No. 24-CV-759

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION,
APPELLANT,

V.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

*JEREMY R. GIRTON
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-2029
jeremy.girton@dc.gov

*Counsel expected to argue

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Legislative History

Other

INTRODUCTION

This appeal challenges the Board of Zoning Adjustment's decision to allow the Republic of Kosovo to establish its chancery at 3612 Massachusetts Avenue, NW. Under the Foreign Missions Act, the Board must undertake a two-step inquiry when evaluating a request to locate a chancery in a low-density residential zone. First, it must determine whether the location is within a "mixed-use area." This requires examining the properties near the proposed chancery to determine whether a sufficient percentage is nonresidential. If the area is mixed use, the Board must proceed to the merits, evaluating the application against six exclusive statutory criteria. These include the municipal interest, as determined by the Mayor, and the federal interest, as determined by the Secretary of State.

The Board followed that two-step process in approving Kosovo's chancery application. The Board evaluated competing definitions of the surrounding "area" and carefully selected the one that accurately captured the existing mix of uses adjacent to the proposed chancery. Because the property is located on Massachusetts Avenue, the Board reasonably concluded that properties on both sides of the avenue were relevant to that analysis. On the merits, the Board properly evaluated the six statutory criteria. Regarding the municipal interest factor in particular, the Board correctly deferred to the Office of Planning (acting for the Mayor) as the statute requires.

Appellant the Massachusetts Avenue Heights Citizens Association (MAHCA) argues that the Board erred by not consulting the District's Comprehensive Plan. But MAHCA has not established that it has standing to even raise this challenge. MAHCA has never alleged that it has membership sufficient to give it associational standing. Even if it does have members, MAHCA has not explained how they were injured—in a concrete and particularized way—by the chancery's approval. It is hard to see how MAHCA could. Kosovo proposed making no changes to the building's exterior, and the chancery would support a small staff of only seven employees. There is no evidence that using the property as a chancery would negatively affect the enjoyment or value of neighboring properties. Merely being disinterested in having the building used as a chancery is not enough to give MAHCA or its members standing to challenge the Board's decision.

In any event, the Comprehensive Plan is not one of the criteria the Board must independently consider. The Plan's recommendations are not binding; they only "discourage" locating chanceries in certain areas of the District. If anything, those recommendations simply rephrase (in less binding terms) the Foreign Missions Act's existing requirements, which the Board properly evaluated. Nothing about the Comprehensive Plan suggests that the Board's decision to approve the Kosovo chancery lacked substantial evidence, was arbitrary or capricious, or was otherwise not in accordance with law.

STATEMENT OF THE ISSUES

1. Whether MAHCA has standing to challenge the Board's decision approving the location of the Kosovo chancery when MAHCA does not allege anything about its membership or any injury-in-fact caused by the approval.

2. Whether the Board's conclusion that the property was in a mixed-use area and otherwise satisfied the requirements of the Foreign Missions Act was supported by substantial evidence.

3. Whether the Board abused its discretion in declining to impose conditions on its approval of Kosovo's application.

STATEMENT OF THE CASE

Kosovo applied to establish its chancery on September 9, 2022. JA 117. The Board accepted written submissions on the application, and it held a public hearing on February 15, 2023. JA 444-541. It approved the application at a public meeting on March 1, 2023. JA 7-14, 542-64. MAHCA petitioned for review in the Superior Court on April 18, 2023. JA 5-6. The Superior Court denied the petition and affirmed the Board's approval on July 19, 2024. JA 105-16. MAHCA timely noted this appeal on August 19, 2024. *See* JA 1.

STATEMENT OF FACTS

1. The Governing Statute And Regulations.

The Foreign Missions Act (FMA) provides the "exclusive procedure" for the establishment of foreign chanceries in the District of Columbia. *Embassy of the*

People's Republic of Benin v. D.C. Bd. of Zoning Adjustment, 534 A.2d 310, 318 (D.C. 1987); *see* D.C. Code § 6-1306(a).[1] A "chancery" is a foreign mission's "principal office[]," D.C. Code § 6-1302(a)(2), as opposed to an "embassy," which refers to an ambassador's residence, 11-B DCMR § 100.2. Congress passed the FMA "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. 97-329, at 1 (1982). The FMA rectified this imbalance by giving the federal government a greater say in decisions regarding the establishment of foreign missions in the District and by requiring "expeditious resolution of chancery issues" through new procedures, which would afford the Secretary of State greater "leverage" to "remove unreasonable restraints and costs on United States missions abroad." *Benin*, 534 A.2d at 314-15.

When performing functions under the FMA, the Board sits as the specially constituted Foreign Missions Board of Zoning Adjustment, and it may have a different composition depending on the President's designations. D.C. Code § 6-1306(i). The Board's decision on a chancery application under the FMA is considered a rulemaking proceeding, not an adjudication. D.C. Code § 6-1306(f);

---

[1] The FMA is codified at both 22 U.S.C. §§ 4301, *et seq.*, and D.C. Code §§ 6-1301 *et seq.* This brief cites the D.C. Code provisions for consistency.

11-X DCMR § 203.2; 11-Y DCMR § 201.3; *see United States v. D.C. Bd. of Zoning Adjustment* (*Taiwan*), 644 A.2d 995, 996-99 (D.C. 1994). The Board holds a public hearing on chancery applications, and members of the public have the opportunity to submit written comments. *See* D.C. Code § 6-1306(c)(2); 11-Y DCMR § 206.

The FMA creates a two-step process for establishing a chancery in the District. *First*, there is a threshold inquiry based on zoning. Depending on the property's zone, it will fall into one of three categories. In the first category, a chancery proposing to locate in any commercial, industrial, waterfront, or mixed-use zone may do so as a matter of right. D.C. Code § 6-1306(b)(1). Chanceries proposing to locate in those zones do not need the Board's approval. In the second category, a chancery proposing to locate in any area zoned medium-high- or high-density residential may do so subject to disapproval by the Board. *Id.* § 6-1306(b)(2)(A). The third category covers chanceries proposing to locate "in any other area," including low- or medium-density residential zones. *Id.* § 6-1306(b)(2)(B). A chancery may locate in these zones—again subject to disapproval by the Board—only if the "area, determined on the basis of existing uses" also "includes office or institutional uses." *Id.*

Accordingly, a chancery's request to locate in, for example, a low-density residential zone requires the Board to decide "whether the proposed location is in a mixed-use area determined on the basis of existing uses." 11-X DCMR § 201.3.

This determination requires first identifying the "area" of the proposed location, which is "the area that the Board of Zoning Adjustment determines most accurately depicts the existing mix of uses adjacent to the proposed location of the chancery." *Id.* § 201.4. Sometimes, the proposed area will be the property's assigned "square" (typically, a city block) as formally recorded by the District of Columbia Surveyor. 11-B DCMR § 100.2. If a chancery applicant proposes defining the area as something other than the property's square, it must include in its application a statement "explaining the basis for using the area," which cannot be based solely on previous Board action for another location. 11-Y DCMR § 301.7.

Once the relevant area is defined, the Board must evaluate whether the area qualifies as mixed-use. An area will be deemed mixed-use if more than 50% of the zoned land within the area "is devoted to uses other than residential uses." 11-X DCMR § 201.5. Even if less than 50% of the area is nonresidential, the Board may still find the area to be mixed-use "upon a showing of non-residential uses as may be submitted by the applicant, Secretary of State, or the Mayor of the District of Columbia." *Id.* If the area is not mixed-use, the Board must disapprove the application. *Id.* § 201.7.

