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October 3, 2003

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Via Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment of the District of Columbia
D.C. Office of Zoning
441 4th Street, N.W., Suite 210
Washington, D.C. 2001

Re: BZA Application No. 17047

Dear Mr. Griffis:

On behalf of the Applicant, please accept the attached proposed Findings of Fact and Conclusions of Law for the above referenced case.

Thank you.

Sincerely,

Edward L. Donohue

Enclosure

BZA
Case No. 17047
Exhibit No. 72

Board of Zoning Adjustment
District of Columbia
CASE NO. 17047
EXHIBIT NO. 72

BZA NO. 17047

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF CASE

Applicant requests variance to parking requirement under DCMR § 2101.1 of 100 parking spaces. The subject property has an existing structure covering nearly 87% of the property preventing the provision of the required parking spaces. The use of the property as a nightclub is permitted by right in the C-3-C Zone. Two property owners in the area entered their appearance in opposition to the requested variance. The opposition requested that the Board require the Applicant provide proof of a lease for the off street parking of 100 cars. The Office of Planning made a similar request.

The Applicant has submitted a letter confirming that as of October 1, 2003, it has a lease for 105 parking spaces during the Club's hours of operation in a parking lot adjacent to the subject property.

FINDINGS OF FACT

Based on the evidence of record, the Board finds as follows:

1. The subject property is located at 33 Patterson Street, N.E. at Square 0672, Lot 0255. The subject property is zoned C-3-C Commercial, high bulk major business and employment center.

2. This Application for variance relief to §2101 of 11 DCMR to permit a decrease in the minimum requirement for parking spaces from 106 to 6.

3. The proposed use of the subject property as an entertainment nightclub is permitted by-right under the zoning ordinance. The Alcoholic Beverage Control Board has granted a liquor license for the subject property.

4. The subject property is located within the Northeast No. 1/Eckington Yards Development Opportunity Area, the Central Employment Area, the North Capital Transfer Development Right. Receiving District, the NoMa Technology, Media, Housing and Arts District and the New York Avenue Special Assessment District, established for the construction of the New York Avenue Metrorail Station. The owners of the property are contributing to the cost of the new Metro station under construction.

5. The subject property is located within the jurisdiction of ANC 6C. ANC 6C, which is automatically a party to the application, unanimously voted to support the requested variance and filed a series of letters in support of the application.

6. The subject property includes a 13 year old secure, 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.

7. A small parking area (2,564 square feet) provides for 6 parking spaces.

8. The building was constructed in 1988-1990 by the New District Fur Company to repair and store fur coats. As a result, it is 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.

9. 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 the "NoMa" vision for a 24 hour city.

10. 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.*

11. Most of the land in this 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.

12. The building has been vacant for several years. The Applicant has sought many other potential uses. These uses included: EEF, museum storage, a specialty manufacturing/assembly area, a church, schools—and a food service business. These opportunities were not able to be brought to fruition.

13. The proposed project 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.

14. There are many parking lots in the area. The amount of curb parking within a 5 minute walk of the property is more than 3 times the variance requested (340 spaces vs. the 100 needed).

15. The District Department of Transportation, in a memo July 22, 2003, indicated that it had no objection to the application. The DOT details the department's reasoning.

16. Plans for the renovation of the property have been reviewed by DCRA and are ready for permit, but for the zoning variance needed for parking.

17. When special events require more parking than usual, Applicant will utilize a valet company to serve customers. Applicant has been speaking with many property owners concerning use of their vacant lots for additional parking. RLA RC (perhaps the largest single property owner in this area) RLA RC has already written a letter to the BZA in support of this application for a parking variance.

18. The Applicant has submitted a Parking Management Plan. This Plan describes the type of club proposed, the type of staff that will run the parking valet service and some of the security that will be provided.

19. As requested by the Office of Planning, Applicant has submitted a letter from DHCD Employee's Association confirming the lease of 105 parking spaces. This parking area is directly adjacent to the subject property.

CONCLUSIONS OF LAW

The Applicant meets the burden of proof for a variance from the parking requirements of the regulations.

