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Sweden

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In re Application of the Republic of Cape Verde on Behalf of the Kingdom of Sweden	:	BZA APPLICATION No. 15623 Hearing Date: April 18, 1990

DEPARTMENT OF STATE'S
MOTION AND MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION DISMISS
APPLICATION FOR FAILURE TO COMPLY WITH
SECTION 106 OF THE NATIONAL
HISTORIC PRESERVATION ACT

QUESTIONS PRESENTED

1. Whether, by its own terms, section 106 the National Historic Preservation Act is inapplicable to the location, replacement, or expansion of the premises of foreign missions in the United States.

2. Whether the provisions of the Foreign Missions Act preclude application of section 106 of the National Historic Preservation Act to chancery zoning cases in the District of Columbia.

SUMMARY OF THE ARGUMENT

Section 106 of the National Historic Preservation Act as amended (16 U.S.C. § 470f) has no application or relevance to the present application before the FM-BZA. Its own terms fall far short of encompassing the property-related activities of foreign missions in the United States or the role that the Department plays in reviewing property acquisition notifications, including that of Sweden here in question.

In addition, the provisions of the Foreign Missions Act as amended (22 U.S.C. §§ 4301 et seq.), taken as a whole, would preclude any application of section 106 to a chancery zoning case before the special Foreign Missions BZA.

ARGUMENT

I. BY ITS OWN TERMS, SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT DOES NOT APPLY TO FOREIGN MISSION PROPERTY ACTIVITIES, OR TO THE DEPARTMENT OF STATE'S ROLE IN CONNECTION THEREWITH, EITHER IN THE DISTRICT OF COLUMBIA OR ELSEWHERE.

Section 106 of the National Historic Preservation Act as amended [hereinafter, "NHPA"; 16 U.S.C., § 470f] provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the

> undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

The opponents of the instant Swedish application have moved that the Foreign Missions Board of Zoning Adjustment ("FM-BZA") dismiss the application. Inter alia, their motion, at p. 25, boldly states, that:

> the State Department, in approving the filing of the instant application, has utterly failed to comply with § 106 of the National Preservation Act.

To have any validity, the predicate underlying this proposition must also be true. That is, the Department of State must have "license[d]" the "undertaking" of the Kingdom of Sweden to construct its chancery, thereby "trigger[ing] the requirements of § 106," as the opponents allege. Id.

The premise relied upon by the opponents, however, is not true. Nor, it should be added, do they furnish any support for it in their Memorandum. Review of the Foreign Missions Act (the "FMA") as amended (Pub. L. No. 97-241, Title II; 96 Stat. 282; codified at 22 U.S.C. § 4301, et seq.; D.C. Code Ann. § 5-1201, et seq.); section 106 of NHPA; the pertinent regulations of Advisory Council on Historic

Preservation (an "independent agency of the United States Government" constituted under 16 U.S.C. section 470i) (the "ACHP"); and applicable case authority all compellingly demonstrates that the opponent's section 106 argument is, in fact, insupportable. It must accordingly be rejected by the BZA.

To begin with, the procedures governing foreign mission property activities throughout the United States must be examined. The governing provisions of the FMA are found in section 205(a) (22 U.S.C. § 4305(a); D.C. Code Ann. § 5-1205(a)). Under that section a foreign mission is required to:

> (1) .....notify the Director prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. The foreign mission (or-other party acting on behalf of the foreign mission) may initiate or execute any contract,proceeding, application, or other action required for the proposed action --
>
> > (A) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and
> >
> > (B) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and condition as the Secretary may determine appropriate in order to remove the disapproval.
>
> (2) For Purposes of the section, "acquisition" includes any acquisition or alteration of, or addition to,any real property or any change in the purpose for which real property is used by a foreign mission.

As is clearly evident from the foregoing provisions, the procedure established under the FMA does not involve any sort of "licensing" by the Department of State. Rather, the Director of the Office of Foreign Missions ("OFM") must simply be notified by a foreign mission "prior to any proposed acquisition ... of any real property by or on behalf of such mission." Once this required notification is given, the statutory mechanism does not provide for any single, uniform procedure that might in any way qualify to be regarded as an "approval" or "licensing" process.

