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October 3, 2003

DENNIS R. HUGHES
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Hand Delivery

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA No. 17047

Dear Members of the Board:

Enclosed please find an original and 20 copies of Proposed Findings of Fact and Conclusions of Law on behalf of 30/60 M Street Limited Partnership, party in opposition to the application. We look forward to the Board's resolution of this matter at its October 7 public meeting.

Sincerely,

Dennis R. Hughes

Enclosures

cc: Jay Hellman
Office of Planning
ANC 6C
Steven Gell
Terry Peay
Chip Akridge
Tim Kissler
Scott Moseley
Andrew Pellman
Diane Pratt
Olav Kollevoll
Mike Fomalont
Reid Liffmann
Steve Braesch

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BZA
Case No. 17047
Exhibit No. 71

Board of Zoning Adjustment
District of Columbia
CASE NO. 17047
EXHIBIT NO. 71

DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW AND OPINION

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Application No. 17047 of 33 PST LLC, pursuant to 11 DCMR 3103.2, for a variance from the off-street parking requirements under Subsection 2101.1, to allow the conversion of a warehouse to an entertainment nightclub in the C-3-C District at premises 33 Patterson Street, NE (Square 672, Lot 255).

HEARING DATE: **September 9, 2003**
DECISION DATE: **October 7, 2003**

ORDER

PRELIMINARY MATTERS:

1) The Board, pursuant to its rules, provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission ("ANC") 6C and to owners of property within 200 feet of the site.

2) The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application.

3) Upon application timely filed pursuant to 11 DCMR §3106.2, the Board accepted 30 60 M Street Limited Partnership and Capitol Square Management LLC as parties in opposition to the application.

4) As directed by 11 DCMR §3119.2, the burden of proving the elements which are necessary to establish the case for a variance pursuant to §3103.2 rests with the Applicant.

5) Three witnesses testified on behalf of the Applicant in support of the application, including the representative of the applicant, its traffic consultant and its zoning consultant. Six witnesses testified in opposition to the application, including representatives of the parties in opposition, 30 60 M Street Limited Partnership and Capitol Square Management LLC, and representatives of neighboring property owners at 131 M Street, NE, 60 L Street, NE, northeast corner of 1st and M Streets, NE, and 90 K Street, NE.

6) The Board received a letter of no objection and a letter in support of the application from neighboring property owners to the Subject Property.

7) The Board likewise received several letters in opposition to the application from neighboring property owners to the Subject Property.

8) The Office of Planning ("OP")submitted a report and testified in opposition to the application.

9) The Department of Transportation ("DOT") submitted a report advising of no objection to the application.

FINDINGS OF FACT:

1) The property that is the subject of this application (Lot 255 in Square 672) is located on the south side of Patterson Street, NE, between North Capitol Street and First Street, NE. The Subject Property contains a total lot area of 19,378 square feet.

2) The Subject Property and surrounding properties are located within the C-3-C Zoning District. Pursuant to 11 DCMR §740.3, the C-3-C District is designed to permit medium-high density development, including office, retail, housing, , and mixed use development. The C-3-C District provides for a maximum FAR of 6.5 and maximum height of 90 feet.

3) The surrounding area is primarily a mixture of office and industrial uses. To the immediate east is the property owned by 30 60 M Street, party in opposition to the application. To the north of the Subject Property, across Patterson Street, is a one-story building housing an industrial use and to its east is a one-story building housing the Veterans Affairs Community Clinic. To the west is a parking lot. To the south is a one-story brick building that is used by the District of Columbia Housing Authority (DCHA), and a parking lot for DCHA.

4) Several office buildings are proposed to the east, across First Street, NE, including the new headquarters for the Bureau of Alcohol, Tobacco and

Firearms, to be located at First and O Street, NE. Further to the east, adjacent to the west side of Metrorail's Red Line tracks, is the site of the New York Avenue Metrorail Station that is scheduled for completion in December 2004. The application indicates that the Metrorail station is approximately 900 feet from the Subject Property.

5) The Subject Property is improved with a former fur storage facility constructed in the late 1980s and containing approximately 16,172 square feet on one level. A small parking area (2,564 square feet) in the eastern portion of the Subject Property provides parking for six automobiles. The building also includes an enclosed loading dock.

