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Preserving Diplomacy over History? Historic Preservation of Chanceries in the District of Columbia Under the Foreign Missions Act

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I. Introduction: An Unfair Balance for Historic Preservation

Section 206 of the Foreign Missions Act (FMA), enacted by Congress in 1982, provides foreign missions seeking to locate or already located in historic districts in the District of Columbia (DC) an expedited process of no more than six months for obtaining permits to locate, alter, expand or replace their chanceries.¹ In the most significant test of DC historic preservation law under the FMA, the Republic of Turkey endured an nine-year legal battle, beginning in 1986, to win approval to demolish and replace its chancery at 2523 Massachusetts Avenue, a site located in two overlapping historic districts.² Turkey's right to demolish the chancery, which was challenged by a coalition of citizens' associations, was definitively affirmed in 1995 by the federal Court of Appeals for the District of Columbia Circuit in *Sheridan Kalorama Historical Association v. Christopher* (hereinafter *Turkish Chancery III*).³

Judge Ginsburg's opinion purported to settle the major procedural and jurisdictional questions of section 206 of the FMA. It did so through radical simplification. The court held that the FMA lodges exclusive original jurisdiction for approving demolition, alteration or expansion permits for chanceries in the specially-constituted Foreign Missions Board of Zoning Adjustment (FM-BZA) rather than the regular DC agencies empowered under DC law to approve such

¹ 22 U.S.C. § 4306 (2005); D.C. Code § 6-1306 (2004). The statute does not specify historic districts per se; rather it provides that chanceries seeking to locate or located in areas "zoned medium-high or high density residential" and "any other area ... zoned mixed-use diplomatic or special purpose" are subject to the oversight of the FM-BZA. 22 U.S.C. § 4306(b)(2). Virtually all the historic districts in D.C. in which chanceries are located or would seek to locate – i.e., Massachusetts Avenue, Sheridan-Kalorama, Dupont Circle – fall into these zoning categories. See "Appendix" for reference to this statute throughout.

² The two historic districts are the Massachusetts Avenue Historic District and the Sheridan-Kalorama Historic District. The new chancery has the address of 2525 Massachusetts Avenue.

³ 49 F.3d 750 (D.C. Cir. 1995).

permits for historic properties,⁴ namely the Historic Preservation Review Board (HPRB) and the Mayor's Agent for Historic Preservation (MAHP).⁵ The FM-BZA's exclusive grant of authority is from the FMA; it exists solely to rule on applications for chancery locations and uses, and it is composed of four DC and two federal appointees. The DC circuit court further found that the FM-BZA was free to disregard the opinion of the HPRB, which had recommended against demolishing the chancery, and free to avoid consulting the MAHP, who had delayed issuing an opinion.⁶ The FMA's mandate that "substantial compliance with District of Columbia ... regulations governing historic preservation shall be required"⁷ was thus seriously weakened to requiring only pro forma procedural courtesies.

The legal challenge to the FM-BZA's decision to grant Turkey its new chancery not only failed to save the historic structure but radically streamlined what the FMA requires. Not surprisingly, since this decision the courts have been clear of disputes involving section 206; all subsequent chancery proposals have been decided within six months. No doubt the primary reason that no chancery permit application has been litigated beyond the FM-BZA is that no foreign mission has been so bold as Turkey as to propose demolishing a historic building. Yet it remains to be seen how the FM-BZA would rule if confronted with such a proposal today – a prospect that is certainly not inconceivable. What seems beyond dispute, however, is that the FM-BZA has the authority to rule as it sees fit on the status of some of DC's most cherished historic properties.

The logic of providing foreign missions expeditious process was driven by another of the FMA's major purposes: to require that the international interests and obligations of the United

⁴ *Id.* at 758.

⁵ *See* D.C. Law § 2-144 (2004).

⁶ 49 F.3d at 759. *See generally* Tom Precious, Plan for Turkish Chancery Angers Neighbors, Wash. Post, Dec. 12, 1987, at E3.

⁷ 22 U.S.C. § 4306(d)(2) (2005).

States be a significant factor in the FM-BZA's review of permit applications.⁸ If the effort to save the Turkish Chancery lost both the battle and the war for the due consideration of historic preservation, the underlying case also exemplified – by way of a real war – how significant a factor foreign policy can be under the FMA. In “timing that could not be more auspicious”⁹ for the privileging of international concerns, Turkey, then as now a key U.S. ally, received approval for demolition from the FM-BZA on the night the Persian Gulf War began, January 16, 1991, at a hearing in which four senior State Department officials testified on Turkey's behalf.¹⁰ The FM-BZA's approval demonstrated the extent to which the FMA could be stretched in extraordinary circumstances to permit international concerns to outweigh any and all municipal objections. The DC circuit court's subsequent affirmance of the least restrictive definition of “substantial compliance” ensured that historic preservation would have even less legal weight in ordinary circumstances than the FMA intended. If the balance between historic preservation and preserving diplomacy was never truly a fair one to begin with, now the historic preservation scale was rendered permanently insubstantial.

This paper explores the precarious preservation status of historic chanceries in the District of Columbia from a policy, legal and practical standpoint. This paper first reviews the

⁸ See 22 U.S.C. § 4306(d).

⁹ Thomas Bell, U.S. Does Favor for Key Ally; Turkey Gets Help Here on Zoning Variance, Wash. Post, Jan. 24, 1991, at J1.

¹⁰ See *id.*; FM-BZA decision issued March 15, 1991. Ironically enough, the first beneficiary of the DC circuit court's decision in March of 1995 was the Embassy of Greece, which filed in July 1995 to build a new chancery annex at 2221 Massachusetts Avenue, receiving the unqualified approval of the FM-BZA on October 20, 1995. Even if international politics did not play a role in this particular decision (because the proposed construction was not offensive to historic preservation, as demonstrated by the HPRB's earlier approval), how could the FM-BZA deny Greece (if it had proposed, say, demolishing and replacing the structure) on historic preservation grounds when Turkey was just definitively allowed to demolish and replace its embassy, for fear of creating an international incident. On the one hand, the FM-BZA could well create an international incident if it gave historic preservation too much weight; on the other hand, the FM-BZA may easily dispense with historic preservation in light of such international concerns. Either way, the problem lies in the FM-BZA having sole authority to judge and weigh both these issues simultaneously (or more correctly, deferring completely to the State Department when it comes to international issues, but not deferring at all to the HPRB when it comes to historic preservation issues). So Turkey and Greece both got their new chanceries. If only their longstanding disputes could be settled so favorably. See FM-BZA decision issued October 20, 1995.

trends and policy interests that are certain to affect historic chanceries in the coming years. This paper next examines the balanced statutory language of section 206 of the FMA in light of its multiple policy goals. This paper also reviews how the FM-BZA has exercised its exclusive authority in several chancery cases and given some consideration to historic preservation in innovative, if not completely legally sound, ways. The reasoning and conclusions of *Turkey Chancery III* will then be examined, and the meaning of “substantial compliance” explored, both in terms of its true legal significance – a high standard of compliance – and proper content – the DC Historic Landmark and Historic Preservation Act of 1978 (hereinafter “the DC Act”).¹¹

II. Historic Chanceries in the District of Columbia: Future Needs

The central document in the ongoing policy discussion of chancery issues is the *Foreign Missions and International Organizations Element* (hereinafter *FM Element*) of the *Comprehensive Plan for the National Capital*, which was adopted by the National Capital Planning Commission (NCPC) on August 4, 2004.¹² The *Comprehensive Plan* provides a “statement of principles, goals and planning policies ... for the next 20 years”;¹³ and the *FM Element* details the NCPC’s vision of the principles, goals and policies affecting foreign missions in DC from the standpoint of the federal interest in “[p]lan[ning] a secure and welcoming environment for the location of diplomatic and international activities ... in a manner that is appropriate to the status and dignity of these activities.”¹⁴

Like the procedures mandated by the FMA, the preparation and implementation of the *Comprehensive Plan* entail a complex mixture of federal and DC responsibilities. As set out in

¹¹ D.C. Law § 2-144 (2004).

¹² *FM Element*, available at <http://www.ncpc.gov/planning_init/CompPlanOnline/ForeignMissions.html>.

¹³ Introduction, *Comprehensive Plan for the National Capital: Federal Elements*, available at <http://www.ncpc.gov/planning_init/CompPlanOnline/Introduction.html#_ftn1>.

¹⁴ See *FM Element*, note 12, *supra*.

the 1973 District of Columbia Home Rule Act,¹⁵ the NCPC only prepares the federal elements; the Mayor prepares the DC elements, which then must be adopted by the DC City Council.¹⁶ Unlike the former process, the latter explicitly includes diverse stakeholders.¹⁷ The *Comprehensive Plan* has guiding rather than binding legal weight for DC administrative agencies and courts.¹⁸ It foremost affects matters of zoning: the DC Zoning Commission is “charged with preparing, adopting and subsequently amending the Zoning Regulations and Map, not to be inconsistent with the Comprehensive Plan”;¹⁹ and, per the FMA, the NCPC reviews proposed amendments to the Zoning Map affecting federal interests to determine whether they are in compliance with the *Comprehensive Plan*.²⁰ The NCPC is even more directly involved in the DC government’s oversight of specific projects requiring zoning adjustment review. The NCPC appoints the fifth member to the Board of Zoning Adjustment (BZA), and per the FMA, the NCPC Executive Director holds the sixth seat on the FM-BZA. Thus, with the NCPC accounting for one third of the votes on the board that oversees chancery issues, the predictions and proposals outlined by the NCPC in the *FM Element* deserve close scrutiny.

According to the *FM Element*, 169 foreign missions are located in DC, of which 152 own the buildings that house their chanceries.²¹ All chanceries in DC are in the Northwest quadrant of the city, predominantly in the Sheridan-Kalorama and Dupont Circle neighborhoods. Eighteen chanceries are located in the International Chancery Center in Upper Northwest, a large parcel of land owned by the federal government and leased to foreign missions at a low cost and without

¹⁵ D.C. Law § 1-203 (2004).

¹⁶ See Introduction, note 13, *supra*. For the status of the District of Columbia Elements, see <<http://www.inclusivitycity.org>>.

¹⁷ See <<http://www.inclusivitycity.org>>.

¹⁸ See *Gondelman v. D.C. Dep’t of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1246 (D.C. 2002) (“District agencies may look to the . . . elements of the Comprehensive Plan for general policy guidance”) (citations omitted).

¹⁹ available at <<http://dcoz.dc.gov/services/zoning/commish.shtm>>.

²⁰ 22 U.S.C. § 4306(e)(2).

²¹ The term chancery refers to the principal administrative office of the embassy.