The Board is authorized to grant variances from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason or exceptional narrowness, shallowness, or shape of a specific piece of property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property . . . " D.C. Officials Code § 6-641.07(g)(3)(2001); 11 DCMR § 3103.2. Relief can be granted only "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." *Id.* An Applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The Applicants in this case, therefore, have made three showings: Uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicants, and that the granting of the variances would not impair the public good or the intent and integrity of the zone plan and regulations.

In the subject case, the requested variance from the parking requirement meets the requirements for the approval of a variance.

Standard 1. The property is unique because, *inter alia*, of its size, shape or topography or other extraordinary or exceptional situation or condition.

Based on the record herein, the Board concludes that the Applicant has shown an extraordinary or exceptional situation or condition that makes the subject property unique.

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 86% lot occupancy and it is now physically impossible for the Applicant to provide parking on-site.

As stated in the Office of Planning report "the subject property is unique because it was constructed as a warehouse, which has a very low parking generation rate (1 space for each 3,000 square feet of gross floor area), and is located within an area that no longer has a market for warehouse space. The warehouses that were formerly located within the surrounding area have been converted to office space or demolished. Therefore, the ability to reuse this existing building is dependent on adaptive re-use. The site can only provide 6 off-street parking spaces. There is no additional area within the subject property that is available for the provision of additional parking because the existing building, which is to remain, occupies approximately 86 percent of the lot. Six parking spaces are all that § 2101.1 requires for the warehouse use of the existing improvements"

A showing of a hardship or difficulty which inheres in the land at issue is not necessary to prove uniqueness. *See Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment, 320 A. 2d 291, 294 (D.C. 1974).* A condition [**9] inherent in the structures built upon the land, rather than in the land itself, may also serve to satisfy an applicant's burden of demonstrating uniqueness. *Id.* In addition, the extraordinary or exceptional conditions which justify a finding of uniqueness can be caused by subsequent events extraneous to the land at issue. *DeAzcarate v. District of Columbia Board of Zoning Adjustment, 388 A.2d 1233, 1237 (D.C. 1978); see also Monaco, supra, 407 A.2d at 1097.*

The presence of an existing building on a site can impose a unique and exceptional situation or condition on Property. *Clerics of Saint Viator, Inc.* at 294. The building on the subject 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).

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. In an earlier case (BZA No. 5875) 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 buildings 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**].[1]

Since the same sets of facts surrounding the lot are applicable in this case, the Board concludes 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.).

The Board concludes that due to the facts surrounding construction of the building the change in zoning and the building's coverage of 86% of lot, this property is unique.

Standard 2. The owner would encounter practical difficulties or undue hardship if the Zoning Regulations were strictly applied; and

The Board concludes that the Applicant has made a convincing showing of the practical difficulties arising out of this unique property.

Strict application of the Zoning Regulations would impose a practical difficulty on the Applicant as he would be unable to establish a use permitted by-right, the public hall/restaurant 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 applicants seeking variances from the parking requirements of § 2101.1 of the Regulations would suffer a practical difficulty if the requested variance is not granted.

The building has been vacant for years notwithstanding an aggressive and diligent marketing effort. Considering the change in zoning and the ongoing redevelopment of the area, the subject property is no longer viable for use as a warehouse. The Applicant sought many other potential uses including use as EEF, museum storage specialty manufacturing / assembly use, churches, schools, and food service business. These opportunities could not be brought to fruition.

Considering the now inappropriate warehouse use and the inability to engage other tenant's in this unique space, a practical difficulty results for the owner's use of this property.

As stated by Office of Planning in their report "there is no additional area within the subject property available for the provision of additional parking because of the existing

[1] While Application No. 15875 was denied on the grounds; the use of property as a Nightclub was ultimately approved by BZA Order 16796.

building." Considering the building is approximately 13 year old, and suitably built for re-use as a club. It would not be economically feasible to demolish the building to provide for the required parking.

