Stanton Park Neighborhood Association
P.O. Box 75085, National Capitol Station, Washington, D.C. 20013-5085

June 2, 2004

Board of Zoning Adjustment
Government of the District of Columbia
One Judiciary Square
Suite 220 South
441 4th St. NW
Washington, DC 20001

Re: BZA Application 17166 (430 3rd St. NE)

Stanton Park Neighborhood Association (SPNA) is a nonprofit civic organization representing the interests of north Capitol Hill residents in the area bounded by East Capitol Street, 2nd Street NE, H Street NE, and 10th Street NE. We write to provide our views on Application 17166, which seeks multiple variances for the construction of an apartment building on Square 755, Lot 835, a/k/a 430 3rd St. NE ("the Property").

As explained in detail below, SPNA opposes the granting of the requested use, lot occupancy, and off-street parking variances. Owing to its many legal and factual shortcomings, the application for these variances should be denied. However, SPNA supports the other requested variance from the requirements for minimum lot width and lot area, in that it is necessary for the construction of a 1- or 2-family dwelling.

## FACTUAL BACKGROUND

The Property is a vacant 14'x98' rectangular lot bounded on the east side by Third Street; on the north by a two-family dwelling; on the west by a public alley; and on the south by an apartment building.[1] The dominant zoning for the immediate area is CAP/R-4, encompassing nearly the entire 400 block of Third St. NE. Further south and west, portions of Square 755 fall within the CAP/C-2-A/CHC Overlay zoning running along Massachusetts Avenue NE.[2]

[1]The Application's description (at p. 2) of the Property's relation to surrounding properties is incorrect.

[2]Contrary to the assertion in the Application (p. 2), none of the neighboring properties are zoned R-5-B, R-5-D, or C-2-B.



BZA
Case No. 17166
Exhibit No. 34

Board of Zoning Adjustment
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CASE NO. 17166
EXHIBIT NO. 34

Squares 755 and 780 – containing the Property and those it faces across Third Street – lie entirely within the Capitol Hill Historic District.[3] Moreover, the vast majority of the structures in that area, and on the 400 block of Third Street NE, are 1- and 2-family rowhouses built in the late 19th century.

SPNA members who live nearby and regularly pass through the area do not understand the basis for the Application's assertion (p. 1) that the Property "has been the source of significant drug activity, rodent infestation, dumping and vagrant squatting." While it is correct to say that the Property has not been put to productive use for many years, it is not a nuisance.

On-street parking in the vicinity is frequently scarce, especially on weekday mornings and afternoons. Many residents lack off-street parking, and the proximity of Union Station draws "Hill commuters" who drive in from more remote areas of Ward 6 to park on the street and take Metro to work.

## THE APPLICATION

The Application seeks the following variances:

- a use variance (deviating from 11 DCMR § 330.5) to construct an apartment building (consisting of 4 two-bedroom units) in an R-4 zone
- an area variance (deviating from § 403.2) to permit 75% lot occupancy
- a variance from the off-street parking requirements of § 2101.1
- a variance from the minimum lot area and lot width requirements of § 401.3

For the reasons set out below, SPNA urges the Board to deny the first three requested variances, but recommends approval of the last (relating to minimum lot width and area).[4]

### A. The Standard for Granting a Variance

The criteria for granting a variance are set forth in D.C. Code § 6-641.07(g)(3) and 11 DCMR § 3103.2. As interpreted by the D.C. Court of Appeals, the law requires that an application meet three conditions before a variance may be granted: 1) uniqueness of the property, 2) resultant difficulties or hardship from a strict application of the zoning regulations, and 3) no

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[3]The Application asserts falsely that "[t]he Property is not located in a historic district." Application p. 2.

[4]The Application purports to seek an additional variance from the rear yard requirements of § 404.1. However, the submitted site plan (case file Exhibit 20) depicts a conforming 20' rear yard, and the self-certification form (Form 135) likewise proposes a 20' rear yard. SPNA would oppose such a variance if actually requested.

substantial detriment to the public good nor to the purposes of the District's zone plan. See Capitol Hill Restoration Society v. D.C. Bd. of Zoning Adjustment, 398 A.2d 13, 15-16 (D.C. Ct. App. 1979).