Instead, what section 205 does create is a range of various options or procedures for the handling of the notification. The solitary requirement common to all cases is that of the notification itself, and this can scarcely be deemed in the nature of a "licensing" activity.

Once notification has been accomplished, the language and framework of section 205 confer upon the Secretary a broad discretion for subsequently treating the proposed action of the foreign mission, on a case-by-case basis. Although section 205(a)(1)(A) does establish a 60-day waiting period, during which time the affected mission may not undertake action in furtherance of the planned activity, even this may be waived, as indicated below.

The extreme breadth of this discretion may be seen from the options the Secretary has available after notification has

been received. Under section 205(a)(1)(A) and (B), the Secretary of State (in practice, his delegatee, the Director of OFM), following notification, has sixty days in which to do, at his sole option, any one of the following: (a) nothing, in which case the mission may proceed at the expiration of the sixty days; (b) notify the foreign mission concerned that the statutory waiting period has been shortened and that therefore the project may proceed in accordance with the statute; (c) disapprove the proposed action altogether; or (d) disapprove, but attach terms and conditions whose satisfaction will remove the disapproval.

The central point in all of the foregoing is that, even when a foreign mission's project is permitted to go forward under the above statutory framework, the Department of State itself still has not conveyed an "approval" that is in any way dispositive. Rather, the project may not proceed until, and unless, local zoning and/or building requirements have been complied with. Thus, if any "licensing" per se does occur, it is the relevant local body issuing the necessary zoning, construction or occupancy permits that performs this role, and not the Department of State.

At most, the Department of State makes a request of, or recommendation to such local bodies that the requisite authorization be granted. It is to convey such recommendations, on behalf of the Secretary of State, that a Department representative appears, for example, in FM-BZA cases.

In the District of Columbia, of course, the actual approval process involves the Zoning Administrator and, where applicable, the FM-BZA. In the latter cases, the provisions of section 206 of the FMA come into play.

Section 206, applies to the "location, replacement, or expansion of chanceries in the District of Columbia." Relevant provisions of section 206 include:

> (b)(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
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> * * *
>
> (c)(1) If a foreign mission wishes to locate a chancery in an area described in subsection (b)(2) of this section, ...it shall file an application with the Board of Zoning Adjustment which shall publish notice of that application in the District of Columbia Register.
>
> * * *
>
> (c)(3) A final determination concerning the location, replacement, or expansion of a chancery ... shall not be subject to the administrative proceedings of any other agency or official except as provided in this chapter.
>
> (d) Any determination concerning the location of a chancery under subsection (b)(2) of this section, ... shall be based solely on the following criteria:
>
> * * *

(d)(2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; ....

* * *

(e)(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) of this section) and shall reflect the policy of this chapter.

* * *

(j) Provisions of law (other than this chapter) applicable with respect to the location, placement, 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.

22 U.S.C. § 4306(b)(2), (c)(1), (c)(3), (d)(2), (e)(1), and (j); D.C. Code § 5-1206(b)(2), (c)(1), (c)(3), (d)(2), (e)(1), and (j). (Emphasis supplied.)

Read together, sections 205 and 206 leave no doubt that it is the FM-BZA, and not the Department of State, which is the licensing agency with regard to the pending application.

Section 106 only applies to a project if such project is a "Federal or federally assisted undertaking" or is subject to the "issuance of a license" by a federal agency. 16 U.S.C. § 470f. As the United States Court of Appeals for the District of Columbia Circuit has explained: "the statute, by its terms, has a narro[w] reach and is triggered only if a federal agency has the authority to license a project or to

approve expenditures for it." Lee v. Thornburgh, 877 F.2d 1053, 1055 (D.C. Cir. 1989). The court continued:

> [Section 470f] imposes obligations on agencies in either of two situations. An agency having authority to license an undertaking may not issue such a license without fulfilling [the statutory] obligations. Likewise, an agency with jurisdiction over a federal or federally-assisted project must comply before approving funds for it. By its own terms, section 106 imposes obligation only in these limited circumstances.

Id. at 1056, citing Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245-46 (7th Cir. 1976); Techworld Development v. D.C. Preservation League, 648 F. Supp. 106, 119 (D.D.C. 1986). (Emphasis added.)

