

**LINOWES  
AND BLOCHER LLP**  
ATTORNEYS AT LAW

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June 5, 2007

**Emily J. Vaias**  
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**Joseph P. Lapan**  
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**Via Hand Delivery**

Ruthanne G. Miller, Chairman  
Board of Zoning Adjustment  
441 Fourth St., NW, Suite 200 S.  
Washington, DC 20001

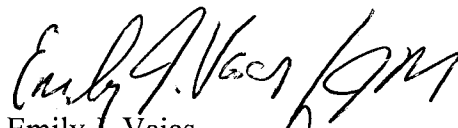
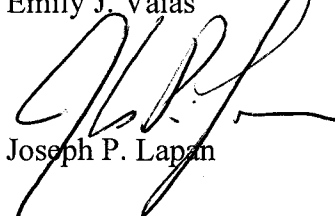
Re: Board of Zoning Adjustment Appeal No. 17615  
Motion to Intervene and Pre-Hearing Statement

Dear Chairman and Members of the Board:

Enclosed please find on behalf of Washington Harbour Condominium Unit Owners a Motion to Intervene and a Pre-Hearing Statement for the above-referenced appeal. Please contact us if you have any questions.

Sincerely,

**LINOWES AND BLOCHER LLP**

  
Emily J. Vaias  
  
Joseph P. Lapan

**Enclosures**

cc: Mr. Kenneth Joy  
Mr. Robert Pence  
Raymond B. Via, Jr., Esq./Paul Sweeney, Esq.  
Vernon W. Johnson, III, Esq.  
Dennis Taylor, Esq.  
Mr. Bill Crews  
Jill Stern, Esq.

BOARD OF ZONING ADJUSTMENT  
District of Columbia

CASE NO. 17615

EXHIBIT NO. 18

Board of Zoning Adjustment  
District of Columbia  
CASE NO. 17615  
EXHIBIT NO. 18

**BEFORE THE BOARD OF ZONING ADJUSTMENT  
OF THE DISTRICT OF COLUMBIA**

Appeal of William J. Harnett from the  
Administrative Decision of the Zoning  
Administrator, DCRA, to Issue Building  
Permit No. 101019

Appeal No. 17615

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D.C. OFFICE OF ZONING  
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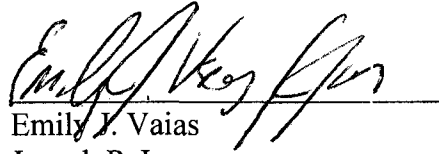
**MOTION TO INTERVENE IN THE APPEAL  
FROM DECISION OF DCRA ADMINISTRATOR  
REGARDING BUILDING PERMIT NO. 101019,  
3030 K STREET, NW, WASHINGTON, D.C.**

Washington Harbour Condominium Owners' Association ("Washington Harbour"), by and through its attorneys, Emily J. Vaias, Joseph P. Lapan and Linowes and Blocher LLP, hereby files this Motion to Intervene in the Appeal of William J. Harnett vs. Zoning Administrator, regarding Building Permit No. 101019 (the "Permit") pursuant to 11 DCMR 3112.15, and as grounds therefore states as follows:

1. The Permit, which approved and permitted the striping of five new parking spaces in Washington Harbour's garage, located at 3030 K Street, NW, was issued to Washington Harbour on November 17, 2006.
2. Mr. Harnett ("Appellant") filed his appeal of the Permit to this Board of Zoning Adjustment ("BZA") on January 12, 2007.
3. As the Permit applicant, governing body of the 3030 K St., NW condominium unit owners and owner of all common areas on the subject premises, Washington Harbour, and the condominium unit owners it represents, have specific rights and interests that will be affected by the BZA action on the appeal.

WHEREFORE, Washington Harbor respectfully requests that the BZA, pursuant to 11 DCMR 3112.15, permit Washington Harbour to intervene in the appeal for the general purpose of providing all relevant facts and legal arguments in support of the issuance of the Permit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Emily J. Vaia", is written over a horizontal line.

Emily J. Vaia  
Joseph P. Lapan  
Linowes and Blocher LLP  
7200 Wisconsin Avenue, Suite 800  
Bethesda, Maryland 20814  
301-961-5174

## CERTIFICATE OF SERVICE

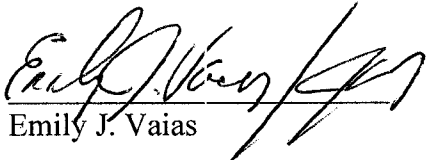
I HEREBY CERTIFY that on this 5th day of June, 2007, a copy of the foregoing Motion to Intervene in the Appeal From Decision of DCRA Administrator Regarding Building Permit No. 101019 was mailed via first class United States mail, postage pre-paid to:

Vernon W. Johnson, III  
Nixon Peabody, LLP  
401 Ninth Street, NW  
Suite 900  
Washington, D.C. 20004-2128

Bill Crews  
Zoning Administrator  
Department of Consumer and Regulatory Affairs  
941 North Capital Street, NE  
Suite 2000  
Washington, D.C. 20002

Jill Stern, Esq.  
Department of Consumer and Regulatory Affairs  
941 North Capitol Street, NE  
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Washington, DC 20001

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Room 9401  
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Emily J. Vaias

**BEFORE THE BOARD OF ZONING ADJUSTMENT  
OF THE DISTRICT OF COLUMBIA**

Appeal of William J. Harnett from the  
Administrative Decision of the Zoning  
Administrator, DCRA, to Issue Building  
Permit No. 101019

Appeal No. 17615

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**WASHINGTON HARBOUR'S PRE-HEARING STATEMENT AND RESPONSE TO  
APPELLANT'S PRE-HEARING STATEMENT**

Washington Harbour Condominium Owners' Association ("Washington Harbour"), by and through its attorneys, Emily J. Vaias, Joseph P. Lapan and Linowes and Blocher LLP, hereby submits this Pre-Hearing Statement and Response to Appellant's Pre-Hearing Statement in the Appeal of William J. Harnett vs. Zoning Administrator (Appeal No. 17615, the "Appeal"), regarding Building Permit No. 101019 (the "Permit").<sup>1</sup>

**I. Statement of the Case**

The Permit, which approved and permitted the striping of five new parking spaces in Washington Harbour's garage, located at 3030 K Street, NW, was issued to Washington Harbour on November 17, 2006.

While Appellant seeks to characterize Washington Harbour and its actions relative to the issuance of the Permit as renegade, clandestine and without respect for the law, in fact, Washington Harbour has been very deliberate in working closely with the Zoning Administrator and Department of Consumer and Regulatory Affairs ("DCRA") since 2005 in order to ensure a proper and legal resolution to this matter. Most importantly to the BZA in its review of the

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<sup>1</sup> This Pre-Hearing Statement and Response to Appellant's Pre-Hearing Statement is made without prejudice to Washington Harbour's positions that Appellant's appeal to the Board of Zoning Adjustment ("BZA") is untimely and improper and that BZA does not have jurisdiction to hear this appeal at this time. See Washington Harbour's Motion to Dismiss.

