

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 9 - 2002

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

2120 Kalorama Road, Inc., et al.,

Plaintiffs,

v.

District of Columbia Foreign Missions
Act -Board of Zoning Adjustment, et al.,

Defendants.

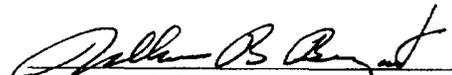
C.A. No. 00-1568 (WBB)

ORDER

Upon consideration of the parties' Cross-Motions for Summary Judgment, and the entire record herein, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is GRANTED; and it is

FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED.



William B. Bryant
Senior U.S. District Judge

Date: *September 9, 2002*

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MEMORANDUM

I. Background

On October 5, 1999, the owner of the property at 2124 Kalorama Road, N.W., Washington, D.C. filed an application on behalf of the Embassy of the Republic of Benin (“the Embassy”) seeking permission from the Foreign Missions Act-Board of Zoning Adjustment (“the Board”) to locate a chancery at that site.¹ The Board held a hearing on this application on December 8, 1999, at which time it heard testimony from the applicant and several other witnesses, and received written submissions favoring and opposing the application. At a meeting held on January 5, 2000, the Board voted not to disapprove the application and resolved all issues in favor of the applicant. The decision was served on March 3, 2000. On April 17, 2000, 2120 Kalorama Road, Inc., a cooperative apartment building association and Daniel W. Brown, Jr., (“Plaintiffs”) filed suit in the Superior Court for the District of Columbia against the Board,

¹ Under the Foreign Missions Act, a chancery may be permitted to locate in the District of Columbia, provided that its application is not disapproved by the Board, which was created to hear chancery cases. See 22 U.S.C. § 4306(b)(2)(B); D.C. Code § 6-1306(b)(2)(B).

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challenging its decision. Specifically, Plaintiffs allege: 1) that the Board's finding that municipal interests do not require disapproval of the application is arbitrary, capricious, and not in accordance with the law; 2) that the Board failed to consider the full extent to which the chancery would adversely affect the historic character of the Sheridan Kalorama Historic District; 3) that the Board failed to properly consider 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 as required by law; 4) that the Board failed to give "great weight" to the comments and recommendations relative to historic preservation, traffic and parking, and failed to address these comments and recommendations in its written decision; and 5) the Board's failure to disapprove the application was arbitrary, capricious and not in accordance with law because it was not supported by substantial evidence. Plaintiffs seek a mandatory injunction directing the Board to vacate its decision on the application, an order directing the Board to disapprove the application, and an award of attorneys' fees and costs. On June 26, 2000, a Motion to Intervene filed by the United States was granted, and on June 29, 2000, the case was removed to U.S. District Court. Currently pending are Cross-Motions for Summary Judgment filed by Plaintiffs, the Board, and the United States. Upon consideration of those pending motions, the parties' opposition thereto, and the entire record in this case, the Court finds that Defendants' Cross Motions for Summary Judgment shall be granted.

II. Standard of Review

In reviewing a decision of the Board, the Court shall apply the standards outlined in the District of Columbia Administrative Procedures Act ("DCAPA"), requiring the court to vacate and set aside decisions that are arbitrary, capricious, or not in accordance with law. D.C. Code

§ 2-510(a)(3) (2001). In DCAPA cases, the Court shall consider whether the Board made findings of fact based on substantial evidence on each material contested issue, and reached rational conclusions based on those findings. See Committee on Washington’s Riverfront Parks v. Thompson, 451 A.2d 1177, 1193 (D.C. 1982). The Board’s findings must be affirmed if they are supported by and in accordance with reliable, probative and substantive evidence in the record as a whole. Kegley v. District of Columbia, 440 A.2d 1013, 1018 (D.C. 1982).