Clearly, as explained above, the Department of State's role in chancery location cases constitutes neither "funding" nor "licensing", the two circumstances outlined by the United States Court of Appeals. The conclusion is the same under ACHC regulations which define "undertaking" (36 C.F.R. Ch. VIII) (7-1-89 Edition) § 800.2(o) as a

> .....project, activity, or program ... under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. (Emphasis added.)

Techworld Development, supra.

The District of Columbia district court opinion cited in Lee v. Thornburgh is also instructive. In Techworld, the National Capital Planning Commission ("NCPC") made a "nonbinding recommendation to the Mayor" regarding the closing

of Eighth Street in connection with the Techworld development project. The opponents of Techworld argued that NCPC's action triggered section 106. The district court disagreed:

> The Mayor is free to follow or ignore the recommendation as he sees fit. The NCPC neither approves the expenditure of federal funds, nor issues any federal license in connection with the street closing. On its face, section 470f plainly is inapplicable to the NCPC in the context of the Eighth Street closing.

648 F. Supp. at 119.

Just as with NCPC's recommendation in Techworld, the FM-BZA here is free to follow or ignore the Department of State's recommendation in the instant case of Sweden. The Department "neither approve[d] the expenditure of federal funds, nor issue[d] any federal license in connection with" Sweden's chancery acquisition and location. Id. In Techworld, opponents of the project "concede[d] that the 'limited' language of section [470f] does not support their argument." Id. Here as in Techworld, the present opponents cannot seriously claim that the "limited", reach of section 106 encompasses the Department's narrow role in making recommendations to the FM-BZA in chancery location cases, or in failing to disapprove such locations under section 205 of the FMA.

Indeed, the United States Court of Appeals for the District of Columbia Circuit, in District of Columbia v. Schramm, 631 F.2d 854, 862 (1980), has specifically held that

the right to veto or to disapprove a project is not the power to license.

The case arose from the District of Columbia's challenge to a permit issued by the State of Maryland for an advanced wastewater treatment plant that would discharge into Rock Creek. Under the Federal Water Pollution Act, as amended, the Environmental Protection Agency ("EPA") can authorize a state to issue discharge permits, but EPA retains jurisdiction and can veto the state action. If a state is not authorized by EPA to issue such a permit, issuance by EPA could be "a major federal acquisition significantly affecting the quality of the human environment." 33 U.S.C. § 1371(c). The District maintained that EPA's failure to object to the issuance of the permit by Maryland was the same as an issuance. In response to this contention the Court stated

> [8] We disagree with the District's fundamental premise that the EPA "issued" the permit for the Rock Creek Plant. After the study under the joint review program was completed, the EPA elected not to veto the project under 33 U.S.C. § 1342(d)(2). It was the state of Maryland that approved and issued the permit. As a district court considering the same question stated, 'the determination of the federal government not to object...'cannot realistically be classified as 'Federal action' much less 'major' Federal action..." Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Board, 453 F.Supp. 122, 125 (E.D.Va. 1978) (quoting Molokai Homesteaders Cooperative Association v. Morton, 506 F.2d 572, 580 (9th Cir. 1974)). See generally McGarity, The Courts, the Agencies and NEPA Threshold Issues, 55 Tex.L.Rev. 801, 837-38 & n. 139, 851 (1977). These being no "major Federal action," the Agency was not required to prepare an environmental impact statement. [Footnotes omitted.]

In support of the section 106 argument, the motion relies on three federal cases. None of these cases support the argument. Indeed one them, Weintraub v. Rural Electrification Administration, 457 F.Supp. 78, 92-93 (M.D. PA 1978), supports the Department of State's position that section 106 does not apply to the pending application. In Weintraub, the court construed the word "license" in section 106 and held that:

> Congress intended the word "license" in that statute have its technical meaning; that is, that it refers to a written document constituting permission or right to engage in some governmentally supervised activity. For example, the Court believes that the statute clearly applies to licenses issued to TV stations by the FCC. The legislative history supports this interpretation. Originally, 16 U.S.C. section 470(f) [sic.] applied only to projects receiving federal funds. An amendment was added in the House of Representatives which according to the Report of the House Committee on Interior and Insular Affairs expands the requirements of 16 U.S.C. section 470(f) [sic.] to include federal licensing agencies. U.S. Cong. & Admin. News 1966 Page 3310. [Footnote omitted.] Certainly, the House Report strongly indicates that the amendment was designed to affect only federal agencies which engaged in licensing activities. Congress did not intend to affect every action which required federal approval. Consequently, the Court concludes that the regulation of REA which requires approval of headquarters buildings and their adjuncts does not provide for a license within the meaning of 16 U.S.C. section 470f. (Emphasis supplied.)