6) The application proposes the renovation of the existing building into a nightclub use. No new building construction is proposed.

7) 11 DCMR §2101.1 sets forth the minimum number of parking spaces required for the proposed use within the C-3-C District. The proposed use is described as a public hall or a dance hall by §2101. Given the occupancy proposed for the nightclub use, 106 off-street parking spaces are required to be provided. The existing parking lot will accommodate six spaces. The Board finds that the applicant is requesting a variance to provide only 5.6 percent of its parking requirement under 11 DCMR §2101.

8) The Applicant provided the Board with an overview of its proposed operations, including general discussion of security and valet management plans. With respect to off-site parking arrangements, the Applicant proposed to provide off-site the 100 spaces it is required to provide under the parking schedule of the Zoning Regulations. The Applicant also provided the Board with a general survey of parking spaces located within 1,600 feet of the Subject Property. The Applicant stated that it will provide evidence to the District of "contractual arrangements" for a minimum of 100 off-street parking spaces to be available for the exclusive use of patrons of the proposed nightclub within approximately 1,000 feet of the Subject Property during all hours that the club is operating.

9) The Subject Property is not eligible for an exception to the schedule of parking requirements because the New York Avenue Metrorail Station is 900 feet away, more than the maximum 800 feet permitted by 11 DCMR §2104.1, and because the Subject Property is approximately 400 feet from an R-4 Zoning District, less than the minimum 800 feet required by 11 DCMR §2104.1(a). It also is not eligible for an exception to the parking requirements for nonresidential structures located within the Central Employment Area because it does not have a direct connection to a Metrorail station, as required by 11 DCMR §2105.1(a). In addition, the Subject Property cannot provide a minimum of 75 percent of the required parking, or 80 parking spaces, on-site, the maximum amount of parking

the Board is empowered by 11 DCMR §2108.2 to reduce the number of required parking spaces for this nonresidential use.

10) ANC 6C stated its support for the application, by letter dated August 7, 2003. The August 7 letter did not contain specific issues and concerns regarding the proposal for the Board to address. The ANC also submitted a letter to the Board dated July 10, 2003, reflecting discussion of a meeting at which a quorum was not present and no vote was taken. The July 10 letter cannot reflect the official position of ANC 6C. Testimony was also received in support of the application from ANC 6C Commissioner Daniel Pernell. Mr. Pernell's testimony did not address issues related to the Applicant's provision of 100 parking spaces off-site.

11) The Office of Planning, by memorandum dated September 2, 2003 and by testimony at the hearing, recommended that the application be denied. OP was of the opinion that the Applicant did not satisfy its burden of proof for a variance from the parking requirements of 11 DCMR §2101.1. In its report and at the hearing, OP concluded that the applicant had not satisfactorily satisfied the criteria for variance relief from §2101, especially as there was insufficient justification by the applicant "that the 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."

12) In its memorandum, OP stated that it cannot recommend approval of the request for a variance to reduce the number of off-street parking spaces required from 106 to 6, because there is no detailed and enforceable parking management plan, including signed leases for use of off-site off-street parking, and contracts and details for valet services, and because the application fails to provide the address or addresses of where the 100 parking spaces will be provided and how the parking will be provided.

13) At the hearing, OP continued to recommend denial of the application unless the following conditions were included: the applicant be required to submit a lease for a minimum of 100 off-street parking spaces prior to the issuance of the Board's final order; the final Order be crafted to expire upon the expiration of off-site parking lease for 100 spaces; and that the applicant be required to submit a parking management plan to OP indicating, among others, the specific location the cars will be parked and a contract for valet services.

14) The District Department of Transportation, in a memorandum dated July 22, 2003, indicated that it had no objection to the application. Comments were solicited from the Metropolitan Police Department, but none were received.

15) The parties and persons in opposition to the application testified that the properties they represent total more than one million square feet of land area

and are being actively marketed for development of high rise structures for office and other permitted use or are occupied with current permitted uses. These parties and persons expressed serious concern over the potential for traffic and parking congestion and threat to public safety likely to be generated by the proposed nightclub use on the Subject Property and the exacerbation of these issues by the applicant's inability to provide its required off-street parking.