Appeal, at no point in time has Washington Harbour or the five parking spaces at issue been in violation of Title 11 of the District of Columbia Municipal Regulations (the “Zoning Regulations”). Upon receiving the Notice of Violation and Notice to Abate issued on January 4, 2005 (the “Notice of Violation”), Washington Harbour immediately appealed to the BZA (Case No. 17317), while continuing to work with the Zoning Administrator to clearly demonstrate that the five parking spaces did not violate the Zoning Regulations. Ultimately, the Zoning Administrator rescinded the Notice of Violation as to the cited zoning violation and confirmed in writing on October 23, 2006, that, after “careful review”, the five parking spaces did not violate the Zoning Regulations. A copy of the Zoning Administrator’s October 23, 2006 letter is attached hereto as Exhibit 1. Washington Harbour then proceeded to withdraw its appeal to the BZA of the Notice of Violation.

In addition to citing a violation of the Zoning Regulations, which was rescinded by the Zoning Administrator, the Notice of Violation also cited Washington Harbour for a violation of Title 12 of the District of Columbia Municipal Regulations (the “Building Code”) for “striping parking garage without approved plans/ building permits” and stated that the required corrective action was to obtain building permits for the striping. It is important to note that whether or not a building permit is required for the mere surface striping of parking spaces in a private garage is an arguable point of law pursuant to a plain reading of the Building Code. Because surface striping does not implicate any structural, architectural or mechanical elements of a building and because the Building Code does not clearly require a permit for such striping, Washington Harbour appealed this element of the Notice of Violation to the Office of Administrative Hearings (“OAH”). However, after many discussions with the Zoning Administrator and DCRA, and before a hearing on the substance of this matter, Washington Harbour opted to take

the specifically required corrective action contained in the Notice of Violation and obtain the Permit. After the Permit was successfully, and legally, obtained, DCRA voluntarily moved to dismiss the pending appeal before OAH on this question. Along with the Zoning Administrator's rescinding of the zoning violation, the corrective action taken by Washington Harbour to obtain the Permit, brought Washington Harbour into full compliance with the Notice of Violation and cured any outstanding matters related to the Notice of Violation. Therefore, in reviewing the Appeal currently before it, the BZA should limit its consideration to whether, in fact, the Permit was issued in compliance with the Zoning Regulations and should decline to entertain the erroneous, irrelevant and misleading presentation of the factual history provided by Appellant.

## **II. Legality of the Five Parking Spaces**

As stated above, and as confirmed by the Zoning Administrator after many meetings and conversations with Washington Harbour and a "careful review" of the documents and materials of record, at no point in time has Washington Harbour or the five parking spaces at issue been in violation of the Zoning Regulations. *See* Zoning Administrator letter dated October 23, 2006, attached hereto as Exhibit 1.

***"Required" vs. "Non-required" Parking Spaces.*** The main failure of Appellant's position with respect to the legality of the five parking spaces at issue is the failure to recognize the clear distinction in the Zoning Regulations between "required" and "non-required" parking spaces. The Zoning Regulations are very clear as to which provisions are applicable to "required" parking spaces and which provisions are applicable to all parking spaces (see 11 DCMR 2118.9). By permitting both "required" and "non-required" parking spaces, the Zoning Regulations implement a policy decision to allow for the provision of the maximum number of

parking spaces possible in urban environments, where space for parking is at a premium. To blur this clear distinction by applying the standards and requirements for “required” parking spaces to “non-required” parking spaces would, in addition to being a misinterpretation of the Zoning Regulations, have the profound citywide effect of significantly reducing the number of available parking garage spaces and placing substantial pressure on the limited available street parking in the city, especially in residential neighborhoods. The opposition of neighborhood and citizens groups, including the Advisory Neighborhood Commissions across the city, to such parking pressures on neighborhood streets is well documented.

The Washington Harbour Condominium is classified in the W-3 Zone. Per Section 2101.1 of the Zoning Regulations (the “Schedule of Requirements”), residential uses in a W zone require one (1) parking space for every three (3) residential dwelling units. Washington Harbour Condominium consists of 35 multi-family dwelling units; therefore twelve (12) parking spaces are required per the Schedule of Requirements. 11 DCMR 2101.2 clearly allows for the creation of parking spaces in an amount that exceeds that required by the Schedule of Requirements (i.e. “non-required” parking spaces) provided that these non-required spaces comply with “all other applicable provisions” of the Zoning Regulations.<sup>2</sup> As clearly indicated in the Zoning Regulations, parking spaces in excess of the “required” number, i.e. “non-required” parking

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<sup>2</sup> It is important to note that no regulatory procedure is required to “select” which individual spaces are deemed to be “required” because this is not the aim of the Zoning Regulations. The Zoning Regulations seek to ensure that a particular use in a particular zone maintain a minimum number of “required” parking spaces, which comply with applicable standards. Washington Harbour has not “selected” which parking spaces are “required” spaces in perpetuity, but instead simply illustrated that the subject parking garage contains a requisite number of “required” parking spaces that meet the applicable standards—an ongoing legal obligation of Washington Harbour. In any event, it is clear that Washington Harbour has chosen to illustrate this point logically, using twelve (12) parking spaces along the main garage entry aisle. Contrary to the inference by Appellant, the order of purchase of parking spaces is wholly irrelevant to the analysis under the Zoning Regulations.

spaces, are subject to certain standards and requirements, but not those standards applicable only to “required” parking spaces.

***The Subject Five Parking Spaces.*** The five parking spaces at issue are “non-required” parking spaces. Therefore, any standard or requirement applicable to “required” parking spaces, including those relating to size, location or access to “required” parking spaces, is clearly inapplicable to the five parking spaces at issue. Specifically, 11 DCMR 2117.5 provides:

**Except as provided in Sections 2115.9 through 2115.18 and 2117.6, when required parking spaces are so arranged that an aisle is required for accessibility or maneuvering space between rows of two (2) or more parking spaces....the aisle shall have a clear width of not less than twenty feet (20 ft.) for ninety degree (90°) angle parking.....**

None of the five parking spaces at issue are “required” by the Schedule of Requirements and, therefore, this provision is inapplicable to those spaces. Nonetheless, each “required” space in the garage is arranged such that an aisle is provided for accessibility and maneuverability that has a clear width of not less than twenty (20) feet. In fact, the drive aisle between the twelve (12) required spaces in the Parking Facility is 22 feet wide. The distance between Space P-112 and new parking space #2 is 19 feet, 6 inches, not 16 feet, 10 inches as claimed by the Appellant.<sup>3</sup> This distance is not in violation of any requirement of the Zoning Regulations since 11 DCMR 2117.5 requires 20-foot aisle width between required spaces, not all spaces—a distinction that is overlooked by Appellant. In addition to being legal and compliant with the Zoning Regulations, as illustrated by the diagrams prepared by Washington Harbour, Space P-112 is fully accessible and useable in a safe manner.

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<sup>3</sup> Washington Harbour understands that the Zoning Administrator and DCRA have taken independent measurements of this aisle width indicating that it is 19 feet, 5 inches. Washington Harbour is willing to concede the width measured by the Zoning Administrator and DCRA for purposes of BZA review of the Appeal since the difference is immaterial to the legality of the parking spaces.

The Appellant cites 11 DCMR 2115.14 for the proposition that the drive aisle between Space P-112 and Spaces #2 and 3 is required to comply with 11 DCMR 2117.5, despite the fact that 2117.5 only applies to “required” spaces. However, as clearly stated in 11 DCMR 2115.9, 11 DCMR 2115.10 through 2115.18 apply to commercial structures in certain zones and are inapplicable in this instance. Therefore, 2117.5 is inapplicable to the subject drive aisle and the Appellant’s assertions that it is applicable via 11 DCMR 2115.14 are erroneous.

