BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of 33 PST LLC

BZA Application No. 17047
Hearing Date: July 29, 2003
ANC: 6C

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STATEMENT OF THE APPLICANT

I.

NATURE OF RELIEF SOUGHT

This statement is submitted on behalf of 33 PST LLC (the "Applicant") in support of the above-referenced application for a variance from the off-street parking requirements for a public hall pursuant to Title 11, Section 2101.1 of the District of Columbia Municipal Regulations (the "Regulations"). The request is being made in order to allow the Applicant to adaptively re-use an almost new (1990 completion) exceptionally well-built "warehouse" building by transforming it into an elegant, technologically sophisticated entertainment / lounge / public hall / restaurant on Lot 0255, Square 0672 located at 33 Patterson Street, NE. When built just a decade ago, it was zoned CM-3. The area was recently re-zoned C-3-C and is part of the "NoMa" vision for a 24 hour city.

It is located in the New York Avenue Special Assessment District (DCMR Sec. 2 Chapter 8 Title 47) and is contributing to the cost of the new Metro station under construction. ATF's new headquarters will be one block away. The proposed public hall/restaurant has enjoyed the support of Advisory Neighborhood Commission ("ANC") 6C on several occasions beginning in the fall of 2002 with ANC support of the liquor license application. Since the property is in an Enterprise Zone, the ANC also expressed support for EZ Bond assistance for this transformation as well. The Applicant is not aware of any opposition to the application.

In a C-4 or C-5 zone, there would be no parking required for this use. As Osborne George correctly observes in his transportation report submitted as part of this case, the neighborhood surrounding this building has all the attributes of C-4 with respect to the dynamics of parking.

BZA
Case No. 17047
Exhibit No. 32

Board of Zoning Adjustment
District of Columbia
CASE NO. 17047
EXHIBIT NO. 32

II.

JURISDICTION OF THE BOARD

The Board has jurisdiction to grant the variance requested herein pursuant to Section 3103.2 of the Zoning Regulations.

III.

BACKGROUND

A. Description of the Subject Property

The subject property is an almost new, exceptionally solid, secure, and hermetically insulated "warehouse" building containing 16,172 square feet on one level, with 20-foot high clear space for 7,000 square feet and 13.5-foot high clear space in the balance. The lot contains 19,378 square feet. A small parking area (2,564 square feet) provides for 6 parking spaces. In addition there is an enclosed loading dock within the building. The building is located on the south side of Patterson Street, NE, which is a one block long "glorified alley" between North Capitol Street and First Street, NE. Patterson Street is narrow. It is just a 50 foot right of way. This narrow street frontage will not permit a C-3-C building to be built, since the Height Act would limit it's height to 70 feet, not the 90 feet (or more with a PUD or TDR's) that this zone permits.

The building was constructed in 1988-1990 by the New District Fur Company to repair and store fur coats. As a result it is expensively built for security and climate control. When that owner's major customers went out of business (Woodie's and Garfinkel's) this property went into default and was foreclosed. After the financial upheaval of the 1990-1996 period, the current ownership came into possession of the property.

In September 2000 I became involved with the property. My initial efforts were to put computers and routers in this exceptional building (an EEF use) as the security, the climate control, the physical configuration of the building, and the proximity to optical fiber rights of way fit this use quite well.

B. Zoning History

Unfortunately, the Office of Planning became concerned that every property in this area

would become EEF's and they asked the Zoning Commission to declare a moratorium, which they did. In October 2000, the Zoning Commission issued Emergency Rulemaking Order 929 for Case No. 00-28T. This property was not exempted from this emergency action (which it should have been given it's unique set of facts). As a result, we had to apply for a special exception under section 745 which became BZA Case 16674. The Zoning Commission approved it in a bench decision on March 1, 2001. That moratorium and BZA process imposed delays and costs resulting in ultimate failure, as the EEF industry went into economic distress. I was forced to look for other uses.

The zoning when the building was constructed was CM-3. The area was subsequently re-zoned C-3-C in concert with the DC Office of Economic Development and the DC Office of Planning conceiving of NoMa -- Lara Belkind of the Office of Planning sent me the following information in response to my inquiry of Jennifer Steingasser (January 22, 2001).