Second, if the chancery passes the threshold zoning inquiry—either because the property is zoned medium-high- or high-density residential, or because it has been determined to be within a mixed-use area—the Board will decide whether to

"disapprove" or "not disapprove" (i.e., approve) the application on the merits. *Id.* §§ 201.1, 201.6. The Board's merits determination must be based "solely" on the six criteria listed in the FMA:

> (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 . . . ;
>
> (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 . . . ;
>
> (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; and
>
> (6) The federal interest, as determined by the Secretary [of State].

D.C. Code § 6-1306(d); 11-X DCMR § 201.8.

2. The Board Approves The Location Of Kosovo's Chancery.

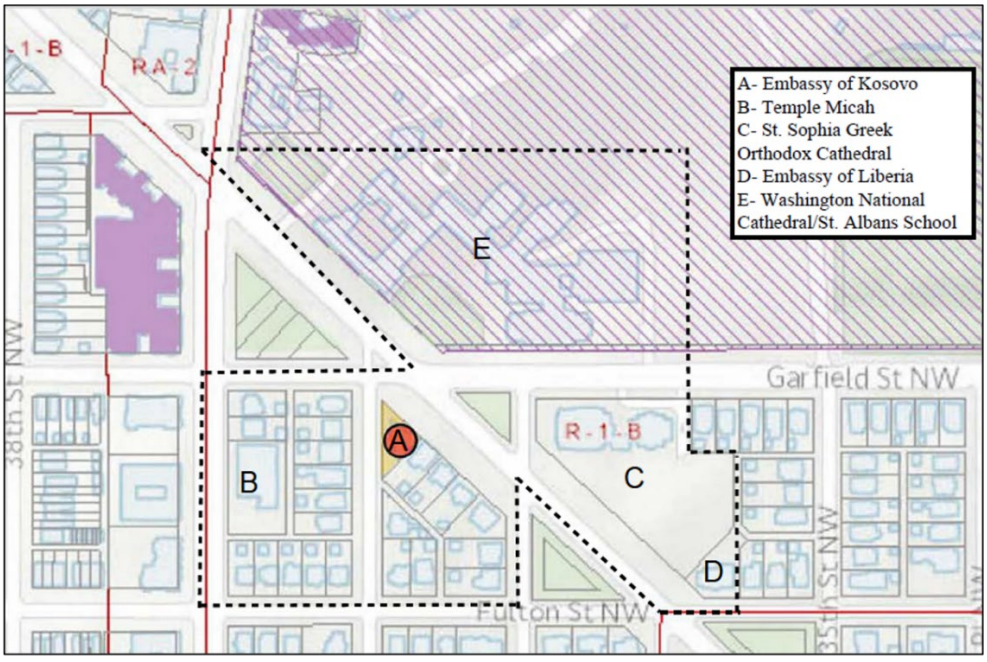
In February 2008, Kosovo declared its independence from Serbia and established diplomatic relations with the United States. JA 177. Almost immediately, it began searching for a permanent location to establish a chancery in the District. *See* JA 178-79, 372, 450. After multiple failed attempts to acquire a suitable property, it purchased 3612 Massachusetts Avenue, NW (Square 1931, Lot 5) in 2022. JA 117, 178-79. Kosovo applied to the Board to establish its chancery

there, proposing to use the existing single-family dwelling to accommodate seven employees. JA 179. The Board timely notified the public of the application. 69 D.C. Reg. 13440 (Oct. 28, 2022).

Map showing proposed chancery within Square 1931. JA 170.

3612 Massachusetts Avenue is a triangular lot at the intersection of Massachusetts Avenue, Garfield Street, and 36th Place. JA 176. The lot is zoned R-1-B, low-density residential. JA 254. To the south and west of the property are single-family residences and Temple Micah. JA 255. Directly across Massachusetts Avenue to the north is St. Albans School and the National Cathedral, and to the east is St. Sophia Greek Orthodox Cathedral. JA 255. Several other embassies are approximately two blocks southeast along Massachusetts Avenue. JA 255.

Kosovo proposed an area for the mixed-use analysis which included properties outside of Square 1931, including residential and nonresidential properties along both sides of Massachusetts Avenue. JA 139, 145-47. Kosovo's application explained that this definition captured nearby institutional religious uses—including the National Cathedral and St. Sophia—that "define the character of the area and are a part of the fabric of this location." JA 139. Kosovo later updated its proposed area to include all of Square 1931 and only the part of the National Cathedral campus closest to the property, encompassing the St. Albans school. JA 189-90. Kosovo explained that this revised definition placed the property "at or very near the center of the proposed area" and included the prominent institutional uses visible from the property. JA 180-81. It also noted that the Board had looked outside the square in prior chancery mixed-use analyses. JA 182-84.

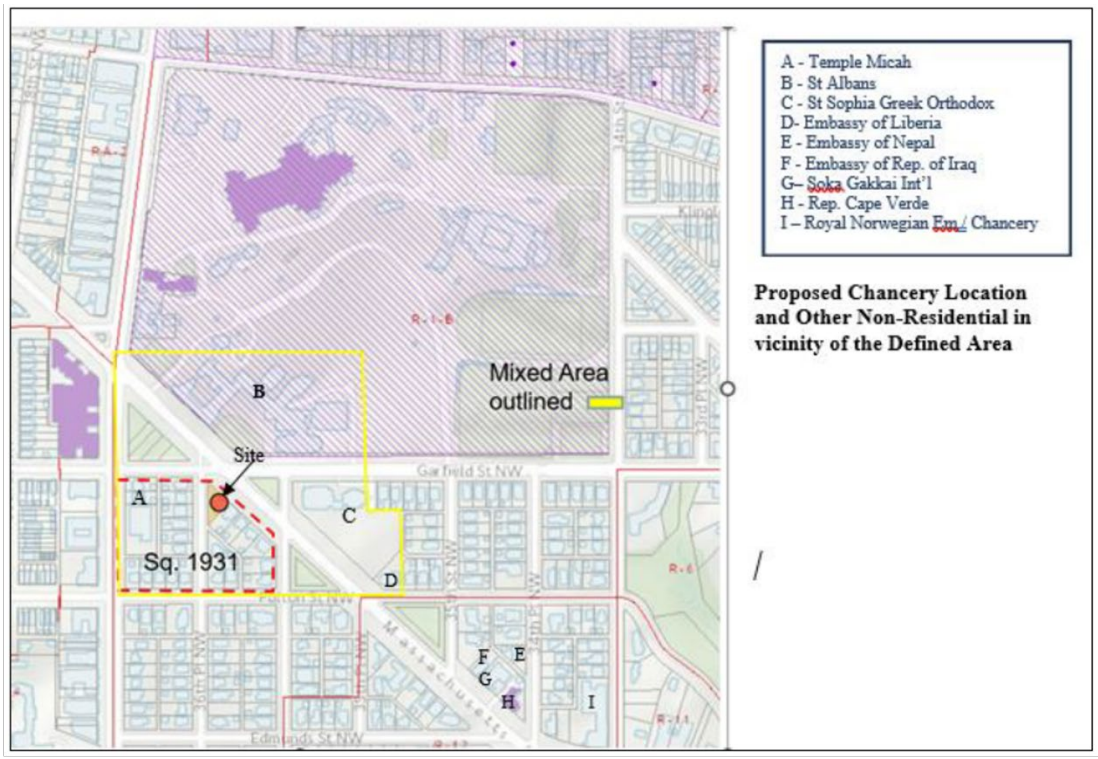


Kosovo's proposed mixed-use area. JA 190.