Generally, Washington Harbour created the five parking spaces at issue with careful regard for the safety of residents and visitors, and have to date received no complaints with regards to the spaces created from any owner other than the Appellant. Washington Harbour and its experts can demonstrate and will testify as to the safety and efficiency of the parking structure and the five parking spaces at issue. In fact, Appellant, now claiming that the five parking spaces at issue are illegal and unsafe, by his own admission in his deposition taken in the related case before the Superior Court, parked in one of these spaces (Space #2) for many years free of charge (relevant portions of referenced deposition attached hereto as Exhibit 2).

Contrary to the claims of the Appellant, the five parking spaces at issue all provide the minimum vertical clearance of 6 feet, 6 inches, required by 11 DCMR 2115.5, as shown and verified by Washington Harbour, the Zoning Administrator and DCRA. These spaces provide the required vertical clearance and, in so doing, are safely spaced from all utility piping and equipment.

The Appellant correctly cites 11 DCMR 2116.8 as requiring that accessory parking spaces shall be located so as to furnish reasonable and convenient parking facilities for the occupants or guests of the building or structures that they are designed to serve. All parking spaces, including the five parking spaces at issue and space P-112, furnish reasonable and

convenient parking facilities for the residents and guests of the building. Washington Harbour can demonstrate, both anecdotally and through its expert witness, that space P-112 is fully accessible by the Appellant.

Contrary to the claims of the Appellant, the Washington Harbour parking garage is safe for pedestrians and provides sufficient access to and from the residential elevator and complies with 11 DCMR 2117.7. 11 DCMR 2117.7 is intended to prevent vehicular encroachment into street, sidewalks and driveways, of which there are none in the subject parking garage—indeed, a parking garage is, by definition, intended for constant vehicular “encroachment” for cars to get to and from parking spaces. Nonetheless, Washington Harbour took great care, acting on behalf of its owners, to ensure that access to the five parking spaces and safety for owners was sufficient and appropriate. Indeed, access to and safety of the five parking spaces at issue is equal to access and safety of all other parking spaces in the existing parking garage.<sup>4</sup> The claim by the Appellant that these parking spaces should be eliminated out of deference to a pedestrian walkway is contradictory to the Appellant’s claim that he needs to be able to drive his car through this area in order to access his parking space. In addition, the Appellant has admitted, in his deposition for the Superior Court proceedings, that he parked his car or cars in this area for many years and in fact tried to claim these spaces as his own at the time of the parking auction. Therefore, any claim of pedestrian safety by the Appellant is not valid.

### **III. Advisory Neighborhood Commission (“ANC”) 2E**

The Appeal record is absent of any comments from ANC 2E because ANC 2E has declined to comment on the Appeal. In conversations with Washington Harbour, the ANC 2E

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<sup>4</sup> The pedestrian directional sign on the wall of the parking structure near space #116 is helpful in directing pedestrians towards the building elevators and is fully within the authority of Washington Harbour as owner of all common elements on the premises.

Vice-Chair/ SMD representative for 3030 K St., NW has indicated that ANC 2E prefers to allow the BZA to review the legal issues raised in the Appeal without input from ANC 2E. All references to the actions of ANC 2E in the Appellant's Pre-Hearing Statement, including the October 6, 2006 letter to the BZA, were, in fact, taken relative to BZA Case No. 17317, which was withdrawn by Washington Harbour after the Zoning Administrator rescinded the Notice of Violation. Contrary to the erroneous statement of Appellant, Washington Harbour was under no obligation, legal or otherwise, nor does DCRA expect that actions taken by an ANC in another proceeding would be somehow mentioned or disclosed in a building permit application.

Notwithstanding the fact that ANC 2E has intentionally declined to provide any input into the matter currently before the BZA, it must be noted that the October 6, 2006 letter sent to the BZA regarding Case No. 17317 lacks any explanation of the basis for the recommendation contained therein because in reaching this decision, the ANC 2E did not receive information, nor consider any of the legal interpretation or compliance issues addressed above at its meeting on October 3, 2006. In fact, immediately prior to the October 3, 2006 meeting at which ANC 2E took the action referenced in the October 6, 2006 letter, Washington Harbour's representative in attendance was specifically asked not to provide a detailed explanation of the legal issues presented in the Appeal. At the conclusion of the Washington Harbour representative's brief remarks to ANC 2E, he offered to provide greater detail and answer any questions. This offer was not accepted. ANC 2E proceeded to briefly deliberate on the matter and made its recommendation based on a diagram provided by Mr. Harnett's representative in attendance, which was not shared with Washington Harbour's representative.

In any event, any recommendation made by an ANC cannot serve to upset a clear and plain-meaning interpretation of the Zoning Regulations, as discussed above. Accordingly, although

pursuant to 11 DCMR 3115.2, the BZA shall give “great weight” to the report of the ANC and acknowledge the ANC as the source of recommendations with explicit reference to each of the ANC's issues and concerns with respect to any matter, we believe the ANC’s recommendation lacks any factual or legal basis. Therefore, even if the BZA is inclined to consider the ANC 2E October 6, 2006 letter despite the fact that it was provided for a different appeal case, the BZA should carefully address and acknowledge the ANC 2E’s recommendation, giving it “great weight”, but still choose to uphold the issuance of the Permit based on the facts and law of this case. See *Spring Valley-Wesley Height Citizen’s Assn. v. D.C. Zoning Comm’n*, 856 A.2d 1174 (2004).

#### **IV. Other Responses to Appellant’s Pre-Hearing Statement**

The Appellant’s Pre-Hearing Statement contains discussion of several irrelevant, misleading or erroneous points that Washington Harbour would like to address:

- Appellant’s Pre-Hearing Statement erroneously contends that Washington Harbour made “clear misrepresentations” on the Permit application in attempts to “conceal the real nature of the work”. As discussed above, the “nature of the work”, i.e. the striping of the five parking spaces, was the subject of many meetings and conversations between Washington Harbour, the Zoning Administrator and DCRA from 2005 through the present and was in no way concealed. All parties involved clearly understood that the Permit application was being pursued as part of the agreed upon corrective action required by the Notice of Violation, and the Permit was processed and issued under the close supervision of DCRA legal staff. All required Permit application materials were submitted and reviewed by DCRA in issuing the Permit. No misrepresentations were made with respect to the Permit application materials, including the cost of the work.

Appellant references a September 20, 2004 invoice from Concrete Protection & Restoration, Inc. as evidence that the work was “far in excess” of the amount stated in the Permit application, however this invoice was for striping work and other garage surface improvements. In fact, the line item for “Additional Striping”, which references the work at issue, cost \$150.