DC regulatory review. A great many chanceries in DC are designated as historic: chanceries that are contributing buildings in historic districts; and chanceries that are themselves historic landmarks.²² The *FM Element* predicts that there will be large growth in the number of existing chanceries relocating and new chanceries locating in DC.²³ The *FM Element* advances three policy recommendations to meet these chancery needs:

- Identify additional areas where foreign missions may locate without review by the Foreign Missions Board of Zoning Adjustment.
- Develop a new methodology to determine appropriate additional chancery development areas.
- Revise the mapped diplomatic areas, reflecting additional areas where foreign missions may locate.²⁴

To act on these recommendations, DC will both have to modify the Zoning Map and find new areas within matter-of-right zones where chanceries can be tempted to locate. The FMA allows chanceries to locate as a matter-of-right in areas zoned “commercial, industrial, waterfront, or mixed-use.” Chanceries are also permitted to locate, subject to FM-BZA disapproval, “in any area which is zoned medium-high or high density residential; and ... in any other area, determined on the basis of existing uses, which includes office or institutional uses, including, but not limited to, any area zoned mixed-use diplomatic or special purpose.”²⁵ DC implemented the latter directive by creating the Diplomatic Overlay District (D) in areas then

²² The Sheridan-Kalorama and Massachusetts Avenue Historic Districts are populated with scores of chanceries that have been deemed contributing buildings. As of January 2003, at least ten chanceries were listed on the District of Columbia Inventory of Historic Sites as historic landmarks: those of Egypt, Iraq, Cameroon, Indonesia, Peru, Russia, Great Britain, Japan, and Brazil.

²³ [L]ocations for as many as 100 new and relocated chanceries may have to be found in the next 25 years. This could require the identification of four to five chancery sites per year. Forty-eight foreign missions relocated within the nation’s capital in the last 20 years, and if this trend continues, some 60 foreign missions will relocate by 2030. In addition, approximately 40 new foreign missions could locate new chanceries in the District. Not all of these foreign missions will require new sites – some will buy or lease existing foreign mission facilities, while others may buy or lease other existing buildings. However, the recent trend has been toward new construction of larger facilities on large lots, both on privately owned land and in the International Chancery Center. *As a result, there may be a requirement to identify a significant number of buildings and sites for these future chanceries.*” *FM Element*, note 16 *supra* (emphasis added).

²⁴ *See id.*

²⁵ 22 U.S.C. § 4306(b).

thought to be most amenable for chanceries, primarily in the Sheridan-Kalorama and Sixteenth Street neighborhoods.²⁶ As the demand for housing has grown tremendously since 1983, some of these areas have become increasingly residential and (from the residents' standpoint) crowded with chanceries. Now, a zoning petition before the DC Zoning Commission seeks to remove the D District from half of the Sheridan-Kalorama neighborhood, which would make it harder for chanceries to locate there.²⁷ Together with the standard complaints about increased traffic and parking congestion, chanceries have long been the target of criticism that they reduce an already scarce housing market.²⁸

If left unaddressed, the trends detailed in the *FM Element* and other trends have negative implications for historic preservation. If existing chanceries requiring more space are not encouraged to relocate to larger facilities, they may opt to take the approach of Greece and seek to expand – or that of Turkey, and seek to replace – their existing buildings. Compounding this threat to historic preservation is an important factor not mentioned in the *FM Element*: the heightened security environment since September 11 may lead chanceries to build new unsightly garages, barriers, and checkpoints on their properties that could disrupt the character of historic

²⁶ “A chancery shall be permitted use in a D Overlay District, subject to disapproval by the Board of Zoning Adjustment, based on the criteria in this section.” 11 D.C.M.R. 1001.1.

²⁷ “To locate, replace, or expand a chancery in the R-5-D, R-5-E, or SP District or in the D Overlay District, or to reconstruct an existing chancery that is destroyed in an R-1, R-2, R-3, R-4, R-5-A, R-5-B, or R-5-C District, application shall be made to the Board of Zoning Adjustment.” *Id.* 1002.1. Thus, any squares in a zone such as the area Sheridan Circle, which is currently zoned as “D/R-3,” if the Diplomatic Overlay District is removed, would no longer allow chanceries. *See* Laila Al-Arian, *Neighbors Seek Relief from Chancery Deluge*, III Dupont Current No. 43, March 30, 2005, at 1.

²⁸ *See FM Element*, note 16, *supra*; District of Columbia Comprehensive Plan Amendments of 1989, D.C. Law 8-129 (discouraging chanceries in residential areas); *cf. Kalorama Heights Ltd. Partnership v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 655 A.2d 865 (D.C., 1995) (affirming the MAHP's denial of a special merit demolition permit for a historic building, a.k.a. “Moses House,” that formerly housed the French chancery, in order to build condominiums on the site). In the underlying MAHP decision appealed in *Kalorama Heights Ltd. Partnership*, “the Mayor's Agent ... noted that the community had made clear it would prefer a chancery to a condominium project.” *Id.* at 870, note 6. The frustrated remarks of petitioner's counsel in the MAHP decision are fairly representative of the anti-chancery and pro-housing perspective: “You're rejecting the idea of additional tax revenue for the city? You're rejecting the idea of preserving the Comprehensive Plan of staying away from embassies and putting housing stock in the District of Columbia as no special merit?” *Id.* at 874, note 12. The building has since been designated a historic landmark.

districts or landmarks.²⁹ Finally, there is always the possibility in a changing world that historic chanceries may simply be abandoned, as was the case with the Macedonian chancery, or diplomatic relations cut off and assets frozen, as was the case with the Iraqi chancery, a historic landmark.³⁰

Addressing chanceries' growth and size demands in the ways recommended in the *FM Element* also has significant implications for historic preservation. Consider the NCPC's specific recommendation to encourage foreign mission to "[l]ocate chanceries within the diplomatic districts of the 16th Street corridor and the adjacent Columbia Heights, Adams Morgan, and Mt. Pleasant neighborhoods," areas which are touted as offering "potential redevelopment and [adaptive] reuse opportunities."³¹ Several of these areas include current and possibly expanded historic districts. It is certainly plausible that chanceries relocating in these areas could have a net positive effect on historic preservation. In the most favorable scenario, foreign missions currently occupying highly desirable (but too small) historic buildings would sell those properties to private buyers, thus returning the oversight of these properties to the HPRB and MAHP. These same foreign missions would either purchase (adequately sized) properties that are not in historic districts, or historic properties that they would agree to use or renovate consistent with historic preservation regulations (as enforced by an FM-BZA committed to historic preservation).³² Perhaps some of these properties would even be in danger of demolition if not for the foreign missions' rehabilitation of them.³³

²⁹ See *Embassy of People's Republic of Benin v. District of Columbia Bd. of Zoning*, 534 A.2d 310, 319 (1987) (comments of Ronald Mlotek).

³⁰ In that case the State Department holds the asset in trust for the foreign government and is responsible for its maintenance.

³¹ It seems far more likely that foreign missions will locate in these rapidly redeveloping areas rather than the other areas touted by the FM Element: the South Capitol corridor and the Anacostia Waterfront. See *FM Element*, note 16 *supra*.

³² For examples of this, see the textual discussion of the FM-BZA's approvals of Benin and Latvia, *infra*.

³³ The *FM Element* refers approvingly to two such properties. See *FM Element*, note 16 *supra*.

The less favorable outcome of the NCPC's recommendations, however, is simply that more foreign missions will own more historic properties, thereby reducing the gross number of properties within the HPRB and MAHP's ambit. And though the *FM Element* does not address this scenario, it seems likely from the combined effect of high demand and sites ripe for adaptive reuse that many of these new and relocated chanceries will seek to alter, expand or even replace newly-acquired historic structures.³⁴ While the *FM Element* does list as an explicit policy goal that foreign missions should be "encouraged" to respect historic preservation in how they use their chanceries, no realistic guidance is offered as to how and when foreign missions should be restricted from doing what they might view as necessary or economically beneficial.³⁵ In light of the seemingly weightier and more imperative policy goal of providing a growing number of chanceries adequate locations and facilities, as well as the temptation to view chanceries as an engine of redevelopment, it is unlikely that the NCPC-influenced FM-BZA would be inclined to enforce the same standard of historic preservation as would the HPRB or MAHP.³⁶

III. Purposes and Compromises of the FMA

The overarching purpose of Section 206 of the FMA (titled "Location in District") was to establish a federal mechanism by which the United States' obligation under the Vienna

³⁴ The Embassy for Sweden made one such proposal. See FM-BZA decision issued June 6, 1990.

³⁵ The *FM Element* also envisions a well-known historic site, the Armed Forces Retirement Home (also known as the "Soldiers' Home"), as becoming a new foreign missions center. This large parcel of land is owned by the federal government and thus would not even be subject to FM-BZA oversight. See *FM Element*, note 16, *supra*; see also <<http://www.afrh.gov/DWP/afrh/washington/afrhwashingtonghistory.htm>>. While the FM Element states that "[a]n additional adjacent 25 to 30 acres [of the Soldiers' Home] are available for mixed-use development and would exceed the requirements for a future foreign missions center," it is not clear how the DC preservation community or a zealously patriotic Congress will respond to plans to populate the Soldiers' Home campus with chanceries of foreign missions.

³⁶ The Sweden case, in which the FM-BZA disapproved Sweden's plans for expansion, may be a relic of the past in this sense; note that it predates *Turkish Chancery III*.

Convention on Diplomatic Relations³⁷ to facilitate foreign missions' use of adequate facilities would be effectively implemented in the District of Columbia. The underlying principle of the Vienna Convention, which the FMA makes explicit, is reciprocity: the US assures that foreign missions enjoy adequate facilities in the US so that US missions abroad receive the same benefits.³⁸ Congress was concerned that DC administrative agencies could undermine the reciprocity principle by discriminating against foreign missions as to where they could locate.³⁹ The FMA prevented this, first, by establishing that chanceries are permitted to locate as a matter of right in commercial zones and to locate, subject to FM-BZA approval, in residential and mixed-use zones. The FMA also forestalled potential discrimination or burdensome oversight by DC agencies by requiring that "the limitations and conditions applicable to chanceries shall not exceed those applicable to other offices or institutional uses."⁴⁰

The FMA not only prevented DC from discriminating against chanceries but ensured that federal determinations about foreign missions would be affirmatively privileged. It did so in two overlapping ways: granting the Secretary of State prior veto power over "any proposed

³⁷ The articles of the Vienna Convention relating to facilitating foreign missions' acquisition of property state:
Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Vienna Convention on Diplomatic Relations, April 18, 1961, arts. XXI-XXII, United Nations, *Treaty Series*, vol. 500, p. 95.

³⁸ 22 U.S.C. § 4301(b).

³⁹ "[T]he criteria under which decisions are made by local authorities as to particular locations, and municipal regulations applicable thereto, do not properly weight the Federal interests involved or national security impacts that result from their actions. What has resulted is a system whereby municipal authorities resolve such matters involving Federal interests wholly on local and municipal grounds." S. Rep. No. 97-283 at 14 (1981).