On the merits, Kosovo asserted that it met all six statutory criteria for approval. JA 186-88. The application was supported by the Secretary of State, who asserted that approval would support the United States' international obligations, further its national interests, and present no security concerns. JA 260-61, 466-67. After Kosovo worked with the District of Columbia Department of Transportation to develop a plan to remove some non-permitted fencing and landscaping that had been installed by a previous owner, the Department also recommended approving the application. *See* JA 250-52, 294-95, 316-18. Given the small staff size of the proposed chancery, the Department estimated that the property would have at most "minor impacts" on parking and traffic in the area. JA 251.

The District's Office of Planning also recommended that the Board approve the application. JA 253-58. It concluded that Kosovo's proposed area accurately captured the "adjacent" properties as required by 11-X DCMR § 201.4, since it covered other institutional uses along the Massachusetts Avenue corridor. JA 255. In essence, this definition captures all of the properties within Square 1931 as well as the properties one block in either direction along Massachusetts Avenue. Using

this area definition, more than 76% of the zoned land was used for nonresidential purposes, which easily satisfied the mixed-use threshold. JA 255.[2]



Office of Planning's proposed mixed-use area. JA 255.

On the merits, the Office of Planning found that the application satisfied the statutory criteria, including the municipal interest factor. JA 256-58. It confirmed that the property would not be detrimental to zoning regulations or the public good and would not bring substantial harm to the privacy or use and enjoyment of neighboring property. JA 257. No external changes would be made to the existing

---

[2] The only difference between the Office of Planning's proposed mixed-use area and the one proposed by Kosovo was the Office of Planning's inclusion of two federally owned triangular parks along Massachusetts Avenue. *See* JA 255, 484-85. The inclusion of those parks does not meaningfully affect the percentage of the area's property classified as nonresidential.

structure. JA 257. And Kosovo represented it did not anticipate daily consular-type visitors, so the effect on the surrounding neighborhood would be minimal or nonexistent. JA 179.

The Board held a public hearing on the application on February 15, 2023. JA 444-541. Representatives from Kosovo, the State Department, and the Office of Planning testified in support of the application. JA 447-70. The Board also heard testimony in opposition to the project from the local ANC commissioner, public witnesses, and the president of MAHCA. JA 471-77, 495-505. It accepted additional written comments from the public and the local Councilmember. JA 167-173, 229-249, 270-293, 296-305, 308, 315, 319-53, 374-400, 418-20.

In its written comments and testimony, MAHCA contended that approval of the application would "adversely impact neighbors," although it did not specify what that impact would be beyond a vague reference to "traffic and parking." JA 232. MAHCA asserted that the mixed-use analysis should be limited to Square 1931 and should not include properties on the other side of Massachusetts Avenue. JA 323-29, 510-12. It also asserted that the application had certain procedural defects, and that any approval should allow additional time for Kosovo and MAHCA to agree to certain conditions governing the property's use. JA 330-38, 512-13. MAHCA's submissions did not mention the Comprehensive Plan.

Following the hearing, the Board requested additional updates on Kosovo's ongoing discussions with the ANC about agreements or conditions, as well as on completing the changes requested by the Department of Transportation. JA 402. Kosovo agreed to speed up the changes requested by the Department, and it explained that it was willing to agree to most of the conditions requested by the ANC, but that the ANC had not formally voted to approve the conditions. JA 404-06. As to parking in particular, Kosovo had no objection to the request that it not seek residential parking permits and that it provide off-site parking outside of the neighborhood for any events. JA 406.

The Board approved the application at a public hearing on March 1, 2023. JA 7-14, 542-64. As to the threshold inquiry, it agreed with the Office of Planning's definition of the relevant area, *supra* pp. 10-11, which included all of Square 1931 and the other properties along Massachusetts Avenue. JA 8. The Board explained that 11-X DCMR § 201.4 required it to identify the area that most accurately depicts the existing mix of uses "adjacent" to the proposed location. JA 8. Because "adjacent" is not defined in the regulations, the Board turned to the dictionary definition of "not distant or far off," "nearby but not touching," or "having a common border." JA 9 n.5. The other properties outside of Square 1931 met this definition because they were close by and bordered Massachusetts Avenue. JA 9. As the Board found, limiting the analysis to just Square 1931 would be "overly narrow"

and fail to account for nearby "religious, institutional, and educational uses," including some directly across the street. JA 9. Based on this proposed area, the Board calculated that approximately 76.6% of the area was nonresidential, which qualified as mixed-use. JA 10.

Turning to the merits inquiry, the Board found that the chancery met all six of the statutory criteria. JA 10-12. The Department of State determined that the chancery would fulfill the United States' international obligations, could be adequately protected, and would further the federal interest. JA 10-12. The Board also concluded that the property was not designated a historic landmark, was not in a historic district, and had adequate parking and access to public transportation. JA 10-11. As to the fifth factor—"the municipal interest, as determined by the Mayor"—the Board explained that the Office of Planning, on behalf of the Mayor, had determined that approval was in the municipal interest. JA 11-12. The Board declined to impose any conditions on its approval of the application because the Office of Planning had determined that no conditions were necessary to make the approval in the municipal interest, and Kosovo had already voluntarily agreed to implement many of the neighborhood's requested conditions. JA 12 & n.7. The Board also noted that it gave "great weight" to the views expressed by the ANC but, for the reasons just explained, was ultimately unpersuaded to adopt its narrower view of the relevant area or to impose conditions on the chancery's approval. JA 12-13.

3. The Superior Court Affirms The Board's Decision.

MAHCA petitioned the Superior Court for review of the Board's decision, naming the Board as the respondent. JA 5-6. It argued that the Board's findings that the property was in a mixed-use area and that approval satisfied the municipal interest contravened the Comprehensive Plan. JA 38-50. MAHCA also argued that the Board abused its discretion in declining to impose conditions on its approval. JA 51. MAHCA originally sought vacatur of the Board's ruling as well as an injunction against the Board and Kosovo, even though Kosovo was not a party to its suit. *See* JA 51-54. It later dropped its request for injunctive relief. JA 102-03.

The Superior Court declined to set aside the Board's approval. JA 105-16. It held that the Board's decision did not contravene the Comprehensive Plan, which provides only recommendations, not binding requirements, regarding the location of chanceries in the District. JA 112-13. It concluded that the Board's mixed-use area determination was supported by substantial evidence and was not arbitrary or capricious. JA 113-15. It also held that there was nothing improper about the Board relying on the Office of Planning's determination regarding the municipal interest. JA 115.

MAHCA timely noted this appeal. *See* JA 1.

STANDARD OF REVIEW

This Court reviews for lack of standing de novo. *Grayson v. AT&T Corp.*, 140 A.3d 1155, 1161 (D.C. 2011). Although not an Article III court, this Court still applies Article III's standing requirement in "every case," looking to both constitutional and prudential aspects of federal standing jurisprudence. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002). Because standing cannot be waived, questions of standing may be raised at any time, even on appeal. *Speyer v. Barry*, 588 A.2d 1147, 1159 n.24 (D.C. 1991).