- Appellant’s Pre-Hearing Statement contains references to and discussion of the internal decision, authority and process used by Washington Harbour to create and auction the license rights to the five parking spaces at issue. In addition to being a misrepresentation of the facts and being wholly irrelevant to the BZA’s consideration of whether the five parking spaces are compliant with the Zoning Regulations, the Appellant fails to mention that the Superior Court of the District of Columbia dismissed Appellant’s claim that Washington Harbour’s actions were in violation of applicable law in any way. *See* Superior Court Order and Memorandum Opinion attached hereto as Exhibit 3. Specifically, the Superior Court, in dismissing this claim by the Appellant, stated that the District of Columbia Condominium Act, and all actions taken by Washington Harbour pursuant to the Condominium Act, were proper and within their authority as the governing body of the condominium association.
- Appellant’s Pre-Hearing Statement makes unfounded statements that the five parking spaces at issue were somehow denied or disallowed at the time of original condominium plat approval, however provides no basis or supporting documents for this claim. Indeed, 11 DCMR 3112.10 required the Appellant to file with the BZA any supporting plans or materials that it seek to enter into evidence as part of the Appeal, and to represent certain facts about the original approvals without such supporting documentation is irresponsible

and prejudicial to Washington Harbour. In any event, the BZA is obligated to review the Permit and the creation of the five parking spaces in light of current requirements of the Zoning Regulations and the Building Code.

**V. Witnesses**

At the hearing on June 5, 2007, Washington Harbour expects to present the following witnesses:

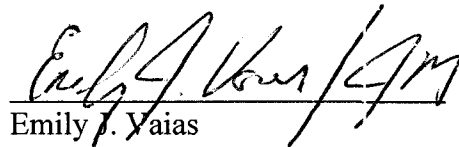
Mr. Robert Pence will offer testimony regarding the creation, auctioning and licensing of the five parking spaces at issue, communications of Washington Harbour with the Zoning Administrator and DCRA, status of the case before the Superior Court of the District of Columbia, parking garage dimensions and measurements and the general safety and operation of the parking garage.

Mr. Wes Guckert, Principal of The Traffic Group, Inc. will offer testimony as to the sufficiency and compliance of parking space widths, aisle widths, clearances, turning radii, accessibility, maneuverability and general safety and operation of the parking garage.

**VI. Conclusion**

Washington Harbour respectfully requests that the BZA, based on the foregoing, and all other materials and testimony provided by it and by the Zoning Administrator and DCRA in support of the issuance of the Permit, deny the Appeal and uphold the issuance of the Permit.

Respectfully submitted,



Emily J. Vaia  
Joseph P. Lapan  
Linowes and Blocher LLP  
7200 Wisconsin Avenue, Suite 800  
Bethesda, Maryland 20814  
301-961-5174

## CERTIFICATE OF SERVICE

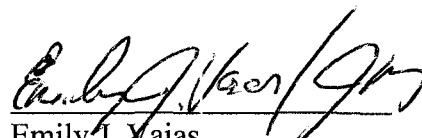
I HEREBY CERTIFY that on this 5th day of June, 2007, a copy of the foregoing Motion to Intervene in the Appeal From Decision of DCRA Administrator Regarding Building Permit No. 101019 was mailed via first class United States mail, postage pre-paid to:

Vernon W. Johnson, III  
Nixon Peabody, LLP  
401 Ninth Street, NW  
Suite 900  
Washington, D.C. 20004-2128

Bill Crews  
Zoning Administrator  
Department of Consumer and Regulatory Affairs  
941 North Capital Street, NE  
Suite 2000  
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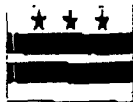
Jill Stern, Esq.  
Department of Consumer and Regulatory Affairs  
941 North Capitol Street, NE  
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Washington, DC 20001

Dennis Taylor, Esq.  
Department of Consumer & Regulatory Affairs  
941 North Capitol Street, NE  
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Washington, D.C. 20001



Emily J. Waia

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS  
OFFICE OF THE ZONING ADMINISTRATOR**



October 23, 2006

Joseph P. Lapan  
Linowes and Blocher, LLP.  
7200 Wisconsin Avenue  
Suite 800  
Bethesda, Md. 20814-4842

Re: Notice of Violation and Notice to Abate for 3030 K Street, NW (January 4, 2005)  
Washington Harbour Condominium Unit Owners Association, Inc.

Dear Attorney Lapan:

After careful review of our records, please be advised that we have rescinded the above Notice of Violation and Notice to Abate, which was issued on January 4, 2005, for the Violation of 11 DCMR 2117. Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Crews".

Bill Crews  
Zoning Administrator

Exhibit 1

**IN THE MATTER OF:**

***WILLIAM J. HARNETT***

***-v-***

***THE WASHINGTON HARBOUR  
CONDOMINIUM UNIT OWNERS  
ASSOCIATION, INC., et al.***

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***VOLUME 1  
WILLIAM J. HARNETT  
DECEMBER 19, 2006***

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***GORE REPORTING COMPANY  
Maryland, D.C., & Northern Virginia  
(410)269-0308***

***Condensed Transcript  
with Word Index***

Page 46

1       **A The car that is in space 112 is kept**  
 2       **there on a regular basis.**  
 3       Q What kind of vehicle is that?  
 4       **A It's a Mercedes.**  
 5       Q What kind of -- strike that. What year?  
 6       **A 1992.**  
 7       Q Color?  
 8       **A Black.**  
 9       Q And who owns that vehicle?  
 10      **A The Washington Capital Group.**  
 11      Q How long had that vehicle been regularly  
 12      parked at the condominium?  
 13      **A Since after its purchase.**  
 14      Q Since 1992?  
 15      **A Yes.**  
 16      Q Has it always been parked in space P112  
 17      regularly?  
 18      **A Yes.**  
 19      Q Have you parked it anywhere else in the  
 20      garage other than parking space P112?  
 21      **A Yes.**

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1       **A For many years.**  
 2       Q And when you were parking there was it  
 3       designated as a parking space?  
 4       **A No, it was not a parking space. It was**  
 5       **designated as a no-parking space with big black and**  
 6       **white stripes painted on the floor to indicate that**  
 7       **it was a pedestrian walkway, or no parking at**  
 8       **least.**  
 9       Q I want to make sure I understand. The  
 10      place that you park which is now parking space  
 11      number 2 --  
 12      **A Okay. Where I park which is now -- go**  
 13      **ahead. I'm sorry.**  
 14      Q That's fine. The place that you  
 15      regularly park which is now designated as parking  
 16      space number 2 had a no-parking sign stencilled on  
 17      the garage itself?  
 18      **A Yes.**  
 19      Q And you parked on that no-parking sign?  
 20      **A Yes. Well, it didn't say no parking.**  
 21      Q What did it --

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1       Q Can you tell me about where else you've  
 2       parked the vehicle?  
 3       **A The space that is now owned or occupied**  
 4       **by Mr. Pence.**  
 5       Q What space is that?  
 6       **A The illegal auction named it space**  
 7       **number 2 I believe.**  
 8       Q I think we're going to have a little bit  
 9       of difficulty with the reference to the illegal  
 10      auction.  
 11      **A I'm sorry.**  
 12      MR. JOHNSON: He's just here to ask you  
 13      questions. Just ask him questions. You don't need  
 14      to comment on what he's saying or --  
 15      Q We'll get through it. I'm sorry we were  
 16      interrupted there briefly.  
 17      That is now what is referred to as  
 18      parking space number 2; is that what you said?  
 19      **A Yes.**  
 20      Q How long did you park in the space that  
 21      is now designated as parking space number 2?

