses  
11 refers to two Zoning Commission orders,  
12 section 509 and 509(a), and that the Board is  
13 bound by those orders and it is not up to the  
14 Board to determine on the basis of existing  
15 uses the location of chanceries.

16 So we, at that point, entertained  
17 some testimony on that question and then said  
18 that we were going to go take a look at these  
19 orders and assess whether or not we thought we  
20 were bound by those orders.

21 Just to fill in the record a  
22 little bit more about what these orders say,

1 according to 509, there is a methodology that  
2 is applied in determining location. It states  
3 "The mixed-use ratio applied to city squares  
4 Zoned R-1-A through R-5-B to identify squares  
5 that equalled or exceeded the ratio, talking  
6 about a 1/3, 2/3 methodology, and certain  
7 squares that met these tests were determined  
8 to be consistent with the provisions of  
9 section 206(b)(2)(b) of the Act and included  
10 as chancery areas subject to disapproval by  
11 the Board of Zoning Adjustment."

12 And Mr. Mlotek has argued that we  
13 are bound by this 1/3, 2/3s test and not that  
14 we can take a look and determine dates on  
15 existing uses, the appropriateness of the  
16 location of the chancery. So -- and Mr.  
17 Mlotek seemed to also strongly indicate that  
18 his position was supported by precedent.

19 So this Board did take a look at  
20 precedent and we certainly consulted with  
21 Office of the Attorney General and here is  
22 some of what we found out. These orders have

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1 not been codified and, therefore, they are not  
2 regulations. There is a difference between  
3 just an order and a regulation.

4 And section 4306(c), I think, of  
5 the Foreign Missions Act refers to regulations  
6 that the Board is, you know, bound by  
7 regulation issued to carry out this section.  
8 And this is not a regulation.

9 So then we also looked at cases  
10 that dealt with this question. BZA  
11 Application No. 14820 of Defense Procurement  
12 Division on behalf of the coordinating Council  
13 for North American Affairs, decided September  
14 7, 1988; BZA Application 16620 of Embassy of  
15 the Republic of Azerbaijan, decided 2000; and  
16 17481 of The Republic of Hungary, decided as  
17 recently as May 2006.

18 And I think that those orders are  
19 actually contrary to the position of Mr.  
20 Mlotek in this case and, in fact, I believe it  
21 was the Azerbaijan case Mr. Mlotek actually  
22 argued the opposite of what he is arguing now.

1 He stated in Azerbaijan that under the Act Mr.  
2 Mlotek concluded the authority to determine  
3 whether existing uses in an area make that  
4 area appropriate or inappropriate for chancery  
5 location rests solely with this Board to be  
6 exercised on a case-by-case basis.

7 Such authority could not, he  
8 contended, be exercised by the Zoning  
9 Commission or any other body through  
10 promulgation of a map or otherwise. That is  
11 from the Board's order in Azerbaijan.

12 There was, let's see what else,  
13 Taiwan case which was the first case I  
14 mentioned was also in accordance with that.  
15 And I don't think we have to go through all of  
16 this. But even in Hungary, the Board did not  
17 even look to the 1/3, 2/3 test. They just  
18 looked at the existing uses.

19 So anyway, I think that the first  
20 question we need to determine is whether or  
21 not we are bound by 509 and 509(a) or whether  
22 this Board has authority to determine location

1 under that first test, under 4306(b)(2)(b) on  
2 the basis of existing uses.

3 And I would suggest that all the  
4 precedent supports the Board's determining  
5 that this Board may make that determination on  
6 the basis of existing uses.

7 Do others have a different  
8 opinion? Okay. So then I think what we do is  
9 then first we need to make some findings to  
10 make the determination on the basis of  
11 existing uses, including office or  
12 institutional uses that the location is  
13 appropriate.

14 So I think there is evidence in  
15 the record which supports our making this  
16 finding. To start with, number one, the  
17 historical use of the property. This property  
18 has been under Uganda ownership and has been  
19 used as an embassy -- not embassy, chancery  
20 until 1994. It was only not used by Uganda or  
21 only used for residential purposes for a very  
22 short time. I think it was only close to

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1 almost six months during this whole period.