The FMA expressly provides that a decision by the Board to approve a chancery application is a rulemaking, D.C. Code § 6-1306(f), and therefore does not qualify as a contested case directly reviewable in this Court. *Taiwan*, 644 A.2d at 998-99. This Court has indicated that the Superior Court may review such decisions pursuant to its general equitable authority over noncontested cases. *Id.* at 999 n.9; *see Capitol Hill Restoration Soc'y, Inc. v. Moore*, 410 A.2d 184, 188 (D.C. 1979) ("Any party aggrieved by an agency's decision may initiate an appropriate equitable action in the Superior Court to seek redress.").

When a party is challenging agency action taken after a hearing in a noncontested case, the Superior Court must apply the same level of review that this Court uses when reviewing contested cases, and this Court then applies the same standard on appeal. *R.O. v. Dep't of Youth Rehab. Servs.*, 199 A.3d 1160, 1165-66

(D.C. 2019). This means this Court reviews the agency's decision to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.* at 1166 (citing D.C. Code § 2-510(a)(3)(A)). This standard is "generally deferential." *McDonald v. D.C. Bd. of Zoning Adjustment*, 291 A.3d 1109, 1115 (D.C. 2023). The Court will affirm an administrative agency's decision so long as "(1) the agency made findings of fact on each contested material factual issue, (2) substantial evidence supports each finding, and (3) the agency's conclusions of law flow rationally from its findings of fact." *R.O.*, 199 A.3d at 1166-67 (quoting *Georgetown Univ. v. D.C. Dep't of Emp. Servs.*, 971 A.2d 909, 915 (D.C. 2009)); *see Hotel Ass'n of Wash. v. D.C. Minimum Wage & Indus. Safety Bd.*, 318 A.2d 294, 311 & n.24 (D.C. 1974) (applying arbitrary and capricious and substantial evidence standards to rulemaking proceeding); *Window Covering Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1286 (D.C. Cir. 2023) ("When applied to rulemaking proceedings, the substantial evidence test is identical to the familiar arbitrary and capricious standard." (cleaned up)).

SUMMARY OF ARGUMENT

1. MAHCA lacks standing to challenge the Board's approval of Kosovo's chancery because it has not shown bona fide membership or that those members would have standing in their own right.

Although MAHCA purports to pursue associational interests on behalf of District residents living near the chancery, nothing in the record indicates that MAHCA actually has members. This Court explained in *Friends of Tilden Park* that an organization must have certain "indicia of membership" to represent the interests of its supporters, such as demonstrating that members have the power to control and fund the organization's activities. 806 A.2d at 1210. MAHCA has alleged virtually nothing about its members here, and it certainly has not provided the requisite detail to establish associational standing.

Even assuming that MAHCA has members, it has not shown that those members would suffer an injury-in-fact. MAHCA does not contend that the Kosovo chancery will disrupt the peace and enjoyment of neighboring homes, decrease property values, or cause a concrete injury related to traffic or parking. The only asserted injury identified in MAHCA's brief is a concern related to "residential integrity," but this would not satisfy either the concreteness or particularization requirements of an injury-in-fact. Absent some particularized and concrete harm, an individual does not have a legally protected right to control how others in the neighborhood use their property. MAHCA's suit seeks to vindicate a generalized grievance and should be dismissed.

2. If the Court reaches the merits, it should affirm because the Board's decision properly applied the FMA's two-step statutory framework and was

supported by substantial evidence. In conducting the mixed-use area analysis, the Board reasonably concluded that the regulation's use of the word "adjacent" meant the Board was permitted to look outside of the proposed chancery's square to determine whether there are nonresidential uses nearby. Looking outside the square was justified in this case because the property is located across the street from major institutional uses like churches and a school. On the merits, the Board examined the six statutory factors, including the municipal interest, all of which supported approval.

MAHCA's argument that the Board should have considered the Comprehensive Plan at one or both steps of the analysis lacks merit. MAHCA conflates the two steps of the FMA's rubric, which are distinct requirements for chancery approvals. The Comprehensive Plan has no role to play in the mixed-use area analysis, which merely assesses whether there are existing nonresidential uses nearby. The Board does not need to consider the Comprehensive Plan during its merits analysis of the municipal interest either, because the FMA commits determination of the municipal interest to the Mayor, who has delegated the task to the Office of Planning. In any event, the Comprehensive Plan's recommendations merely rephrase the FMA's requirements in nonbinding terms, so any failure to explicitly invoke the Comprehensive Plan was harmless.

3. The Board did not abuse its discretion in declining to impose conditions on its approval of Kosovo's chancery application. No conditions were required to ensure that the FMA's statutory requirements were satisfied, which distinguishes the case from prior chancery applications where the Board imposed conditions. Moreover, MAHCA has forfeited its argument by failing to identify any specific conditions or explain why they are needed. In any case, the Board's decision was not motivated by a misunderstanding of its own authority to impose conditions but rather by a determination that conditions were not warranted in this case. Lastly, MAHCA's contention that the lack of conditions means Kosovo can freely alter its chancery is incorrect; any substantial changes will require approval by the State Department and the Board.

ARGUMENT

I. MAHCA Lacks Associational Standing To Challenge The Board's Decision.

A. MAHCA does not allege that it has members.

As the party invoking jurisdiction, MAHCA bears the burden to establish standing. *Nicdao v. Two Rivers Pub. Charter Sch., Inc.*, 275 A.3d 1287, 1292 (D.C. 2022); *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 430-31 (2021). MAHCA's theory of standing appears to be associational—based on its status as "a citizens association that represents the residents of the Neighborhood," JA 29 n.15—rather than on its own behalf as an organization. An association has standing to sue on

behalf of its members when (1) its members would otherwise have standing to sue; (2) the interests that it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Fraternal Ord. of Police v. District of Columbia*, 290 A.3d 29, 38 (D.C. 2023). Accordingly, MAHCA has standing to challenge the Board's approval of Kosovo's chancery application only if it has "members [who] would have standing in their own right." *Union Mkt. Neighbors v. D.C. Zoning Comm'n*, 197 A.3d 1063, 1067 n.3 (D.C. 2018).

Here, MAHCA has provided virtually no information about its membership. MAHCA asserts that it is "an organization that represents residents" in the neighborhood surrounding the proposed chancery location. JA 323; *see* JA 29 n.15; JA 231-33. Beyond its president and current counsel, who both testified before the Board, JA 510-13, 517-18, it does not allege that it has bona fide members who are neighborhood residents, nor has it clearly defined the borders of that neighborhood. MAHCA has not offered any details about how it is organized, funded, or controlled. The only representation that MAHCA has made about its membership was its statement to the Board that membership "is free" and that "anyone can sign up to receive MAHCA news and announcements," even if they do not live in the area. JA 323. Thus, it is speculative to assume that MAHCA has members, let alone that those members reside near the Kosovo chancery.

This makes MAHCA similar to the neighborhood organization in *Friends of Tilden Park*, 806 A.2d at 1208-10, which the Court found lacked standing to represent the interests of neighborhood residents who were not actual members of the organization. The Court observed that it "is no small matter for an organization to assert the right to sue, not on behalf of itself, but on behalf of others." *Id.* at 1209. An organization must demonstrate "that it ha[s] at least a *de facto* membership relationship with the 'supporters' whom it claim[s] to represent." *Id.* The *Friends of Tilden Park* organization lacked the required "indicia of membership" because it had not demonstrated that its supporters had the power to elect its directors, fund its activities, or exert control over the organization, and it did not show that there was any "financial nexus" between the organization and its supporters. *Id.* at 1210 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977)).