Page 49

1       **A Just big stripes but it was --**  
 2       Q It was your understanding it was  
 3       designated no parking?  
 4       **A I would assume that, but it didn't have**  
 5       **a number and it didn't -- people would park there**  
 6       **all the time, whether it was a parking space or**  
 7       **whatever the designation. That was the problem.**  
 8       **They would park on that Mr. Pence's now number 2**  
 9       **space and I couldn't get in or out of my space,**  
 10      **which was 112. That's why I parked there.**  
 11      Q So you parked the Mercedes in what is  
 12      now parking space number 2 regularly; is that  
 13      correct?  
 14      **A Mercedes or any other car that I had at**  
 15      **the time, yes.**  
 16      Q And you did that so that space P112  
 17      would be unimpeded so that that space could be  
 18      used?  
 19      **A So that I could get the car out.**  
 20      Q Would you regularly have one vehicle  
 21      parked on the no-parking area and another vehicle

13 (Pages 46 to 49)

Page 50

1 parked in space P112?

2 A No.

3 Q You would just have a vehicle in front  
4 of space 112 and space 112 would be vacant; is that  
5 your testimony?

6 A Regularly you said?

7 Q Yes.

8 A Right.

9 Q I just wanted to make sure I understood  
10 you. And approximately what time frame are we  
11 talking about when you testified you were parking  
12 in the no-parking area?

13 A Well, from the time that I purchased 206  
14 and shortly after I moved in there I parked there  
15 to prevent someone from blocking me in.

16 Q And you say you parked there regularly  
17 but you also said other individuals parked in that  
18 space as well?

19 A No.

20 Q I thought I heard you say that people  
21 used that space.

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1 others; is that your understanding?

2 A No, other unit owners parked there also.  
3 It was a nice handy space.

4 Q Do you know what other unit owners  
5 parked there, the identity?

6 A No. I would report it to the  
7 residential director and she would contact if she  
8 could find out. Oftentimes she was unable to find  
9 who owned the car so it took some extended period  
10 of time before they could find out and they thought  
11 they would have to tow the car sometimes and other  
12 times I would --

13 Q Did you ever have a car towed from that  
14 area yourself?

15 A They considered doing that but it's very  
16 difficult to tow a car in a residential garage.

17 Q I'm not talking about the association.  
18 Did you personally ever seek to have a vehicle  
19 towed from that area?

20 A How could I do that? No.

21 Q Now, I don't mean to patronize you

Page 51

1 A If my car wasn't there they would use  
2 it, yes.

3 Q So when your vehicle wasn't there  
4 somebody else might use it?

5 A Always did.

6 Q Would that be temporarily until you  
7 returned or did you have get into a tussle with  
8 somebody about who was going to be using that  
9 space?

10 A I don't know if you want to call it a  
11 tussle. When I'd come to go to work in the morning  
12 and somebody parked behind me and I couldn't get  
13 out of my space I would have to go to the  
14 residential directors and ask them who has that  
15 car. And there were many different situations of  
16 why it was there and sometimes it was there -- the  
17 daughter of the president of the board of directors  
18 and other times it was visitors from all the other  
19 unit owners.

20 Q But it wasn't being used by another unit  
21 owner regularly, it was being used by visitors and

Page 53

1 and -- but I just want to make sure you understand  
2 how condominium real estate works. You understand  
3 you own a unit in the building, correct?

4 A Yes.

5 Q The remainder of the area of the  
6 building is classified as what is called common  
7 elements. Have you heard that term before?

8 A Yes.

9 Q And you understand what common elements  
10 are?

11 MR. JOHNSON: Objection to the form of  
12 the question. You can answer.

13 Q You can answer.

14 A Yes.

15 Q Is it your understanding that common  
16 elements are that portion of the building which is  
17 owned in common by all of the unit owners?

18 A Yes.

19 Q Would you classify that space, which is  
20 now parking space number 2, during the time that  
21 you parked there to be a common element?

14 (Pages 50 to 53)

Page 54

1       **A Say that again please.**

2       **Q** What is now parking space number 2 was  
3 an area in the association's parking garage that  
4 was unmarked other than these lines that you  
5 indicated were no parking. Did you understand or  
6 do you now understand that that area was a common  
7 element at the time you were parking on it?

8       **A I did.**

9       **Q** And because it was common element and  
10 because you were making regular use of it did you  
11 understand that to be a violation of the  
12 association's governing documents?

13       **A The association knew that I was parking**  
14 **there for all those years.**

15       **Q** That's an answer but that's not the  
16 answer to my question. My question is did you  
17 understand that you were parking in the  
18 association's common elements in violation of its  
19 governing documents? Did you understand that?

20       **A I did not.**

21       **Q** Did you offer to compensate the

Page 55

1 association in any way for parking in common  
2 elements of the condominium?

3       **A Why would I do that? No.**

4       **Q** Was there any other place in the garage  
5 which was an unmarked space or a means of ingress  
6 or egress that was being used as a parking space by  
7 any other unit owner, to the best of your  
8 knowledge?

9       **A The space next to number 2, that would**  
10 **be space number 3, which was the illegal auction**  
11 **space number 3, was occupied by various people.**

12       **Q** Do you know who occupied that space?

13       **A Well, the last person who occupied the**  
14 **space was Ambassador Wilkins.**

15       **Q** How do you know that?

16       **A Because he parked his motorcycles there,**  
17 **he and his wife.**

18       **Q** For what period of time did Ambassador  
19 Wilkins park his motorcycles in what is now space  
20 number 3?

21       **A Years I guess. I don't know exactly the**

Page 56

1       **dates, but --**

2       **Q** Was a motorcycle regularly parked in  
3 what is now space number 3?

4       **A Yes.**

5       **Q** And is space number 3 closer to the  
6 elevators or farther from the elevators in what is  
7 now space number 2? That's the best way I can  
8 describe where it is in the garage. We'll get to a  
9 map of the garage later, but I'm just trying to get  
10 a general sense.

11       **A I lost the number there.**

12       **Q** What is now space number 2 is where you  
13 testified you parked?

14       **A Yes.**

15       **Q** And is space number 3 closer to the  
16 elevators or --

17       **A No, it's one space away from the**  
18 **elevator.**

19       **Q** Was that within this area that you felt  
20 indicated no parking?

21       **A Yes, the stripes were on that area as**

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1       **well.**

2       **Q** Now, you brought this lawsuit against  
3 the association in September of 2004. Does that  
4 time frame sound right to you? I'm going to show  
5 you what we're going to mark as Defendant's Exhibit  
6 2 and ask you if you can identify that document.

7       (Exhibit 2 marked.)

8       (Pause for document examination.)

9       **Q** The question pending is do you recognize  
10 that document?

11       **A I'm familiar.**

12       **Q** You are familiar with that document?

13       **A Yes.**

14       **Q** And if you turn to page 14 of the  
15 document which is entitled Verification by  
16 Plaintiff, is that your signature at the top of the  
17 page?

18       **MR. JOHNSON:** Do you want me to help  
19 you?

20       **A What is Brim Inc., doing there and**  
21 **what's Travelers Insurance Company?**

15 (Pages 54 to 57)

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1 answer the question.

2 MR. VIA: He's not answering the  
3 question that I asked.

4 MR. JOHNSON: He is. He's telling you  
5 about evidence. You asked him as broad and  
6 open-ended a question as you possibly could. He's  
7 got to have the opportunity to answer.

8 MR. VIA: Okay. I think he's had the  
9 opportunity to answer.

10 MR. JOHNSON: I don't think so because  
11 you interrupted him.

12 Q Mr. Harnett, if there's anything more  
13 you need to add, then please do so.

14 A Well, give me a minute to reflect on  
15 what you said, but I'm trying to be responsive but  
16 I also see that I should cover myself and explain  
17 all the facts that the president of the board of  
18 directors knew where I was parking.