⁴⁰ 22 U.S.C. § 4306(b)(3).

acquisition ... of any real property”⁴¹; and requiring that international obligations and federal concerns be significant factors in the FM-BZA approval process. Section 205 of the FMA requires foreign missions to notify the Director of the newly-created Office of Foreign Missions (OFM) of any proposed acquisition of a property and provides the Secretary of State sixty days to approve or disapprove the proposal. The FMA instructs the Secretary of State to take into account a given country’s treatment of the US mission in that country in determining the privileges and benefits to be accorded that country’s mission in the US.⁴² This determination is made before a foreign mission’s application can be forwarded to the FM-BZA.

The heart of the FMA is the delineation of the FM-BZA’s authority and the criteria of review it must use. These criteria reflect an attempted balance of both federal and municipal interests involved in chancery issues, but they effectively assure the primacy of federal concerns. Within six months of a foreign mission’s filing of an application “concerning the location, replacement or alteration of a chancery,” the FM-BZA is required to make a determination “concerning the location of a chancery ... or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map.”⁴³ Two of the six criteria that the FM-BZA must take into account involve foreign policy: “(1) [t]he international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign mission in the Nation’s Capital”; and “(6) [t]he Federal interest, as determined by the Secretary [of State].” The other four criteria are: (2) historic preservation, as determined by the FM-BZA; (3) the adequacy of parking; (4) the extent to which the site presents a security risk, as determined by the Secretary of State; (5) and the municipal interest, as

⁴¹ 22 U.S.C. § 4305(a)(1). “‘Acquisition’ in this section includes ‘any acquisition or alteration or, or addition to, any real property ... by a foreign mission.’” *Id.* at § 4305(b).

⁴² 22 U.S.C. § 4301(c).

⁴³ 22 U.S.C. §§ 4306(c)(3), 4306(d).

determined by the Mayor of DC. Thus, the FM-BZA, which is already weighted with two NCPC appointees, is required to take into account and defer to the Secretary of State's determinations on three of six criteria.

Between sections 205 and 206 of the FMA, the Secretary of State has two functions to perform that are really one and the same. Once the Secretary approves the chancery proposal under her section 205 authority, it is a foregone conclusion that criteria (1), (4) and (6) of the FM-BZA's review will be satisfied. Congress's aim was to leverage the reciprocity principle to the US's advantage by providing the Secretary a strong bargaining position with respect to foreign missions whose countries may be discriminating against US missions or harming US interests.⁴⁴ As a result, the State Department holds all of the cards as to whether the chancery proposal is initially approved and at least half of the cards as to whether it is ultimately approved by the FM-BZA, a fact reflected rhetorically in the OFM's publications for foreign missions.⁴⁵ In practice this means that once the State Department has made up its mind in the first instance, and extracted whatever promises or compromises it has from the foreign mission, it effectively becomes that foreign mission's strongest advocate before the FM-BZA, unless the State Department views it as useful to shift the blame for disapproval to the FM-BZA. In either case, the FM-BZA is at the disposal of the State Department's objectives.

⁴⁴ "The purpose of S. 854 is to address a serious and growing imbalance between the treatment accorded in many countries to official missions of the United States, and that made available to foreign government missions in the United States. At present, the Department of State lacks authority compared to that enjoyed by many other governments to enforce reciprocity in an appropriate manner." S. Rep. No. 97-283 at 25 (1982).

⁴⁵ See State Department Diplomatic Note 02-01 (June 1, 2002) ("Missions are encouraged to notify the Department's Office of Foreign Missions of proposed acquisitions as early in the process as possible. *Missions which obtain the benefit of the Department's experience and advice in the early stages of an acquisition may avoid unnecessary financial or legal complications.*") (emphasis added); State Department Guidance for Administrative Officers § 7.4 ("The complexity of the zoning process with regard to the purchase or lease of chanceries or chancery annexes requires missions to work closely with OFM *before* committing substantial time or financial resources to a chancery project.") (emphasis in original), both available at <<http://www.state.gov/ofm/resource/pubs/>>.

The FMA's overlay of foreign jurisdiction over chancery issues and insistent privileging of federal concerns did not, however, altogether remove DC's authority and interests. After all, historic preservation is expressly included -- and the most lengthily expounded -- among the six criteria that the FM-BZA must apply.⁴⁶ The FM-BZA is still a DC administrative agency and composed of a majority of DC officials. And whatever its weight relative to the federal interest, DC's municipal interest in the proposal, as determined by the Mayor, must nonetheless be taken into account. Finally, even though the FMA provided that FM-BZA proceedings are rule-making rather than adjudicatory,⁴⁷ the FM-BZA approval process of chancery proposals has garnered ample and timely participation from citizens groups, as the FMA itself encouraged.⁴⁸

The legislative history of the FMA makes clear that it could have been worse for DC and historic preservation. The bill reported by the House Committee on Foreign Affairs transferred all jurisdiction over chancery locations from DC agencies to the NCPC.⁴⁹ And a bill reported by the Senate Committee on Government Affairs amended the House bill to include a seven-member Foreign Missions Commission which would have been composed of four federal and three DC appointees.⁵⁰ Significantly, while it far from clear throughout the bill's progress whether DC would even have any jurisdiction over chanceries, historic preservation concerns were included from the beginning. Its fortunes, however, were linked to the jurisdictional question: the bill first reported to the House only assured "the continuity of application of

⁴⁶ "Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks." 22 U.S.C. § 4306(d)(2).

⁴⁷ *Id.* § 4306(f).

⁴⁸ *See id.* § 4306(c)(2) ("Regulations issued to carry out this section shall provide appropriate opportunities for participation by the public in proceedings concerning the location, replacement, or expansion of chanceries."). In this way, the FMA embodied the community-conscious preservation laws and dynamics described by Carol Rose in her seminal article on historic preservation that was exactly contemporary with the FMA. *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *Stan. L. Rev.* 473 (1981).

⁴⁹ *See* H. Rep. 97-102 at 33-34 (1981).

⁵⁰ *See* S. Rep. No. 97-329, *Minority Views of Messrs. Mathias, Eagleton, Rudman, Levin, and Sasser*, at 40-42 (1982).

historical [sic] preservation measures to facilities of foreign mission under regulations to be issued by the NCPC”;⁵¹ the Senate’s bill simply changed this to “regulations issued by the new [Foreign Missions] Commission.”⁵²

What measures or regulations these would be, however, and how stringently they would they be applied, were questions left unanswered until final passage of the bill. Responding to pressure from DC Home Rule and historic preservation advocates alike, Congress substituted the FM-BZA for the Foreign Missions Commission and enumerated its authority, however ambiguously, to ensuring “substantial compliance” with the existing historic preservation regime: “[I]n order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.”⁵³ If historic preservation was only one of six criteria on which the FM-BZA would base its decisions, at least it appeared to be a substantive consideration controlled by laws that the FM-BZA could not arbitrarily disregard.

IV. Ad Hoc Applications of the FMA: The FM-BZA and Historic Preservation

The FM-BZA and the State Department have done much in terms of regulatory enactments and ad hoc policy decisions to take into account historic preservation concerns. To be sure, regulations spelled out by the FM-BZA specify only the minimum procedural requirements as to the application of DC’s historic preservation law: “When a chancery is located in an historic landmark or historic district and the use requires review and processing of new

⁵¹ H. Rep. 97-102 at 35 (1981).

⁵² H. Conf. Rep. 97-693 at 40 (1982). For a more comprehensive but skewed account of the legislative history of the FM-BZA, see *Embassy of People’s Republic of Benin v. District of Columbia Bd. of Zoning*, 534 A.2d 310 (1987).

⁵³ 22 U.S.C. § 4306(d)(2).

construction, demolition, or alteration pursuant to [the DC Act] ... the application shall be referred to the Historic Preservation Review Board ... for report and recommendation to the Board of Zoning Adjustment.”⁵⁴ And the FM-BZA does not mince words as to the what deference it owes the HPRB’s report and recommendation: “The Board of Zoning Adjustment shall make the final determination as to substantial compliance with D.C. Law 2-144.”⁵⁵ For its part, the HPRB has not asserted any independent authority, as its most recent regulation demonstrates: “The Board acts upon referrals from the Foreign Missions Board of Zoning Adjustment relating to the new construction, demolition and alteration of foreign missions, chanceries, and international organizations located in historic districts or historic landmarks, pursuant to the [FMA].”⁵⁶ As will be examined more fully at the end of this paper, it is not the HPRB’s but the FM-BZA’s regulatory prerogative – and ultimately that of the DC City Council and Mayor – to grant the HPRB a more substantive role in chancery issues.

While the FM-BZA monopolized as much substantive authority as the FMA seemed to allow, the FM-BZA also enacted regulations allowing for significant municipal participation in the FM-BZA’s review process. Many of the same procedural requirements are applied to chancery applications as to other Board of Zoning Adjustment hearings,⁵⁷ and two notable regulations are also included: “The applicant shall submit sufficiently detailed plans to facilitate review by the Board of any proposed new construction, demolition, or alteration.”⁵⁸ And: “Any person may appear at a hearing in a chancery application proceeding and present evidence, testimony, or argument that is relevant and not unduly repetitious.”⁵⁹ The regulations further

⁵⁴ 11 D.C.M.R. 1002.7

⁵⁵ 11 D.C.M.R. 1002.8

⁵⁶ 10A D.C.M.R. 106.4

⁵⁷ 11 D.C.M.R. 3134.6

⁵⁸ 11 D.C.M.R. 1002.9

⁵⁹ 11 D.C.M.R. 3134.12

specify timely notice requirements, an opportunity for persons in opposition to the application to be heard, and publication of a full and complete record of the hearing.⁶⁰

Owing in no small part to the participation of citizens groups, the FM-BZA's rulings on the few chancery proposals that have presented significant historic preservation challenges have not been as unfavorable as the *Turkish Chancery III* precedent could have brought about – and could still bring about. To the contrary, apart from the Turkish chancery case, the FM-BZA and the State Department have been quite sensitive to DC municipal and historic preservation objections. Several rulings have in fact developed an innovative case law (if it can be called such) and a novel mediation process which incorporate historic preservation and other municipal concerns into the FM-BZA's review and ongoing enforcement.

This case law has not developed through denials but rather approvals of chancery applications. The one notable example of a denial by the FM-BZA on historic preservation grounds, predating *Turkish Chancery III*, involved Sweden's proposal to purchase the Babcock-Macomb House, a historic landmark, from the Republic of Cape Verde, and significantly expand the site. At that time, FM-BZA was referring chancery location and alteration applications to the MAHP for comment. Pursuant to the MAHP's recommendation, the FM-BZA determined:

The height, bulk, and over-all scale of the proposed addition are starkly and unequivocally incompatible with the scale of the Babcock-Macomb House. The essential result of the proposal is that the addition would become the main structure on the lot, both in fact and as viewed. The existing historic landmark would become a minor element of a much larger mass. Its historic consequence would be lost.⁶¹

⁶⁰ 11 D.C.M.R. 3134.9, 3134.13, 3134.16

⁶¹ FM-BZA decision issued June 6, 1990.