So too here. MAHCA's contention that it "represents" the interests of the neighborhood containing the Kosovo chancery is not enough to establish that it has the authority to speak on behalf of actual members living in the area. Simply having officers or directors is not enough. *Id.* MAHCA provides no details that could satisfy the "indicia of membership" this Court identified in *Friends of Tilden Park*; it does not allege that its members provide funding, elect its officers, or control its activities. MAHCA's representations are insufficient to meet its burden of showing

that it has standing to seek redress for injuries suffered by individuals living near the Kosovo chancery. *See id.*

B. MAHCA does not allege an injury-in-fact.

Even assuming that MAHCA has members who reside near the chancery, it does not contend that those members themselves would have standing to challenge the Board's decision. To demonstrate constitutional standing, a party must show that (1) it has suffered or will suffer an injury-in-fact, (2) there is a causal connection between the injury and the conduct of which the party complains, such that the alleged injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Padou v. D.C. Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013). An injury-in-fact requires an invasion of a legally protected interest that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Friends of Tilden Park*, 806 A.2d at 1207 (quoting *Lujan*, 504 U.S. at 560).

For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (internal quotation marks omitted). Alleged harms "shared in substantially equal measure by all or a large class of citizens" are not particularized injuries; they are generalized grievances that do not "warrant exercise of jurisdiction." *Padou*, 70 A.3d at 212

(quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Rather, the plaintiff must show that "he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (emphasis added).

In addition to being particularized, an injury must be "concrete." *Spokeo*, 578 U.S. at 339. This means the harm must be "real, and not abstract." *Id.* at 340 (cleaned up). "[E]ven in the context of a statutory violation," a "bare procedural violation, divorced from any concrete harm," cannot confer standing. *Id.* at 341. The procedural injury must "threat[en] . . . a separate concrete interest of the would-be plaintiff." *Friends of Tilden Park*, 806 A.2d at 1211. This Court has recognized qualifying injuries may arise from "specific and concrete interference with the use and enjoyment of a recreational or aesthetic resource," like a park or a library. *D.C. Libr. Renaissance Project v. D.C. Zoning Comm'n*, 73 A.3d 107, 113 (D.C. 2013). Along the same lines, a plaintiff may have standing if there are specific allegations that a project would "lessen the alleged aesthetic and recreational values of the surrounding area." *Kalorama Citizens Ass'n v. SunTrust Bank Co.*, 286 A.3d 525, 532-33 (D.C. 2022).

MAHCA has never asserted that any individuals living near the chancery have suffered or will suffer any concrete and particularized harm from its establishment.

There is no allegation that the chancery will deprive residents of a recreational or aesthetic resource or harm property values. *Cf. D.C. Libr. Renaissance Project*, 73 A.3d at 113; *Kalorama Citizens Ass'n*, 286 A.3d at 532-33. Nor could MAHCA feasibly make such an allegation. Kosovo's application did not propose any changes to the property's exterior other than those required by the Department of Transportation to rectify fencing and landscaping installed by a prior owner without a permit. Accordingly, no neighboring property owner could credibly claim that their "everyday views would be affected by [the] proposed development." *Tiber Island Co-op. Homes, Inc. v. D.C. Zoning Comm'n*, 975 A.2d 186, 192 n.6 (D.C. 2009).

Before the Board, MAHCA briefly adverted to a potential injury related to "traffic and parking," JA 232-33, but this would not create an injury-in-fact either. There is no concrete allegation that the chancery will increase traffic or reduce the availability of parking in the neighborhood, even assuming those are legally protected interests. Kosovo's application stated that the property had sufficient on-site parking to meet its needs, and the Department of Transportation concluded that any impact on traffic or parking would be minor. JA 251. The Board evaluated the evidence presented to it and concluded that concerns about traffic and parking were unsubstantiated. JA 11. It found that the property would be used by only seven staff, did not anticipate frequent visitors, and was well served by public

transportation. JA 11. Accordingly, it concluded that the property's existing parking spaces "will be adequate to accommodate the parking needs of its staff and visitors," JA 11, leaving the neighborhood essentially unaffected.

The only potential injury MAHCA identifies in its brief is a vague interest in preserving the neighborhood's "residential integrity." Br. 2, 29, 34, 37. But this is not sufficient to confer standing. Absent some specific contention that converting a property to nonresidential use "will disrupt the peace, order, and quiet" of the plaintiff's own property (or its value), *Padou*, 70 A.3d at 212, this Court has never recognized a legally cognizable interest in "residential integrity" standing alone. Such an interest would satisfy neither particularization nor concreteness, both of which are required. *Spokeo*, 578 U.S. at 339-40.

Starting with particularity, an interest in a neighborhood's general residential character is not "personal" to any individual. It is by definition an "undifferentiated" interest "common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 177 (1974) (internal quotation marks omitted). It is no different than an interest in preventing the loss of tax revenue or in promoting economic development, which are generalized grievances. *See York Apartments Tenants Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1079, 1084 (D.C. 2004). Similarly, an interest in preventing a chancery from establishing in a residential zone unless permitted by law amounts to little more than a desire to have the Board act in accordance with the

applicable laws and regulations governing chancery approvals, which is also a generalized grievance. *Id.*

An interest in preserving "residential integrity" also fails the concreteness requirement. Simply pointing to the "close proximity" of the chancery is not enough, standing alone, to plausibly allege that it will be injurious to neighbors. *Id.* at 1085. In general, a neighbor has no concrete, legally protected interest in whether a property's interior is used as a home or an office. *See id.* (noting that not "every use, or change in use," is injurious to neighboring properties). Some additional explanation is necessary to reasonably infer that the chancery will interfere with the use and enjoyment of nearby homes or an aesthetic resource, and MAHCA has provided none. *Id.* At most, MAHCA has identified a threat that is "merely conjectural and hypothetical," which is not enough to create standing. *Id.*; *see Padou*, 70 A.3d at 211 (finding it speculative that renewing a liquor license to a property would increase crime in the neighborhood sufficient to create standing).

MAHCA cannot draw support from this Court's decision in *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417 (D.C. 1983), which addressed historic preservation. The issue in *Barry* was whether a citizens association had statutory standing under the Historic Landmark and Historic District Protection Act of 1978 to challenge the construction of a new building in a designated historic district. *Id.* at 420-22. With only a single sentence of substantive analysis, the Court concluded

that the association had alleged a "threat[] to the use and enjoyment of an aesthetic resource" by asserting that the proposed design (a 10-story office and retail building) would harm the character of the historic district. *Id.* at 421-22.

Barry does not support MAHCA here. The property at issue is not within a historical district and the building is not a designated historic property, so there is no conceivable interest in historic preservation. The property's modern structure was built before Kosovo purchased it and will remain unchanged. *See* JA 131-32. The Board was required to consider the effect of the application on historic landmarks and districts, and it concluded that the approval would have no effect whatsoever. JA 10. It would also be inappropriate to extend *Barry*'s logic about historic preservation to the broader and more amorphous concept of "residential integrity." There is a clear distinction between a designated historic district—which is protected by statute and which *Barry* appeared to treat as an "aesthetic resource" in and of itself—and the more generalized concept of a residential neighborhood. This Court has never held that an individual has a legally protected interest in preventing someone else from using their property in a way that would cause no discernible harm. Doing so here would potentially open the floodgates to suits seeking to litigate generalized grievances by disgruntled (but legally unharmed) neighbors on a host of issues unsuited to judicial review.