19 Q That would be Mr. Joy?

20 A Yes. No, that was -- the president then  
21 was Ambassador Stuart Bernstein. The residential

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1 and plus I had no comment from anyone else and I  
2 don't know if there were -- well, that's my answer.  
3 It was good enough for me and I didn't ask him to  
4 put anything in writing.

5 Q Let me just show you what -- 5 and ask  
6 you if you can identify if you've ever seen that  
7 document before?

8 (Exhibit 5 marked.)

9 A I've seen this.

10 Q Have you seen that document?

11 A Yes, I have.

12 Q Can you tell me the circumstances in  
13 which you've seen it?

14 A I'm not certain when I saw it but I've  
15 seen it.

16 Q When did you first see it?

17 A I don't know, I just told you I'm not  
18 certain but I don't know when I first saw it but I  
19 do recall.

20 Q Do you know who provided it to you?

21 A Someone might have. I don't know.

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1 or the manager of the condominium, Brim in the form  
2 of Bernie Robinson, knew exactly where I was parked  
3 and I spoke with him about what could we do about  
4 these people that parked to block me in, do we tow  
5 them. I talked to the residential directress and  
6 she said that she did call to try to get someone to  
7 tow away cars from time to time but that she  
8 couldn't get anyone to take the responsibility of  
9 driving the car out of there, and they just delayed  
10 me from getting my car out until they tried to find  
11 out who owned the car that was parking there.

12 Q Now, you said that Ambassador Bernstein  
13 had a conversation with you about the parking  
14 space?

15 A At one time Ambassador Bernstein said  
16 that they reviewed my parking situation and he said  
17 you've got your space, you can park there.

18 Q When you said he reviewed it, did you  
19 receive anything in writing from Ambassador  
20 Bernstein on behalf of the board of directors?

21 A No, a handshake was good enough for me

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1 Q You can't recall when you first saw this  
2 or the circumstances surrounding when you first saw  
3 it?

4 A No.

5 Q Was it produced in discovery in this  
6 case or had you seen it prior to that?

7 A I'm not certain.

8 Q Calling your attention to the contents  
9 of that document, would you dispute the accuracy of  
10 Ambassador Bernstein's recollection of his  
11 discussions with you?

12 MR. JOHNSON: Objection to the form of  
13 the question. You can answer.

14 A Well, sir, it says I have no  
15 recollection that while I was president and/or a  
16 member of the board of Washington Harbour  
17 Condominium Association that the board authorized  
18 Bill Harnett, or anyone else in the building, to  
19 park in the common area adjacent to his parking  
20 space or any other common area in the garage. And  
21 this doesn't mean that Bernstein didn't authorize

25 (Pages 94 to 97)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION

WILLIAM J. HARNETT,

Plaintiff,

v.

THE BOARD OF DIRECTORS OF  
THE WASHINGTON HARBOUR  
CONDOMINIUM UNIT OWNERS'  
ASSOCIATION, *et al.*,

Defendants.

Civil Action No. 2004 CA 007452 B  
Calendar 4 – Civil I  
Judge Herbert B. Dixon, Jr.

**ORDER**

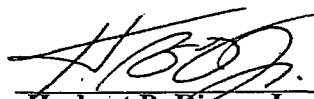
(Granting in Part and Denying in Part Defendants' Motions to Dismiss)

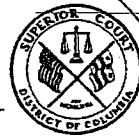
Pursuant to Super. Ct. Civ. R. 58 and for the reasons stated in the Memorandum Opinion contemporaneously issued this date, it is by the court this 12<sup>th</sup> day of January 2006

**ORDERED**, that defendants' motions to dismiss the complaint as to the Board and the individual defendants shall be and are hereby **GRANTED**; and it is further

**ORDERED**, that defendants' motions to dismiss Counts I and II of the complaint as to the Association shall be and are hereby **GRANTED**; and it is further

**ORDERED**, that defendants' motions to dismiss Counts ~~III~~ IV and V of the complaint as to the Association shall be and are hereby **DENIED**.

  
Herbert B. Dixon, Jr.  
Judge



*Informal*  
*nm*  
*ppk*  
*hghs*

Order filed and distributed electronically

Copy to: See Next Page

Exhibit 3

Copy to:

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On or about July 22, 2003, the Board created the Parking Committee ("Committee") to address the need for additional residential parking spaces. The Committee included defendants Cathi Bostic and Peter Bernard. Shortly before the Board's meeting on September 3, 2003, the Committee submitted its written report to the Board for review.

On August 18, 2004, the Board sent a memo titled "Auction of License for Use of Five New Parking Spaces" to Condominium unit owners. According to the memo, the Board made a determination that it was in the best interest of the Association to create five new parking spaces from the common elements in the garage and auction them off to the unit owners. The memo also provided rules and procedures for those wishing to participate in the auction, including provisions that the auction would be held on September 15, 2004 at 9:00 a.m. in the Condominium's parking garage, and would be limited to unit owners in good standing as of September 10, 2004.

On or about August 26, 2004, a majority of unit owners presented to the Board a petition in opposition to the auction. On September 8, 2004, the Board unanimously decided to proceed with the auction.

The auction took place on September 15, 2004. The plaintiff attended the auction to ~~contest the legality of the new parking spaces and the auction. The plaintiff did not bid on any of~~ the parking spaces. The five new parking space licenses were sold out at the auction. The auction winners were defendants Peter Bernard (unit owner / one space), Cathi Bostic (not a unit owner / one space), Robert Pence (unit owner / two spaces) and Lynne Wasserman (unit owner / one space).

On September 22, 2004, the Association began repairing areas of plaintiff's units 206, 207, and 208 that were damaged by water. The repairs included replacement of carpets, terrace

doors, terrace skylight, and repairing of electrical wiring. However, repair work ceased because, among other reasons, the correct carpeting had to be reordered.

On September 29, 2004, the plaintiff filed his initial complaint.

On October 25, 2004, with repair work on the plaintiff's units still outstanding, the plaintiff wrote to the Condominium Residential Director, who reports to but is not a member of the Board. In the letter, the plaintiff reminded the Residential Director of the incomplete repair work, including the activation of the plaintiff's security system. The plaintiff also expressed concern that the failure to complete the repairs was retaliatory or punitive in nature by the Association or the Board for the plaintiff's complaint concerning the new parking spaces.

On October 27, 2004, the District of Columbia's Building and Land Regulation Administration submitted to the Association a "Notice of Violation and Notice to Abate" that cited provisions of the District of Columbia Municipal Regulations ("DCMR"), namely, 11 DCMR § 2117 (1995) and 12A DCMR § 105.1 (1999 supp.). 11 DCMR § 2117 details access, maintenance, and operation requirements of parking spaces. 12A DCMR § 105.1 empowers a D.C. code official to enforce the District of Columbia Construction Code, including the official's responsibility of receiving and approving construction permit applications, per 12A DCMR § 105.2 (1999 supp.). In this case, both violations by the Association required correction by obtaining the proper construction permits from the DCMR.

On October 28, 2004, the Residential Director responded by letter to the plaintiff's October 25, 2004 letter concerning the outstanding repair work. The Residential Director's letter stated that although some repairs were unfinished, most of the repairs had been completed. The Residential Director attributed the delay in ordering the correct carpet to a cost increase, an increase that needed Board approval. Finally, the Residential Director stated that the failure to

repair the plaintiff's security system was partly due to the plaintiff's failure to provide the system's code number.