Far from the rule, this is the one example of a disapproval by the FM-BZA on historic preservation in the last fifteen years.⁶² The FM-BZA's disapproval of Sweden's application, as compared to Turkey's, was no doubt made easier that Sweden is neither a key US ally nor a country which the State Department would view as likely to recriminate against US interests.⁶³

In recent years, the FM-BZA has taken a more accommodating but no less serious approach to historic preservation, as seen in its handling of two acquisition and alteration proposals (of two more sensitive countries) to which citizens' groups raised objections: those of Benin and Latvia. In a 2000 decision concerning the proposed relocation of the Benin chancery to 2124 Kalorama Road, a site within the Sheridan-Kalorama Historic District, the FM-BZA for the first time imposed historic preservation conditions on a foreign mission's use of a property:

A number of witnesses ... expressed the concern that a lack of property maintenance at the subject premises could adversely affect the Sheridan-Kalorama Historic District. The witnesses identified several chancery buildings, including Benin's Cathedral Avenue chancery, that suffer from neglect and disrepair, as well as poorly maintained and paved-over yards.

At the hearing, [Benin] Ambassador Lucien Tonoukouin stated his country's commitment to maintaining the subject premises. He assured the Board that no work would be done to alter the exterior of the building *without first obtaining the necessary historic preservation approvals*. Before the hearing, [Benin] Ambassador Tonoukouin met with the Sheridan-Kalorama Historical Association and developed a number of conditions relating to use of the property, including retention of a resident caretaker to maintain both the inside and outside of the premises on a daily basis, that will help preserve the residential and historic character of the subject property. These conditions have been incorporated into this Board's order.⁶⁴

⁶² Cape Verde has recently obtained approval of the HPRB and MAHP for the subdivision and sale of a small lot of Babcock-Macomb House site in order to obtain funds for the house's refurbishment. *See* MAHP decision issued Feb. 5, 2004. Cape Verde apparently voluntarily (or perhaps at the urging of the State Department) submitted its applications to the HPRB and MAHP in lieu of the FM-BZA, presumably because Cape Verde knew it would prevail. Nonetheless, the Mayor's Agent assertion of jurisdiction, while certainly admirable, is incorrect in light of *Turkish Chancery III*: "Because the Babcock-Macomb House is a designated landmark listed in the Inventory, the application for subdivision was referred to the HPRB for its review and recommendation to the Mayor's Agent pursuant to D.C. Official Code § 6-1106(b)." *Id.*

⁶³ Predictably, Sweden has since opted to remain in a matter-of-right district at 15th and M Street, NW. Sweden is scheduled to relocate to the Georgetown waterfront in 2006 in a newly-constructed property. *See* The Washington Diplomat (April 23, 2003). The waterfront is also zoned as a matter-of-right zone.

⁶⁴ FM-BZA decision issued March 31, 2000, reported at 47 D.C. REG. 2327, 2333 (emphasis added).

Whether deliberately or not, the actual order did not in fact condition the FM-BZA's approval on Benin's agreeing to obtain the HPRB's approval for future alterations.⁶⁵ Nonetheless, the case demonstrated the FM-BZA's willingness to take into account a foreign mission's past performance of its historic preservation duties and to require specific measures to ensure its future stewardship. More significant still, the FM-BZA, together with the State Department, also established and legally justified a novel mediation process for enforcement of the conditions imposed in the FM-BZA's order:

The State Department has taken the position that the Board can impose conditions, whether agreed-upon or not, in its determinations under the Foreign Missions Act. Under Section 206(g) of [the FMA] ... 'The Secretary [of State] shall require foreign missions to comply substantially with District of Columbia building and related codes in a manner determined by the Secretary to be not inconsistent with the international obligations of the United States.' When the Board includes conditions in its order on a chancery application, the State Department considers those conditions enforceable in the same manner and to the same extent as the building and related codes of the District of Columbia.

The State Department outlined the procedures that should be followed in the event of a violation or other community concern. The complaining party should first contact the pertinent embassy to discuss the matter. If that fails, the next step would be to request the relevant District of Columbia agency to investigate the matter and certify to the State Department that a violation has occurred. The State Department will then take up the matter diplomatically with the foreign mission. In the case of exigent circumstances, complaints should be referred directly to the State Department.⁶⁶

In a 2001 decision concerning Latvia's proposed acquisition of a property at 2306 Massachusetts Avenue, the FM-BZA again referenced this ad hoc mediation process to enforce the conditions it imposed on its approval. Yet this time, the FM-BZA also went so far as to mandate (seemingly) direct HPRB involvement in any future alterations undertaken by Latvia:

⁶⁵ "The Embassy of the Republic of Benin will retain and maintain the residential features and appearance of the premises in a manner consistent with the residential character of the neighborhood. This includes exterior landscaping and maintenance, interior lighting visible from Kalorama Road, N.W.; exterior lighting; use of draperies and/or shades in the windows; maintenance of the driveway and walkway; and only one small plaque adjacent to the front door to identify the premises as the Chancery of the Republic of Benin. No new fluorescent fixtures shall be installed in the building, but any such existing fixtures in the kitchens, bathrooms, and basement may remain." *Id.*

⁶⁶ *Id.*

At the hearing, Mr. Peteris Vinkelis, Deputy Chief of Mission of the Latvian Embassy, stated his country's commitment to maintaining the historic qualities of the subject property. He assured the Board that no work would be done to alter the designated portions of the buildings *without first obtaining the necessary historic preservation approvals*. Before the hearing, the Latvian Embassy developed and submitted to the ANC a number of conditions relating to use of the property, including respect for the historic preservation status of the building.... These conditions have been incorporated into this Board's order.

The ANC [Advisory Neighborhood Council] expressed concern that the proposed chancery use would affect the historic character of the building and the neighborhood, as the neighborhood is a historic residential neighborhood. The ANC pointed out that the HPRB only approved the proposed signage in concept, *and that the HPRB mentioned its limited ability to regulate interior alterations and the property of foreign governments. The Board finds that any work on the historic portions of the property beyond the signage will require the review of the HPRB, and that the proposed public access to the interior will help to insure that no inappropriate alterations are undertaken.*⁶⁷

As novel as this mediation process devised by the FM-BZA and the State Department would seem to be, it is ambiguous in practice, very limited in its application in the best of circumstances, probably unsustainable, and legally problematic. Even in the FM-BZA's decision concerning Latvia, which explicitly anticipated future review by the HPRB, the process by which Latvia would obtain permission from the HPRB was (again) not specified or mandated in the actual ordering language.⁶⁸ It might then appear to Benin and Latvia – and surely from the perspective of their legal representatives – to be completely voluntary whether they should submit an application to the HPRB in advance of any renovations they decide to undertake. If they simply do not bother with obtaining HPRB approval, and a violation occurs, the damage has already been done from the standpoint of historic preservation (unless, somehow, the State Department manages to step in under “exigent circumstances”). Correcting the violation will then depend wholly on the vigilance of concerned citizens, the willingness of DC agencies to “investigate” the violation (presumably with the HPRB then taking the lead), and the willingness of the State Department to twist arms diplomatically. Ultimately, the Benin and Latvia decisions

⁶⁷ FM-BZA decision issued November 16, 2001, reported at 48 D.C. Reg. 10476, 10481-82.

⁶⁸ See *id.* at 10489-90.

do not grant more enforcement authority to DC but simply provide more leverage to the State Department's already strong bargaining position vis-à-vis chancery properties.

In their practical application, these precedents are also inadequate to address future needs. The promises made by both Benin and Latvia would possibly be binding on them in the contractual sense, but even so this only accounts for Benin and Latvia, not the scores of other chanceries in historic districts. This ad hoc process of addressing historic preservation issues itself only creates another ad hoc process of policing historic preservation violations. And this legal regime will only be effective so long as the FM-BZA and State Department continue to apply it.⁶⁹ In light of the rising demand and adaptive reuse recommendations outlined by the NCPC, it may well be that the State Department and FM-BZA will be increasingly likely to tread more heavily on historic preservation.

Without strong precedents of denial on historic preservation grounds, the limits of what an chancery can do remain undefined. And the two recent precedents of conditional approval and enforced mediation have little relevance to demolition and replacement proposals. With proposed acquisitions, there was always much more room for negotiation and arm-twisting and crafting binding conditions in advance. With a demolition and replacement proposal, however, it is often a question of yes or no, although these proposals do offer room for negotiation when partial demolition could potentially meet the future use requirements.⁷⁰ It is unclear what approach the FM-BZA and the State Department will take if a demolition and replacement project is proposed.

⁶⁹ While the State Department may have assured the FM-BZA in the Benin and Latvia hearings that it approves of this mediation process, pursuant to its authority under 22 U.S.C. 406(g), it has not formalized this policy in a setting other than an FM-BZA hearing. This is then a policy designed to give the State Department flexibility should it choose to develop a different policy in the future.

⁷⁰ See, e.g., *Citizens Committee to Save Historic Rhodes Tavern v. DC DHCD*, 432 A.2d 710 (D.C. 1981); *Calvary Baptist Church*, HPA Nos. 00-601, 01-044 (Mayor's Agent, October 4, 2002).

Finally, the legal basis and implications of the FM-BZA's imposition of conditions and enforced mediation process remain murky. If in fact Benin and Latvia are now required to apply to the HPRB for alteration permits, it seems that this would violate the spirit if not the letter of section 206 of the FMA as interpreted in *Turkish Chancery III* as well as in the FM-BZA's regulations.⁷¹ If Benin and Latvia's applications are denied by the HPRB, presumably they would appeal those decisions to the FM-BZA. Alternatively, the State Department could intervene by enforcing the HPRB's decision diplomatically; but if a foreign mission persists in contesting the decision, a court could find that the HPRB lacked the legal authority to issue the decision and remand to the FM-BZA. This legal muddle thus raises the broader legal and policy questions incorrectly and unsatisfactorily answered by *Turkish Chancery III*: If the FM-BZA believes delegating to the HPRB is a workable and desirable process for Benin and Latvia, as a retrospective matter, why should it not be equally workable and desirable for all historic chanceries, and for all chancery proposals involving alteration, expansion or demolition, as a prospective matter? Why, in brief, should the FM-BZA have original jurisdiction over such matters at all?⁷²

V. Judicial Misinterpretations and Unwarranted Simplifications of the FMA

Ironically enough, it was a legal challenge by the Republic of Benin to a Board of Zoning Adjustment (BZA) denial order that first established the FM-BZA's original jurisdiction over

⁷¹ See 22 U.S.C. § 4306(j) (Provisions of law (other than this chapter) applicable with respect to the location, replacement, or expansion of real property in the District of Columbia shall apply with respect to chanceries only to the extent they are consistent with this section.”)