II. The Board's Decision Is Supported By Substantial Evidence And Is Not Arbitrary Or Capricious.

If the Court concludes that MAHCA has standing or assumes that it does for the sake of argument, *see Miller v. D.C. Bd. of Zoning Adjustment*, 948 A.2d 571, 575 (D.C. 2008), it should affirm on the merits. The Board complied with the FMA's two-step process for approving chanceries in low-density residential zones. *See supra* pp. 3-7. Its factual findings were supported by substantial evidence in the record, and its conclusions flowed rationally from those findings. *R.O.*, 199 A.3d at 1166-67. Its approval was not arbitrary, capricious, or otherwise not in accordance with law.

A. The Board properly applied the FMA.

At the threshold zoning inquiry, the Board properly analyzed whether the property was within a mixed-use area and thus eligible for use as a chancery. JA 8. The Board acknowledged that its task in defining the relevant "area" was to establish "the area that the Board determines most accurately depicts the existing mix of uses adjacent to the proposed location of the chancery," JA 8, which is consistent with the relevant regulation, 11-X DCMR § 201.4. After concluding that the property was in a mixed-use area, it applied the six exclusive statutory criteria. JA 10-12 (applying D.C. Code § 6-1306(d); 11-X DCMR § 201.8). The Board's detailed and careful analysis should be affirmed for three reasons.

1. The Board correctly interpreted "adjacent."

The Board correctly interpreted the regulation defining the relevant area by its "adjacent" uses to include those outside the property's square. "Adjacent" is not specifically defined in the regulations and therefore carries the definition provided by Webster's Unabridged Dictionary. 11-B DCMR § 100.1(g). That dictionary provides several definitions for the term, all of which are capacious and flexible: "not distant or far off," "nearby but not touching," "relatively near and having nothing of the same kind intervening," "having a common border," or "living nearby or sitting or standing relatively near or close together." *Adjacent*, Webster's Third New International Dictionary Unabridged 26 (2002); *see Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 406 (D.C. 2007) (citing this dictionary); Br. 17 n.23 (same). The Board concluded that these broad definitions meant that the Board's analysis need not be rigidly limited to Square 1931. Instead, it could include properties outside the square, so long as they were "not distant" or shared the common corridor of Massachusetts Avenue. JA 9 & n.5.

That conclusion was a reasonable interpretation in light of the FMA's text and purpose. The FMA instructs the Board to determine whether the "area" "includes office or institutional uses." D.C. Code § 6-1306(b)(2)(B). The mixed-use analysis carries out that mandate by assessing whether the property's low- or medium-density residential zone accurately reflects that the property is within an essentially

residential area or instead contains a mix of uses. As one Board member explained, cabining that analysis to the property's square would almost always result in a finding that the area is not mixed-use, since a square usually contains only one zone. JA 555. If Congress's intent had been to prohibit chanceries in *all* low- and medium-density residential zones, it could have done so and eliminated the need for the mixed-use analysis altogether. Instead, it acknowledged that some properties with this zoning designation are nonetheless adjacent to other nonresidential uses, making them suitable locations for chanceries. *See Shah v. Kingdom of Morocco*, No. 06-cv-1888, 2010 WL 11668356, at *6 (D.D.C. Feb. 16, 2010) (explaining that the mixed-use analysis essentially permits the Board to "issue variances to the local zoning ordinances in order to accommodate chanceries seeking to establish themselves in the District of Columbia").

For this reason, the zoning regulations specifically contemplate using an area broader than a particular square to conduct the mixed-use analysis. If a chancery application proposes to use "an area other than a square . . . to calculate the percentage of existing uses" for the mixed-use analysis, the regulations require the applicant to include "a statement . . . explaining the basis for using the area." 11-Y DCMR § 301.7. There would be no reason to include this requirement if the Board were not permitted to look outside the property's square in defining what uses are "adjacent" to the chancery's proposed location. 11-X DCMR § 201.4.

To the extent there is any ambiguity in the term "adjacent," this Court should defer to the Board's legal interpretation. It is settled that the Board's "interpretation of the laws and regulations it administers is entitled to deference by this [C]ourt." *D.C. Dep't of Env't v. E. Capitol Exxon*, 64 A.3d 878, 881 (D.C. 2013). Because the Board is charged with implementing the FMA and its regulations, the Board's "interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation." *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 749 A.2d 1258, 1262 (D.C. 2000) (internal quotation marks omitted); *see Benin*, 534 A.2d at 323 (noting that "deference" to the Board's interpretation of the FMA is "fully warranted").

That deference is undiminished following the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* and *Loper Bright* both concerned the deference afforded by federal courts under the federal Administrative Procedure Act, not under District law. This Court's precedents deferring to the Board's legal interpretations predate *Chevron*. *E.g.*, *Keefe Co. v. D.C. Bd. of Zoning Adjustment*, 409 A.2d 624, 625 (D.C. 1979). And the Council has amended the District's Administrative Procedure Act to confirm that those precedents remain good law even after *Loper Bright*. *See* Review of Agency

Action Clarification Temporary Amendment Act of 2024, D.C. Law 25-290, § 2(b), 72 D.C. Reg. 3101 (Mar. 21, 2025).

2. The Board reasonably conducted the mixed-use area analysis in this case.

The Board's factual conclusion that Kosovo's proposed chancery was in a mixed-use area was supported by substantial evidence. Adhering to the regulation's instruction that the area should accurately depict the existing mix of adjacent uses, 11-X DCMR § 201.4, the Board chose the area proposed by the Office of Planning, which was essentially the same as the area Kosovo had proposed. JA 9-10; *see supra* p. 11 & n.2. That area includes all of Square 1931 and other properties on both sides of Massachusetts Avenue, with the chancery roughly at the center of the selected area. The Board concluded that 504,759 square feet out of the area's 658,862 square feet—approximately 76.6%—were used for nonresidential purposes. JA 10. Because this figure exceeded the 50% threshold, the area automatically met the definition of mixed-use. JA 10; *see* 11-X DCMR § 201.5.

This case is a prime example of where the Board properly exercised its discretion and defined the relevant area more broadly than the property's assigned square to avoid "improperly exclud[ing] . . . nearby existing non-residential uses." JA 9. As the Office of Planning explained, the Kosovo's chancery is directly across the street from several "large institutional use[s]," including the St. Albans school and St. Sophia, which would not be captured if the area were limited to Square 1931.

JA 255. Those institutions are plainly visible from the chancery's property and form part of the surrounding neighborhood. Indeed, the institutions are of such a large scale that they dominate the property's sightlines. JA 214-25. Including those uses in the definition of the relevant area properly adheres to the regulation's instructions to include "adjacent" uses, since all the properties are "nearby" and share the "common border" of Massachusetts Avenue.

The Board has applied a similar rationale in other chancery cases. In the decision approving the establishment of the Republic of Gambia's chancery at 5630 16th Street, NW, JA 598-604, the Board assessed whether there were other institutional uses near the property, including outside of the property's square. It noted that Thailand and Egypt had institutional properties south of the proposed chancery at 5600 and 5500 16th Street. JA 600. Although the proposed Gambian chancery was within Square 2721, JA 598, 5500 16th Street is within Square 2720. *See* JA 182-84. Likewise, in the application to approve Nepal's chancery at 2730 34th Place, NW, the Board included properties outside the chancery's square. 66 D.C. Reg. 2225, 2226-28 (Feb. 15, 2019). In that case, the Board analyzed a broader area because it concluded that limiting its consideration to the chancery's square would be unduly narrow and fail to account for nearby diplomatic and religious uses in the neighboring square, which formed part of the same area. *Id.* at 2227-28.

