No. 24-CV-0759

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION,

APPELLANT,

v.

D.C. BOARD OF ZONING ADJUSTMENT,

APPELLEE.

On Appeal from the Superior Court for the District of Columbia, Civil Division in Case No. 2023-CAB-002455 (Honorable Carl E. Ross, Judge)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Brief of the D.C. Board of Zoning Adjustment (the "Board") confirms that the Board, at each step of its review of the chancery application (the "Application") of the Embassy of the Republic of Kosovo (the "Applicant"), ignored the goal of the Foreign Missions Act ("FMA") to balance the federal interest with the District's interest in protecting essentially residential areas from chancery intrusion. As a practical matter, the Board accommodated only the federal interest, defeating the purpose of both the FMA and the Home Rule Act. The Board's interpretation of the FMA and its regulations exalts results over adherence to the governing law. If upheld, the Board's legal rulings would allow it to further eviscerate the will of the D.C. Council and Congress that chanceries, to the extent possible, should not be located in neighborhoods that are essentially residential.

Appellant Massachusetts Avenue Heights Citizens Association ("MAHCA") submits this Reply Brief to respond to the Board's arguments.[1] The Board wrongly asks this Court to disregard Congress' intent in enacting the FMA and to ignore the District Elements of the Comprehensive Plan for the National Capital (the "Comprehensive Plan" or "Plan"), which by law sets forth the District's interest in

[1] The Board's brief is the "Brief," and MAHCA's brief is the "MAHCA Brief." *Amicus* United States submitted a brief that summarily restates several of the Board's arguments. Therefore, MAHCA responds primarily to the issues raised by the Board.

preventing chanceries from being located in essentially residential areas like Massachusetts Avenue Heights (the "Neighborhood").[2]

II. ARGUMENT

The Board erred as a matter of law in its decision (the "Decision") to permit the Applicant to locate its chancery (the "Chancery") in the Neighborhood. The Board's fundamental error was to rely blindly on the recommendations of the District's Office of Planning ("OP") in disregard of the Plan and the FMA's objectives to limit the location of chanceries in areas that are essentially residential.

In reviewing an application to locate a chancery in a low-density residential neighborhood, the Board must first determine that the applicant seeks to locate in a "mixed-use" area. The Board allowed the Application past that threshold by recharacterizing the essentially residential Neighborhood as a "mixed-use" area. It did so in reliance on OP's recommended extension of the Neighborhood's traditional boundaries. Brief at 29–34. But the Board exceeded its enabling authority because OP's recommendation interpreted the FMA's mixed-use regulations in a manner inconsistent with the Plan and the FMA. MAHCA Brief at 36 n.32.

Having unlawfully allowed the Application to clear the "mixed-use" threshold, the Board asserts that, in applying the FMA location criteria to the

[2] The Neighborhood has "been a residential neighborhood for a century," JA 514:22, and is essentially residential, containing one commercial use, JA 171. The square in which the Chancery is located is 86.25% residential. JA 423 n.4.

Application, it was required to totally defer to OP's unlawful determination that the Chancery fulfills the District's municipal interest (the "OP Determination").[3] Brief at 37–41. But the FMA makes the Board accountable for whether the OP Determination complied with OP's mandate to implement the Plan under the Home Rule Act, so the Board legally erred by relying on the unlawful OP Determination.[4] MAHCA Brief at 30–36.

Finally, the Board claims it cannot impose conditions that are independent of OP's recommendations. Brief at 41–45. This claim misconstrues the Board's conditioning power under the FMA: the Board may issue conditions that protect the Neighborhood's residential character. MAHCA Brief at 37–41.

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[3] The Board attempts to justify its deference by claiming that (1) the Plan is not explicitly one of the FMA's six criteria, Brief at 37–38; (2) the OP Determination is solely within OP's discretion and therefore unreviewable by this Court, *id.* at 38–39; and (3) the Plan imposes no substantive requirement applicable to OP or the Board's conduct in a chancery proceeding, *id.* at 39–41. The Superior Court endorsed the Board's first and third arguments and made a legally unsubstantiated assertion that the Board's reliance was not "contrary to the *law*." JA 112–16. MAHCA focuses primarily on the Board's legal assertions due to this Court's standard of review. MAHCA Brief at 27.

[4] The Home Rule Act requires OP to implement the Plan's objectives of (1) "[e]ncourag[ing] foreign missions to locate their chancery facilities where adjacent existing and proposed land uses are compatible (i.e., office, commercial, and mixed-use)," (2) "taking special care to protect the integrity of residential areas," (3) "[d]iscourag[ing] the location of new chanceries in any area that is essentially a residential use area," and (4) "[e]ncourag[ing] the development of new chancery facilities in locations where they would support neighborhood revitalization and economic goals, particularly in federal enclaves and east of 16th Street NW." D.C. Mun. Regs. 10.A §§ 318.10–11.

The Board, apparently concerned that its unlawful Decision cannot withstand scrutiny, seeks to avoid this Court's review by asserting for the first time that MAHCA lacks standing, either because it has no members or its members (the "Members") have suffered no injury. Brief at 20–28. Because the Board, a "resourceful institutional litigant," waited until this Court to raise its standing objection, this failure "is persuasive at least to some degree that the belated challenge may lack merit." *Speyer v. Barry*, 588 A.2d 1147, 1159 n.24 (D.C. 1991); *see* JA 059–084. The facts confirm that the Board's standing arguments are baseless.

