

District of Columbia
Board of Zoning Adjustment

Appeal of William J. Harnett
Case No. 17615

Department of Consumer and Regulatory Affairs

Exhibits

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17615

EXHIBIT NO. 22

Board of Zoning Adjustment
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**District of Columbia
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**Department of Consumer and Regulatory Affairs
Exhibit Index**

DCRA Number	Item
001	Building Permit No. 101019
002	Plans submitted with application for Building Permit No. 101019
003	Parking Space No. P-116 (showing elevator sign No. 1)
004	Parking Space No. P-116 - showing elevator sign No. 2
005	Parking Space P-1 (empty)
006	Measurement No. 1 – Space P-1 – Length
007	Measurement No. 2 – Space P-1 – Width
008	Parking Spaces P-111 & P-112 (occupied)
009	Parking Space P-112 - Close
010	Measurement No. 4 – Space P-112 – Length
011	Measurement No. 5 – Space P-112 – Width
012	Measurement No. 7 – Space P-112 – Height
013	Measurement No. 3 – Space P-112 – Wall to Front Bumper - A
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015	Parking Spaces P-2 & P-3 (semi-occupied) (rear view)
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017	Measurement No. 6 – Aisle from P-112 to P-2
018	Parking Space P-3 – showing slanted column
019	Parking Space P-143 – showing slanted column
020	Measurement No. 9 – Space P-2 - Length
021	Measurement No. 8 – Space P-2 – Height (overhang)
022	Measurement No. 11 – Space P-2 – Height (side pipe)
023	Measurement No. 12 – Aisle - Height
024	Measurement No. 10 – Aisle from P-2 to P-142
025	Measurement No. 13 – Aisle – Width (column to column)
026	Parking Spaces P-2 & P-3 (from back of space to column - 1)
027	Parking Spaces P-2 & P-3 (from back of space to column - 2)
028	Order and Memorandum Opinion – <i>Harnett v. Bd. of Directors of the Washington Harbour Condominium Unit Owners' Assoc.</i> , D.C. Sup. Ct. Case No. 2004 CA 007452 B, Jan. 12, 2006



Department of Consumer and Regulatory Affairs

Building and Land Regulation Administration

941 North Capitol Street N.E. Room 2100

Washington D.C. 20002

B

Tel:(202) 442-4470

Fax:(202) 442-4862

Building Permit

THIS PERMIT IS VALID ONLY FOR THE PREMISES
OF THE PROJECT ADDRESS

PERMIT NO. 101019

DATE: 11/17/2006

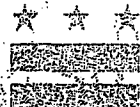
ADDRESS OF PROJECT: 3030 K ST NW		SSL: SQ: 1173 WARD: 2 ZONE R-1-B	LOT: 102
DESCRIPTION OF WORK: STRIPING OF FIVE (5) NEW PARKING SPACES IN OWNER'S PARKING GARAGE IDENTIFIED IN YELLOW AS SPACES P1 - P5 ON THE ATTACHED PLANS			
PERMIT TYPE: ALTERATION AND REPAIR	PLANS (Y/N): Y	EXISTING USE: RESIDENTIAL APARTMENT	PROPOSED USE: Residential Apartment
PERMISSION IS HEREBY GRANTED TO OWNER: WASHINGTON HARBOUR UNIT OWNERS		PERMIT FEE: \$33.00	
AGENT NAME: JOE LAPAN 301-961-5172			
CONDITIONS / RESTRICTIONS: ALL CONSTRUCTION DONE ACCORDING TO THE CURRENT BUILDING CODES; ALL CONSTRUCTION DONE ACCORDING TO THE CURRENT ZONING REGULATIONS;			
TO REPORT WASTE, FRAUD OR ABUSE BY ANY D.C. GOVERNMENT OFFICIAL, CALL THE D.C. INSPECTOR GENERAL AT 1-800-521-1639;			
DIRECTOR: <i>Patrick Canavan, Psy. D.</i> Dr. Patrick Canavan, Psy. D.	PERMIT CLERK: <i>[Signature]</i>		EXPIRATION DATE: 11/17/2007