3. The Board reasonably reviewed the merits.

On the merits, the Board properly applied the six statutory factors listed in the FMA. JA 10-12. Those factors are: (1) the international obligation of the United States, (2) historic preservation, (3) parking, (4) security, (5) the municipal interest, and (6) the federal interest. D.C. Code § 6-1306(d); 11-X DCMR § 201.8. These six criteria are the only factors the Board may consider when deciding whether to approve a chancery application. *Benin*, 534 A.2d at 318. And in this case, all six factors favored approval of the application, which was supported by the Department of State and the Office of Planning. JA 10-12. MAHCA contests only the municipal interest factor, implicitly conceding that substantial evidence supports the Board's analysis of the remaining factors.

The FMA states that the municipal interest factor must be "determined by the Mayor." D.C. Code § 6-1306(d)(5). The Mayor has delegated that task to the Office of Planning. Mayor's Order 83-106 (Apr. 28, 1983). The Office of Planning concluded that Kosovo's application was in the municipal interest and recommended approval. JA 253-58. In particular, the Office of Planning highlighted that the chancery did not propose "any external changes to the existing building," was unlikely to affect "the privacy and use of enjoyment of neighboring property," and that the site was "well supported by adequate public transportation." JA 257. The

Board properly deferred to that determination in finding that the chancery was in the municipal interest. JA 11-12.

B. MAHCA's arguments to the contrary are unpersuasive.

MAHCA contends that the Board should have considered the Comprehensive Plan as part of both the mixed-use area determination and the municipal interest factor. Br. 30-36. Notably, MAHCA never raised this argument to the Board as part of the proceedings to approve Kosovo's application. Although other commenters mentioned the Comprehensive Plan in passing, MAHCA never argued (in its written submission or oral testimony) that the Board was required to address the Comprehensive Plan. *See* JA 229-34, 321-50, 510-13. Regardless, MAHCA's current argument fails for multiple independent reasons.

First, MAHCA's argument conflates the two steps of the FMA analysis: the mixed-use inquiry and the six merits factors. At times, MAHCA suggests that consideration of the "municipal interest" merits factor should "govern the Board's mixed-use determination." Br. 31; *see also* Br. 13 n.14, 33-34, 36 n.32. But at other points, it argues the reverse: that the municipal interest factor should include analysis of whether the property is in a mixed-use area. *See* Br. 35-36. Neither of these suggestions is a correct reading of the FMA. The mixed-use area analysis is a separate, threshold requirement for chanceries seeking to locate in particular zones. *See supra* pp. 5-6. Only if the property is determined to be within a mixed-use area

may the Board proceed to the merits, including consideration of the municipal interest. *See supra* pp. 6-7.

Second, the FMA does not require the Board to consider the Comprehensive Plan's recommendations at either step of the analysis. The Comprehensive Plan is a (generally nonbinding) interpretive tool designed to guide future zoning decisions by policymakers. *See infra* pp. 39-41. At the threshold zoning inquiry, the Board's role is not to make policy. Rather, it is to determine whether the "area" surrounding the chancery also "includes office or institutional uses." D.C. Code § 6-1306(b)(2)(B). That task is descriptive, not normative. The Board is charged with determining whether an area in fact contains existing institutional uses. *See* 11-X DCMR § 201.3 to .4. The Comprehensive Plan has no bearing on that limited factual inquiry.

At the merits phase, the Comprehensive Plan is also inapposite, but for a different reason. The FMA's criteria are exclusive; the Board is instructed that its decision must be based "solely" on the six listed factors. D.C. Code § 6-1306(d). This Court has similarly confirmed that the Board must consider chancery applications "applying *only* the substantive provisions of the Foreign Missions Act, rather than the generally applicable zoning regulations." *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 530 A.2d 1163, 1165 n.4 (D.C. 1987) (emphasis added) (citations omitted). The Comprehensive Plan is not one of the

factors listed in the statute, as MAHCA acknowledges, Br. 31, so it cannot be considered.

MAHCA's argument that the Comprehensive Plan must be evaluated as part of the municipal interest factor is mistaken. MAHCA's theory is that because the Office of Planning has responsibilities related to "the preparation and implementation of the District's elements of the comprehensive plan," D.C. Code § 1-204.23(a), as well as with determining the "municipal interest" factor under the FMA, *id.* § 6-1306(d)(5), those two obligations necessarily must interact. Br. 9-10, 31-32. But it is not clear why that would be the case. Just because an agency has duties under one statute does not necessarily mean those duties apply when the agency is performing tasks under another, unrelated statute. MAHCA points to nothing stating that the Office of Planning must implement the Comprehensive Plan at all times or when specifically performing its role under the FMA.

Even assuming that the Office of Planning was obligated to consider the Comprehensive Plan, that duty cannot be further imputed to the Board. In its brief, MAHCA asserts—in a single sentence and without any supporting authority—that the Board "commit[s] an error of law" if it "relies on a determination of the municipal interest that contravenes the Comprehensive Plan." Br. 31. This cursory argument misunderstands the Board's role under the FMA. The Office of Planning is the entity charged with "determin[ing]" the municipal interest, not the Board. D.C.

Code § 6-1306(d)(5). That determination is solely within the Office of Planning's discretion and cannot be reviewed here. *See Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 62 (D.C. 2001); *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 413 A.2d 152, 154 (D.C. 1980). Once the Office of Planning has made its determination, the Board has "no authority to review the validity of the coordinate agency's action"; it may only weigh the factor alongside the other statutory criteria. *Craig v. D.C. Alcoholic Beverage Control Bd.*, 721 A.2d 584, 588 (D.C. 1998). Second-guessing the Office of Planning's determination would have effectively made the Board "a court of appeals over other coordinate administrative departments." *Kopff*, 413 A.2d at 154.

Third, even if the Board were somehow obligated to consider the Comprehensive Plan as part of its own analysis, the provisions that MAHCA identifies in its brief are merely planning recommendations, not legal requirements. "The Plan is not a code of prohibitions; it is . . . a broad statement of policy to guide future public decision-making." *Durant v. D.C. Zoning Comm'n*, 65 A.3d 1161, 1168 (D.C. 2013) (cleaned up). "Except where specifically provided, the Plan is not 'binding'; it is only an interpretive tool." *Id.* Even in areas where the Plan must be considered, an agency "may balance competing priorities in order to evaluate whether a project would be inconsistent with the Plan as a whole." *D.C. Libr. Renaissance Project*, 73 A.3d at 126.

Here, the Comprehensive Plan provisions that MAHCA cites confirm that they are merely nonbinding recommendations for planning purposes. MAHCA points to Policy LU-3.4.1, which "encourage[s]" chanceries to locate in areas with compatible uses and "discourage[s]" them from locating in "any area that is essentially a residential use area":

> Encourage foreign missions to locate their chancery facilities where adjacent existing and proposed land uses are compatible (i.e., office, commercial, and mixed-use), taking special care to protect the integrity of residential areas. Discourage the location of new chanceries in any area that is essentially a residential use area to the extent consistent with the Foreign Missions Act.