Further, the court in its conclusions of law at p. 93 concluded that:

> 7. The Rural Electrification Administration's right to approve construction of headquarters building of its borrowers and the adjuncts of those buildings including garages and parking lots and the right of REA to approve the use of surplus funds by electric cooperatives do not constitute the power to grant a "license" as that term is used in 16 U.S.C. section 470(f) [sic.].

See also National Indian Youth Council v. Watt, 664 F.2d 220, 226-228 (10th Cir. 1981) (surface mining operations on an Indian reservation); Morris County Trust and Historic Preservation v. Pierce, 714 F.2d 271 (3rd Cir. 1983) (local urban renewal project approved and funded by a federal agency).

In sum, the relevant case law compellingly demonstrates that the failure of the Secretary of State to disapprove the acquisition of property does not "trigger" section 106.

A review of federal and state laws defining license and licensing likewise demonstrates that the authority of the Secretary of State to veto an acquisition of property by a foreign mission for a chancery in the District of Columbia is not a licensing function. This review shows that, under section 206 of the FMA, there can be no doubt but that the license to establish the chancery is granted by BZA. Under analogous federal law, the definitions section of the Administrative Procedure Act (5 U.S.C. § 551) defines licenses and licensing as follows:

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. (Emphasis added.)

As noted above, it is not the Department of State that grants "permission" to governments such as Sweden to locate or construct their chanceries in the District of Columbia. It is, instead, the FM-BZA.

Similarly, under the cases involving analogous questions, license has been defined as "a right or permission to carry on a business or to do an act which without such license, would be illegal." Sea Lar Trading Co., Inc. v. Michael, 107 Misc.2d 93, 433 N.Y.S.2d 403, 406, (Sup. Ct. 1980), citing 53 C.J.S. Licenses, p. 445. "The license may be defined as the formal permission granted by a sovereign," ACORN v. City of New Orleans, 407 S.2d 1225 1228 (La. 1981). Licensing has been defined as the procedure of a state to authorize operation of a business. United States v. State of New Mexico, 536 F.2d 1324, 1328 at n. 3 (10th Cir. 1976).

Accordingly, in view of the foregoing, it is clear that section 106 does not apply to the determination of the Secretary of State, pursuant to section 206 of the FMA, not to disapprove the proposed chancery location of a foreign mission or to his recommendation to the FM-BZA for favorable action on a chancery application, such as that of Sweden here.

II. THE FOREIGN MISSIONS ACT PRECLUDES APPLICATION OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT TO CHANCERY LOCATION IN THE DISTRICT OF COLUMBIA.

Even if the Department of State's action regarding chancery location did constitute the "licensing" of an "undertaking" under the NHPA, which it does not, the FMA precludes the application of section 106 to chancery location decisions, in any event. Sections 206 and 207 of the FMA clearly express the exclusive and preemptive effect of that statute on chancery location determinations.

Congress enacted the FMA in order to provide the Secretary of State with the necessary discretionary authority to regulate the activities of, and the provision of benefits to, foreign diplomatic missions. This intent is reflected in the "Declaration of findings and policy" set forth at the heading of the Act, which states:

> (a) The Congress finds that the operation in the United States of foreign missions ..., including the permissible scope of their activities and the location and size of their facilities, is a proper subject for the exercise of Federal jurisdiction.
>
> * * *

> (c) The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States."

22 U.S.C. § 4301(a),(c); D.C. Code § 5-1201(a),(c).

The statute, therefore, establishes an Office of Foreign Mission within the State Department headed by a Director (with the rank of Ambassador) and directs that "benefits may be provided to or for.....foreign mission(s) by or through the Director on such terms and conditions as the Secretary may approve." See 22 U.S.C. §§ 4303-05; D.C. Code §§ 5-1203 to 1205. Benefits are broadly defined under the Act to include "any acquisition" by a foreign mission, including acquisitions of real property by purchase or lease, utilities and other public services, supplies, and travel. 22 U.S.C. § 4302(a)(1); D.C. Code § 5-1202(a)(1).