Considering "increased expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration." *Association for Preservation of 1700 Block of N St., N.W., & Vicinity v. District of Columbia Board of Zoning Adjustment, 384 A.2d 674 (D.C. 1978). See also Wolf v. District of Columbia Bd. of Zoning Adjustment, 397 A.2d 936, 943 (D.C. 1979)* Board properly granted area variance to permit conversation to three-unit rental apartment where "marketability" of property would otherwise be [*1368] "unfeasible" and investment would yield loss rather than profit); [**19] *Russell, 402 A.2d at 1236* (area variance properly granted "where the owner could never sell the unimproved lot for a [permitted] residential use absent a variance.")

The change of circumstances has made it impossible to continue to operate this uniquely constructed property as a warehouse. Under such uncommon conditions, strict application of the zoning regulations undoubtedly would result in "peculiar and exceptional practical difficulties."

The Board is convinced that the existing building and lack of parking results in a practical difficulty for the use of the property and to demolish the building would be economically infeasible.

Standard 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.

The Board concludes that 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. The subject property has six (6) existing parking spaces. The Applicant has submitted a letter confirming the lease of 105 spaces from a parking lot directly adjacent to the subject property. Therefore, the Applicant has provided sufficient proof of parking available for use by Applicant.

In support of the showing that there would be no detriment to the Public, the Applicant submitted a letter dated July 22, 2003 from the Department of Transportation. The letter states in relevant part.....

> The site is located near the New York Avenue Metro Station, currently under construction. The site falls within a Special District in which all properties over 10,000 square feet that fall within 2,500 feet of the New York Avenue Station, but not less than 1,500 feet to Union Station, are required to pay towards construction of the new station. The property contributes $9,280.00 per year to the new station.
>
> The applicant submitted Traffic and Parking assessment of the site prepared by a traffic consultant. Using North Capital Street as a boundary to the west, a

survey was conducted within a five-minute walking distance, or 1,500 feet, from the site, a total of 340 on-street parking spaces were available.

There are over several public parking lots in the immediate area generally for daytime use, and the applicant is actively pursuing parking contracts. The area consists of several government agencies and large parking lots, with railroad tracks creating boundary to the east, North Capitol to the west, and Florida Avenue to the north, and Union Station to the south. The nearest residences to the site are located west of North Capitol Street, and should not be significantly impacted regarding on-street parking supply.

The proposed use of the site fits the description of the uses proposed for the NoMa area by the Office of Planning, where a vibrant new Downtown community is envisioned with a mixture of uses including residential, retail, cultural and entertainment. The site is well served by mass transit, located 900 feet from the proposed New York Avenue Metro Station, within walking distance of the Union Station Metro Station, and large number of on-street parking spaces are available during afternoon and evening hours for patrons. **Accordingly, DDOT has no objection to the application.** (emphasis added).

The Board finds the points noted in the DOT letter to be persuasive those include: the coming of the Metro Station scheduled for completion in 2004 and 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 Applicant anticipates using at appropriate times. And as stated above Applicant negotiated an agreement with DHCD Employee's Association for use of their vacant lot immediately adjacent to the property.

Therefore the requested variance of 100 parking spaces can be granted without substantial detriment to the public good. Further evidence of this fact comes from the ANC letter of support discussed below.

ANC GREAT WEIGHT

The Board is required to give "great weight" to the recommendations of the affected ANC. ANC 6C voted unanimously to support the variance Application at its meeting in August, 2003.

The bullet points below come from the July 10, 2003 ANC letter of support in the record:

- 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 its 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.

- 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, makes 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 negotiate 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 D.C. 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.

Considering the support of the local ANC, the letter from DOT detailing its lack of objection, the City's "NoMA" vision for the area emphasizing nighttime entertainment as an important element and the fact that Applicant has supplied a letter confirming its lease of the required parking spaces the Board concludes that the variance may be granted without any detriment to the public good and without impairing the zone plan.

CONCLUSION

Having considered the evidence presented in Case No. 17047, the Board finds that it may grant the variance to the parking regulation § 2102.1 DCMR due to the unique condition of the subject property, the practical difficulties resulting on the owner from a strict application of the regulation, and the fact that the requested 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 Regulation and Map.