10-A DCMR § 318.10. MAHCA also cites Policy LU-3.4.2, which similarly "encourage[s]" chanceries to locate in areas in need of revitalization:

> Encourage the development of new chancery facilities in locations where they would support neighborhood revitalization and economic development goals, particularly in federal enclaves and east of 16th Street NW. Work with the Department of State, the NCPC, and other organizations to encourage foreign missions to locate in these areas.

10-A DCMR § 318.11. Nothing in these two policies states that a chancery application will not satisfy the FMA's municipal interest factor if it conflicts with the policy's recommendation. In fact, these policies do not link their recommendations to the FMA's municipal interest factor specifically.

Moreover, these policies appear to simply restate—in less binding terms—the FMA's existing mixed-use area requirement. Policy LU-3.4.1's suggestion that chanceries should locate in areas with "adjacent" nonresidential uses simply

rephrases the statutory and regulatory requirement that the Board conduct a mixed-use analysis before approving a chancery in a low- or medium-density residential zone. Likewise, "discourag[ing]" chanceries from locating in "essentially a residential use area" is the purpose of the mixed-used area analysis. By concluding that an area is mixed-use, the Board has necessarily found that the chancery is "compatible" with existing land uses and that the area is not purely—or even predominantly—residential. And Policy LU-3.4.1 explicitly acknowledges that the FMA serves as a limitation; its recommendation should be followed only "to the extent consistent with" the statute. Thus, by conducting the two-part inquiry required by the FMA, the Board has already given the necessary consideration to these policy concerns. Any failure to explicitly label that analysis as also consistent with the Comprehensive Plan was harmless and cannot render the Board's approval unsupported by substantial evidence. *Harding v. D.C. Off. of Emp. Appeals*, 887 A.2d 33, 35 (D.C. 2005).

III. The Board Did Not Abuse Its Discretion In Declining To Impose Conditions On Its Approval.

Finally, MAHCA contends that the Board erred in failing to impose conditions on its approval of Kosovo's chancery application. Br. 37-41. In arguing that the FMA "allows" the Board to apply conditions to its approval, MAHCA appears to concede that the decision to include conditions is committed to the Board's discretion. Br. 38 (arguing that the Board "can" include conditions as an

"[i]mplicit" part of its "power" to approve applications). This Court similarly has acknowledged that chancery approval under the FMA is an "exercise of judgment" by the Board. *Benin*, 534 A.2d at 322. Because the decision to impose conditions is discretionary, the Board's determination that no conditions were needed "will be set aside only for an abuse of discretion." *Recio v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 134, 144 (D.C. 2013) (quoting *King v. D.C. Water & Sewer Auth.*, 803 A.2d 966, 968 (D.C. 2002)).

The Board did not abuse its discretion in declining to condition its approval of Kosovo's application. The Board correctly noted that the Office of Planning had recommended approving the application without conditions, and none were needed to ensure that the application met the FMA's statutory factors. JA 12 & n.7.

That makes this case different from the Republic of Benin case that MAHCA cites, Br. 39, where "the Office of Planning expressed strong concerns" that the application did not meet the statutory factors and was not in the municipal interest, JA 575. The Board imposed conditions in the Benin case that were relevant to those concerns and directly linked to the factors identified in the FMA. For instance, it imposed conditions related to historic preservation, JA 579-80, which is an explicit FMA factor, D.C. Code § 6-1306(d)(2). It also required the chancery to use a shuttle service to limit its effect on parking, JA 580, another FMA factor, D.C. Code § 6-1306(d)(3). Lastly, it imposed other conditions related to maintenance, lighting,

deliveries, trash collection, and social functions, because the Office of Planning had raised concerns about these issues negatively affecting the municipal interest. JA 575. In this case, by contrast, the Office of Planning identified no concerns with Kosovo's application related to any statutory factor, so conditions were not needed to ensure that the FMA was satisfied. *See* JA 12 n.7.

Similarly, in the Gambia case, the Board imposed a limited set of conditions related to parking, receptions, and maintenance that were the subject of a formal agreement between Gambia and the local ANC. JA 602. Kosovo and the ANC never agreed to any conditions here, and the ANC never formally requested any conditions. JA 13, 404-06.

MAHCA's arguments to the contrary are unpersuasive. *First*, MAHCA's argument is forfeited because it has never identified what specific conditions the Board should have imposed or why those conditions would be warranted. Br. 41. The Board did not abuse its discretion by failing to consider an argument that was not raised before it and which has not even been articulated in this appeal. *D.C. Metro. Police Dep't v. Fraternal Ord. of Police*, 997 A.2d 65, 73 (D.C. 2010). Before the Board, MAHCA did not propose any conditions; it merely asked for time to come to an agreement on mitigation measures with Kosovo. JA 336-38. In the Superior Court, MAHCA requested seven conditions, but only if Kosovo converted the property from a chancery to an ambassadorial residence. JA 53-54. As MAHCA

acknowledges, an ambassador's residence may locate in a low-density residential zone as a matter of right; the FMA's procedures for chanceries do not apply to residences. Br. 42 n.34; *see* D.C. Code § 6-1302(a)(2) (defining chancery). In that circumstance, the Board would have no power to impose conditions on the property because Board approval would not be required. By failing to identify any particular conditions that the Board should have imposed on the chancery, MAHCA has forfeited the argument that the Board abused its discretion. *Fair Care Found., A.G. v. D.C. Dep't of Ins. & Sec. Regul.*, 716 A.2d 987, 993 (D.C. 1998).

Second, MAHCA argues that the Board declined to impose conditions because the Board mistakenly believed it lacked the power to impose or enforce conditions in a chancery case. Br. 37-38. There is no evidence that this was the rationale for the Board's decision. MAHCA points to a few isolated passages where the Board expressed skepticism that it could impose *certain* conditions in this case where those conditions had no relationship to the FMA's statutory factors. Br. 37-38. But at no point did the Board assert that it lacked the power to impose conditions in general, and it has done so in prior chancery cases like Benin and Gambia where doing so was necessary to satisfy the FMA's requirements or where the conditions were the subject of a formal agreement by the applicant. There is simply no evidence that the Board's decision here was motivated by a misapprehension of its own authority.

Third, MAHCA is wrong in arguing that the lack of conditions means that Kosovo can modify the property without oversight. Br. 41. Any "alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission" requires prior notification to the State Department. D.C. Code § 6-1305(a)(2). The State Department then has 60 days to review the proposal, and it may disapprove the request or impose additional conditions on its approval. *Id.* § 6-1305(a)(1)(A)-(B). And any request by a chancery that qualifies as an "expansion" must go through the FMA's two-step process for chancery establishment. *Id.* § 6-1306(a); *see Benin*, 534 A.2d at 318 (concluding that construction of a radio tower was governed by the FMA). Even if the alteration is approved by the State Department and the Board, it must still "comply substantially with District of Columbia building and related codes." D.C. Code § 6-1306(g).

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment below with instructions to dismiss for lack of standing or, in the alternative, affirm.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

/s/ Jeremy R. Girton
JEREMY R. GIRTON
Assistant Attorney General
Bar Number 888304147
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-2029
(202) 741-8786 (fax)
jeremy.girton@dc.gov

May 2025

CERTIFICATE OF SERVICE

I certify that on May 28, 2025, this brief was served through this Court's electronic filing system to:

Paul A. Cunningham

/s/ Jeremy R. Girton
JEREMY R. GIRTON