The District's Vision for NoMa

As an underutilized, under-built area with good transportation access and proximity to the city center, city officials and community leaders hold high aspirations for NoMa to become a vibrant new downtown neighborhood. The vision for NoMa emphasizes a mixture of uses: residential, retail, and cultural uses - as well as incoming technology-related companies and other businesses. NoMa should promote a vision of the city as a place of contemporary culture and diversity, rather than official function or downtown office. At the same time, it should support the District's role as the nation's capital - by showcasing national cultural achievement in the form of creative contemporary architecture and public space design. It should also demonstrate innovation in community building, by discouraging separations of diverse uses and users.

An article in the Washington Post on Thursday, June 5, 2003; Page B01, by David Nakamura, reinforces this vision:

District Makes a Pitch For Hip New Residents
Ad Campaign Touts Style, Entertainment

The cornerstone of the District's new marketing campaign will be a simple slogan: "city living, dc style!" ... . The District is "hip, happening, the hot place to be," said **Michael Stevens,** president of the Washington, D.C., Marketing Center.

What is "city living, dc style"? According to city planners, it's affordable housing options for people of all incomes, sports and concerts at MCI Center, cultural activities at museums and

theaters and an active nightlife at the city's bars and restaurants.

... officials were quick to point out that they are focusing the campaign on the audience they believe the District most appeals to: young, childless professionals and empty-nesters looking to leave the suburbs for a more active life.

C. Description of Surrounding Area

This area was an industrial / warehouse / service area until recently. In 1988 when the subject property was constructed, it was zoned CM-3. As you can see from the aerial photograph (Exhibit 2 in O. R. George & Associates, Inc. Technical Memorandum addressing the transportation / parking merits of this case) many of these former industrial buildings have been demolished. Most of the land in this 9 Square neighborhood bounded by K Street to the south, North Capitol Street to the west, New York Avenue / Florida Avenue to the north and the railroad tracks to the east is vacant large lots ripe for re-development.

Not only are there many parking lots, the amount of curb parking within a 5 minute walk is almost 5 times the variance we are requesting here (340 spaces vs the 74 needed).

On the large site immediately south of the ATF headquarters (Square 711) are two signs. One is First & M Street Investing Company, LLC, a joint venture of The PENROSE Group and Pritzker Realty Group (703 847-5270). The other is a sign with a rendering of three high design, high-rise office buildings proposed on this site (Ole Kollevol at the same tel no.). There are other large property owners that have assembled large sites for re-development. RLA RC, too, owns a number of large vacant sites here.

IV.

THE VISION: BUILDING / NEIGHBORHOOD TRANSFORMATION

A. Description of the Proposal and Requested Variance

Night & Day Management LLC, the tenant, has hired one of the leading architectural firms in the city and have designed an exceptionally upscale entertainment (live), lounge, restaurant facility. There will even be a smoke free lounge as one of the rooms for people to gather and socialize. Quality, comfort and security are their top concerns.

The award winning architectural firm -- diVISION ONE Architecture -- has completed

exciting plans for the renovation. These have been reviewed by DCRA and are ready for permit, but for the zoning variance needed for parking.

The improvements within the building will be high design and high tech. Outside, the bland masonry walls will get high design signage and lighting to enliven and make more secure the pedestrian's experience walking to Metro, to the bus, or to their car parked along the street.

In addition, particularly when special events would require even more parking than usual, Night & Day Management will utilize a valet company to serve customers. They have been speaking with RLA RC (perhaps the largest single property owner in this area) and working out an agreement to use one of their vacant lots for additional parking. (RLA RC has already written a letter to the BZA in support of this application for a parking variance.)

The strategic location of this building is so proximate to the new DC Convention Center and to Capital Hill that it makes it exceptionally convenient to host companion events. People attending these would be arrive primarily by contract bus service, by taxis or by Metro rather than private automobiles.

The parking required per the Regulations (2101.1) treats C-3-C as "all other districts". We have already explained why this immediate area is much more C-4 in character and in fact than "any other district". In combination with the new Metro station, which should reduce the required parking by 25%, the variance required is 106 spaces times 75% equals 79.5, less the 6 provided brings the variance needed to 73.5 or 74 spaces. The total parking variance required, 100 spaces is thus provided in two increments -- a Metro reduction and the balance as set forth below.

V.