Notably, in applying the second prong the Court of Appeals has distinguished between area variances – which address restrictions such as side yard, rear yard, and minimum lot requirements – and use variances, which "seek[] a use ordinarily prohibited in the particular district." Palmer v. Bd. of Zoning Adjustment, 287 A.2d 535, 541 (D.C. Ct. App. 1972). Because a use variance alters the character of the zoned district, "a more stringent showing is warranted with respect to the more drastic relief inherent in a use variance." Id.

Specifically, a use variance requires a showing of "undue hardship," as opposed to the "more easily satisfied prerequisite of 'practical difficulties'" applicable to an area variance. Wolf v. D.C. Bd. of Zoning Adjustment, 397 A.2d 936, 941 (D.C. Ct. App. 1979).

**B. Analysis of The Requested Variances**

In SPNA's view, the Application fails to meet the relevant legal standards in its request for the use, parking, and lot occupancy variances, and should therefore be denied to that extent. At the same time, the fourth requested variance – from the lot width and lot area requirements – satisfies the "practical difficulties" test, and should be granted accordingly.

1. The Use Variance for an Apartment Building

As noted above, in order to justify issuance of a use variance, an applicant must establish, inter alia, "undue hardship." In other words, the applicant "must prove that the property cannot be 'put to any conforming use with a fair and reasonable return arising out of the ownership thereof.'" Downtown Cluster of Congregations v. D.C. Bd. of Zoning Adjustment, 675 A.2d 484, 491-92 (D.C. Ct. App. 1996) (quoting Palmer). However, a use variance may not be granted simply because an applicant wishes to put a property to its most profitable use. See Tyler v. D.C. Bd. of Zoning Adjustment, 6906 A.2d 1362, 1367 n.7 (D.C. Ct. App. 1992) ("In the context of use variances, this court has held 'an inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.'") (citations omitted).

The Applicants' request for a use variance fails to meet this test, and should be denied. Most importantly, the Application offers no evidence of undue hardship, and instead merely repeats the conclusory assertion that other uses of the Property would be economically unfeasible. In fact, recent sales of properties on the same block demonstrate the opposite: that 1- and 2-family dwellings in the vicinity command extraordinarily high prices.

As detailed in the chart and accompanying exhibits in Attachment A, three different properties on the block – a single-family rowhouse, a condo in a 2-unit building, and a 2-unit row

dwelling – have sold within the past year. All occupy lots smaller than the Applicants' Property, yet the sale prices for all three fell into the range $302 to $312 per square foot of interior living space. The most recent sale – of 440 3rd St. NE – involves a property that requires (and is currently undergoing) major interior renovation; occupies a lot of only 510 square feet; and lacks any off-street parking. This property sold for $430,000, which works out to $309/square foot based on the Assessor's listing of 1,391 interior square feet of space.

These figures demolish Applicants' claim that anything other than a 4-unit apartment building is not economically viable. A single- or 2-family dwelling on the Property could occupy, as a matter of right, 60% of the lot, or roughly 823 square feet. See 11 DCMR § 403.2. Building to the matter-of-right limit of 3 stories, see § 400.1, would result in roughly 2,465 square feet of gross area. Applying a conservative value estimate of $300/sf, such a residence would be worth approximately $739,500.[5] Unless Applicants grossly overpaid for the empty lot that is the Property, they have every expectation of realizing a fair profit even without the requested use variance.[6]

The Applicants' reliance on Tyler is grossly misplaced. Most importantly, the Tyler case involved area variances, not use variances. See 606 A.2d at 1363. Indeed, the Tyler case undercuts Applicants' claims, noting that "in the context of use variances, ... we have indeed held that 'the Board [of Zoning Adjustment] has no authority to grant a variance in order to assure the economic viability of the use of a particular property in a particular manner.'" 606 A.2d at 1367 (quoting Silverstone v. D.C. Bd. of Zoning Adjustment, 396 A.2d 992, 994 (D.C. Ct. App. 1979) (emphasis added by Tyler court).

Finally, even if the Applicants were able to demonstrate undue hardship in this case, it would be a hardship of their own making. The Applicants knew, or should have known, of the area's longstanding zoning restrictions.[7] In claiming a lack of economic viability, the Applicants effectively concede that they overpaid for the property[8] in light of its permissible uses, a strategy which the Court of Appeals has expressly rejected as a basis for a variance:

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[5]Normally, a newly constructed residence would command a higher price than older, depreciated properties of similar type, making this an extremely conservative estimate.

[6]If Applicants overpaid for the Property, they may not use that as justification for the requested variance. See infra at 5.