Moreover, the Court cannot substitute its judgment for that of the Board, see id., and must defer to the Board’s interpretation of the statute it administers unless that interpretation is unreasonable in light of prevailing law. See Anthony v. District of Columbia Dep’t of Employment Servs., 528 A.2d 883, 884 (D.C. 1987). In addition, because the Board has heard live witnesses, its findings are entitled to even greater consideration. See Allen v. District of Columbia Bd. of Elections and Ethics, 663 A.2d 489, 495 (D.C. 1995)(finding that Board of Elections’ decision based on credibility of live witnesses deserves more deference).

III. Analysis

The Foreign Missions Act (“FMA”) was passed by Congress in 1982 “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.” S. Rep. No. 329, 97th Cong., 2nd Sess., at 1 (1982), reprinted in 1982 U.S.C.C.A.N. at 714, Embassy of the People’s Republic of Benin v. District of Columbia Bd. of Zoning Adjustment, 534 A.2d 310, 314 (D.C. 1987). The FMA was intended to allow the federal government to carry out its international treaty obligations to facilitate the operation of foreign missions in the United States, and to balance local and federal interests involved in the location

and operation of foreign missions. See People's Republic of Benin at 315.

The site in question in the present case is located in a D/R-1-B zoning district, which signifies a single-family residential zone with a diplomatic overlay known as a "mixed-use diplomatic" zone. Board decision at 5. Under the FMA, a chancery "may be permitted to locate" in such a district, provided that the application is not "disapprove[d]" by the Board. 22 U.S.C. § 4306(b)(2)(B); D.C. Code § 6-1306(b)(2)(B)(2001). The Board may take into account the following criteria when determining whether to disapprove the location of a chancery in the District of Columbia:

- (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 [of State], 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 [of State], 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 of State.

22 U.S.C. § 4306(d); D.C. Code § 6-1306(d) (2001).

In their Complaint, Plaintiffs assert that the Board's decision not to disapprove the Republic of Benin's application was arbitrary, capricious and contrary to law because of its failure to account for the municipal interest, historic preservation concerns, and parking and

traffic considerations, and for its failure to give “great weight” to the concerns of the Advisory Neighborhood Commission (“ANC”).² See Complaint ¶¶ 27, 30, 33, 37. The Court will address each of these concerns in turn.

A. Historic Preservation

Under the FMA, the Board must consider “[h]istoric 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); D.C. Code § 6-1306(d)(2). The building at issue is not a historic landmark, but it is a contributing property to the Sheridan-Kalorama Historic District. Determination and Order, District of Columbia Board of Zoning Adjustment, January 5, 2000 (“Board Decision”) at 7.

It is clear from the record that the Embassy proposed no changes to the outside of the building, except for the addition of a small flagpole and plaque outside the front door of the building. *Id.* The Embassy discussed these changes with the Sheridan-Kalorama Historical Association, and the Historic Preservation Division of the Department of Community and Regional Affairs reviewed and approved the placement of the flagpole. *Id.*

The Board heard testimony from the District of Columbia Office of Planning (“OP”) and the Advisory Neighborhood Commission for the area (“ANC 1D”) regarding the concern that a lack of property maintenance at the proposed site could affect the Sheridan-Kalorama Historic

² The Court will not address the Board’s analysis of the FMA’s three criteria relating to international obligation, security, and the federal interest because Plaintiffs do not challenge the Board’s analysis regarding those criteria.

District. Such testimony included concern regarding the upkeep of other chanceries in the neighborhood, as well as the other chancery operated by the Embassy on Cathedral Avenue. In response to these concerns, Ambassador Tonoukouin expressed the fact that his country was committed to maintaining the chancery, and that no work would be done on the exterior of the building without first obtaining the necessary historic preservation approvals. Transcript of Public Hearing before the Government of the District of Columbia Board of Zoning Adjustment, December 8, 1999 (“Transcript”) at 43-44. The Ambassador also met with the Sheridan-Kalorama Historical Association and developed a list of conditions that would help to preserve the historic character of the neighborhood. Id. at 48. One of these conditions was the hiring of a resident caretaker and property maintenance company, both of whom would be charged with maintaining the inside and outside of the chancery. Id. at 45. Ms. Mary Vogel (“Ms. Vogel”), the representative from OP, noted at the hearing that she previously had not been aware of the Embassy’s willingness to hire a resident caretaker, and that “the caretaker and the property management company combined could alleviate . . . a major concern.” Id. at 122.