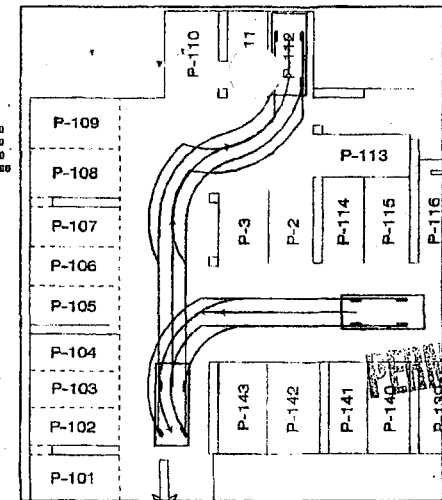
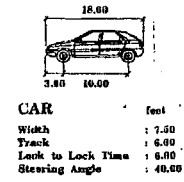
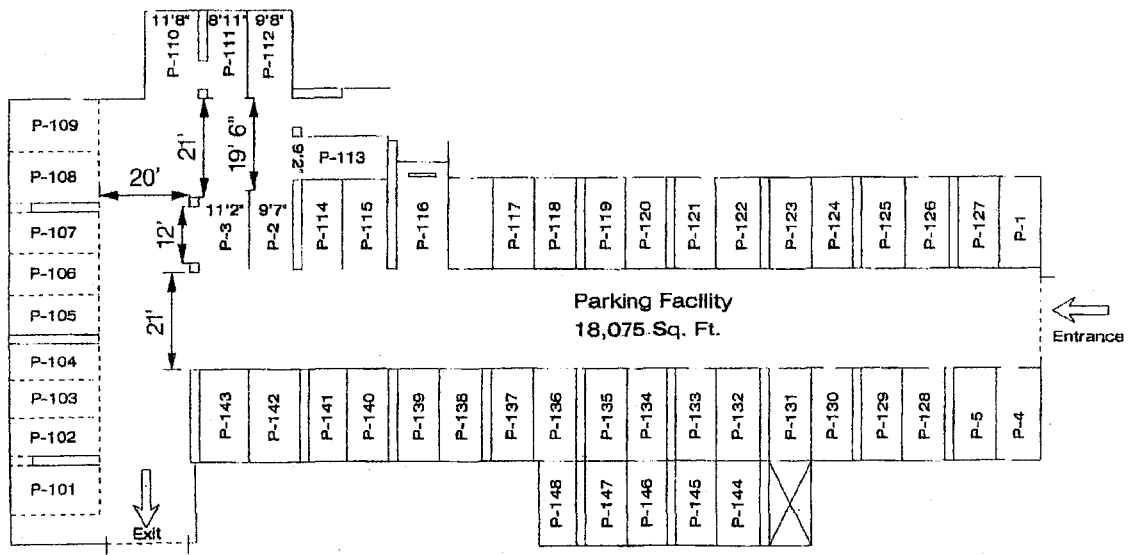
CONDITIONS: As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all the work authorized by this permit and to require any change in construction which may be necessary to insure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under the Permit must start within one (1) year of the date appearing on this permit or this permit is automatically void. If work is not started, any application for partial refund must be made within six months of the date appearing on this permit.

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT ADDRESS OF WORK UNTIL WORK IS COMPLETED.

NOTIFY THE BUILDING INSPECTOR THE DAY THE WORK STARTS. PHONE: (202)442-4641 941 NORTH CAPITOL ST NE WASHINGTON DC 20002.

A separate permit is required for all Plumbing, Refrigeration, Gas Fitting, and Electrical Work.