[7]In Downtown Cluster, by contrast, the zoning restrictions necessitating the granting of a variance came into effect after the applicant acquired the property. See 675 A.2d at 487.

[8]Among the many conspicuous omissions in the Application is any indication of the purchase price for the Property.

> The original petitioner's claims of hardship are embodied in [the statements that] "strict application of the Zoning Regulations would cause an economic loss to her by reason of her large financial expenditure in purchasing this property thinking that it could be used as a flat"; and ... "it is impractical for (her) single family use...." In effect, the current petitioners seek ... a variance in order to avoid presumed financial burdens of a transaction which they may have entered into improvidently.

Silverstone, 396 A.2d at 993-94 (affirming denial of variance). Because such self-imposed hardships may not be used to justify a use variance, see Wolf, 397 A.2d at 945 n.3, the Board should deny the Application. A contrary result would open the door for any future applicant to game the system by overpaying for a property and then insisting on entitlement to a variance permitting more profitable use.

Finally, Applicants' arguments concerning the "public good" prong of the variance test – that the development of the Property will benefit the neighborhood – do not justify the requested use variance. Construction of a 1- or 2-family dwelling, both of which are permitted as a matter of right (§ 330.5(a),(b)), would confer these same benefits.

To sum up, the Application asserts implausibly that no conforming use of the Property is economically viable. Applicants make this claim without supplying even the merest scintilla of factual support, and in the face of contrary evidence establishing the value of 1- and 2-family homes in the area's thriving real estate market. And even insofar as Applicants could ever make a showing of hardship, it is a hardship they have imposed on themselves by overpaying for the Property. The Application for the use variance is legally insufficient, and the Board should emphatically reject it.

2. The Parking Variance

Applicants also seek a variance from the off-street parking requirements. For many of the same reasons cited above, this request should also be denied.

Off-street parking variances are a hybrid, with aspects of both use and area variances. See Palmer, 287 A.2d at 541. Here, too, Applicants cannot demonstrate undue hardship, as the parking requirement for a conforming use (1- or 2-family dwelling) is one off-street space, which the Property can readily accommodate.

In addition to failing the undue hardship test, a parking variance would cause substantial detriment to the public good. On-street parking in the area is extremely scarce during weekdays under the present circumstances; adding four 2-bedroom units would likely add the pressure of 4 to 8 additional vehicles, only one of which could be parked on the Property.

As a result, SPNA emphatically disputes the Application's casually speculative claims that the proposal "will not be a problem for ... the residents of the neighborhood" (p. 12) and that "even three parking spaces will not severely impact the community" (p. 14). Moreover, the parking facilities to which Applicants allude – at Union Station or nearby office buildings – are at present inadequate or inappropriate for local residents' daily needs; thus, they would not mitigate the adverse impact of Applicants' proposal.

3. The Lot Occupancy Variance

Applicants seek permission to construct on 75% of the Property. Here again, the Board should deny the requested variance.

The "practical difficulty" identified by the Applicants is the requirement, at 11 DCMR § 403.2, that their proposed multi-unit dwelling occupy no more than 40% of the Property. As with the requested parking variance, this self-imposed "difficulty" is nothing more than another cascading effect of the Applicants' insistence on overbuilding the Property. The same regulation permits a 1- or 2-family dwelling – a conforming use – to occupy 60% of a lot. As explained above, a row dwelling or flat occupying 60% of the Property would, like many neighboring properties, be readily marketable.

In addition, the third prong of the variance criteria – examining potential detriment to the public good – counsels against the Applicants' request. Contrary to the Application's assertion that the proposed building will not adversely affect the adjacent properties' light and air, use, and enjoyment (p. 12), the Application lacks crucial information central to such a determination. Most obviously, the site plan offers no information about the relation of the proposed structure to the adjoining properties. A 3-story apartment building occupying 75% of the Property could have enormously detrimental impact on adjacent properties, especially the property immediately to the north (432 3rd St. NE). Absent far more detailed information – such as contextual drawings showing other buildings in relation to the Property, including structure height – the Applicants have not met the burden of proving a lack of "substantial detriment to the public good," and their request for a lot occupancy variance should be denied.

4. The Minimum Lot Width and Lot Area Variance

SPNA supports the Applicants' request for a variance from the strictures of 11 DCMR § 401.3, albeit not for the reasons requested.

Here again, the Applicants' insistence on constructing a multi-unit apartment building triggers heightened zoning requirements: minimum lot area of 4000sf, and minimum lot width of 40'. Seeking relief from these requirements for the Property – 14' wide and 1372sf in area – borders on the absurd.