Ultimately, the Board incorporated these and other conditions into its Order. Board Decision at 15-17. Based on the fact that the Embassy agreed to maintain the property in accordance with the historic character of the neighborhood, and because the changes proposed to the outside of the building had received the necessary historic preservation approvals, the Board determined that historic preservation does not present grounds for disapproval of the application. Id. at 8. The Court finds that there was substantial evidence in the record to support the Board’s conclusion.

B. Parking Issues and Public Transportation

Under the FMA, the Board also must consider “[t]he 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 [of State], after consultation with Federal agencies authorized to perform protective services.” 22 U.S.C. § 4306(d)(2); D.C. Code § 6-1306(d)(2).

The Board heard testimony regarding concerns that the proposed chancery would create parking problems in the neighborhood, including testimony from OP, ANC 1D, and some City Council Members. In particular, the witnesses were concerned about increased traffic and congestion in the neighborhood, as well as a reduction in on-street parking. See transcript at 129, 163-4. The Board also received a petition from the Residents of Kalorama raising issues regarding effect of the proposed chancery on traffic and parking in the neighborhood.

Ambassador Tonoukouin explained that the Embassy had spent time coming up with a plan for parking—four cars would be parked in the driveway, and employees would be shuttled to work from the chancery on Cathedral Avenue. Id. at 45-46. Consular and visa services, which could create a small increase in activity at the chancery, were to be handled at the property on Kalorama only for a period of two to three months. Id. at 44-45. The Embassy agreed they would not request any on-street parking for the chancery. Id. at 45, 58. Public transportation would be readily available for Embassy staff and visitors. Id. at 46-47.

The applicant also called upon Robert L. Morris, an expert on traffic and transportation matters, who submitted a report and testified at the hearing. Mr. Morris concluded that the proposed chancery would provide adequate off-street parking and would not adversely affect

traffic operating conditions in the neighborhood. Transcript at 52-56; Application of Adel Partnership on behalf of the Embassy of the Republic of Benin, Ex. G. Mr. Morris also explained that the petition that the Board had received from the Residents of Kalorama was based on several assumptions, none of which were factually correct, including: 1) that the Embassy was going to use on-street parking; 2) that the vehicles parked in the driveway would need to be shuffled; 3) that there would be increased traffic congestion because of the coming and going of visitors and staff; and 4) that 77 feet of the driveway was not available for parking. Id. at 52-54. Finally, in his testimony, Mr. Morris stated that the Board “would be hard pressed to find a chancery anywhere in the District of Columbia that would have less of an impact in terms of traffic and parking than the proposal [before the Board].” Id. at 56.

The Board found that the parking considerations do not furnish grounds for disapproval of this application. The Court finds that there is substantial evidence in the record to support the Board’s conclusion.

C. The municipal interest

Under the FMA, the Board must consider “the municipal interest, as determined by the Mayor of the District of Columbia.” 22 U.S.C. § 4306(d)(5); D.C. Code § 6-1306(d)(5). At the hearing, Ms. Vogel testified on behalf of the Mayor’s office and provided a written report. At the hearing, the Board questioned Ms. Vogel regarding the OP report, and whether OP had made a final recommendation to the Board regarding the application. Ms. Vogel stated that she was instructed by the Director of OP to take out the recommendation that was in an earlier version of the report. Transcript at 114. Ms. Vogel therefore noted that while the Director of OP “questions whether another chancery use in such a chancery saturated residential area is in the

municipal interest of the District of Columbia,” *id.* at 111, OP felt that “in deference to the Department of State and to the country itself....[OP] would not make a recommendation specifically, just raise issues.” *Id.* at 115. Therefore, the Board received no recommendation regarding the municipal interest from the representative of the Mayor of the District of Columbia.