⁷² Cf. MAHP decision issued Feb. 5, 2004 (Cape Verde), discussed in note 62, *supra*. Cape Verde was an easy case because the HPRB had already approved the subdivision and the purpose of the subdivision was to raise funds for the refurbishment of the landmark. An interesting question is whether the FM-BZA could have crafted such a compromise where criteria other than historic preservation would have been included. Presumably the State Department encouraged Cape Verde to take its case to the HPRB and MAHP precisely to avoid an FM-BZA review of an actual historic landmark that would exclude the MAHP altogether and thus raise the hackles of the preservationist community.

chancery expansions and paved the way for *Turkish Chancery III*. In *Embassy of People's Republic of Benin v. District of Columbia Board of Zoning Adjustment*,⁷³ decided in 1987, the District of Columbia Court of Appeals held that all chancery alterations fall under the provisions of section 206 of the FMA.⁷⁴ This holding is unimpeachable in general terms, but the court's further determination of what section 206 requires was warranted neither by the facts of the case nor the FMA's language.

Benin had sought a variance from the BZA to build a radio broadcast tower on the roof of its chancery after being informed by the DC Zoning Administrator that the tower would violate the zoning height restriction. The BZA denied Benin's application on the basis of DC zoning law. The court concluded that the argument that

Benin is entitled to seek a special exception to construct the radio tower under local zoning procedures while reserving its right -- in the event its request was denied under local law -- to pursue its request under the FMA, *would be contrary to the clearly-expressed intent of Congress to insure a particular form of federal participation in such decisions in the District of Columbia*. Allowing Benin to proceed under local law *would provide no assurance* to the federal government that its interest in foreign affairs will be taken into account, and is, therefore, an interpretation plainly at odds with the expressed goals of Congress.⁷⁵

The modest argument that the court was rejecting here was submitted by no less than the United States in an amicus brief. The US argued that, pursuant to the FMA, the BZA has the authority to review Benin's application as an original matter under DC zoning law; and that the FM-BZA has the authority to review the appeal from the BZA under the additional criteria of section 206.⁷⁶ The FMA grants the FM-BZA jurisdiction "concerning the location of a chancery under subsection (b)(2), or concerning an appeal of an administrative decision with respect to a

⁷³ 534 A.2d 310 (D.C. 1987).

⁷⁴ "[T]he FMA provides the exclusive procedure available for consideration of Benin's application, and ... the BZA ... was without jurisdiction to review the application solely under District of Columbia law." *Id.* at 319.

⁷⁵ *Id.* at 321-22 (emphases added).

⁷⁶ This is no longer the US's legal position; after *Turkish Chancery III*, why should it be? But it may well be the State Department's practice when it comes to potentially thorny historic landmarks. *Cf.* FM-BZA decision, note 72 *supra* (Cape Verde).

chancery based in whole or in part upon any zoning regulation or map.”⁷⁷ The plainest reading of this provision is that the FM-BZA may review chancery application *either and only* concerning “location” *or* an “appeal of an administrative decision.” The FM-BZA’s only original jurisdiction over chancery applications must be concerning “location”; the regular DC agencies have original jurisdiction over all other permit matters (including alteration and expansion of current chanceries); and the FM-BZA reviews appeals of DC agencies’ decisions applying the full section 206 criteria.

The *Embassy of Benin* court’s opinion strains logic in rejecting this plain reading of section 206. How does Benin having to appeal from the BZA to the FM-BZA rather than enjoying direct access to the FM-BZA in any way jeopardize “federal participation” in chancery issues or prevent the federal government’s interest in foreign affairs from being “taken into account”? The court reached this determination because it was most concerned with what it discerned to be the FMA’s primary purpose: “Congress ... perceived that the protection of United States interests abroad required the expeditious resolution of chancery issues and consequently sought to eliminate the time-consuming and overlapping proceedings which resulted under the then-existing practices.”⁷⁸ A related factor driving the court’s decision was the fact that Benin was seeking permission to build a radio tower. In the Cold War context of 1987, nothing could be more in keeping with the FMA’s privileging of national security and the reciprocity principle than the ability of US missions abroad to have unimpeded communication and broadcast rights.⁷⁹

⁷⁷ 22 U.S.C. §§ 4306(c)(3), 4306(d). Section 4306(c)(1) is the actual grant of jurisdiction: “If a foreign mission wishes to locate a chancery in an area described in subsection (b)(2) of this section, or wishes to appeal an administrative decision relating to a chancery based in whole or in part upon any zoning map or regulation, it shall file an application with the [FM-BZA].”

⁷⁸ 534 A.2d at 315.

⁷⁹ See *id.* at 319 (“The conferees reported that by directing the Secretary of State to require ‘substantial compliance’ with local laws, § 206 (g) not only imposed a requirement ‘stricter than current practice under which [building and related] codes are not enforced with respect to foreign missions because of diplomatic immunity,’ but it also permit[ted] the Secretary of State to accommodate special building requirements, generally involving security,

In many respects, this was an easy case, and the court's instincts were correct. Benin was owed the consideration of the federal interest at some point in its application, and it would be contrary to the intent of Congress to have a DC agency decide whether Benin could *ultimately* have a communications facility "solely" on the basis of DC law. Benin's radio tower, in short, was clearly a matter for zoning adjustment, as there was no question it would violate the ordinance, and clearly a matter for federal participation, as this was a serious diplomatic matter. Because Benin had already received an advisory opinion from the Zoning Administrator, having to go to the BZA and then the FM-BZA would indeed have been redundant. The court could simply have ruled that, for chancery applications such as Benin's requiring zoning adjustment, the BZA should make a speedy determination and certify the case to the FM-BZA, thereby cutting out the overlap and ensuring timely federal participation. But because the court was most concerned about DC agencies in general having the last word rather than the first word on serious diplomatic issues, the court took it upon itself to decide the much broader jurisdictional point as to which body should have the *only* word on *all* chancery applications.

Although Benin's chancery was in a historic district, the Benin case had nothing to do with historic preservation regulations. Unlike a straightforward zoning question, the application of historic preservation law to a demolition or expansion proposal is more a matter of expert judgment and the weighing of multiple considerations according to legal standards. If the *Embassy of Benin* court viewed it as imperative to cut out the redundancy to ensure federal participation in matters of zoning adjustment, nothing in the opinion required or made much policy sense that the same should apply in matters of historic preservation. Yet in *Turkish Chancery III*, the federal Court of Appeals for the DC Circuit, perhaps taking its cue from the

communications, and related needs, which are often required to be adjusted in a similar manner for U.S. missions abroad.' [citing H.R. Conf. Rep. No. 693-97 at 42] (emphasis added).")

broadly interventionist stance of the DC Court of Appeals, held that the FM-BZA has original jurisdiction over all chancery replacement and expansion applications involving DC historic preservation law.⁸⁰ The court further held that “substantial compliance” with the DC Act entails nothing more than obtaining an opinion from the HPRB that could be summarily ignored.⁸¹

Like *Embassy of Benin*, the radically simple, broad and unwarranted holding of *Turkish Chancery III* arose from a messy accident of circumstances and jurisdictional confusion. Turkey first sought permission to demolish and replace its chancery in 1986, before *Embassy of Benin* was decided. Quite naively, Turkey did not at first avail itself of the FM-BZA but instead filed its application with the DC Department of Consumer and Regulatory Affairs (DCRA). Turkey was then referred by the DCRA to the HPRB and was denied three successive times by the HPRB.⁸² After the final denial, in 1988, Turkey requested a review by the MAHP pursuant to the DC Act, but then withdrew this request and filed its application as an original matter with the FM-BZA, probably on the strength of the then recently-decided *Embassy of Benin*. The FM-BZA, not knowing quite what to do, referred the proposal to the MAHP for a recommendation, whose jurisdiction Turkey opposed. Faced with the argument of opposition counsel⁸³ that the FM-BZA lacked original jurisdiction, the MAHP threaded the needle and “assume[d] for the purpose of conducting [the] hearing that the FMA does not preclude a Mayor’s Agent hearing and [decided to] proceed accordingly.”⁸⁴ The MAHP found that the demolition of the contributing historic building to be inconsistent with the DC Act, and that Turkey did not meet

⁸⁰ 49 F.3d 750, 758 (D.C. Cir. 1995).

⁸¹ *Id.* at 759.

⁸² See MAHP decision issued September 6, 1988 (“The Review Board [HPRB] reviewed the application on three separate occasions: December 17, 1986, September 16, 1987 and October 21, 1987. The Review Board recommended the demolition permit be denied in the December 17, 1986 meeting, and reaffirmed that position in the subsequent meetings.”).

⁸³ Richard Nettler, whose arguments I am renewing and expanding in this paper, and who provided valuable guidance.

⁸⁴ See MAHP decision issued September 6, 1988.

its burden of demonstrating the special merit of its project.⁸⁵ With the MAHP's opinion in hand, the FM-BZA then rejected the application on narrower historic preservation grounds. The FM-BZA did not disapprove the demolition but found the "excessive size" of the proposed replacement building to be incompatible with the other structures in the historic district.⁸⁶ Thus, while the FM-BZA decision established that "one criterion [of the six section 206 criteria], standing alone, may be so sufficiently preponderant as to be dispositive of the case"⁸⁷ and that historic preservation could be that criterion, the decision also established that the FM-BZA could interpret *de novo* – and significantly lower – what compliance with the DC Act entails.

At the end of its 1988 opinion, the FM-BZA invited Turkey to correct the size defect and reapply.⁸⁸ For a time, Turkey gave up the ghost and in 1989 instead sought to move its chancery altogether to a new building at 1714 Massachusetts Avenue. Although this site was also in a historic district, the FM-BZA approved Turkey's proposed relocation because it involved no plans for alteration or expansion.⁸⁹ But Turkey soon resumed its original plan to demolish and replace its existing chancery. With a new and architecturally innovative design that significantly reduced the size of the above-ground structure,⁹⁰ and with the renewed support of the State Department,⁹¹ Turkey resubmitted its application to the FM-BZA in 1990. The FM-BZA sought the opinion of the HPRB, which again recommended against the demolition but separately found that the new structure would be compatible with the historic district.⁹² The FM-BZA also solicited the opinion of the MAHP, who delayed responding (perhaps so as not to contradict the

⁸⁵ *Id.*

⁸⁶ FM-BZA decision issued September 7, 1988.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ FM-BZA decision issued April 26, 1989.

⁹⁰ See Turkish Embassy Brochure, available at <<http://www.turkishembassy.org/embassy/index.htm>>.

⁹¹ See 2001 Annual Report of the Department of State Office of Foreign Missions, 11-12 (touting the State Department's crucial support in getting the chancery built), available at <<http://www.state.gov/ofm/resource/pubs/>>.