However, even to construct a row dwelling or flat on the Property would normally require a lot width of 18' and area no less than 1800sf. Because strict application of this zoning regulation would indisputably result in a "practical difficulty" – total inability to construct any dwelling on the Property – SPNA believes that this prong of the test has been met. In addition, SPNA believes that infill residential development in the area is generally in the public interest, and that the public good would be well served by construction of a row dwelling or flat consistent with the character of the neighborhood.

## CONCLUSION

For the foregoing reasons, SPNA respectfully urges the Board to deny the requested variances, with the exception of the lot width/lot area variance.

Sincerely,

Drury Tallant
Co-Chair, SPNA Land Use Committee

cc: Earle C. Horton, III, Esq.

VI.

## COMMUNITY SUPPORT

The Applicant is actively seeking the support of ANC 6C08 and will submit support letters by the scheduled hearing date before the BZA.

VII.

## CONCLUSION

For the reasons stated above, the requested relief meets the applicable standards for a variance under the Zoning Regulations. Accordingly, the Applicant respectfully requests the Board to Grant the Application.

**Respectfully submitted,**

GRAVES & HORTON, LLC

By: _____
**Earle C. Horton, III, Esq**

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1133 21st Street, NW
Suite 525
Washington, D.C. 20036
(202)216-0660
(202)216-0639 fax

**ATTACHMENT A**

| **Property; Type** | **Lot Area** | **Gross Interior Area** | **Sale Price/Date** | **Parking Space?** | **Price/ Interior Square Foot** | **Condition** |
|---|---|---|---|---|---|---|
| 440 3rd St. NE (square 755, lot 15); 2-unit rowhouse built in 1880 | 510 sf | 1,391 sf | $430,000 (4/2/04) | No | $309/sf | Interior is being gutted (new plumbing, electrical, etc.) |
| 432 3rd St. NE #1 (square 755, lot 2001); half of 2-unit condominium built in 1940 | 538 sf | 832 sf | $251,500 (5/20/03) | No | $302/sf | Unknown |
| 411 3rd St. NE (square 780, lot 27); 1-family rowhouse built in 1880 | 1,323 sf | 1,621 sf | $505,000 (11/13/2003) | Yes (1) | $312/sf | Renovated prior to sale |



Prev

## Property Detail

**Address:** 440 3RD ST NE
**SSL:** 0755 0015

| | | | |
|---|---|---|---|
| **Neighborhood:** | Old City I | **Sub-Neighborhood:** | K |
| **Use Code:** | 11 - | **Class 3 Exception:** | No |
| **Tax Type:** | TX - | **Tax Class:** | 01 - |
| **Homestead Status:** | ** Currently receiving the Homestead Deduction*. | | |
| **Assessor:** | Darrell, Alston | **Assessor Phone No.:** | |
| **Gross Building Area:** | | **Ward:** | 6 |
| **Land Area:** | 510 | **Triennial Group:** | 2 |



| | |
|---|---|
| **Owner Name:** | KAREN L POTTEBAUM |
| **Mailing Address:** | 440 3RD ST NE; WASHINGTON, DC 20002-4919 |
| **Sale Price:** | $430,000 |
| **Sale Date:** | 04/02/2004 |
| **Instrument No.:** | 45860 |

| | Current Value | Proposed New Value (2005) |
|---|---|---|
| **Land:** | $136,440 | $158,750 |
| **Improvements:** | $159,570 | $146,520 |
| **Total Value:** | $296,010 | $305,270 |
| **Taxable Assessment:** * | $131,510 | $147,291 |

* Taxable Assessment after Tax Assessment Credit and after $38,000 Homestead Credit.

** This property is currently receiving tax relief through the Homestead deduction program. If you are not domiciled in the District or the property is not your principal place of residence, you are obligated to inform the Office of Tax and Revenue. This can be done by accessing the link below and completing the necessary form and returning it per the instructions. You may also write to the Office of Tax and Revenue, Real Property Administration, P.O. Box 176, Washington, DC 20044. For additional information regarding the Homestead program, call (202)727-4TAX.