On November 12, 2004, the defendants filed motions to dismiss. The plaintiff filed his opposition to these motions on December 9, 2004.

On February 9, 2005, the plaintiff filed an amended complaint, adding two additional counts, for a total of five counts, namely,

1. The defendants knowingly and willfully violated the District of Columbia Condominium Act of 1976 and Condominium Instruments by exceeding the authority granted to the Board when it created the parking committee, created and sold the five new parking spaces, and held an "unlawful" auction purporting to allow licensees to occupy portions of the general common elements to the exclusion of all other unit holders.
2. The Parking Spaces created by the Board, purportedly on behalf of the Association, do not comply with applicable laws and regulations of the District of Columbia relating to private parking spaces, and access and egress thereto.
3. The actions of the Board, the Association, and certain individual defendants constitute a breach of the fiduciary duty owed by them to plaintiff and others similarly situated as a member of the Association.
4. The defendants, by approving the sale of the new parking spaces, have intentionally interfered with plaintiff's use of his property, causing the plaintiff to suffer damages.
5. The Association, via the Board, has knowingly and willfully breached its obligations and agreements to make necessary repairs to plaintiff's unit and has taken retaliatory measures against plaintiff for initiating the instant action by making his home uninhabitable.

On February 23 and 25, 2005, the defendants filed replies to plaintiff's opposition.

## **II. DISCUSSION**

The defendants make two primary arguments in support of their motions to dismiss. First, the defendants argue that the Association is the sole legal entity against which the plaintiff can bring his tort and contract suit, and that all other defendants should be dismissed. Second, the defendants argue that the Board acted within the legal boundaries set by the Condominium

Instruments and the District of Columbia's Condominium Act when the Board converted sections of the parking garage common elements into limited common elements<sup>1</sup> in the form of five new parking spaces, and when the Board sold licenses for the parking spaces in an auction.

**A. Whether The Board and Individual Directors Are Proper Defendants**

The defendants argue that the complaint should be dismissed as to the Board and the individual directors (Joy, Lerner, Little, O'Donnell, Pence) because the Association is the only proper defendant that the plaintiff is permitted to sue for the underlying action.

The plaintiff contends that his claims against the Board and the individual directors are proper. The plaintiff argues that his action does not arise from a contract. Rather, the plaintiff argues, he is seeking an order declaring the license agreements illegal and void, and for equity relief against the Board. Furthermore, the plaintiff argues that all of the named defendants participated in a concerted effort to circumvent the Condominium Instruments in order to enrich themselves with new parking spaces to the detriment of other unit owners, making joinder of these defendants desirable and necessary.

This member of the court concurs with the defendants; the Association is the only proper party against whom the plaintiff can bring this suit. D.C. Code § 42-1903.09 (c) states in relevant part: ~~“An action arising from a contract made by or on behalf of the unit owners'~~ association, its executive board, or the unit owners as a group, shall be brought against the association . . . .” *Id.* Likewise, D.C. Code § 42-1903.09 (a) states in relevant part: “An action for tort alleging a wrong done: (1) by any agent or employee of the declarant or of the unit owners' association . . . shall be brought against . . . the association . . . .” *Id.* This member of

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<sup>1</sup> The District of Columbia Condominium Act defines a limited common element as “a portion of the common elements reserved for the exclusive use of those entitled to the use of 1 or more, but less than all, of the units.” D.C. Code § 42-1901.02 (19) (2001).

the court does not find any ambiguity in the referenced statutory language. Consequently, the complaint herein should be dismissed as related to the Board and the individual directors.

**B. Whether the Individual Defendants Owning Licenses to the New Parking Spaces Are Proper Defendants**

The defendants argue that the individual defendants who won licenses for exclusive use of the new parking spaces (Bernard, Bostic, Pence, and Wasserman) should be dismissed from this instant case. The defendants rely on *Hall v. Ford Enters., Ltd.*, 445 A.2d 610 (D.C. 1982), which states in relevant part:

In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of a special relationship between the parties.

*Id.* at 611 (footnote omitted). The defendants also rely on *Whetzel v. Jess Fisher Mgmt. Co.*, 108 U.S. App. D.C. 385, 388, 282 F.2d 943, 946 (1960) which states that “[a]n essential element of tort liability is the breach of a duty of care owed.” *Id.* at 388, 282 F.2d 946. The defendants argue that the plaintiff has failed to demonstrate the existence of a duty owed by the individual defendants to the plaintiff, or a special relationship between the defendants and the plaintiff.

The defendants further argue that D.C. Code § 42-1903.09 (a) and (c) also apply to the individual defendants. The defendants argue that the purpose of these provisions is to prevent aggrieved unit owners from escalating disputes with the Association into blood feuds against individual residents. Lastly, the defendants argue that the plaintiff’s lawsuit is premised on two documents by the Association, namely, (1) the parking space license agreement and (2) the Condominium Bylaws, which is “a contract that governs the legal rights between the Association and unit owners.” *Lacy v. Sutton Place Condo. Ass’n, Inc.*, 684 A.2d 390, 393 (D.C. 1996) (quotation omitted). Therefore, the defendants argue, the Association is the only proper defendant in this case, and the individual defendants should be dismissed.

The plaintiff asserts that by signing a contract authorized by the Board, the individual defendants have created a “special relationship” with the plaintiff because they now have exclusive use and occupation of the common elements to the exclusion of the plaintiff and other unit owners. The plaintiff argues that these defendants cannot shield themselves from the jurisdiction of the court. The plaintiff further argues that the individual defendants are proper parties to this complaint because any court order in this case shall affect their interest, use or enjoyment of the purported licenses.

This court concludes that the complaint herein should be dismissed as to the individual defendants. Pursuant to D.C. Code § 42-1903.09 (a) and (c), the only legal and proper defendant subject to the plaintiff’s action is the Association.

### **C. Whether the Complaint Should be Dismissed As Related to the Association**

#### **Count I**

The plaintiff, seeking prohibition of the exclusive use of the new parking spaces, argues that the Board knowingly and willfully violated the Condominium Act and the Condominium Instruments when the Board converted certain parts of the common elements into five new parking spaces (limited common elements). The plaintiff asserts that the Condominium Act and the Condominium Instruments, together, do not authorize the Board’s course of action regarding the new parking spaces. Specifically, the plaintiff relies on D.C. Code § 42-1903.01 (b) (2001), which states in relevant part,

The bylaws may delegate to [the Board], inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners’ association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners’ association or its executive board may delegate to a managing agent.

*Id.* The plaintiff also relies on the Condominium Act § 42-1903.01 (c), which states in relevant part:

The bylaws shall provide whether or not there shall be officers in addition to the members of the executive board . . . [and] may delegate to such additional officers, inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners' association.

*Id.* Accordingly, the plaintiff contends that the Bylaws do not explicitly authorize the Board to delegate its powers and responsibilities to committees composed of non-Board member or non-Unit Owners, nor does it grant the Board the power to create new parking spaces and auction licenses for them. Furthermore, the plaintiff argues that the Board engaged in actions that amount to the unlawful and exclusive use of common elements to benefit certain individuals, citing *Ridgely Condo. Ass'n v. Smyrnioudis*, 681 A.2d 494 (Md. 1996).

