

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

In Re Appeal of:

William J. Harnett

v.

**Zoning Administrator
Department of Consumer and Regulatory
Affairs**

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)
) **BZA Appeal No. 17615**
) **ANC 2E**
) **Public Hearing: July 31, 2007**
) **(Continued from June 5, 2007**
) **And July 17, 2007)**

**APPELLANT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**
Submitted September 7, 2007

APPEAL NO. 17615 of William J. Harnett, pursuant to 11 DCMR §§ 3112, from the November 17, 2006, administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issuance Building Permit No. 101019, permitting the alteration and repair, including striping five (5) new parking spaces in the owner's parking garage identified in yellow as spaces P-1 through P-5. The subject property is located in the W-3 District at premises 3030 K Street, N.W. (Square 1173, Lot 102).

HEARING DATES: June 5, 2007, July 17, 2007, and July 31, 2007.

DECISION DATE: October 2, 2007.

DECISION AND ORDER

William J. Harnett ("Mr. Harnett" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") challenging the decision of the Zoning Administrator to approve the issuance, as a matter of right, of Building Permit No. 101019, permitting the alteration and repair, including striping five (5) new parking spaces, in the residential parking facility at the Washington Harbour Condominium. The permit was applied for and issued on November 17, 2006, and authorized the Washington Harbour Condominium Unit Owners' Association, Inc. ("WHCA" or "Intervenor") to perform the alteration and repair, including the striping, which had actually been done in 2004. Based on his review of a copy of a scaled drawing, with handwritten additions made by WHCA, the Zoning Administrator determined that the alteration and repair referenced in the permit conformed with the Zoning Regulations. Mr. Harnett's appeal challenged that determination.

**BOARD OF ZONING ADJUSTMENT
District of Columbia**

CASE NO. _____

EXHIBIT NO. _____

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17615
EXHIBIT NO. 34

PRELIMINARY MATTERS

The Parties

The parties to the proceeding were William J. Harnett, represented by Vernon W. Johnson, III, Esq. of Nixon Peabody LLP; the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), represented by Dennis Taylor, Esq.; and Intervenor Washington Harbour Condominium Unit Owners' Association, Inc., represented by Emily J. Vaia, Esq. and Joseph P. Lapan, Esq. of Linowes and Blocher LLP. The Board granted WHCA leave to intervene in the appeal. ANC 2E was an automatic party pursuant to 11 DCMR § 3199.1 and did not appear at the hearing, but made a written submission into the record which was dated June 28, 2007.

Motion to Dismiss At the hearing, the Intervenor moved to dismiss the appeal, claiming it was untimely and procedurally improper. The Board considered the motion to dismiss fully, and denied it.

ANC Report In its report dated June 28, 2007, ANC 2E indicated that, at a regularly scheduled meeting and with a quorum present, it voted to support the position of the Appellant on this appeal. At the meeting, ANC 2E had noted its concern that Mr. Harnett's vehicle had been blocked in its parking space for an extended period of time due to the addition of spaces.

Appellant's Case Appellant presented testimony from Mr. Harnett; Michael P. Albers, P.E., who was qualified as an expert in parking measurement and zoning issues; and Ellen M. McCarthy, who was qualified as an expert in land use and planning and the Zoning Regulations.

Motion to Compel On the third day of the hearing, Mr. Harnett moved to compel the Intervenor and DCRA to produce correspondence between the former Zoning Administrator and the law firm representing WHCA. The motion was made after an acknowledgement of that correspondence on the second day of the hearing and WHCA's counsel made a representation that the correspondence and documents would be produced and introduced in evidence (July 17, 2007 Hearing Trans. at 470). When those documents were not produced, Mr. Harnett filed his motion to compel, which both WHCA and DCRA opposed. The Board considered the motion to compel fully, and denied it.

Zoning Administrator's Case The Zoning Administrator presented testimony from Lindsley Williams; the former Zoning Administrator, Bill Crews; and the current Acting Zoning Administrator, Matthew LeGrant.

Intervenor's Case The Intervenor presented testimony from Ken Joy.