While noting that OP had made no formal recommendation, the Board did take the time to consider OP’s discussion regarding the fact that the residential neighborhood where the proposed site was located potentially may become saturated by chanceries. Specifically, the Board noted that when the Zoning Commission mapped the diplomatic overlay on the square in question, OP supported that mapping, and that since that time, there have not been any additional chancery or diplomatic uses that have moved into that square.³ *Id.* at 117. While the Board noted that OP urged it to consider the cumulative impact of the proposed chancery use on the neighborhood, the Board was careful to clarify that its determination in this case must be made on a site-specific basis. Therefore, the Board made no finding concerning whether the Sheridan-Kalorama area has become saturated with chanceries.

OP also raised concerns regarding the enforceability of the conditions under which the Ambassador had agreed to operate the chancery, including the need for monitoring of the proposed shuttle system. Report submitted to the Foreign Missions Board of Zoning Adjustment by the Government of the District of Columbia Office of Planning, December 7, 1999 (“OP Report”) at 4. Representatives from the State Department noted that the Board can impose

³ In 1987, the Zoning Commission amended the Zoning Map by mapping the area in question with a diplomatic overlay designation. In order to receive this designation, at least one third of the square had to have office or institutional uses. See Zoning Commission Order No. 509, Case No. 84-7, February 9, 1987.

conditions under the FMA that the State Department would consider to be enforceable in the same manner and to the same extent as building and other related codes of the District of Columbia. Transcript at 81-82. In its Order, the Board provided a list of conditions that would need to be met in order to help maintain the residential nature of the area. Board decision at 15-16.

Based upon the testimony and the record, the Board found that the municipal interest does not require that the application should be disapproved.⁴ The Court finds that this decision was based upon substantial evidence.

D. The Board's Consideration of ANC 1D's Recommendation

Finally, Plaintiffs argue that the Board is also required to give "great weight" to the recommendation of ANC 1D, and cite Bakers Local Union No. 118 v. District of Columbia Board of Zoning Adjustment, 437 A.2d 176 (D.C. 1981) as authority for this proposition.

However, this requirement does not appear to apply to the present case, since the present case involves the FMA, which lays out six exclusive criteria outlined that the Board is required to consider. The D.C. Court of Appeals has noted that:

[the Embassy of] Benin is not merely another residential property owner. Its chancery is the headquarters of another sovereign nation's official mission to the United States. Decisions concerning its property may have international repercussions which will directly affect United States interests abroad. For this reason, we conclude that an issue of such primary importance as the furnishing of adequate communications facilities to a chancery is subject only to the provisions

⁴Under the FMA, the Board must consider the recommendation of the Mayor, represented here by OP, when considering the municipal interest. Therefore, while there was information in the record and live testimony given by members of the community and members of the D.C. Council in opposition to the application based upon the municipal interest, the Board was correct in making its determination based only on the OP report and testimony provided by OP at the hearing.

of the FMA.

Embassy of the Republic of Benin at 322. Here, the Court finds that when considering a chancery's application, the Board need only take into account the six criteria outlined in the FMA. The requirement that it give "great weight" to the recommendations of the ANC is beyond what was intended by Congress.⁵

IV. Conclusion

As stated above, absent a finding that the Board acted arbitrarily, capriciously, or not in accordance with the law, the Court is required to affirm the Board's decision. Here, the Board carefully considered the record and the testimony given at a public hearing when making its determination. The conclusions that the Board made were based upon substantial evidence in the record. Therefore, the Court cannot and will not substitute its own judgment for that of the Board. The Court must affirm the Board's decision and grant summary judgment for Defendants.


William B. Bryant
Senior U.S. District Judge

Date: *September 9, 2002*

⁵ In reviewing the Board's decision, the Court is not convinced that the Board did not, in fact, give "great weight" to the ANC's recommendation. However, it is not necessary to reach that determination here.