A. The Board's Mixed-Use Determination Violated Its Enabling Authority.

The first step in the Board's review of the Application is to determine whether the Chancery seeks to locate in a "mixed-use" area. The Board must determine what "adjacent" properties comprise the "area" that guides the "mixed-use" analysis. Here, the Board rejected MAHCA's more "narrow"[5] definition of "adjacent" that sought to protect the Neighborhood's residential character in favor of OP's "expansive" definition of "adjacent" as "shar[ing] the common corridor of Massachusetts Avenue." JA 423. It thereby created a 76.6% nonresidential, "mixed-use" area, based primarily on institutional uses that were well-beyond the Neighborhood's traditional boundaries and had never been recognized as meaningfully "adjacent." JA 424.

[5] A narrow definition prevents chancery location in essentially residential areas, not "*all* low- and medium-density residential zones," as the Board suggests. Brief at 31.

The Board ignores that its interpretation of the term "adjacent" is bound by (1) the Zoning Enabling Act's mandate to interpret regulations such that they are not inconsistent with the Plan, D.C. Code § 6-641.02; (2) the FMA's mandate that its regulations must "be consistent with" and "reflect the policy" of the FMA to prevent chanceries from locating in essentially residential areas,[6] D.C. Code § 6-1306(e)(1); H. R. Rep. No. 97-693, at 41 (1982) (Conf. Rep.); and (3) the Zoning Enabling Act's mandate that the Board "shall not have the power to amend any regulation," D.C. Code § 6-641.07(e). Together, these mandates preclude the Board from interpreting "adjacent" in a manner that obviates the objectives of the Plan and the FMA. *See* MAHCA Brief at 36 n.32. The Board, however, unlawfully adopted a nebulous "common corridor" metric for adjacency, JA 423, that removes the limits placed on the "mixed-use" determination by the Plan and the FMA, obviating the protection Congress and the D.C. Council intended to provide essentially residential areas.

The Board does not address, much less rebut, this legal error. It merely claims that it used a "reasonable" definition of "adjacent." Brief at 30–32. That is not sufficient defense. The fact that a violation of the law is "reasonable" in the violator's judgment does render it lawful.[7]

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[6] The Board recognized this was the purpose the adjacency test. Brief at 41.

[7] There is nothing to support the Board's claim of reasonableness. Its adjacency definition permitted it to cherry-pick properties to create a "mixed-use" area rather than adhere to its duty to "most accurately depict[] the existing mix of uses adjacent

B. The Board Committed Legal Error by Failing to Consider Whether OP's Municipal Interest Determination Was Lawful.

After erroneously allowing the Chancery over the "mixed-use" area threshold, the Board erred again by basing its ultimate Decision on the unlawful OP Determination.[8] The FMA states that the Decision "shall be based solely on," *inter alia*, "[t]he municipal interest, as determined by [OP]." D.C. Code § 6-1306(d)(5); Mayor's Order 83-106. The Board argues that this requirement means it must "defer" to the OP Determination without scrutiny. Brief at 35–36. But that argument would require the Board to abdicate its responsibility under the FMA to make the "final [chancery] determination," D.C. Code § 6-1306(c)(3), by blindly accepting even an unlawful OP determination. The argument thus "reflects a misconception of" the

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to the proposed location of the chancery." D.C. Mun. Regs. 11.X § 201.4; D.C. Code § 6-1306(b)(2)(B). The Board determined institutional uses in an area across Massachusetts Avenue were "adjacent," even though the Avenue is a major four-lane arterial that historically and practically **bounds** the Neighborhood. MAHCA Brief at 18–21. Practically, for example, pedestrians cannot access one of these institutional uses, the National Cathedral, from the Avenue due to "a ravine that's 30-feet deep filled with trees." JA 513:24. The Board's refusal to include as adjacent the directly abutting, entirely residential Square 1933 was also unreasonable, as it is far closer to the Chancery than the institutional uses across the Avenue. MAHCA Brief at 33–34.

[8] For the first time, the Board complains that MAHCA "never raised this argument to the Board." Brief at 36. But many Members did raise the issue. MAHCA Brief at 18. That is sufficient for MAHCA, as the Members' representative, to raise this issue on appeal. *Waterkeeper All. v. United States Env't Prot. Agency*, 140 F.4th 1193, 1212 (9th Cir. 2025) (explaining that issue need only be raised with "sufficient clarity" by "someone other than the petitioning party" to be preserved for appeal).

FMA that this Court must reject. *Georgetown Univ. v. D.C. Dep't of Emp. Servs*, 971 A.2d 909, 915 (D.C. 2009) (internal quotations omitted).

The Board's argument would also allow OP to circumvent the Home Rule Act. By the authority vested in the Mayor by the Home Rule Act, the Mayor assigned OP the Mayor's statutory duty to "[p]repare, refine and implement" the Plan. Mayor's Order 83-25; D.C. Code § 1-204.23(a). Because OP's authority derives solely from the Home Rule Act, OP cannot ignore the Home Rule Act when making its municipal interest determination. MAHCA Brief at 10 & nn. 10–11. Even when acting under the FMA, the Board may not accept a determination from OP unless it comports with OP's mandate under the Home Rule Act to implement the Plan. *See U.S. v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) (rejecting the argument that a statute's "terms can be evaded at will by asserting jurisdiction under another statute" because courts should be "hesitant to infer that Congress intended to authorize evasion of a statute at will").[9] This is especially the case here, where the

[9] The Board seeks to excuse OP's contravention of the Plan by asserting that OP's "duties under one statute does not necessarily mean those duties apply when the agency is performing tasks under another, unrelated statute." Brief at 38. But it never explains why OP is relieved of its duty to implement the Plan under the Home Rule Act when carrying out its duties under the FMA. Nor could it do so. The FMA's very purpose is to "accommodate the competing local and federal concerns" regarding the location of chanceries in the District. *Embassy of the People's Republic of Benin v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 310, 319 (D.C. 1987).