THE APPLICANT MEETS THE BURDEN OF PROOF FOR A VARIANCE FROM THE PARKING REQUIREMENTS OF THE REGULATIONS

(A) Standards for Granting a Variance

Under D. C. Code Section 5-424(g)(3) and 11 DCMR 3103.2, the Board is authorized to grant variances from the strict application of the regulations where it finds three conditions exist:

(1) the property is unique because, *inter alia*, of its size, shape or topography or other extraordinary or exceptional situation or condition;

(2) the owner would encounter practical difficulties or undue hardship if the Zoning Regulations were strictly applied; and

(3) the variance would not cause substantial detriment to the public good and may be granted without substantially impairing the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map. *See French v. District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (*quoting Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *see also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

In the case of an area variance, the Applicant must show that the uniqueness or exceptional situation or condition of the property imposes a practical difficulty on the Applicant's ability to comply with the regulations and such variance will not substantially impair the intent and purpose of the regulations and Map. In the subject case, the requested variance from the parking requirement meets the requirements for the approval of a variance.

(B) Variance relief under Section 2101.1 (Parking Requirements)

1. <u>The Property is Affected by an Extraordinary or Exceptional Situation or Condition.</u>

The subject property is affected by an extraordinary situation or condition in that, at the time it was built in 1989, the Zoning Regulations for CM-3 required parking on-site of just 6 spaces. As such, the property was built to almost 87% lot occupancy and it is now physically impossible for the Applicant to provide parking on-site no matter what the use or how many spaces are required under such use.

In an earlier case involving a similar property in which the Applicant sought a variance from the required parking, the Board found that the property suffered from an exceptional situation or condition because of its inability to provide parking on-site due to the building's near 100% occupancy of the lot. The Board's Order in BZA Application No. 15875, on page 10, states:

> The Board concludes that the applicant has demonstrated a practical difficulty arising from an ***exceptional condition of the property*** in that the lot is occupied

almost entirely by the subject structure and no parking can be provided on the site. **[emphasis added]**

In *Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d, 291, the Court found that the presence of an existing building on a site could impose a unique and exceptional situation or condition on Property. The Applicant submits that the building on the Property constitutes an exceptional situation or condition in that the building occupies nearly 87% of the lot given its construction within what was at the time a CM-3 District. This exceptional situation or condition is amplified by the building's newness (1990 completion) and its expensive solidness and considerable insulation (built as a vault to handle and store fur coats). Finally, this mid-block site on narrow Patterson Street cannot accommodate a C-3-C building.

In addition, the Board has previously found in a prior application that a similar property is unique due to the exceptional condition of its near 100% occupancy of the lot. The Applicant would argue that since the same set of facts surrounding the lot are applicable in this case, the Board as a quasi-judicial body is bound by the principles of *res judicata* to again conclude that the Property is affected by an exceptional situation or condition. Under the principle of *res judicata*, a matter decided or passed upon by a court of competent jurisdiction is received as evidence of truth. (See, e.g. *Smith v. District of Columbia Board of Zoning Adjustment*, App. D.C., 342 A.2d 356 (1975) (in which the Court found that while the Board is not bound for all time by its prior positions, it should consider any long-standing interpretations of zoning regulations which it has approved in the past.)).

2. <u>Strict Application of the Zoning Regulations would impose a practical difficulty on the Applicant.</u>

Strict application of the Zoning Regulations would impose a practical difficulty on the Applicant as he would be unable to establish the public hall/restaurant use he seeks for the Property unless a variance is granted because parking cannot physically be accommodated, on-site. As with the "exceptional situation or condition" prong of the three prong variance test, the Board has previously found in other cases where applicant's seeking variances from the parking requirements of § 2101.1 of the Regulations would suffer a practical difficulty if the requested variance is not granted and should again do so in this case.

The building has been vacant for years notwithstanding an aggressive and diligent marketing effort. After the EEF opportunity disappeared, the Applicant sought many other potential uses. These included museum storage (for delicate and expensive exhibits -- in synch with the original fur maintenance and storage function). The Applicant had meetings with the Corcoran and the Smithsonian. It was not possible to make a deal.

The Applicant had a detailed series of meetings with a specialty manufacturing / assembly company with a proprietary two-seater sports car. They failed to complete their financing. Another series of meetings involved churches. Still more involved schools -- charter schools, schools for handicapped children ... Another potential client was in the food service business, catering to DC Public Schools. His contract with the DC School Board failed to materialize in time.