In enacting the FMA Congress was also concerned with issues regarding the "location, replacement or expansion of chanceries in the District of Columbia." See 22 U.S.C. § 4306(a); D.C. Code § 5-1206(a). The statute, therefore, also establishes, inter alia, "acceptable areas" for the "location" of chanceries" in the District and special procedures and criteria by which such "location" decisions can be made (by the FM-BZA, not the Department of State.) Id.

In enacting the Foreign Missions Act, Congress was

acutely aware that it was legislating in the field of foreign affairs, where the Executive is preeminent and where judgment and nuance are essential. See H.R. Rep. No. 97-102 (Part 1), 97th Cong., 2d Sess. 27. Accordingly, and to effectuate the objectives of the statute as set forth above, Congress enacted certain "discretionary authorities" for the Secretary of State, which were "intended to provide the flexibility, which the Department of State has not heretofore possessed, to enable the Secretary to decide which sanction or other response is most appropriate to solve a specific problem." Id. at 28.

These discretionary authorities include, in addition to the ability to confer or deny "benefits" broadly defined, the authority to require the payment of a surcharge by a foreign mission, 22 U.S.C. § 4304(c), D.C. Code § 5-1204(c); the authority to disapprove any acquisition of real property by a foreign mission, 22 U.S.C. § 4305, D.C. Code § 5-1205; and the authority to make determinations of the federal interest in chancery location applications, 22 U.S.C. § 4306(d)(6), D.C. Code § 5-1206(d)(6).

Section 207 of the Foreign Missions Act, 22 U.S.C. § 4307, D.C. Code § 5-1207, is entitled "Preemption". It was enacted to ensure the primacy of the Secretary of State in administering the provisions of the Act. It reads as follows:

> Notwithstanding any other provision of law, no act of any Federal agency shall be effective to confer or deny any benefit with respect to any foreign mission contrary to this chapter. ....

In enacting this provision, Congress expressly wished to avoid conflicting or inconsistent decisions among federal agencies affecting foreign missions. The Conference Report on the final bill makes this intent crystal clear:

> Section 207 expresses the preemptive effect of the right of the Federal Government, through the Secretary of State, to preclude the acquisition of any benefits by a foreign mission within the United States. A denial by the Secretary for example, of a right of a particular foreign government to open or maintain a mission within the United States, or a condition limiting the number of their personnel or other factors relating to the mission, would be controlling. This is consistent with current practice and reflects the policy of Federal preemption in foreign relations. ...
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> * * *
>
> This section also requires coordination among Federal agencies, under the leadership of the Secretary of State, in order to achieve an effective policy of reciprocity so as to fulfill the purposes of this legislation by precluding any Federal agency from taking any action inconsistent with the Foreign Missions Act. The provision has the effect of rendering unenforceable any rules or regulations of any Federal agency, to the extent that such rules or regulations would confer or deny benefits contrary to this title." (Emphasis added.)

H.R. Conf. Rep. No. 97-693, 97th Cong., 2d Sess. 43-44, reprinted in 1982 U.S. Code Cong. & Ad. News 691, 702-03. Accord, H.R. No. 97-102 (Part I), supra at 36 ("Section 207 declares the preemptive effect of the exercise of Federal jurisdiction with regard to ... the location or use or real property .... The exercise of Federal jurisdiction embodied

in section 206 and the other applicable provisions of this title preempts the application of any other provision of law, to the extent that such other law is inconsistent."); 127 Cong. Rec. 26,076 (Oct. 29, 1981) (Remarks of Rep. Fascell) ("The language of section 207 would also have the effect of rendering unenforceable any rules or regulations of any Federal agency, to the extent that such rules or regulations would confer or deny benefits contrary to this title.")

In "precluding any Federal agency from taking any action inconsistent with the Foreign Missions Act," H.R. Conf. Rep. No. 97-693, supra at 44, section 207 conclusively disposes of the argument that Sweden's application should be referred to the Advisory Council on Historic Preservation for review and comment.

Section 207 makes it clear that Congress intended that chancery location decisions not be subject to the actions of other federal agencies or federal entities. Such other proceedings, decisions, or review and comment present the potential for inconsistent positions among competing federal agencies that could undermine or complicate the Secretary's reciprocity policy under the Foreign Missions Act.