⁹² See FM-BZA decision issued January 16, 1991.

earlier MAHP decision that demolition was inconsistent with the DC Act). Six days before the MAHP's opinion was due, the FM-BZA approved Turkey's application on January 16, 1991.⁹³

The ensuing legal proceedings in court were also a jurisdictional muddle. Citizens groups as well as the National Trust for Historic Preservation (NTHP) filed suit in federal district court rather than the DC Court of Appeals, because the Secretary of State was named as a defendant and the case also involved novel questions about the application of federal historic preservation law.⁹⁴ In the court's first summary judgment (hereinafter *Turkish Chancery I*), Judge Greene found that the FMA grants the FM-BZA original and exclusive jurisdiction not only over chancery locations but all expansion and demolition permits.⁹⁵ Judge Greene did not, however, resolve the question as to whether the FM-BZA substantially complied with the DC Act until the court's second summary judgment (hereinafter *Turkish Chancery II*), when he took into account the newly-presented fact that the FM-BZA had solicited the opinion of the MAHP as well as the HPRB. Judge Greene found that consultation with the HPRB and MAHP was all the compliance required under FMA section 206.⁹⁶ After the NTHP and the citizens groups appealed on this and other issues, Turkey, now an intervenor in the case, overcame its final obstacle when the DC Circuit affirmed that the FM-BZA's jurisdiction and decision were in accordance with the FMA.

On the question of the FM-BZA's original jurisdiction over demolition and expansion as well as location, the *Turkish Chancery III* decision offered an argument from statutory language:

The most plausible reading of the statute ... is that it gives the [FM-BZA] exclusive jurisdiction over all proposals involving 'the location, replacement, or expansion of chanceries in the District of Columbia.' 22 U.S.C. § 4306(a). After all, the statute contemplates that a foreign mission will file an application with the [FM-BZA] 'with

⁹³ *Id.*

⁹⁴ This large issue is beyond the scope of this paper. But see textual discussion *infra* for why filing in federal court may have been a mistake that, in retrospect, could have been avoided, perhaps with a different result. The citizens groups were shooting for the moon on the federal historic preservation law question.

⁹⁵ *Nat'l Trust for Historic Preservation v. Dep't of State*, 834 F. Supp. 443, 453 (D.D.C. 1993).

⁹⁶ *Nat'l Trust for Historic Preservation v. Dep't of State*, 834 F. Supp. 453, 455 (D.D.C. 1993).

respect to such location, replacement, or expansion,’ 22 U.S.C. § 4306(b)(2), (c)(3); provides that the decision of the [FM-BZA] ‘shall not be subject to the administrative proceedings of any other agency or official,’ 22 U.S.C. § 4306(c)(3); and allows for the operation of other laws ‘only to the extent they are consistent with [22 U.S.C. § 4306].’ 22 U.S.C. § 4306(j).⁹⁷

All of the language cited above by Judge Ginsburg is relevant and accurate, but nothing in it specifically or in the aggregate requires the FM-BZA to have original jurisdiction over “replacement or expansion” as well as “location.” The fact that the first paragraph of section 206(a) states that “[t]he location, replacement, or expansion of chanceries [in DC] shall be subject to this section” does not mean that section 206 requires all three to be dealt with in the same way.⁹⁸ The fact that the statute contemplates the “filing of an application [with the FM-BZA] with respect to such location, replacement, or expansion,” and that “[a] final determination concerning the location, replacement, or expansion of a chancery shall be made not later than 6 months after the filing of an application” does not mean that the “applications” must be original applications and not applications considered by the FM-BZA on appeal.⁹⁹ The fact that the statute provides that the determination by the FM-BZA “shall not be subject to the administrative proceedings of any other agency or official” does not preclude an administrative agency from making an *original* determination concerning a replacement or expansion permit.¹⁰⁰

In fact, on the language cited by the court, the statute could be read in two ways that run counter to Judge Ginsburg’s interpretation. When replacement or expansions are contemplated as pendent questions of location – that is, when a foreign mission is either newly locating or relocating and has plans to expand or replace the structure – then and only then does the FM-BZA have original jurisdiction over replacement and expansion proposals. Or, alternatively and

⁹⁷ *Turkish Chancery III*, 49 F.3d 750, 757 (D.C. Cir. 1995).

⁹⁸ 22 U.S.C. § 4306(a).

⁹⁹ *Id.* at § 4306(b)(2)

¹⁰⁰ *Id.* at § 4306(c)(3)

more strictly, the FM-BZA only has original jurisdiction over location and relocation proposals, and only appellate jurisdiction over replacement and expansion (and of course alteration) applications. The only outstanding question with the latter possibility is whether the six-month time limit would apply to both the DC agency's and FM-BZA's decision (thereby capping the total application process at six months, and compelling the DC agency to act quickly) or just to the FM-BZA's appellate decision. The former would make more sense from a policy standpoint.

If the language cited by Judge Ginsburg were all the relevant language bearing on the jurisdictional question, the court's reading might indeed be plausible. But the court also had to come to terms with the contradictory language of section 206(c)(1), which describes the FM-BZA's jurisdiction as concerning "locat[ion]... *or* [an] appeal [from] an administrative agency" and nothing else.¹⁰¹ To resolve this contradiction, Judge Ginsburg had to conflate the specific with the general in a statutory surgery that does not quite work (although he presents it as necessary):

Paragraph (c)(1) ... *cannot* describe the universe of cases that may come before the [FM-BZA]. For paragraph (c)(3) of § 206 speaks of [FM-BZA] determinations "concerning the location, replacement, or expansion of a chancery" and provides that such decisions "shall not be subject to the administrative proceedings of any other agency or official except as provided in this chapter." 22 U.S.C. § 4306(c)(3). The *only way to give effective operation to both of these provisions* is to conclude that the term "location" in paragraph (c)(1) includes the 'replacement' and 'expansion' determinations referred to in paragraph (c)(3), and that zoning issues that do not involve 'location, replacement, or expansion,' i.e., those not covered by paragraph (c)(3), are to be raised first before the appropriate D.C. authority and then brought to the [FM-BZA] on appeal pursuant to paragraph (c)(1).

If paragraph (c)(1) allowed the [FM-BZA] to review only zoning decisions of some other agency (at least when the matter is not one of 'location'), then the reference in paragraph (c)(3) to replacement and expansion determinations not subject to the proceedings of any other agency *would be meaningless*. Rather, we *must conclude* that paragraph (c)(3) gives the [FM-BZA] exclusive original jurisdiction over zoning determinations governing the 'location, replacement, or expansion' of a chancery; as to all other zoning issues relating to a chancery, [FM-BZA] has exclusive appellate jurisdiction under subsection (c)(1). Replacement and perhaps expansion are clearly at

¹⁰¹ *Id.* at § 4306(c)(1).

issue in this case, and Turkey's proposal was therefore properly before the [FM-BZA] in the first instance.

The District of Columbia Court of Appeals would agree [citing *Embassy of Benin*]....¹⁰²

As a matter of interpreting statutory language, this discussion is riddled with specious assertions of necessity (conveniently emphasized above). First, Judge Ginsburg bears the burden of plausibility because he is contradicting the plainest reading of the statute. A standard canon of statutory interpretation is “*expressio unius est exclusio alterius*”¹⁰³ – the expression of one thing rules out the thing not mentioned. Read according to this canon, the FMA specifying either location or appeal does exclude everything else that is not specified from the universe of the FM-BZA's jurisdiction. Second, Judge Ginsburg simply ignores his own cited language of “except as provided in this chapter” when he quotes that the FM-BZA determinations “shall not be subject to the administrative proceedings of any other agency or official....” A fairer opinion would have examined how the chapter does in fact provide otherwise, and an obvious answer would be that it treats decisions about location differently than decisions about replacement or expansion. But even this is an unnecessary argument to make, because the section referred to (but not cited) by Judge Ginsburg as the capstone of his interpretation in fact only refers to “a *final* determination concerning the location, replacement, or expansion of a chancery....”¹⁰⁴ In other words, this language only mandates that the FM-BZA cannot be *subsequently* reviewed by another agency or official; it has nothing to do with a *prior* determination by an agency or official. Far from requiring that there be one and only one determination, the word “final” implies an original determination appealed to the FM-BZA.

¹⁰² *Turkish Chancery III*, 49 F.3d at 757-58 (emphases added).

¹⁰³ See generally William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621, 664 (1990).

¹⁰⁴ 22 U.S.C. § 4306(c)(1).

Third, it is hardly necessary, let alone logical, to read “location” as including “replacement” and “expansion” and far from “meaningless” to read it otherwise. “Location” as meaning, in shorthand and implicitly, “location, replacement, or expansion” is a questionable interpretive stretch, especially when two interpretations are available that take the words as they are: (1) that the FM-BZA can only take up replacement and expansion as an original matter when pendent with a location determination; or (2) that the FM-BZA can never take up replacement and expansion as an original matter. Judge Ginsburg, in other words, chose the least plausible interpretation of several possibilities. Moreover, he never acknowledges the fact that if Congress had intended the jurisdictional scheme favored by the court, it could have simply stated that “location” means “location, replacement, or expansion” for the purposes of this section.¹⁰⁵

Fourth, Judge Ginsburg wholly ignores the statute’s repetition in section 206(d) of “location ... or appeal from an administrative decision” when laying out the FM-BZA’s criteria for making its determinations.¹⁰⁶ This restatement of the 206(c)(1) language lends strong support to the interpretation that these are exhaustive and exclusive terms: to think otherwise is to presume that Congress made the same mistake twice. Of course, the interpretation favored by this paper still has to account for section 206(d)(2), which speaks of the criterion of historic preservation as applied to “new construction and to demolition of or alteration to historic landmarks.” How can the FM-BZA only have original jurisdiction over “location” when here construction, demolition, and alteration are explicitly contemplated? But this is not difficult to resolve, because the same jurisdictional framework applies. Again, two possibilities present

¹⁰⁵ Section 205 suggest that the radical reading may be the more plausible, that location only means location: “For purposes of this section, ‘acquisition’ includes any acquisition or alteration of, or addition to, any real property.” 22 U.S.C. § 4305. This refers to all the instances when a foreign mission must inform the OFM in advance of a chancery acquisition. The point is limited, because it only applies “for purpose of this section,” but it shows that Congress knew how to define “location” as “location, replacement or expansion” if it wanted to, but did not do so in section 206. Also, Congress could have simply put in “acquisition” instead of location if it wanted to provide the most comprehensive original jurisdiction to the FM-BZA.