D.C. Council's enactment of the Plan was entirely consistent with Congress' intent regarding chancery location when it enacted the FMA. MAHCA Brief at 11.

Before the Board, OP defined the municipal interest as being "synonymous with the District's regulatory requirements." JA 254. The Board's municipal interest determination, therefore, must consider the Plan, which is a regulatory requirement enacted by the D.C. Council that bears directly on chancery applications. MAHCA Brief at 8–11, 32 n.30. Nonetheless, the Board blindly accepted OP's unlawful analysis, thereby assuring an outcome that contravenes the Plan. MAHCA Brief at 31–35. It did so even though (1) the OP Determination did not determine that the Chancery is in "compliance with the Comprehensive Plan," *see Youngblood v. D.C. Bd. of Zoning Adjustment*, 262 A.3d 228, 242 (D.C. 2021), or even reference the Plan, JA 253–58, 467:15–70:18, 489:10–90:7, and (2) many Members informed the Board that the OP Determination was unlawful, *supra* p. 6 note 8.

1. The OP Determination is Reviewable by This Court.

The Board seeks to defend its inert adoption of the unlawful OP Determination by making a circular argument it did not raise below—that OP's error cannot be "imputed" to the Board because the "determination is solely within [OP]'s discretion and cannot be reviewed here." Brief at 38–39. But the Board does not explain why the Board, as the ultimate decision maker, is not accountable for assuring the lawfulness of its Decision or why MAHCA may not therefore seek review of the OP

Determination through judicial review of the Decision itself. *U.S. v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 995, 999 n.9 (D.C. 1994) (holding that petitioner may seek review of chancery decisions in the Superior Court).

The Board seeks to shield its culpability for relying on the unlawful OP Determination by pointing to *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 413 A.2d 152 (D.C. 1980) as governing precedent. *Kopff* held that an agency deciding whether to issue a beverage license could not also "ascertain whether or not [a certificate of occupancy that was a predicate requirement for a beverage license] was properly issued" because it was prohibited from "acting in effect as a court of appeals over other coordinate administrative departments." *Id.* at 154.

Kopff, however, does not govern here. Unlike the certificate of occupancy in *Kopff*, the OP Determination had no independent legally reviewable import until the Board rendered its Decision. D.C. Code § 6-1306(c)(3) (the Board is responsible for all "final determination[s] concerning the location, replacement, or expansion of a chancery"). *Kopff* applies only where a petitioner could have sought "proper recourse" from the agency granting the predicate license. *Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 62 (D.C. 2001). It does not apply here, where the Board is "responsible for administering" the relevant statute and only its Decision has reviewable legal import. *Craig v. D.C. Alcoholic Beverage Control Bd.*, 721 A.2d 584, 588 (D.C. 1998).

The Board cannot escape its ultimate responsibility for the unlawfulness of its Decision. When the Board adopts an unlawful OP determination, this Court must find legal error because only the Decision is reviewable. While there appears to be no directly applicable precedent under the FMA, this Court may follow analogous interpretations of other federal law. *Stribling v. U.S.*, 419 F.2d 1350, 1352 (8th Cir. 1969) ("[W]here the interpretation of a particular statute at issue is in doubt, the . . . legislative construction of another statute not strictly *in pari materia* but . . . applying to similar . . . cognate relationships may control by force of analogy.").

Cases applying the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, provide an apt analogy. NEPA requires the agency conducting an environmental review "to balance a project's economic benefits against its adverse environmental effects." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996). The reviewing agency's decision often relies on the determinations of other coordinating agencies. 42 U.S.C. § 4332(C). When the reviewing agency's decision is challenged, courts will remand that decision to correct errors made by a coordinating agency that formed a basis for the decision. *Hughes*, 81 F.3d at 450. To deny MAHCA a similar avenue to relief would render meaningless Congress' intent to "accommodate the competing **local** and federal concerns," *Embassy of the People's Republic of Benin v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 310, 319 (D.C. 1987) (emphasis added), and to prevent

chanceries from locating "in any area which is essentially a residential area," H. R. Rep. No. 97-693, at 41 (1982) (Conf. Rep.).

2. Here, the Comprehensive Plan's Chancery Policies Bind The Board.

The Superior Court ignored OP's legal mandate under the Home Rule Act to implement the Plan and the Board's legal mandate under the FMA to recognize the OP Determination only if it is consistent with the Plan. It held instead, *ipse dixit*, that the Plan is "immaterial" to the FMA process because it "is not binding on [the Board's] final determination." JA 112–13. Pointing to *Durant v. D.C. Zoning Comm'n*, 65 A.3d 1161, 1168 (D.C. 2013), the Board seeks to defend the Superior Court by noting that the Plan itself does not "state[] that a chancery application will not satisfy the FMA's municipal interest factor" if the chancery application conflicts with the Plan. Brief at 39–40. The Board mistakenly relies on the lack of reference to the FMA in the Plan. The Plan provides a "legal mandate" whether expressed by "other law or the Plan itself." *Tenley & Cleveland Park Emergency Committee v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 338 (D.C. 1988) (internal citation omitted). In this case, the Home Rule Act expressly requires OP to implement the Plan, so the Plan governs OP's municipal interest determination and whether the Board can accept that determination. *Supra* pp. 7–8.[10]

[10] The Board claims that it and OP "may balance competing priorities in order to evaluate whether a project would be inconsistent with the Plan as a whole." Brief at 39. But it ignores that it and OP neither considered nor identified any competing

Apparently recognizing the indefensibility of the Superior Court's conclusion, the Board seems to accept that the Plan is material but argues that it merely restates the mixed-use analysis "in less binding terms" and is given "necessary consideration" by applying the FMA's regulations. Brief at 40–41. Neither the Board nor the Superior Court earlier proffered that theory, and it has no legal support.