The defendants counter that the Board did not exceed its powers regarding the new parking spaces. The defendants rely on *Johnson v. Hobson*, 505 A.2d 1313 (D.C. 1986), for the proposition that it is well established that the governing body of a condominium enjoys broad authority in regulating the affairs of the property. The defendants also cite to D.C. Code § 42-1903.08 (a)(6) which gives the Association the “[p]ower to regulate the use, maintenance, repair replacement, or modification of common elements.” Furthermore, the defendants argue that the Condominium Instruments lack any provision that prohibits the challenged actions, and that the Condominium Bylaws expressly authorize such action. The defendants note that pursuant to Bylaw Art. III, Sec. 1 (o), the Board may, “[i]n its sole discretion, designate from time to time certain Common Elements as ‘Limited Common Elements’ and impose such restrictions and conditions on the use thereof as the Board of Directors deems appropriate.” *Id.* The defendants also refer to Bylaw Art. III, Sec. 20, which states in relevant part:

The Board of Directors is hereby irrevocably appointed as agent and attorney-in-fact for the Unit Owners of all of the Units . . . to manage, control and deal with the interests of such Unit Owners in the Common Elements of the Condominium to permit the Board of Directors to fulfill all of its powers, rights, functions, and duties. . .

The Board of Directors may grant and accept easements and licenses pursuant to D.C. Code § 45-1848 (b)<sup>2</sup> of the [Condominium] Act.

*Id.*

This member of the court concludes that the combination of Condominium Act § 42-1903.08 (a)(6), Bylaw Art. III, Sec. 1 (o) and Bylaw Art. III, Sec. 20 grants discretionary authority to the defendant to convert common elements into parking spaces for exclusive use. Consequently, the court will dismiss Count I of the complaint as related to the Association.<sup>3</sup>

### **Count II**

In Count II, the plaintiff argues that the parking spaces created by the Board do not comply with applicable laws and regulations of the District of Columbia relating to private parking spaces and access and egress thereto. The plaintiff refers to the “Notice of Violation and Notice to Abate” that the Association is in violation of 11 DCMR § 2117 and 12A DCMR § 105.1. The plaintiff points out that the violation is applicable to the new parking spaces because 11 DCMR § 2118.9 (1995), in full, states as follows:

Except where otherwise indicated, whenever the word “all” is followed by the words “parking spaces” in the same sentence, the parking requirements as specified shall apply to all parking spaces, whether or not the spaces are required by this chapter. The requirements shall also apply to both accessory parking spaces and parking spaces that are constructed as a principal use unless otherwise specified.

*Id.* Accordingly, the plaintiff argues that the laws applicable to the new parking spaces should

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<sup>2</sup> D.C. Code § 45-1848 has since been recodified as D.C. Code § 42-1903.08 (2001).

<sup>3</sup> The court also grants defendants’ motions to dismiss Count I as related to the Association for the plaintiff’s lack of standing. The plaintiff was not harmed by the auction of the parking spaces because he did not participate in the auction.

preclude their use as currently configured and located. Furthermore, the plaintiff argues, the new parking spaces are unsafe, and make it impossible for existing parking space owners and the plaintiff to use their parking spaces or common elements according to the original condominium instrument.

The defendants argue that the plaintiff has no standing to privately enforce District of Columbia municipal parking code violations. Since the violation citation is addressed to the Association and not the plaintiff, the defendants assert that the violation is a legal matter between the Association and the D.C. government. The defendants further argue that the mere issuance of the violation ticket does not constitute or confirm the alleged “illegality” of the parking spaces. Also, the defendants argue that under the doctrine of primary jurisdiction, the plaintiff’s action should be stayed pending the determination of the legality of the parking spaces by the appropriate administrative agency. *District of Columbia v. L.G. Indus., Inc.*, 758 A.2d 950, 955-956 (D.C. 2000).

This member of the court agrees with the defendants. The Bylaws designate the Board “to act for the Association [and, consequently, all unit owners,] in governing the Condominium and in managing its affairs and business.” Bylaws, Art. III, Sec. 1. As the agent, the Board is responsible in “defending [legal] proceedings . . . instituted on behalf of, or against, the Association.” Bylaws, Art. III, Sec. 1 (h). In that the violations have been issued to the Association, these issues must be resolved between the Association and the D.C. government. Therefore, Count II of the complaint shall be dismissed as related to the Association.

#### **Counts III and IV**

In his third count, the plaintiff claims that the defendants’ actions constitute a breach of fiduciary duty. The plaintiff argues that the defendants engaged in conduct designed to satisfy

their own interest with respect to acquiring and using additional parking spaces, and that the Condominium Instruments do not permit such conduct.

The defendants argue that the plaintiff's allegations and legal conclusions do not state a claim for breach of fiduciary duty. The defendants argue that the facts show that the defendants simply did what they had the legal right to do under statutory law and the Condominium Instruments, and that such conduct does not violate the defendants' fiduciary duty to unit owners, including the plaintiff.

In his fourth count, the plaintiff argues that the Board, by approving the sale of new parking spaces on common elements, has intentionally interfered with the plaintiff's use of his property, including use of his parking space and of the common elements in the parking garage. The plaintiff argues that the defendants' actions are knowing, willful and made in an effort to obtain personal gain with reckless disregard of the plaintiff's rights.

The defendants counter that Count IV is another instance in which the plaintiff fails to state a claim, because the Board acted pursuant to their legal rights. The defendants rely on *Steinkamp v. Hodson*, 718 A.2d 107 (D.C. 1998), which held that defendant landowner failed to state a claim for tortious interference with property rights where the plaintiff neighbor merely enforced her interest in an easement. The *Steinkamp* court stated:

To the extent that [plaintiff] did have a right to enforce her interest in the easement, the [defendants] have not made out a *prima facie* case of tortious interference with their own property rights, because even though plaintiff's actions were clearly intentional, the [defendants] have not established that [plaintiff's] actions were unreasonable.

*Id.* at 112.

The defendants argue that this case is similar to the *Steinkamp* case in that the Board, like the *Steinkamp* plaintiff, is only exercising its right to convert a portion of the common elements

into parking spaces and to license the use of those spaces per the Condominium Instruments and the Condominium Act. The defendants argue that consequently, plaintiff Hartnett fails to state a claim for intentional interference with property rights.

The court is unable to conclude, based on the present record, that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *See Owens v. Tiber Island Condo. Ass'n, et al.*, 373 A.2d 890 (D.C. 1977). Whether plaintiff has proffered sufficient evidence to support his claims on these counts is more appropriately addressed upon a motion for summary judgment after completion of discovery. Therefore, this court shall deny defendants' motions to dismiss Count III and IV of the complaint as related to the Association.

#### **Count V**

The plaintiff argues that the Association, in retaliation against the plaintiff for filing the instant action, has knowingly and willfully failed to complete necessary repairs to the plaintiff's residential unit, making it uninhabitable. The plaintiff argues that defendant consequently is failing to carry out its obligations defined in the Condominium Instruments and the Condominium Act.

The defendants argue that none of the outstanding work to the plaintiff's unit should be construed as rendering the unit uninhabitable. Furthermore, defendants argue that the plaintiff is complicit in the Association's inability to complete any outstanding repair work for failing to provide the workers with the information needed to proceed with the repair work.

Once again, the court is unable to conclude that plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *Id.* Accordingly, the motions to dismiss count V of the complaint as related to the Association shall be denied.