¹⁰⁶ 22 U.S.C. § 4306(d).

themselves. When a chancery locates at a new location, and if its proposed use involves “expansion or replacement,” then the FM-BZA as an original matter may look to “new construction and to demolition of or alteration to historic landmarks ... in order to ensure compatibility with historic landmarks and districts.”¹⁰⁷ When a chancery is appealing a decision of the HPRB and MAHP which did not involve a change in or new “location,” the section 206(d)(2) criterion becomes the standard of appellate review. This latter would also be the case under the stricter interpretation that the FM-BZA has original jurisdiction only over “location” and only “expansion or replacement” as an appellate matter. A final difficulty is that the criterion section refers to “alteration” as well, whereas the preceding provisions speak of “replacement or expansion.” But this too is not difficult to resolve. As an appellate matter, the FM-BZA will only apply this historic preservation criterion if a DC agency (namely the HPRB) denies an alteration permit. This section, then, does not undermine the FM-BZA’s original jurisdiction only over location (and perhaps pendent jurisdiction over replacement or expansion). In short, everything in section 206 can be logically and consistently fit into the “location ... or appeal” framework in ways that do no violence to the plain language.

As its final jurisdictional point, the *Turkish Chancery III* court makes much of the fact that the FMA, in section 207, expressly allows for the preemption of DC law. But this argument suffers from the same interpretive flaw as the court’s misreading of section 206:

[T]he plaintiffs argue that the FMA does not preempt applicable local law, and that Turkey is still required to comply with the procedures of District of Columbia zoning law. Both the FMA and local law, however, strongly suggest the contrary. Section 207 of the FMA, 22 U.S.C. § 4307, provides: ‘Nothing in section 4302, 4303, 4304, or 4305 of this title may be construed to preempt any State or municipal law of governmental authority regarding zoning, land use, health, safety, or welfare....’ Glaringly absent from this provision is any reference to § 206, 22 U.S.C. § 4306, which, of course, implies that § 206 ‘may be construed to preempt’ D.C. zoning and kindred laws.¹⁰⁸

¹⁰⁷ *Id.* at § 4306(d)(2).

¹⁰⁸ 49 F.3d at 758.

Just as the court closed its eyes to the fact that not allowing the FM-BZA's final decisions to be subject to DC review did not rule out the FM-BZA having appellate DC decisions not concerning "location," here the court is willfully unmindful that the FMA only preempts what the FMA does not allow of DC law. Because section 206 already permits DC original jurisdiction over every other matter but "location," and in fact mandates "substantial compliance" with DC law on appeal to the FM-BZA, the DC Act is not preempted in the same way that DC zoning law concerning new locations would be preempted per *Embassy of Benin*. The court is also on uncertain ground in implying that its interpretation must be correct because DC regulations interpret the FM-BZA's authority in the same way.¹⁰⁹ Surely the court is not suggesting that DC itself would have any say one way or another in how the FM-BZA is to be applied, since (in its view) the FMA preempts DC law from having any say. But the court, against its better judgment, may in fact be right on this count. As the Conference Report on the FMA stated: "Section 206(j) provides that other provisions of law shall apply to chanceries in [DC] only to the extent they are consistent with this section. This is in lieu of the House provision which made the [FMA] the exclusive law governing foreign missions in DC."¹¹⁰ Not only is the DC Act consistent with section 206, but, because Congress ultimately decided to create the FM-BZA as a majority-DC hybrid agency whose regulations are part of DC law, DC may perhaps retain significant interpretive authority over what substantial compliance requires.

Like the *Embassy of Benin* court, The *Turkish Chancery III* court also argued for the FM-BZA's broad original jurisdiction from a one-sided view of the legislative history and objectives

¹⁰⁹ "Likewise, § 206 provides that the Secretary shall require missions to comply substantially with D.C. 'building and related codes,' 22 U.S.C. § 4306(g); and D.C. law provides a comprehensive scheme for the HPRB to review applications submitted to the [FM-BZA], see, e.g., 11 D.C.M.R. § 1002.7. Both of these requirements would be wholly redundant if proposals such as Turkey's were subject to the usual processes for making D.C. zoning determinations. Accordingly, we affirm the district court's conclusion that Turkey's application was properly submitted to the [FM-BZA], rather than to whatever local body would have been appropriate but for the FMA." *Id.*

¹¹⁰ H.R. Conf. Rep. No. 693 at 43 (1982).

of the FMA.¹¹¹ Yet the legislative history makes clear that Congress was primarily concerned with chancery location issues – with DC erecting barriers to entry through zoning and with preventing chanceries full use of their facilities – and not with overly-strict policing of historic preservation violations.¹¹² The emphasis on zoning is consistent throughout the evolution of jurisdiction from the NCPC to the Foreign Missions Commission to the FM-BZA.¹¹³ Allowing the FM-BZA rather than the NCPC or Foreign Mission Commission to determine chancery issues, and allowing a significant place for DC law in these determination, reinforce the interpretation that the FM-BZA properly has only appellate jurisdiction over matters not concerned with zoning. In sum, nothing in the legislative history precludes the split jurisdiction model, and nothing in it requires the sole original jurisdiction advanced in *Turkish Chancery III*.

Turkey Chancery III did perhaps an even greater disservice to DC historic preservation law by establishing no floor for what substantial compliance means under section 206(d)(2). If the court performed a motley surgery on the jurisdictional question, here it performed a blunt amputation. The court defined substantial compliance in strictly procedural terms:

Although the statute speaks in the passive voice and thus fails to state clearly who or what must substantially comply with the applicable regulations, we believe it is the project, not the [FM-BZA]. In practice, however, this determination does not advance the issue very far, because ‘compliance’ with these laws, in this case at least, is not as much a

¹¹¹ See *Turkish Chancery III*, 49 F.3d at 759-60.

¹¹² Nowhere throughout any of the relevant reports of the House or Senate did I find any reference to overly-strict enforcement of historic preservation law.

¹¹³ The Report of the House Committee on Foreign Affairs stated that, in the context of national security issues, the legislative “places the authority to determine the location of foreign missions in the capital with the [NCPC], which under present law already has statutory authority to plan for such locations.” H. Rep. No. 97-102 at 34-35 (1981). The Report of the Senate Committee on Foreign Relations stated: “Section 206 provides that issues concerning the location of foreign missions in the District of Columbia will be settled by a newly created District of Columbia Foreign Missions Commission.” Further: “The controversy with respect to this section concerns the location in the Nation’s Capital of foreign mission chanceries.... Notwithstanding the significant Federal interest, local officials have since 1978 initiated actions which have severely curtailed the ability of the foreign affairs agencies to comply with international obligations in our Nation’s capital, through restrict laws and regulations openly discriminating against chancery uses.... What section 206 seeks is to establish procedures and regulatory guidelines which provide a proper balance of Federal and local interests with respect to the location of foreign missions in [DC].” S. Rep. No. 97-283 at 17-18 (1981). The Report of the Senate Committee on Governmental Affairs reiterated the FMA’s emphasis on location and non-discrimination against chanceries. See S. Rep. No. 97-329, at 13 (1982).

matter of meeting any specific standard as it is of submitting the proposal to the appropriate regulatory body or bodies for review and comment. Thus, the plaintiffs argue that the proposal had to be reviewed – at some point – by the MAHP... [whereas] the defendants argue that referral to the HPRB fully satisfied the requirements of the statute.

...

We do not reach the question whether anyone was required to submit the proposal to the MAHP, because the [FM-BZA] in fact referred Turkey's plan to the MAHP. The plaintiffs' argument therefore reduces to an assertion that the [FM-BZA] was required to wait for a determination by the MAHP before approving Turkey's proposal.

...

The FMA requires the [FM-BZA] to make a final determination on a chancery proposal within six months of receiving an application. 22 U.S.C. § 4306(c)(3). The [FM-BZA] received Turkey's application on September 18, 1990 and referred it to the MAHP promptly on September 26. On March 15, 1991, only a few days before the six months had run, the [FM-BZA] made its decision without having heard back from the MAHP. Nor is there any indication in the record that the MAHP was about to respond. For the [FM-BZA] to have waited upon the MAHP would have been inconsistent with its statutory timetable and would have imported into the process just the sort of indeterminate delay that the FMA was meant to keep out of the process for approving chancery improvements.¹¹⁴

Judge Ginsburg accomplished a none-too-subtle sleight of hand here. He “reduces” the plaintiffs’ argument that the FM-BZA failed to ensure substantial compliance with DC historic preservation law to the barest procedural question of whether the FM-BZA “was required to wait” for the MAHP’s opinion. This is hardly a legitimate reduction, because even as the court acknowledges, it is the “project, not the Board” that must substantially comply. But even on the terms chosen by the court, it was absurd to find that requiring the FM-BZA to “wait[] upon the MAHP ... would have imported into the process the indeterminate delay that the FMA was meant to keep out of the process.”¹¹⁵ Six days is exactly the opposite of “indeterminate”; it is a fixed and brief period, and everyone agreed six months was the proper timetable. The court claimed to not “reach” the question of whether the MAHP was required to be consulted, but then illogically ruled that, once consulted, the MAHP need not be given its full statutory leeway. Never mentioned in the opinion, of course, is the real reason for the FM-BZA’s rush – not the

¹¹⁴ *Turkish Chancery III*, 49 F.3d at 758-59.

¹¹⁵ *Id.* at 759.

impending expiration of the statutory timetable, but the impending Persian Gulf War. That is what in fact “imported” a new element into the process and why the FM-BZA would not wait six more days. The court simply substituted its own view of what the FMA was “meant” to do in holding, in effect, that the FMA privileges speed over compliance with DC law to an extent greater than the FMA actually requires. Not only is actual compliance with the statutory six months now insufficient to comply with the FMA, but “substantial compliance” with DC law is not even necessary.

These are small quibbles, however, compared to the larger problem with the court’s holding that “substantial compliance” is “not a matter of meeting any specific standard” but rather is a matter only of observing procedural courtesies. The plaintiffs’ real concern was not which “appropriate regulatory body or bodies” should have been “consulted” but rather what standard of deference or review “substantial compliance” requires of the FM-BZA. In its approval of the Turkish chancery’s demolition and replacement, the FM-BZA simply ignored the HPRB’s disapproval without comment and never identified how the project substantially complies with the DC Act. Behind the smokescreen of the court’s procedural discussion of the MAHP, the upshot of *Turkish Chancery III* is that so long as the FM-BZA complies with its own procedural regulations, it owes no deference to the HPRB and need not apply the DC Act at all in its review of chancery projects. Earlier the court characterized the regulations governing the FM-BZA’s procedures as a “comprehensive scheme.” It is hardly this; rather, as we have seen, it is a bare-bones scheme.¹¹⁶ Instead of establishing a legal standard for what, at a minimum, substantial compliance with the DC Act would mean – what part would be required, and what

¹¹⁶ *Id.* at 759 (“Likewise, § 206 provides that the Secretary shall require missions to comply substantially with D.C. ‘building and related codes,’ 22 U.S.C. § 4306(g); and D.C. law provides a comprehensive scheme for the HPRB to review applications submitted to the DCFMA-BZA, *see, e.g.*, 11 D.C.M.R. § 1002.7.”). See notes 54-57, *infra*, and accompanying text, for discussion of why this regulation is far from “comprehensive.”

part could be overlooked – *Turkish Chancery III* set the floor for compliance lower than DC law itself – to procedural regulations that were simply a first attempt to implement the FMA. Because the FM-BZA owes no deference to the HPRB as a procedural matter, the DC Act has no necessary weight under the FM-BZA’s section 206 authority.