16) The parties and persons in opposition testified in support of the OP position that, absent long-term binding leases and a satisfactory parking management and transportation plan for the Subject Property, the application fails to meet the third prong of the variance test, and relief cannot be granted.

17) At the hearing, the Board requested that the Applicant revisit and supplement its parking management plan to address issues raised at the hearing. The Board has not received any additional information from the Applicant identifying specific locations off-site where the Applicant has secured parking to meet its requirement of 100 spaces.

18) As to the sufficiency of the Applicant's proposal, the Board finds the following: that the application involves a substantial variance of approximately 94.5 percent from the parking requirements for the proposed nightclub use; that the proposed occupancy of approximately 1,100 patrons (according to the Applicant's Building Code analysis) is significant; and that the Applicant's proposal does not insure that the 100 parking spaces will be provided and available as long as the nightclub use is in effect, because no specific locations or binding agreements have been provided to the Board.

19) Given the significant variance requested, the absence of specific information provided by the Applicant, the Board finds that the Applicant has not met is burden of proof and the approval of the application , as proposed, has the potential for serious harm to the public good and the Zone Plan.

CONCLUSIONS OF LAW AND OPINION:

Based upon the foregoing findings of fact, the Board concludes that the Applicant is requesting a variance from 11 DCMR §2101.1. With respect to the request for variance relief, the Applicant must prove that it has complied with the requirements of 11 DCMR §3103. The Board concludes that the requested relief is for area variance, the granting of which requires proof of a practical difficulty upon the Applicant arising out of some exceptional condition or situation of the Subject Property. The Board further must find that the relief requested can be granted

without substantial detriment to the public good and without substantial impairment to the Zone Plan.

The Board concludes that the Applicant has not met its requisite burden of proof. The Board acknowledges that the Subject Property is subject to extraordinary or exceptional conditions, by virtue of its zoning and development history, and that compliance with the applicable parking regulations imposes a practical difficulty upon the Applicant. However, the Board is not satisfied that the significant variance relief requested will not cause substantial detriment to the public good or the Zone Plan. The Board concurs with the concerns raised by OP and the parties and persons in opposition that the Applicant has failed to provide adequate safeguards that it will continually and consistently provide for 100 parking spaces at a nearby off-site location, and that the Applicant has failed to adequately document a parking management plan, including detailed information regarding a valet parking arrangement.

While the Board appreciates the consideration and efforts given to the application by ANC 6C and takes note of the ANC's recommendation of approval of the application, the Board concludes that ANC 6C has not raised any issues or concerns regarding the application which are entitled to "great weight" from the Board.

It is therefore ORDERED that this application be **DENIED.**

VOTE: - -

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____

Jerrily R. Kress, FAIA

Director

FINAL DATE OF ORDER: _____

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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ALTERNATIVE CONCLUSIONS

If the Board determines to grant the application, 30 60 M Street requests that the Board condition its approval as follows:

(1) A minimum of 100 off-street parking spaces meeting the size and access requirements of the Regulations shall be made available off-site by the Applicant by means of written lease agreement(s) which include the owners of said property(ies);

(2) Said lease(s) is/are to be made part of the record before the Board and subject to review and comment by the parties, prior to the issuance of any order from the Board approving the variance application;

(3) The nightclub shall only be allowed to operate during hours for which parking is provided by lease arrangement;

(4) The Board's approval and any certificate(s) of occupancy issued for the proposed nightclub shall terminate with the expiration of the above-referenced lease agreement(s) [30/60 M recommends that both the approval of the variance and the C of O(s) be tied to the lease agreements to ensure that adequate scrutiny is given to the parking provisions]; and

(5) The parking spaces to be provided off-site shall not include any on-street parking and shall be located within 500 feet walking distance from the main entrance of the establishment. [While 30/60 M prefers the requirement that the spaces be provided within 500 feet so as to provide greater assurance that patrons choose to utilize the off-street parking provided by the Applicant rather than street parking, 30/60 M does not object to the Office of Planning's recommendation of 800 feet.]