Washington Harbour Condominium Washington, District of Columbia

Rendered By: L. Fowler Woodward
 Designed By: P. Foy

Scale: 1" = 20'
 Date: Oct. 16, 2006
 Job No.: 2006 1008
 File Name: 2006-1008-Traffic-Layout.dwg
 Location: District of Columbia







DCRA 005

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7 8 9 10 11 9 FT 1 2 3 4 5 6 7



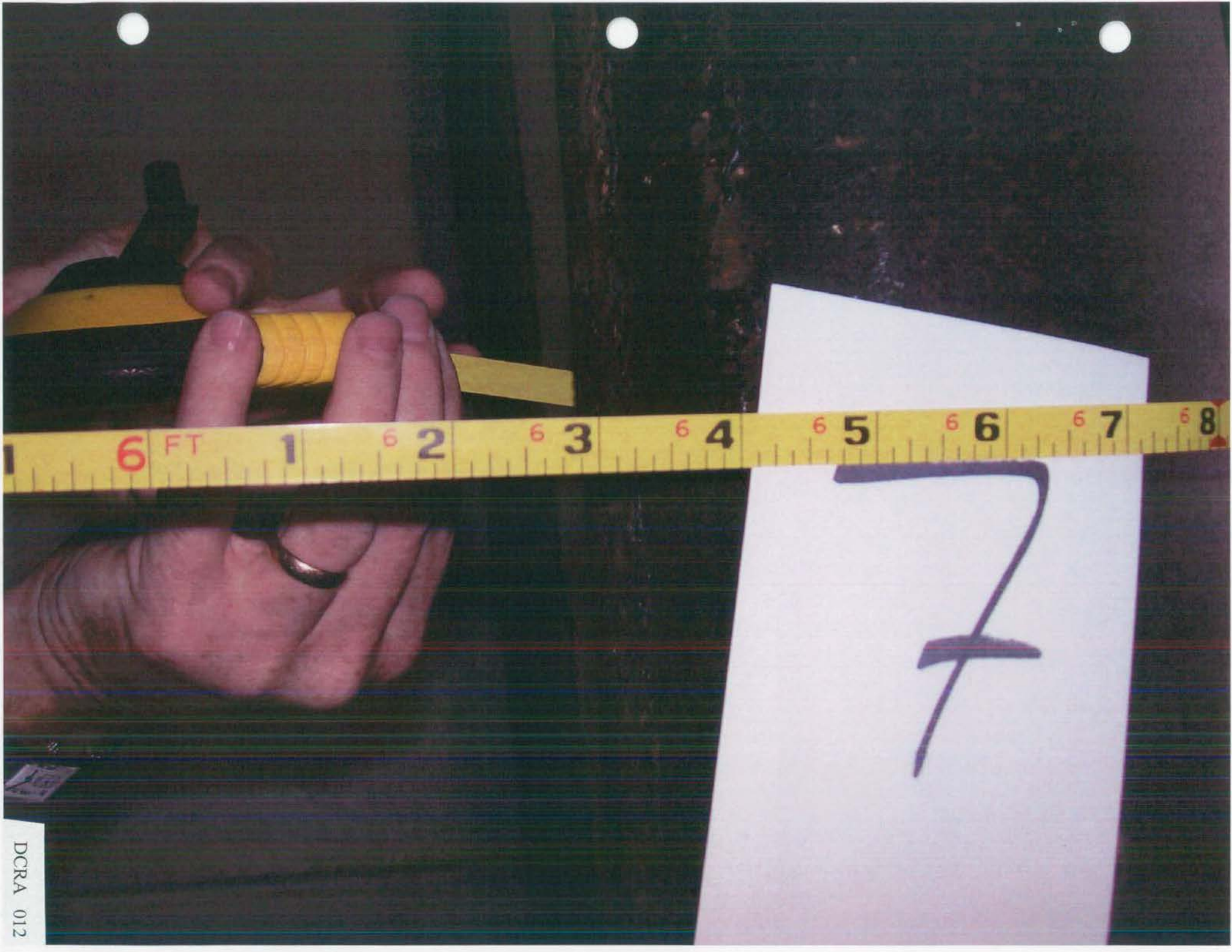
DCRA 008