VI. Conclusion and Recommendations: Meaning of Substantial Compliance with DC Law Under the FMA

What is to be done about *Turkish Chancery III*, now that the opinion is nearly a decade old? Exactly nothing has been done so far, either by DC or Congress. Yet, it is worth asking, even by those who would ultimately agree with the DC circuit court’s view, whether, under DC Home Rule, a federal court should have the final say over the interpretation of the FMA and the FM-BZA’s compliance with it. It is worth noting, as well, that had the citizens groups only sued on the questions of the FM-BZA’s jurisdiction and “substantial compliance” with the DC Act, they would have gone instead to the DC Court of Appeals, and the result might have been different, though perhaps not so in light of *Embassy of Benin*. Yet that too was an old case, not decided on historic preservation, and well before the HPRB and MAHP had established their legal bona fides as consistent and fair regulatory bodies administering the DC Act.

One telling omission of *Turkish Chancery III* is that the DC circuit court did not cite to a crucial 1978 opinion of the DC Court of Appeals, *Wheeler v. District of Columbia Board of Zoning Adjustment*,¹¹⁷ that clearly defined substantial compliance. This must have been a deliberate omission, because *Wheeler* was cited to (and mischaracterized) in *Turkish Chancery II*.¹¹⁸ *Wheeler* concerned whether the BZA complied with a provision of DC law that requires

¹¹⁷ 395 A.2d 85 (D.C. App. 1978).

¹¹⁸ “‘Substantial compliance’ is not strict compliance [citing *Wheeler*]. The FM-BZA need only comply with the spirit of law 2-144, which here means soliciting the views of the Mayor’s Agent.” *Turkish Chancery II*, 834 F. Supp. 443, 455 (D.D.C. 1993).

that the BZA to give “great weight” to the opinion of an Advisory Neighborhood Commission (ANC) in deliberating about a special exception project. The law requires that “[t]he issues and concerns raised in the recommendations of the ANC shall be given great weight during the deliberations by the governmental agency and those issues shall be discussed in the written rationale for the governmental decision taken.”¹¹⁹ A legal decision subsequent to the underlying BZA decision, *Kopff v. D.C. Alcoholic Beverage Control Board*,¹²⁰ interpreted the “great weight” provision as requiring “explicit reference to each ANC issue and concern *as such*, as well as specific findings and conclusions with respect to each.”¹²¹ Because the BZA’s decision preceded the *Kopff* guidance, the *Wheeler* court held that only substantial compliance with the “great weight” provision was required.¹²² The court explained what this standard entails:

“Substantial compliance” is “such compliance with [the] essential requirements of the . . . provision as may be sufficient for the accomplishment of the purposes thereof.” [citation omitted]. It “means actual compliance in respect to the substance essential to every reasonable objective of the statute.” [citations omitted]. Consequently, a determination of whether the BZA has substantially complied with D.C. Code 1978 Supp., § 1-171i(d) requires first an examination of the “purposes” or “reasonable objectives” of the “great weight” provision, and second a decision of whether the BZA’s findings sufficiently satisfy these purposes and objectives.¹²³

In *Wheeler*, the ANC had raised eight issues concerning the project in question which the BZA was required to address. The court found that of these six issues, one was not a genuine issue, one was irrelevant, and the BZA had covered the four other issues in its discussion of the special exception project.¹²⁴ Because the purpose of the “great weight” provision was to “forc[e]

¹¹⁹ D.C. Code 1978 Supp., § 1-171i(d).

¹²⁰ 381 A.2d 1372 (D.C. App. 1977).

¹²¹ *Id.* at 1384.

¹²² *Wheeler*, 395 A.2d at 90.

¹²³ *Id.*

¹²⁴ *Id.* at 91.

an agency to come to grips with the ANC view – to deal with it in detail,” and the BZA had sufficiently accomplished this, the court found that the BZA substantially complied.¹²⁵

Wheeler is useful in pointing the way forward for “substantial compliance” under the FMA in two respects. It firmly establishes not only what substantial compliance entails – a high standard of compliance – but what it meant at the time the FMA was passed – both *Wheeler* and the DC Act were four years old in 1982. Ensuring substantial compliance under FMA section 206(d)(2) thus meant ensuring that the DC Act’s purposes and objective were being sufficiently met by a given chancery proposal. *Wheeler* is also useful in suggesting how substantial compliance can be achieved through procedural means, because it reminds us that the FM-BZA is still required to give “great weight” to the ANC opinion concerning a chancery project in performing its section 206 balancing of the six criteria applicable to chancery applications.¹²⁶

DC could similarly pass a law or promulgate a regulation that would require the FM-BZA to give some measure of deference or even “great weight” to the HPRB as well: requiring, at least, that the FM-BZA respond directly to each point of the HPRB’s opinion of how the DC Act applies to the chancery project in question. This new requirement would of course only be operative when, in cases such as that of Turkey, the FM-BZA rejects the HPRB’s disapproval. It would still ultimately be up to the FM-BZA to determine that the HPRB’s historic preservation concerns may not be enough to deny a permit, because the FM-BZA must still weigh historic preservation against five other considerations under FMA section 206, and there may well be case where the foreign policy interest of the United States do trump historic preservation. But this change in the law would at least require historic preservation to be taken into account

¹²⁵ *Id.*

explicitly and in light of the applicable standards of the DC Act. Historic preservation, in short, would at least be allowed a fair chance.

While the time is ripe for a regulatory reform of the FM-BZA's application of "substantial compliance," DC probably could not, on its own, correct the improper jurisdictional scheme affirmed in *Embassy of Benin* and *Turkish Chancery III*. The FM-BZA's sole original jurisdiction over chancery issues is too well-settled (albeit wrongly settled); there has been too much reliance on the scheme currently in place for any court, or even DC, to change what is perceived to be a statutory requirement. Congress alone can clarify the jurisdictional issue, which is unlikely to happen. But because "substantial compliance" with DC law would merely be a matter of applying existing DC law, and because the term already has a definite legal meaning in *Wheeler*, a new DC regulation that simply raised the standard back to what it should be would probably survive a legal challenge in a DC court. Such a challenge would have to arise from a foreign mission whose application were denied by the HPRB and also (perhaps reluctantly so) by the FM-BZA. Ironically enough, even in light of *Turkish Chancery III*, a new historic preservation "great weight" law or regulation would probably be on solid legal ground. To be sure, it was probably mere convenience, if not cynicism, that led the *Turkish Chancery III* court to cite to DC's modest regulations as evidence that that court's impoverished interpretation of the FMA was both proper and in keeping with DC law. Yet *Turkey Chancery III* could nonetheless be advanced as standing for the proposition that DC has the right to interpret FMA section 206(d)(2) as it sees fit, so long as that interpretation is consistent with the purposes of the FMA.

This more modest regulatory reform of "substantial compliance" would also probably have much the same effect as would a more radical and far less feasible jurisdictional reform. The HPRB need not have original jurisdiction over demolition and replacement so long as the

FM-BZA is directly responsive and somewhat deferential to the HPRB's review of a chancery project, which would be applying the DC Act. Substantial compliance, accurately applied, would more than compensate for the HPRB's lack of original jurisdiction. Moreover, this reform could build on the FM-BZA's recent Benin and Latvia precedents where the State Department and FM-BZA seem already inclined to delegate to the HPRB for matters of historic preservation enforcement traditionally within the HPRB's purview. The recent Cape Verde decision may in fact demonstrate a newfound willingness on the part of the State Department and the FM-BZA to defer to DC preservation authorities such as the MAHP at least for non-controversial cases.¹²⁷

On the one hand, the FM-BZA and the State Department's newfound respect for historic preservation marks one positive legacy of the Turkish Chancery case. While historic preservation may certainly still be ignored as a legal matter, practically and politically speaking that is difficult to do today. Even the radical and unwarranted resolution of the Turkish Chancery case itself was still subject to the political input of historic preservation: It was perhaps a small victory but a victory nonetheless that Turkey was forced to reduce the size of its new chancery due to the HPRB's multiple disapprovals before the jurisdictional question was decided. Thus, even if no legal or regulatory reform is achieved, the Turkish Chancery case still stands as a cautionary tale. No foreign mission, let alone the State Department or FM-BZA, would wish to go through the same legal hassle again or risk similar political resistance.

On the other hand, because of the radical legal scheme left in place by *Turkish Chancery III*, no foreign mission would have to go through quite the same travail. Though the next demolition and replacement proposal will probably (hopefully) not have the benefit of a war to help its case, it will still have the benefit of the ill-advised precedent set by *Turkish Chancery III* that historic preservation has no legal weight as compared to the foreign policy interests of the

¹²⁷ See note 62, *supra*.

United States. Today, those foreign policy interests are perhaps more significant and far-reaching than ever before. When the time comes for a new challenge to an FM-BZA decision by the historic preservation community – and that time could be near due to the impending growth of chanceries in DC, and the attractiveness of historic properties – *Turkish Chancery III* will well be worth reexamining. Perhaps then DC authorities, a DC court, or even Congress, will act to achieve a long overdue reform and restore the balanced compromise between preserving diplomacy and history that the FMA embodied.

Appendix: FMA Section 206, 22 U.S.C. § 4306

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

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

(b) Acceptable areas; limitations and conditions.

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

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

(A) in any area which is zoned medium-high or high density residential, and

(B) in any other area, determined on the basis of existing uses, which includes office or institutional uses, including but not limited to any area zoned mixed-use diplomatic or special purpose,

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

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

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

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

(2) Regulations issued to carry out this section shall provide appropriate opportunities for participation by the public in proceedings concerning the location, replacement, or expansion of chanceries.

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

(d) Criteria for determination. Any determination concerning the location of a chancery under subsection (b)(2), or concerning an appeal of an administrative decision with respect to a chancery based in whole or in part upon any zoning regulation or map, shall be based solely on the following criteria:

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

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

(3) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking requirements, subject to such special security requirements as may be determined by the Secretary, after consultation with Federal agencies authorized to perform protective services.

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

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

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

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

Commission.

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

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

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

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

(h) Approval of Board of Zoning Adjustment or Zoning Commission not required. Approval by the Board of Zoning Adjustment or the Zoning Commission or, except as provided in section 205, by any other agency or official is not required--

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

(2) for continuing use of a chancery by a foreign mission to the extent that the chancery was being used by a foreign mission on the effective date of this section.

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

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

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

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

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

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