The theory ignores that the D.C. Council, **after** Congress enacted the FMA and implementing regulations were promulgated, amended the Plan to "set[] forth policies in support of the residential neighborhood objectives" to prevent chancery incursions into essentially residential neighborhoods. Exhibit E to MAHCA Brief at 5. The Council amended the Plan not to duplicate *but to strictly govern OP's decisions* under the FMA. *Singer v. U.S.*, 323 U.S. 338, 344 (1945) (courts are "reluctant to give a statute [a] construction which makes it wholly redundant" of other statutes absent "a clear legislative purpose" to the contrary); *Kopff*, 381 A.2d at 1381 ("Statutory interpretations which result in redundancy are disfavored."). OP's specious compliance with the FMA but ultimate contravention of the Plan is not adequate compliance with the law.

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priorities that would offset the Plan's chancery location mandates. *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1035 (D.C. 2016).

C. The Board's Determination that It Could Not Condition Its Decision to Comply with the Comprehensive Plan was an Error of Law.

Regardless of whether the Board's deference to the OP Determination was lawful, it erred as a matter of law by failing to condition its Decision to mitigate the adverse effects of the Chancery on the Neighborhood. The Board asserts that it could not impose conditions because its power is limited to the FMA's six criteria and OP did not suggest the municipal interest required conditions. Brief at 41–45; JA 426 n.7. But the Board misconstrues its conditioning power. The FMA permits the Board to place "limitations and conditions" on chanceries, so long as they do not "exceed those applicable to other office or institutional uses in that area." D.C. Code § 6-1306(b)(3). Since the six factors apply only to the Board's antecedent "determination concerning the location of a chancery," D.C. Code § 6-1306(d), the Board is not constrained by those factors, MAHCA Brief at 39–40.[11] The Board therefore had the authority to impose conditions that would reduce the adverse effects of locating the Chancery in the Neighborhood.[12]

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[11] The Board attempts to distinguish its past cases from this one, Brief at 42–43, but the Board does not (and cannot) contest that it issued conditions in those cases without OP determining they were required by the municipal interest. *See* MAHCA Brief at 39–40.

[12] MAHCA sought conditions to protect the Neighborhood's residential character. JA 411–17; MAHCA Brief at 41. Making the Chancery more "in harmony" with the Neighborhood's residential purposes would not discriminate against the Chancery because that is required of all non-chancery office and institutional uses. *Marjorie Webster Junior Coll., Inc. v. D.C. Bd. of Zoning Adjustment*, 309 A.2d 314, 316 n.4 (D.C. 1973); *see* D.C. Mun. Regs. 11.U § 901.2(a); D.C. Mun. Regs. 11.D § 300.1.

D. MAHCA Has Standing to Challenge the Decision.

The Board claims, *for the first time*, that MAHCA lacks standing because it either has no members or the Members have suffered no injury in fact. Brief at 20–28. Had the Board reviewed the record before making its last-minute standing claim, it would have recognized the claim is meritless.[13] MAHCA is a long-standing, well-recognized representative of its Members' interests in zoning matters.[14] Several Members live sufficiently close to the Chancery to be affected by its presence as an office, and all Members suffer injury from a Decision that harms the Neighborhood's residential character and encourages future harmful nonresidential incursions.[15]

1. MAHCA Has Members and a Membership Structure.

MAHCA "was created to deal with zoning issues" affecting the Neighborhood. JA 518:3. It "represents the interests of [the] [N]eighborhood at large as determined by its residents." JA 232; *see also* JA 287, 323. Contrary to the Board's argument that "it is speculative to assume that MAHCA has members, let alone that those

[13] Strangely, the Board claims MAHCA never "clearly defined the borders of" the Neighborhood. Brief at 21. The record proves otherwise. MAHCA Brief at 13.

[14] MAHCA has long represented the interests of its Members in challenging zoning decisions adversely affecting the Neighborhood without objection. *See*, *e.g.*, *Massachusetts Ave. Heights Citizens Ass'n v. Embassy Corp.*, 433 F.2d 513 (D.C. Cir. 1970); *Massachusetts Ave. Heights Citizens v. D.C. Bd. of Zoning Adjustment*, No. 19-AA-1049 (D.C. Sept. 6, 2022).