FINDINGS OF FACT

The Subject Property

1. The subject property is an underground parking facility located at 3030 K Street, N.W. (Square 1173, Lot 102) in the W-3 District. It is part of the Washington Harbour Condominium complex, which is a residential condominium built in the mid 1980's and containing 36 residential units, 48 originally approved parking units, and various limited common elements.
2. The Condominium was developed by Herbert Miller, through two companies, Washington Harbour Associates Limited Partnership and Georgetown Potomac Company. Those two companies were the original Owners of the Condominium when it was designed, approved, built, and sold.
3. DCRA has been unable to locate the original approved parking plan for the Condominium, but portions of the Public Offering Statement were available and received in evidence, as an exhibit to Mr. Harnett's rebuttal testimony. When the Condominium was developed and the residential and parking units were sold, there was no designation on the plans for the parking facility for any "non-required" parking spaces.
4. As originally constructed, approved, and sold, each of the parking spaces in the Condominium's parking facility met the required dimensions set forth in Section 2115.1 of the Zoning Regulations for "required spaces": each parking space was at least 9 feet wide and 19 feet long. The developers did not seek or obtain approval for any parking spaces less than those dimensions, and no parking spaces of less than those dimensions were constructed or sold.
5. When the Condominium was developed, the developer sold the parking spaces in the parking facility, and the residential units in the Condominium, to others. The current owners of the parking spaces are not WHCA, but rather the individuals and entities who own title to the parking units in fee simple absolute. Those owners also own an undivided interest in the limited common elements of the Condominium.
6. Mr. Harnett purchased residential unit PH-206, and along with it parking units P-112 and P-116, over 20 years ago. He was the first owner of PH-206, P-112, and P-116, and acquired these interests from the developer. He was one of the first Unit Owners at Washington Harbour.
7. When he acquired these interests, Mr. Harnett was given the choice of any parking space in the parking garage. He looked closely at all of the spaces. He was told that the developer had initially submitted plans to the District for a parking garage consisting of 50 spaces, but that the District refused to approve two of those spaces and limited the approved number of spaces to 48 – the number which the parking facility contained until 2004.
8. After considering his options concerning his choice of any parking spaces within the parking facility, Mr. Harnett chose space P-112 because it was close to the residential elevators in the garage.

9. When Mr. Harnett acquired his interests, the area which is now designated as spaces 2 and 3 was painted over with diagonal lines, and pedestrian traffic was directed through the area to the residential elevators. The areas now designated as spaces 1, 4, and 5 were used for storage. Over the years, there were times when people parked in the area now designated as spaces 2 and 3. When they did so, Mr. Harnett was unable to move his vehicle from P-112. He notified WHCA's Board of Directors about these problems.

The Decision to Alter the Parking Garage

10. In 2004, the Board of Directors sent out notices that it intended to create five "new" parking spaces and to auction them off. (Appellant's Prehearing Statement, Exhibit 2.) The notice sent out on August 18, 2004 included a map by which the Board indicated that the aisle width between space P-112 and new spaces 2 and 3 was seventeen feet.

11. Although a majority of the Unit Owners asked the Board to at least delay its action in moving forward with this "auction," the Board refused to do so and decided to move ahead with the auction. The Board did not seek the approval of the Unit Owners, and the Unit Owners did not approve of any of the actions of the Board in conducting the auction or taking the other actions at issue on this appeal.

12. In anticipation of the auction, the Board had the parking garage repainted in 2004. The striped area was painted over and turned into spaces 2 and 3. The sign directing pedestrians to the residential elevators was moved to just inside space P-116, another parking space owned by Mr. Harnett, and pedestrian traffic was routed through P-116. (Appellant's Prehearing Statement, Exhibit 6 at page 7.) The Board authorized payment of \$2,650.00 for all of the work. (Appellant's Prehearing Statement, Exhibit 3.)

13. In its notice concerning the auction (Appellant's Prehearing Statement, Exhibit 2), WHCA identified the five parking spaces it intended to create. They were numbered consecutively, 1 through 5. Mr. Harnett had been told originally that the District had refused to approve the spaces identified as 1 and 4, because they were too close to the entrance door to the parking garage. In addition, Mr. Harnett was told initially that no approval was sought for the space identified as number 5, because it did not meet the vertical height requirements and had utility lines running through it. He was also told that space number 4 was not approved by the District because it did not meet the vertical height requirements and had utility lines running through it.