Even action of another federal entity which, as with ACHP here, may not be outcome-dispositive but which poses an additional hurdle for a foreign mission to overcome, may undercut the Secretary's conduct in the field of foreign relations. Such potential for inconsistent action among

differing federal agencies, in short, is precisely and expressly disapproved under section 207.

Section 206 of the FMA, 22 U.S.C. § 4306, D.C. Code § 5-1206, similarly provides for the exclusive treatment of chancery location issues under the statute. That provision reads in relevant part:

> (c)(1) If a foreign mission wishes to locate a chancery in an area described in [FMA section 206(b)(2)(B)]..., it shall file an application with the [Foreign Mission Board of Zoning Adjustment (FM-BZA)].
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> * * *
>
> (c)(3) [The FM-BZA's determination concerning the] location ... of a chancery ... shall not be subject to the administrative proceedings of any other agency or official except as provided in the [FMA].
>
> * * *
>
> (d) Any determination concerning the location of a chancery ... shall be based solely upon the following criteria:
>
> > (2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section;....
>
> * * *
>
> (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 that they are consistent with this section.

22 U.S.C. § 4306(c)(1),(3), (d)(2), (j); D.C. Code § 5-1206(c)(1),(3), (d)(2), (j).

Section 206, by its terms, requires historic preservation issues related to chancery location to be

> chancery issues could have a substantial impact on United States interests abroad and was determined that the nation's international legal obligations should not be subject to negation by the acts or omissions of local officials. ... The language of the FMA leaves little doubt that Congress wished to create a comprehensive scheme for the fair and expeditious decision of issues relating to foreign chanceries in the District of Columbia.

Embassy of the People's Republic of Benin v. D.C. Board of Zoning Adjustment, 534 A. 2d at 315, 316, citing S. Rep. No. 97-283, 97th Cong., 1st Sess. 11-12 (1981), and H.R. Rep. No. 97-102 (part 1), supra at 34. The Court's analysis in Benin applies with equal vigor to the preemptive effect of the statute over the actions of other federal agencies.

In summary, the language of sections 206 and 207 of the FMA, reinforced by the D.C. Court of Appeals decision in Benin, can leave no doubt that Congress intended that the Foreign Missions Act have a preemptive and preclusive effect over actions of other federal agencies affecting chancery location. Under these authorities, the argument that Sweden's application must be referred to the Advisory Council on Historic Preservation for review and comment cannot stand.

WHEREFORE, the United States Department of State respectfully requests that the FM-BZA deny the motion of the opponents to dismiss the instant application on the grounds of its failure to comply with section 106 of the National storic Preservation Act.

considered exclusively by the FM-BZA, upon the Department of State's failure to disapprove under section 205 of the Act. The language of the statutory provisions in question simply leaves no room for an extra proceeding or review and comment by another federal agency. Indeed, sections 206 and 207 of the FMA expressly preclude such other agency action.

The District of Columbia Court of Appeals has underscored the unique status of the FM-BZA as "the special entity created by Congress to resolve ... chancery related issues," Embassy of the People's Republic of Benin v. D.C. Board of Zoning Adjustment, 534 A.2d 310, 323 (D.C. App. 1987). The Court has held that proceedings before that body are "exclusive". Id. at 318, 319, 317-22. The Court continued:

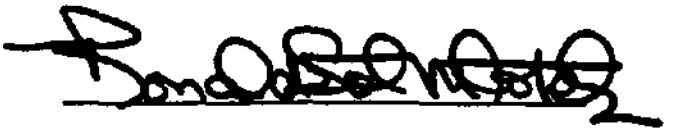
> ....the provisions of the FMA should exclusively govern the location and expansion of chanceries in the District.... (Section 206) is intended to assure the establishment of an expeditious decision making process, which will preclude overlapping and time-consuming proceedings which can result under existing law and regulations. (Emphasis in original.)

534 A.2d at 319, 320, quoting 127 Cong. Rec. 20,879 (1981).

The exclusivity of procedures established by the FMA is necessary to effectuate the fundamental objectives of the statute:

> Congress intended to assure that in deciding issues relating to the location and operation of foreign missions, the local and federal interests would be appropriately balanced. Congress recognized that the decision of

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum was sent this 25th day of May, 1990, by regular U.S. mail, to:

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