[15] The injury stems from (1) the opening of the Neighborhood to chancery and office uses that were previously prohibited by its R-1-B zoning; and (2) the Applicant's use of the property for a chancery as opposed to an embassy (which the Applicant now locates on the property) or other matter-of-right use.

members reside near the Kosovo chancery," Brief at 21, MAHCA showed that several of its Members live within **200 feet** of the Chancery. JA 136 (list of residences within 200 feet), 278, 284, 302, 305, 308, 315, 351, 387, 389. Other Members live within **one to three blocks** of the Chancery. JA 293, 296, 298, 381, 513:13–14. At least four residents stated explicitly that they are MAHCA Members. JA 275 (members), 510:8 (current President), 517:25–18:1 (former President and current MAHCA board member).[16]

The Board wrongly asserts that MAHCA is "similar to the neighborhood organization" in *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201 (D.C. 2002). Brief at 22. The *Tilden Park* organization was denied standing because "its articles of incorporation precluded it from having members" and its relationship with its supporters was "not the functional equivalent of a membership association." *Id.* at

[16] MAHCA "reasonably believed [its] standing [was] self-evident," so it did not fully explain its standing in its initial brief. *Am. Libr. Ass'n v. F.C.C.*, 401 F.3d 489, 492 (D.C. Cir. 2005). The recordcontains sufficient evidence regarding MAHCA's representational role and the injury suffered by its Members for this Court to find standing. *See Delaware Dep't of Nat. Res. & Env't Control v. E.P.A.*, 785 F.3d 1, 9 (D.C. Cir. 2015) ("[I]t was reasonable for [petitioner] to believe that its standing was self-evident . . . , [so] we look . . . to the reply brief to establish standing."). MAHCA also attaches, as "Exhibit A," a declaration of counsel with a copy of MAHCA's bylaws. Should this Court require more evidence to inform its standing decision, MAHCA requests opportunity to submit further evidence and briefing. *Am. Libr. Ass'n*, 401 F.3d at 494. Such an opportunity would be especially warranted because the Board attempted a "gotcha" after refraining from asserting a standing issue in the Superior Court. *Cf. Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006).

1209. Here, Members testified to their membership in MAHCA, *supra* p. 15, and the Declaration confirms an association-member relationship between MAHCA and its Members. Exhibit A at ¶¶ 10–12; *cf. Tilden Park*, 806 A.2d at 1210 (explaining evidence of this relationship includes the ability to "elect . . . directors," "guide [the organization's] actions," or exert "control over the organization").

2. The Decision Injures MAHCA's Members.

The Board, oblivious to the record, contends that "MAHCA has never asserted that any individuals living near the chancery have suffered or will suffer any concrete and particularized harm from its establishment." Brief at 24. Yet Members testified before the Board that permitting the Chancery to locate unlawfully in the Neighborhood would obliterate the Neighborhood's residential character and permanently diminish the integrity of its R-1-B zoning. *See*, *e.g.*, JA 299 ("Our opposition is an objection to any commercial or office development" that "will fundamentally change the nature of our residential neighborhood").

This uncontested transformation undoubtedly injures the Members. "[T]hreats to the use and enjoyment of an aesthetic resource may constitute an injury in fact." *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 421 (D.C. 1983) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). For decades, the Neighborhood's residents have enjoyed its unique features. *See*, *e.g.*, JA 240 (describing as "valuable" the "supportive network," "social interaction," and "strong communities"

found in the Neighborhood), 302 (explaining that the Neighborhood is a place where neighbors "go over the top with . . . halloween decorations"), 400 (describing how "young and small children . . . play in the street" and a "full block" can be "shut down" for a "neighborhood Block Party"). These experiences are possible only with minimal office or commercial presence. JA 302, 400.

The Decision also sets a precedent for further nonresidential development in the Neighborhood. *See*, *e.g.*, JA 319 (the Chancery's "exception" will become "precedent" that "threaten[s] to erode the residential character of the neighborhood"), 374 (citing the "chancerization of previously residential areas" as evidence of how the Neighborhood will be adversely affected by the Chancery); MAHCA Brief at 34–35. Unless reversed, the Decision will strengthen subsequent foreign missions' claims to locate within the Neighborhood. JA 418 (Ward 3 Councilmember explaining that the Chancery creates "binding precedent" that "open[s] up large areas [of the Neighborhood] for placement of Chanceries effectively rewriting the regulation"), 475:21 (ANC commissioner explaining that the Application would make the Neighborhood "ripe for foreign missions").

History suggests that subsequent nonresidential development applications will be forthcoming. MAHCA has been forced frequently to "defend" against these applications because "developers find the [Neighborhood] a convenient target for uses other than single-family residential." JA 290; *see* JA 275. Foreign missions see

the Neighborhood as the "perfect opportunity" to locate their chanceries because "the typical likely locations, including Embassy Row and Dupont Circle," are no longer accessible because they have only "sparse" and "expensive" properties available. JA 178. As the Plan recognized, "sites for as many as 100 new and relocated chanceries may be needed during the next 25 years," D.C. Mun. Regs. 10.A § 318.2, so the Plan aimed at steering them ***away*** from low-density residential neighborhoods, *id.* §§ 318.10–11. It is hardly "speculative" that the Board's unlawful approval lowers the barrier to the further location of chanceries and other nonresidential developments in the Neighborhood. Brief at 27.