2 You know, we're looking at what is  
3 around the chancery. I think we also look at  
4 the other building right there that is already  
5 being used as a chancery as part of the  
6 location. And then we can look at other  
7 institutions in the square.

8 In Exhibit No. 37, the applicant  
9 has identified in No. 6 the many institutions  
10 that are in the subject square, including  
11 sophism reorienting and city gate and others  
12 there. Then he lists up through J, Embassy of  
13 Liberia. I would just adopt all of those as  
14 reflecting institutional uses in the square.

15 Do others want to add other  
16 considerations of institutions or else in the  
17 area? I think the fact that, you know, this  
18 area of 16<sup>th</sup> Street does have a lot of  
19 institutions makes it an appropriate location.  
20 Are you all ready to make that initial  
21 determination then?

22 Okay. That's a consensus. Okay.

1 And then we can, I think, jump into even more  
2 of the meat of this analysis, which is the  
3 criteria that this Board is required to use to  
4 determine the location of chancery and that's  
5 set forth at 4306(d) of the Foreign Missions  
6 Act.

7 It says "Criteria for  
8 determination: Any determination concerning  
9 the location of a chancery and the (b)(2) of  
10 this section or concerning an appeal of an  
11 administrative decision with respect to a  
12 chancery, based in whole or in part upon any  
13 Zoning Regulation or Map, shall be based  
14 solely on the following criteria."

15 And the first is "the  
16 international obligation of the United States  
17 to facilitate the provision of adequate and  
18 secure facilities for foreign missions in the  
19 nation's capital."

20 Exhibit 29, the Department of  
21 State made a determination that favorable BZA  
22 action on the present application would

1 fulfill the international obligations of the  
2 United States to facilitate the acquisition of  
3 adequate and secure premises by the government  
4 of Uganda for its diplomatic mission in  
5 Washington.

6 Does anybody else want to add  
7 anything else to that determination? Okay.

8 No. 2, "Historic preservation is  
9 determined by the Board of Zoning Adjustment  
10 in carrying out this section. And in order to  
11 ensure compatibility with historic landmarks  
12 and districts, substantial compliance with  
13 District of Columbia and Federal Regulations  
14 governing historic preservation shall be  
15 required with respect to new construction and  
16 to demolition of or alteration to historic  
17 landmarks."

18 This building is not a landmark or  
19 a contributing building in a Historic  
20 District, so that resolves No. 2.

21 No. 3, "The adequacy of off-street  
22 or other parking and the extent to which the

1 area will be served by public transportation  
2 to reduce parking requirements subject to such  
3 special security requirements as may be  
4 determined by the Secretary after consultation  
5 with federal agencies authorized to perform  
6 protective services."

7 Exhibit 29 also says that "The  
8 Department of State, after consultation with  
9 federal agencies authorized to perform  
10 protective services, has determined that there  
11 exists no special security requirements  
12 relating to parking requirements in this  
13 case."

14 Office of Planning also has  
15 submitted a report and they determined that  
16 the existing conditions on the property will  
17 provide an adequate amount of parking with  
18 respect to occurring and anticipated activity  
19 of the chancery.

20 The Office of Planning noted that  
21 while the number didn't meet the regulations  
22 of 2101, there are six legal spaces on-site

1 and two on the street and that has been  
2 sufficient. There has been no parking  
3 problems from the existing use. And they are  
4 not increasing, you know, the use of the  
5 property together. They just want to go into  
6 this building.

7 So the history shows that they  
8 don't -- that the parking is adequate.

9 No. 4, "The extent to which the  
10 area is capable of being adequately protected  
11 is determined by the Secretary after  
12 consultation with federal agencies authorized  
13 to perform protective services."

14 Again, I think I might have  
15 already mentioned this, but the Department of  
16 State, after consultation with federal  
17 agencies authorized to perform protective  
18 services, has determined that the subject site  
19 and area are capable of being adequately  
20 protected.

21 No. 5, "The municipal interest is  
22 determined by the Mayor of the District of

1 Columbia." Office of Planning did submit a  
2 report to the Board and stated that the  
3 proposed use would be consistent with the  
4 Comprehensive Plan and DC Zoning Regulations.