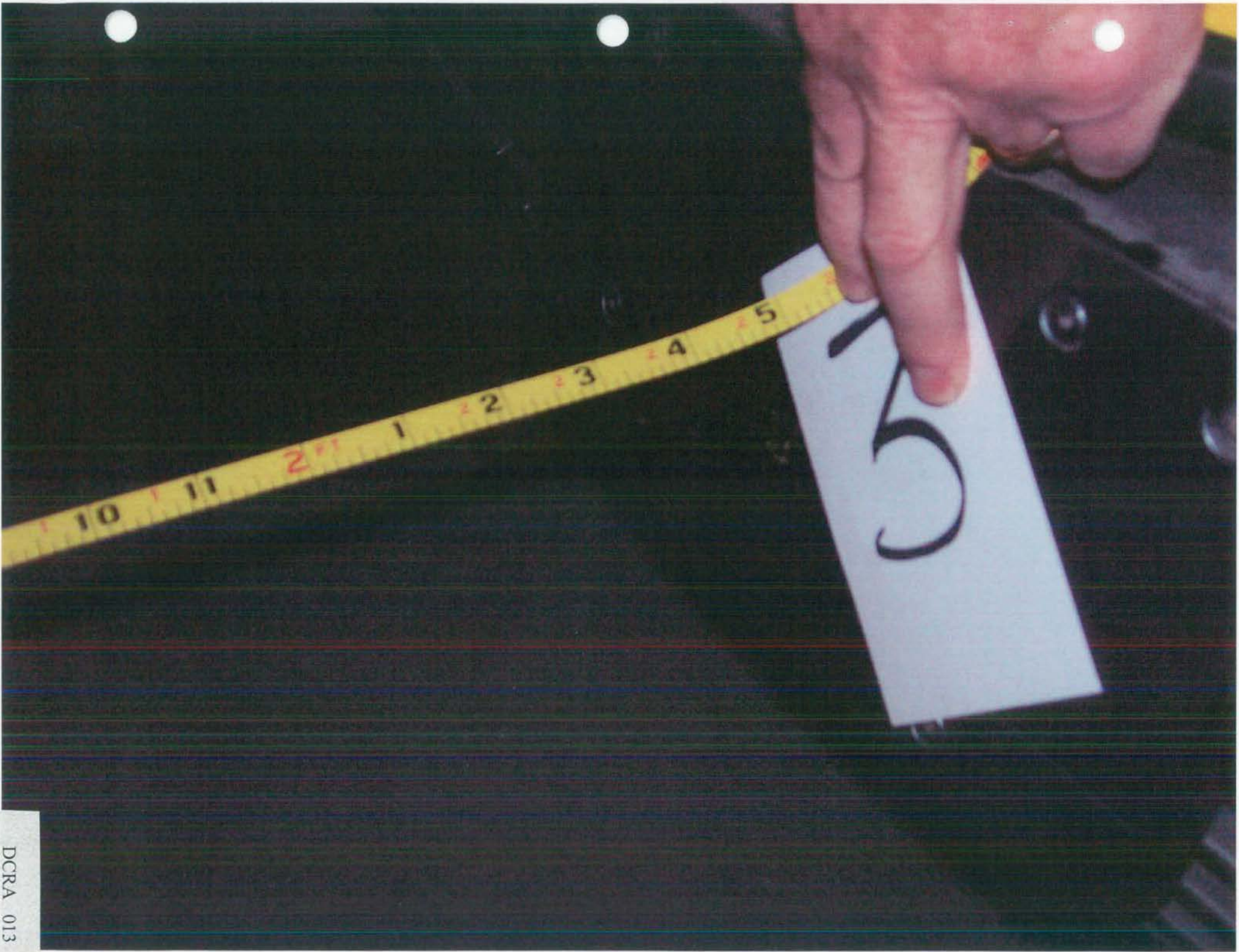


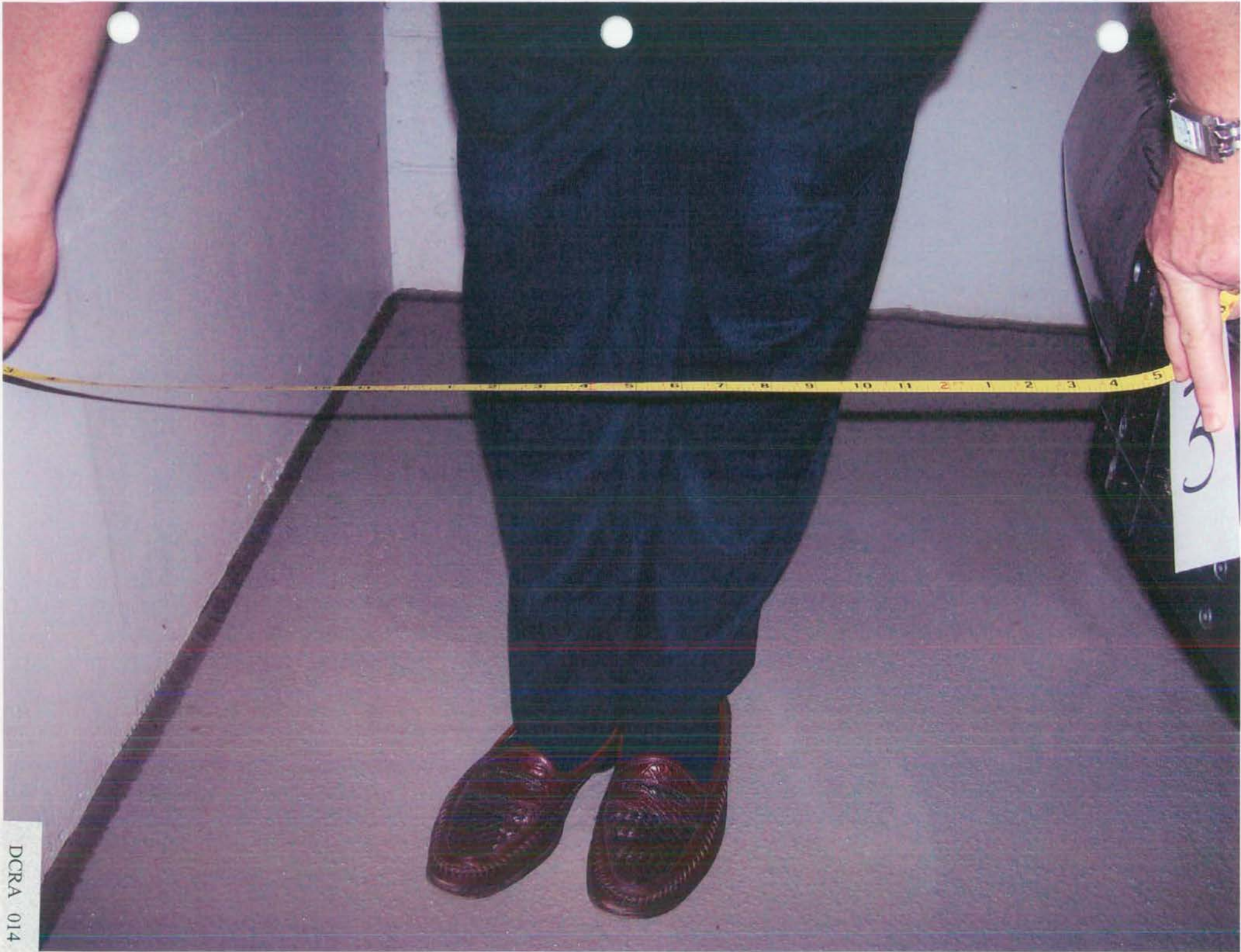


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DCRA 014



DCRA 015

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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 12th 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
with
apt
high*

Order filed and distributed electronically

Copy to: See Next Page

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

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 elements¹ 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

¹ 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)² 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.³

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

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

³ 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.