Locating chanceries in residential neighborhoods harms residents by diminishing their neighborhoods' residential integrity. As the National Capital Planning Commission ("NCPC")[17] observed, a "large number of chanceries . . . change[s] the character of [an] area and result[s] in . . . [adverse] impacts associated with office development." JA 290 (quoting NCPC, *Foreign Missions in the District of Columbia: Future Location Analysis*, at 1 (Oct. 2003), accessible at

[17] The NCPC is "the central planning agency for the federal government" in the District. D.C. Code § 2-1002(a)(1). The NCPC has stated that "concentrating chanceries in neighborhoods" may cause "issues related to protecting neighborhood character." *Comprehensive Plan for the National Capital: Federal Elements*, at 143 (June 2024), https://www.ncpc.gov/plans/compplan/; *see also* Martin Austermuhle, *Planning Commission Wants Chanceries Out of D.C. Residential Areas*, WASHINGTON DIPLOMAT (Aug. 27, 2014), https://washdiplomat.com/planning-commission-wants-chanceries-out-of-dc-residential-areas/.

https://www.ncpc.gov/docs/Foreign_Missions_Future_Location_Analysis_Oct2003.pdf). Several District Councilmembers have explained that, once a neighborhood "become[s] saturated with chanceries," they "adversely affect[] the neighborhood's . . . residential character." JA 568; *see* JA 418–20. This well-recognized harm is why the D.C. Council (with the approval of the NCPC) amended the Plan to have OP "support . . . residential neighborhood objectives." Exhibit E to MAHCA Brief at 5. Even OP agrees that repeated chancery incursions cause "a significant adverse impact on [a neighborhood's] residential character." JA 575.

Notwithstanding this evidence, the Board asserts that the Members' injury is not "concrete" because "residential integrity" is an "amorphous" concept. Brief at 28. This ignores the ordinary notion of residential quality of life recognized in the FMA. *Supra* p. 5. Placing a commercial use within a residential area "immediately and directly affects each homeowner" because it "interfere[s] with the enjoyment of their property . . . and detract[s] from the aesthetic residential character of the neighborhood." *E. Diamond Head Ass'n v. Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 479 P.2d 796, 797–798 (Haw. 1971); *cf. Barry*, 455 A.2d at 421–22 (standing where neighborhood association "asserted" a "clash of the proposed design with the character of the historic district"); *Speyer*, 588 A.2d at 1161 (standing where "Georgetown residents" alleged project "threatened future disruption of the tranquility of their neighborhood"). Here, the Chancery and the precedent it creates

will prevent the Members from enjoying the unique, residential nature of the Neighborhood.[18]

The Members' injury is not a generalized grievance "common to all members of the public." Brief at 26.[19] Only the Members stand to lose the unique, residential nature of **their** Neighborhood that **they** enjoy daily, and many of them "live on the same block as, or around the corner from, the [Chancery]." *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 272 n.2 (D.C. 2013).[20]

III. CONCLUSION

MAHCA has standing to pursue this appeal. For the reasons set forth above, the Decision was unlawful. This Court should vacate the Superior Court's Order and remand this matter to the Superior Court for further proceedings consistent with this Court's findings.

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[18] The Board's supercilious assertion that Members can only be injured through adverse impacts to their "everyday views" ignores that Members will suffer injury to the use and enjoyment of their Neighborhood. Brief at 25; *see supra* pp. 16–19.

[19] Based on *York Apartments Tenants Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1079 (D.C. 2004), the Board argues the Members have suffered no injury because (1) they seek only to "have the Board act in accordance with the applicable laws and regulations governing chancery approvals," (2) their interest is comparable to "preventing the loss of tax revenue" or "promoting economic development," and (3) the Members' "close proximity" to the Chancery is irrelevant. Brief at 26–27. But unlike in *York*, there is sufficient evidence "in the record to indicate that [the Members] ha[ve] suffered, or [are] in immediate danger of suffering, [a] direct harm as a result of [the Decision]." *York*, 856 A.2d at 1085; *see supra* pp. 16–19.

[20] The Decision thus does not "indiscriminately" injure "every citizen" in the District. *D.C. Libr. Renaissance Project/W. End Libr. Advisory Grp. v. D.C. Zoning Comm'n*, 73 A.3d 107, 115 (D.C. 2013) (internal citation omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 15th day of August, 2025, a copy of the foregoing was served via the Court's electronic filing and service system on all parties:

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EXHIBIT A

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION, Appellant, v. D.C. BOARD OF ZONING ADJUSTMENT, Appellee.	)	Case No. 24-CV-0759

DECLARATION OF PAUL A. CUNNINGHAM

I, Paul A. Cunningham, under penalty of perjury, hereby declare as follows:

1. My name is Paul A. Cunningham, and I am a Partner at Harkins Cunningham LLP and counsel for Massachusetts Avenue Heights Citizens Association ("MAHCA") in the above-captioned matter.

2. I was the President of MAHCA for over thirty (30) years until 2019 and am now serving as a board member. I testified to these facts before the D.C. Board of Zoning Adjustment (the "Board"). JA 517–18.

3. Through these positions, I have gained personal knowledge of MAHCA's operations. The purpose of this Declaration is to describe (1) MAHCA's purpose and litigation history and (2) its organizational structure. To support these assertions, I attach as "Exhibit 1" a true and correct copy of MAHCA's original by-laws (the "By-laws"), which were approved on December 5, 1972.

MAHCA's Purpose and History

4. MAHCA recognizes the Massachusetts Avenue Heights Neighborhood (the "Neighborhood") as consisting of 13 blocks bounded by Massachusetts Avenue, Wisconsin Ave, Calvert Street, and Naval Observatory Circle. By-laws art. I.

5. On May 6, 1970, the residents of the Neighborhood established MAHCA. Its purpose is "to preserve the amenable character and to develop the aesthetic values of [the Neighborhood] as a pleasant neighborhood to live in and to help protect the interests of the residents and home owners." By-laws art. III. It is also designed to "act on matters that affect [the Neighborhood]," such as zoning-related issues. *Id.*

6. MAHCA has represented its members in previous litigation. In the early 1970s, MAHCA sued to stop the illegal construction of a hotel in the Neighborhood. *Massachusetts Ave. Heights Citizens Ass'n v. Embassy Corp.*, 433 F.2d 513 (D.C. Cir. 1970). The litigation was resolved by a settlement between MAHCA and the hotel. MAHCA has opposed the hotel's subsequent actions that adversely affect the Neighborhood. *See*, *e.g.*, *Application of the Massachusetts Avenue Heights Citizens Association*, Board of Zoning Adjustment Order No. 19077 (decided Nov. 25, 2015), accessible at https://app.dcoz.dc.gov/Exhibits/1907/BZA/19077/Exhibit71.pdf.