5 I think in some of the submissions  
6 there was a question of whether variances  
7 would be required, because they didn't exactly  
8 meet every single variance -- every single  
9 regulation, but it was determined that that  
10 wasn't required, that what is required here is  
11 just a determination of the municipal  
12 interest.

13 And in this case, Office of  
14 Planning did find that. They found that 10 --  
15 that the current staff or 10 plus anticipated  
16 two more would not create adverse impacts on  
17 the neighbors due to traffic or noise,  
18 particularly since the embassy does not -- I  
19 mean, the chancery doesn't intend to increase  
20 its activities. And they don't anticipate  
21 adverse impacts from traffic or parking  
22 whatsoever.

1 I think this one is easy to  
2 evaluate, since there is a history here and  
3 the use is not being increased. Are there  
4 other comments on this, those elements?

5 VICE CHAIR LOUD: Just very  
6 briefly, Madam Chair.

7 CHAIRPERSON MILLER: Yes.

8 VICE CHAIR LOUD: I thought you  
9 did an excellent job of laying it out. I just  
10 wanted to note that the 16<sup>th</sup> Street Heights  
11 Civic Association also supported the request.  
12 And I think that may fit under the municipal  
13 interest sort of analysis, a step of the  
14 analysis. And also, our colleague, Mr.  
15 Dettman, had compiled some information  
16 regarding the adequacy of the bus routes along  
17 16<sup>th</sup> Street.

18 CHAIRPERSON MILLER: Is that in  
19 the record? Are you putting it in the record?

20 VICE CHAIR LOUD: I think it's --  
21 whether it is actually in the record or not,  
22 I think we can either take judicial notice of

1 it or the equivalent of judicial notice as  
2 regards to 16<sup>th</sup> Street bus routes, the S2 and  
3 the S4. With respect to the 16<sup>th</sup> Street  
4 Height's piece, that's Exhibit 30. So that's  
5 already on the record.

6 CHAIRPERSON MILLER: I do -- oh,  
7 I'm sorry. Before I just want to piggyback on  
8 the for a second and then move to you. I do  
9 have in my notes that Office of Planning also  
10 found that this was well-served by transit.  
11 And as far as also -- I mean, I think it is  
12 the -- the municipal interest is presented to  
13 us by Office of Planning, but I think we also  
14 do have other indicia of it and I think there  
15 was also evidence in the record about the  
16 neighbors, you know, right on the street, and  
17 finding no adverse impact.

18 Then we get to the federal  
19 interest and, you know, if someone thinks of  
20 something and they want to come back to these  
21 other elements, that's fine. But the federal  
22 interest is determined by the Secretary and in

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1 Exhibit 29, the Department of State said that  
2 there is a federal interest in this project,  
3 both the government of the Republic of Uganda  
4 and the city of Kampala have assisted with the  
5 Zoning and Land Use needs of the U.S. Embassy.

6 This cooperation allowed the  
7 Department of State to successfully complete  
8 the construction of new embassy compound in  
9 February of 2001 and most recently the  
10 construction of a new facility for USA, that's  
11 also in Exhibit 29.

12 So I'm going to let others speak  
13 to any of these elements that I have gone  
14 through, if you would like to add something.

15 Okay. We have just addressed the  
16 criteria for determination. And I think that  
17 that does complete our analysis. So at this  
18 point, I would move that we not disapprove  
19 Chancery Application No. 17787 of Republic of  
20 Uganda. Do I have a second?

21 MEMBER ACOSTA: Second.

22 CHAIRPERSON MILLER: Further

1 deliberation? Okay.

2 All those in favor say aye.

3 ALL: Aye.

4 CHAIRPERSON MILLER: All those  
5 opposed? And would you call the vote, please?

6 MR. MOY: Yes, Madam Chair. The  
7 staff would record the vote as 5-0-0. This is  
8 on the motion of the Chair, Ms. Miller,  
9 seconded by Mr. Acosta. Also in support of  
10 the motion Mr. Loud, Mr. May and Ms. Walker.

11 CHAIRPERSON MILLER: Thank you.  
12 And I think that concludes our meeting for the  
13 Foreign Missions BZA.

14 (Whereupon, the Public Meeting was  
15 concluded at 10:10 a.m.)

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