14. The auction was conducted on September 15, 2004. WHCA did not follow all of the procedures it had outlined in the August 18, 2004 mailing. An advance registration requirement was imposed, and Mr. Harnett was not told about it until after the new registration "deadline" had expired.

15. At the auction, the five spaces were sold for approximately \$267,500 to four individuals. The prices ranged from \$42,500 to \$65,000. The purchasers included the girlfriend

of a Unit Owner/Board member (who was not herself a Unit Owner) and one of the Board of Directors purchased two parking spaces.

The Effect of the Alteration of the Parking Garage

16. Since September 2004, Mr. Harnett's car has been landlocked in space P-112. He cannot move it when space 2 is occupied. (Appellant's Prehearing Statement, Exhibit 6 at pages 2-6.)

17. On several occasions, Mr. Harnett's vehicle in space P-116 was scratched when someone brought a shopping cart through it as directed by the sign directing pedestrians through it to the residential elevators.

18. When spaces 2 and 3 were created, the diagonal lines were painted over and a single line was painted between 2 and 3. There are no end lines painted for either of the spaces. No wheel stop, wheel bumper guard, curb, guard rail, screening, or other obstacle was placed at the endpoint of spaces 2 or 3. (Appellant's Prehearing Statement, Exhibit 6 at page 8.) Various measurements were conducted of the aisle width between P-112 and 2 and 3. WHCA's original measurement was stated to be 17 feet. (Appellant's Prehearing Statement, Exhibit 2 at page 10.) Mr. Harnett measured the distance and found it to be 16 feet 10 inches. The distance is even less if the user of space 2 pulls forward past the imaginary end line. (Appellant's Prehearing Statement, Exhibit 6 at pages 1, 12-16.)

19. The exact length of spaces 2 and 3 is unclear. The painted line between spaces 2 and 3 is just over 15 feet, 11 inches. (DCRA Exhibit No. 020.)

20. Measuring from the north wall at the end of spaces P-112, P-111, and P-110, to the south wall at the end of spaces P-142 and P-143, the distance is 92 feet, 8 inches. Allowing for three required spaces of 19 feet each, and two drive aisles of 20 feet each, there would need to be at least 97 feet total to fit in three such parking spaces and drive aisles.

21. The creation of spaces 2 and 3 results in a parking arrangement that is neither reasonable nor convenient.

22. Upon the creation of spaces 2 and 3, Mr. Harnett's ingress and egress maneuver with respect to space P-112 was rendered nearly impossible. Michael Albers, the expert witness with regard to parking, testified that based on his examination of the parking garage and his knowledge, training, and experience, as supplemented by use of the standard software used to determine accessibility of parking spaces, when a vehicle is parked in space 2, it is almost impossible for a driver of a full size vehicle to get in and out of space P-112. The drive aisle width is simply too narrow and vehicles and columns behind and adjacent to space P-112 prevent a parking/unparking maneuver that can be deemed acceptable.

23. There is simply not enough distance to create spaces 2 and 3 and comply with the drive aisle width requirements on both sides. In addition, a vehicle in space P-112 has nowhere to turn when spaces 2 and 3, and particularly space 2, are occupied. A vehicle in space P-113

and the adjacent column and storage units prevents a movement in that direction, and there is not enough space in the aisle to allow the vehicle from P-112 to maneuver.

24. The futility of the entry/exit maneuvers in/out of space P-112, was demonstrated further, by Mr. Albers, without contradiction, by use of the computer program "AutoTurn," a commercially available program that allows the design vehicle to be input into the program and visually track how it can make a turn. Even with multiple back and forth maneuvers and hitting columns, cars, and other barriers, the parking maneuver fails. The exit maneuver is even more impractical than the entry maneuver. Backing out in the same serpentine manner to get to the end bay drive aisle between space 3 and P-107 is unreasonably dangerous and is not recommended or acceptable for ease and safety reasons.

25. Employing "level of service" concepts and standards which are customary in evaluating parking design issues, the creation of spaces 2 and 3 results in a level of service for space P-112 which is lower than an "F" (the lowest recognized standard), down from its previous "B" level, and can be described as "off the charts" for purposes of the level of service analysis.