7. In the 1990s, MAHCA successfully defended against the District's proposal to steer the Guy Mason Recreation Center away from its recreational and cultural purposes. *See* Rene Sanchez, *Zoning Board Puts Off Ward 3 Shelter Decision*,

WASHINGTON POST (Nov. 20, 1991), https://www.washingtonpost.com/archive/local/1991/11/21/zoning-board-puts-off-ward-3-shelter-decision/1bb97c22-8e6f-4a65-a184-f0dac828291a/.

8. More recently, MAHCA opposed the Board's approval of an assisted living facility and associated allocation of parking spaces that disrupted the Neighborhood's residential character. *Massachusetts Avenue Heights Citizens v. D.C. Board of Zoning Adjustment*, No. 19-AA-1049 (D.C. Sept. 6, 2022); *Application of MED Developers, LLC*, Board of Zoning Adjustment Order No. 19751 (decided Jan. 30, 2019), accessible at https://app.dcoz.dc.gov/Exhibits/2010/BZA/19751/Exhibit511.pdf. In that case, the Board granted MAHCA party status.

9. On September 9, 2022, the Embassy of the Republic of Kosovo (the "Applicant") set out to convert 3612 Massachusetts Avenue NW into its chancery (the "Chancery"). The Applicant's ambassador and counsel organized a community meeting with MAHCA on October 12, 2022, to discuss its plans for the Chancery. During that meeting, at least 40 MAHCA members expressed their opposition to the Chancery locating in the Neighborhood. *See generally* MAHCA videos, *Community Meeting on Kosovo Chancery 10.12.2022*, YOUTUBE (Jan. 8, 2023), https://www.youtube.com/watch?v=o1HdLqSgbp0 (mentioned in record at JA 337 n.65). When the Applicant continued with its Chancery application, MAHCA sought party status from the Board to participate in the proceeding. The Board denied

MAHCA's application, but MAHCA and several members filed comments or provided testimony in opposition to the Chancery.

MAHCA's Organizational Structure

10. Membership in MAHCA is automatically granted to "[a]ny person 18 years of age or older who owns or resides in a home in [the Neighborhood] that conforms with the requirements of category R-1-B zoning." By-laws art. IV, § 1. Members also include residents of a condominium constructed at the corner of Massachusetts Avenue after zoning approval for the condominium was secured with MAHCA's support.

11. Residents of the Neighborhood retain MAHCA membership "unless and until [they] choose not to be a member." *Id.* The By-laws also require MAHCA to "fix" its "membership dues . . . from time to time." But MAHCA has always fixed those dues at zero dollars, preferring to keep membership free and to raise funds by other means, including its annual block party. MAHCA Members elect by majority vote MAHCA's President, Vice President, Treasurer, and Secretary (collectively, the "Officers"). By-laws art. VII.

12. MAHCA's members have ultimate control over the organization. "Transaction of business by [MAHCA]" is approved or disapproved, *inter alia*, through a "quorum" of at least "[f]ifteen" MAHCA members. By-laws art. VI, § 3. Each member is entitled to one vote, which must be cast in person. *Id.* art. VI, § 4. Additionally, the Board of Directors must report any "necessary and urgent business"

transacted "during the intervals between meetings" to "[MAHCA] for its approval and shall perform such special duties as may be assigned to it by [MAHCA]." *Id.* art. XII.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this day August 15, 2025.

Paul A. Cunningham

EXHIBIT 1

ORIGINAL

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION

BY-LAWS

ARTICLE I - NAME

The name of this Association shall be the Massachusetts Avenue Heights Citizens Association (MAHCA). Massachusetts Avenue Heights, as used in the By-Laws shall be understood to be that area bounded by Massachusetts Avenue, Wisconsin Avenue, Calvert Street, and Naval Observatory Circle, N. W., Washington, D. C.

ARTICLE II - SEAL

The Association shall have a corporate seal with its name incised thereon.

ARTICLE III - OBJECT

The object of this Association shall be to preserve the amenable character and to develop the aesthetic values of Massachusetts Avenue Heights as a pleasant neighborhood to live in and to help protect the interests of the residents and home owners. To these ends, the Association will act on matters which affect Massachusetts Avenue Heights and Washington, including the maintenance of Massachusetts Avenue Heights as an in-town area of homes and gardens. The Association will assist Congress, the District of Columbia officials, the courts and appropriate Federal Agencies in the fulfillment of their duties and will gather, preserve and impart information of value to the members of the Association.

ARTICLE IV - MEMBERSHIP

Section 1. Any person 18 years of age or older who owns or resides in a home in Massachusetts Avenue Heights that conforms with the requirements of category R - 1-B zoning under the zoning laws and regulations of the District of Columbia is a member of this Association unless or until he chooses not to be a member. A resident member who is not a property owner of Massachusetts Avenue Heights shall automatically become an associate member upon moving out of Massachusetts Avenue Heights.

Section 2. There shall be a non-voting associate membership in this Association open to persons who wish to further its objectives but who do not qualify under Section 1 of this Article IV. Associate members shall be elected to this Association upon recommendation of the Membership Committee by a majority vote of the members present at any regular meeting.