The nightclub / entertainment / lounge / restaurant use became an increasingly popular opportunity. Before selecting Night and Day Management LLC, the Applicant was in serious discussion with three other operators. Since finalizing a deal with Night and Day, at least three more have expressed serious interest.

3. Relief Can Be Granted Without Substantial Detriment to the Public Good and Without Substantially Impairing the Intent, Purpose and Integrity of the Zone Plan As Embodied in the Zoning Regulations and Map

Relief can be granted without substantial detriment to the public good and without substantially impairing the purpose and integrity and of the zoning regulations and map. As indicated herein, the Applicant is required under §2101.1 to provide 106 spaces. Because of proximity to the new Metro station, a reduction of 25% would be appropriate. This reduces the required spaces to 79.5 less the 6 provided makes the variance required 74 spaces. Given the night time hours of operation, there are almost 5 times that many spaces at the curb within 5 minutes walk (per O.R. George & Associates report).

Beyond the considerable amount of street parking, there are acres of parking lots in immediate proximity. These lots will be developed with high-rise buildings with 100% lot occupancy and below ground garages. Office building garages, which are vacant at night, offer the opportunity to serve as event parking in particular, in concert with the Valet service that Night and Day Management LLC anticipates using at appropriate times. For the immediate future, Night and Day is negotiating an agreement with RLA RC for use of their vacant lot

immediately across Patterson Street from the building. They recognize that making access convenient and secure for their clientele is critical to their survival. It is why the MCI Center has a garage with 500+ spaces under the building even though the C-4 zoning did not require any parking at all.

The bullet points below come from the July 10, 2003 ANC letter of support in the record (although the ANC did not have a quorum at that meeting -- as the letter points out, they were one commissioner short -- but there were no objections from the 4 commissioners present, or from the public attending the meeting)

- NoMa calls for mixed-use 24 hour city with entertainment as an important element. The use proposed is an ideal adaptive re-use of this building. It's location and it's soundproofing assures that it will not disturb anyone.

- In the spirit of environmental concerns and LEED -- re-using an existing building rather than demolishing it is dramatically more environmentally responsible.

- New Metro station under construction, completion in 2004, long before the abundance of parking lots will turn into new buildings.

- Every new building will contain below grade parking -- much of which will be available in night hours when this club will need parking. This is why there is no parking requirement for nightclubs in C-4 or C-5 zones.

- phasing of new construction in vicinity will keep the parking space availability high.

- proximity to the new Convention Center and to Capital Hill, and its exceptional accessibility, make this use in this unique building a great contribution to the city.

The bullet points below come from the December 9, 2002 ANC letter of support to the Alcoholic Beverage Regulation Administration (Number 50211, for Night and Day Management LLC T/A Fur Factory, Retailer's Class "CN" 33 Patterson Street, N.E.) in the record of this BZA case 17047:

- The Club Fur Factory is a Professional and Social Club. The club is not a sexual orientated club. The Club Fur Factory promotes charitable events for Food for the Homeless - Diabetes Foundation - Whitman Walker Foundation - Children's Hospital - MS Benefit -The Bank Nightclub. They have also added to their new plan to partnership with the SMD ANC 6CO4, Near Northeast Citizens Against Crime and Drugs and The Public Interest Civic Association.

- **Parking:** The Club approximately two and half blocks from a residential community and parking would not be a primary issue in the area of the club. The Club Patrons would use off street parking on Patterson Street - First Street- N., Street and-New York Avenue, N. E. Fur Factory Club has a plans to negociate an agreement with neighboring Parking Lot owners on New York Ave to use their parking facility after hours and on the week ends. Owners with retain a valet parking company with plans to hire 13 or more individuals to ensure efficient handing of patrons cars.

- **Security**: The Fur Factory Club will place surveillance cameras and bright lights in and around the perimeter of the club site and as well inside the club. The club is planning to hire off duty DC Police Officer.

- **Use of Alcohol:** Everyone's ID will be check at the door. No Alcohol will be allowed outside the club. Patrons will not loiter around the building after hours or after they have left the club.

- **Employment at the Club Fur Factory:** Seven of the current employees are DC Resident. Concerning the security of surrounding community. A plan to notify the First and Second District Police to have the Club Fur Factory put on their watch.