26. WHCA submitted materials to the BZA previously, which include a drawing prepared with the AutoTurn program. (Appellant's Prehearing Statement, Exhibit 5.) This document shows that, by WHCA's own calculations, the car is shown hitting the wall and confirms that this maneuver cannot be carried out.

27. The 48 legal spaces in the parking garage are all owned by various Unit Owners. Each space is assessed and real property taxes must be paid to the District. The current assessment is \$50,000.00 per space. Mr. Harnett testified, and it was not disputed, that the five "new" spaces are not assessed and no real property tax is paid on them.

The Initial Failure to Seek a Building Permit

28. When WHCA performed the restriping and alteration that created the five parking spaces numbered 1-5, it did not seek or obtain a building permit.

29. On January 4, 2005, the Zoning Administrator caused the issuance of a Notice of Violation and Notice to Abate to WHCA for the unauthorized restriping and alteration within the parking facility. (Statement in Support of Appeal, Exhibit 2.)

30. Following the issuance of the Notice of Violation and Notice to Abate, counsel for WHCA engaged in an extended series of private communications and correspondence with the Zoning Administrator. Mr. Harnett was not a party to nor was he made aware of the discussions and correspondence.

31. Sometime in the context of those discussions and correspondence, WHCA's counsel created a drawing which was received as Exhibit 28 at the hearing. On the drawing, WHCA's counsel handwrote a number of things, including designating with diagonal lines "Required Space, in accordance with DCMR 11 2101.1 (12)." WHCA's counsel identified nine parking spaces on the north side of the main drive aisle as "required": P-118, P-119, P-120, P-121, P-122, P-123, P-124,

P-125, and P-126. WHCA's counsel identified three spaces on the south side of the main drive aisle as "required": P-128, P-129, and P-130. Other than these twelve spaces, WHCA's counsel did not designate any other "required" parking spaces.

32. The preparation of Exhibit 28 and the designation of twelve "required" spaces on it was done solely by WHCA's counsel. The Board of Directors was not consulted in connection with the preparation of the drawing or the designation of "required" spaces, and the Board of Directors did not approve those actions. At the time, WHCA was not the owner of any parking spaces in the parking facility. All of the spaces were owned by members of the Condominium. Those owners were not consulted in connection with the preparation of the drawing or the designation of "required" spaces, and those owners did not approve those actions.

Consideration by ANC 2E of the Issues on this Appeal

33. On October 6, 2006, at a regularly scheduled meeting and with a quorum present, ANC 2E voted to support the position of Mr. Harnett on this appeal. At the meeting, ANC 2E noted its concern that Mr. Harnett's vehicle had been blocked in its parking space for an extended period of time due to the addition of spaces in the parking facility.

34. In its report dated June 28, 2007, ANC 2E indicated that its position on the matter has not changed and that it remains in support of the position of Mr. Harnett on this appeal.

Application for and Approval of the Building Permit

35. Mr. Crews testified that the private discussions and correspondence between WHCA's counsel and the Zoning Administrator resulted in a private "settlement agreement" under which WHCA agreed to apply for a building permit and the Zoning Administrator agreed that a building permit would be issued.

36. In reaching agreement with WHCA's counsel, the Zoning Administrator was aware of ANC 2E's position on these issues and that ANC 2E supported Mr. Harnett, but he decided to disregard ANC 2E's position because he felt that "what ANC-2E was concerned with was the requirement that if you were going to change parking, that you should have a building permit." (July 31, 2007 Hearing Trans. at 160.19-161.15.)

37. WHCA's Application for Construction Permits on Private Property was prepared and signed by its counsel on November 15, 2007, and filed with DCRA on November 17, 2006. (Statement in Support of Appeal, Exhibit 3.) The only drawing included with the Application was DCRA Exhibit 002.

38. The Zoning Administrator approved the issuance of the building permit as a matter of right, and Building Permit No. 101019 was issued the same day as the application was submitted, on November 17, 2007. (Appellant's Prehearing Statement, Exhibit 1.) The Zoning Administrator did so without a site visit, and without referring the application to the Department of Transportation, as would typically be the case for parking plans.