ARTICLE V - DUES

The membership dues in this Association shall be as fixed by the Association from time to time, payable by each member annually on or before March 1st, and there shall be no further assessments of the members, though voluntary special solicitations for the benefit of the corporation or its activities may be authorized by the Directors.

ARTICLE VI - MEETINGS

Section 1. Regular meetings shall be at annual intervals at a convenient time and place in Massachusetts Avenue Heights or elsewhere in the District of Columbia to be designated by the Board of Directors. Unless otherwise provided by the Board of Directors, the annual meeting of this Association shall be the May meeting.

Section 2. Special meetings may be called by the President and shall be so called upon the written request of any three members of the Board of Directors or of any fifteen members of the Association. Such request shall state the reason for the meeting and the business to be transacted thereat. The call for a Special Meeting shall be mailed to each member in time to reach his residence in Massachusetts Avenue Heights at least five days in advance of the meeting. No business other than that specified in the notice of the Special Meeting shall be transacted thereat.

Section 3. Fifteen members shall constitute a quorum for the transaction of business by the Association, and of its Board of Directors and of any standing or special committee a majority shall constitute a quorum.

Section 4. Each regular member of the Association shall be entitled to one vote to be cast in person. There shall be no votes by proxy or by mail.

ARTICLE VII - OFFICERS

The officers of the Massachusetts Avenue Heights Citizens Association shall be a President, a Vice President, a Treasurer, and a Secretary, all of whom shall be elected by a majority of the members present and voting at the Annual Meeting. They shall serve for a term of one year, or until their successsors have been elected,Only members residing in Massachusetts Avenue Heights may serve as officers of the Association. The President shall appoint a nominating committee to report a slate of nominees for all offices at the regular meeting prior to the Annual Meeting at which elections are to be held. At the Annual Meeting nominations may also be made from the floor. Any officer may be removed from office at any time by vote of a majority of members present and voting at any Special Meeting.

ARTICLE VIII - THE PRESIDENT

The President shall preside at all meetings of the Association at which he is present, unless the Association shall direct otherwise; shall appoint all committees, standing and special, and shall be, ex-officio, a member of each committee.

All officers shall make reports to him, when requested and their reports shall be by him submitted to the Association. He shall be required to take all necessary measures for maintaining order and efficiency in the management of the affairs of the Association in all its departments.

In the case of the death of an officer, removal from office, resignation, or absence of any of the officers, the President shall appoint one of the members to fill the vacancy temporarily, until the return of the absentee or until a successor may have been elected.

ARTICLE IX - THE VICE PRESIDENT

The Vice President shall discharge the duties assigned to the President in case of his absence, or disability, or a vacancy in the office, or if the Association shall so direct.

ARTICLE X - TREASURER

The Treasurer shall be the custodian of all the funds of the Association and shall deposit or invest said funds as the Association may direct. He shall keep all necessary accounts and vouchers, subject at all times to such inspection and audit as the Association may direct, and shall make a report to the Association at each regular meeting, wherein he shall show the amount of money on hand and the receipts and disbursements since the preceding meeting.

ARTICLE XI - SECRETARY

The Secretary shall keep a correct record of all minutes of the meetings of the Association and of the Board of Directors and shall perform such other duties as may, from time to time, be assigned to him by the Association or by the Board of Directors.

ARTICLE XII - BOARD OF DIRECTORS

The Board of Directors shall consist of not less than seven, nor more than eleven, members of the Association including the President, who shall be ex-officio Chairman of the Board, the vice President, the Treasurer, the Secretary, the immediate past President, and not more than six other members to be appointed by the President in his discretion. The Board of Directors shall during the intervals between meetings be empowered to transact all necessary and urgent business and report the same at the next regular meeting or any special meeting of the Association for its approval and shall perform such special duties as may be assigned to it by the Association. The Board of Directors shall meet upon the call of the President, Vice President or any three directors. Unless waived, at least two days prior notice of any meeting shall be given to all directors.

ARTICLE XIII - STANDING COMMITTEES

The Standing Committees of the Association shall include the following:

1. Committee on Police and Fire Protection
2. Committee on Membership

3. Committee on Zoning, Planning and Building.

The President shall assign the work of the Association to these committees, shall determine their membership and shall decide any questions of jurisdiction over matters of common interest which may arise between the committees.

ARTICLE XIV - SPECIAL COMMITTEES

Special Committees may be appointed by the President as required.

ARTICLE XV - DISBURSEMENTS

Moneys of the Association shall be paid out only as directed by the Association, by check of the Treasurer, on bills approved by the President. Expenditures suggested from the floor at a meeting of the Association shall be referred to the Board of Directors for approval.

ARTICLE XVI - HEADQUARTERS ADDRESS

The headquarters address shall be that of the President of the Association.

ARTICLE XVII-PARLIAMENTARY PROCEDURE

The rules of Parliamentary Procedure contained in Robert's "Rules of Order, Revised", shall be the authority governing all meetings of the Association, subject always to existing laws and by-laws.

ARTICLE XVIII - AMENDMENTS

These By-Laws may be amended by a two-thirds vote of those present at any regular meeting or at any special meeting called for (though not necessarily confined to) this purpose, provided that written notice of such proposed amendment shall be mailed to each member in time to reach his residence in Massachusetts Avenue Heights at least ten days in advance of the meeting at which a vote is to be taken upon such amendment.

Approved by MAHCA Board of Directors on December 5, 1972