*

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Citywide Call Center : (202) 727-1000

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004



# Property Features
## SSL: 0755 0015

All information below will be updated on a monthly basis.

| | |
|---|---|
| **Building Type** | Row Inside |
| **Building Style** | 2 Story |
| **Gross Building Area** | 1,391 |
| **Year Built** | 1880 |
| **Bed Rooms** | 2 |
| **Bath Rooms** | 1 |
| **1/2 Bath Rooms** | 0 |
| **Total Rooms** | 6 |
| **Wall** | Common Brick |
| **Floor** | Wood Floor |
| **Heat** | Forced Air |
| **Air Conditioning** | None |
| **Fireplace(s)** | 1 |



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# Property Detail

**Address:** 432 3RD ST NE Unit: 1
**SSL:** 0755 2001

| | | | |
|---|---|---|---|
| **Neighborhood:** | Old City I | **Sub-Neighborhood:** | K |
| **Use Code:** | 16 - | **Class 3 Exception:** | No |
| **Tax Type:** | TX - | **Tax Class:** | 01 - |
| **Homestead Status:** | ** Currently receiving the Homestead Deduction*. | | |
| **Assessor:** | Willis, Shandra | **Assessor Phone No.:** | |
| **Gross Building Area:** | | **Ward:** | 6 |
| **Land Area:** | 538 | **Triennial Group:** | 2 |



| | |
|---|---|
| **Owner Name:** | DANIEL J KANIEWSKI |
| **Mailing Address:** | 423 3RD ST NE # 1; WASHINGTON, DC 20002-4918 |
| **Sale Price:** | $251,500 |
| **Sale Date:** | 05/20/2003 |
| **Instrument No.:** | 61672 |

| | Current Value | Proposed New Value (2005) |
|---|---|---|
| **Land:** | $57,740 | $82,030 |
| **Improvements:** | $134,740 | $191,390 |
| **Total Value:** | $192,480 | $273,420 |
| **Taxable Assessment:** * | $192,480 | $173,018 |

* Taxable Assessment after Tax Assessment Credit and after $38,000 Homestead Credit.

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Washington, DC 20004



# Property Features
## SSL: 0755 2001

All information below will be updated on a monthly basis.

| | |
|---|---|
| **Building Type** | No Data |
| **Building Style** | No Data |
| **Gross Building Area** | 832 |
| **Year Built** | 1940 |
| **Bed Rooms** | 2 |
| **Bath Rooms** | 2 |
| **1/2 Bath Rooms** | 1 |
| **Total Rooms** | 0 |
| **Wall** | No Data |
| **Floor** | No Data |
| **Heat** | No Data |
| **Air Conditioning** | Yes |
| **Fireplace(s)** | 1 |

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# Property Detail

## Address: 411 3RD ST NE
## SSL: 0780 0027

| | | | |
|---|---|---|---|
| **Neighborhood:** | Old City I | **Sub-Neighborhood:** | K |
| **Use Code:** | 11 - | **Class 3 Exception:** | No |
| **Tax Type:** | TX - | **Tax Class:** | 01 - |
| **Homestead Status:** | ** Currently receiving the Homestead Deduction*. | | |
| **Assessor:** | Darrell, Alston | **Assessor Phone No.:** | |
| **Gross Building Area:** | | **Ward:** | 6 |
| **Land Area:** | 1,323 | **Triennial Group:** | 2 |



| | |
|---|---|
| **Owner Name:** | GITTE J BLANCHET |
| **Mailing Address:** | 411 3RD ST NE; WASHINGTON, DC 20002-4918 |
| **Sale Price:** | $505,000 |
| **Sale Date:** | 11/13/2003 |
| ***Instrument No.:*** | 158438 |

| | Current Value | Proposed New Value (2005) |
|---|---|---|
| **Land:** | $157,900 | $192,540 |
| **Improvements:** | $217,170 | $274,830 |
| **Total Value:** | $375,070 | $467,370 |
| **Taxable Assessment:** * | $261,516 | $292,898 |

* Taxable Assessment after Tax Assessment Credit and after $38,000 Homestead Credit.

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*

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# Property Features
## SSL: 0780 0027

**All information below will be updated on a monthly basis.**

| | |
|---|---|
| **Building Type** | Row Inside |
| **Building Style** | 2 Story |
| **Gross Building Area** | 1,621 |
| **Year Built** | 1880 |
| **Bed Rooms** | 3 |
| **Bath Rooms** | 1 |
| **1/2 Bath Rooms** | 1 |
| **Total Rooms** | 6 |
| **Wall** | Common Brick |
| **Floor** | Wood Floor |
| **Heat** | Warm Cool |
| **Air Conditioning** | Yes |
| **Fireplace(s)** | 1 |



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