39. In determining that the building permit could be issued as a matter of right, the Zoning Administrator did not rely upon DCRA Exhibit 002. He relied upon Exhibit 28, which was not included with the Application for the building permit. Exhibit 28 is a copy of what appears to have originally been a scaled drawing, but the photocopying would eviscerate the scale.

40. Spaces 4 and 5 do not meet the minimum vertical clearance requirements of Section 2115.5. (Appellant's Prehearing Statement, Exhibit 6 at pages 10-11.)

This Appeal

41. Mr. Harnett timely and properly noted his appeal on January 12, 2007.

42. On June 27, 2007, WHCA's Board of Directors voted unanimously to engage Linowes and Blocher LLP to represent the Association with respect to all zoning and permitting issues related to the parking spaces that are the subject of the Appeal. The Board further indicated that, "As such, the Association has duly authorized Emily J. Vaias, Esquire, Joseph P. Lapan, Esquire and the law firm of Linowes and Blocher LLP to represent the Association with respect to any and all Appeal proceedings before the Board of Zoning Adjustment and all related matters."

CONCLUSIONS OF LAW

Motion to Dismiss

This appeal was properly and timely filed pursuant to 11 DCMR §§ 3100.1 and 3112.2 and D.C. Code §§ 6-641.07 and 6-641.09. The motion to dismiss filed by the Intervenor before it was granted leave to participate in the proceedings was therefore denied in its entirety.

Motion to Compel

The BZA denied the motion to compel on the grounds that it does not have the power to grant the relief requested by Mr. Harnett. The Board also indicated that it did not remember the indication by Ms. Vaias that WHCA intended to submit the accompanying correspondence. (July 17, 2007 Hearing Trans. at 470.)

Merits of the Appeal

On this appeal, the BZA interprets and applies the Zoning Regulations in accordance with their plain meaning, taking into account the provisions of 11 DCMR § 101. This appeal challenges the Zoning Administrator's determination to approve the issuance of the building permit as a matter of right, notwithstanding several violations of the Zoning Regulations which were or should have been apparent upon the Zoning Administrator's review. Failing to apply the Zoning Regulations to provide their minimum requirements would result in chaos, as entities would be free to revise parking plans years after the fact, without the approval of the owners of the parking spaces involved, and with disregard for the protections afforded under the law.

Application for Building Permit

WHCA filed the Application for the building permit on November 17, 2006. The Application asked for approval to conduct “alteration and repair” work described as “striping of five (5) new parking spaces in owner’s parking garage identified in yellow as spaces P1-P5 on the attached plans.” The only plans provided with the Application were identified as DCRA Exhibit No. 002.

The Application stated that the work was to begin “ASAP,” that “Completion Date of Work” would be “1 week after start,” and that the cost would be \$200. The work had, in fact, already been completed in 2004 for a total cost of \$2,650.00. (Appellant’s Prehearing Statement, Exhibit 3.)

Section 2100.2

Under Section 2100.2, “No application for a building permit for a building or structure to be erected on or after May 12, 1958 shall be approved unless there is included with the plans for the building or structure a parking plan showing the location, dimensions, and grades of all parking spaces and approaches thereto in accordance with the provisions of this chapter.” Here, there was no “parking plan showing the location, dimensions, and grades of all parking spaces and approaches thereto in accordance with the provisions of this chapter”, as none are evident in DCRA’s Exhibit 002, which it identified as the only plan submitted with the building permit application.

DCRA’s Exhibit 002, “Plans submitted with application for Building Permit No. 101019,” and the Drawing identified as Exhibit 28 did not meet the requirements of Section 2100.2. Exhibit 002 has very few dimensions and no indication of “required” or “non-required” parking spaces, and both the Acting Zoning Administrator and the former Zoning Administrator conceded that it would not have met the requirements of Section 2100.2. Exhibit 28 also lacked the required dimensions. In particular, it showed a distance of 22 feet between spaces P-118 and P-135, but then showed that space P-136 had an endpoint beyond that of P-135. Nowhere did it show any dimension for the continued drive aisle between spaces P-136 and P-143, on the south side, and P-118 and 3, on the north side – although that is the same drive aisle between the designated required spaces identified as P-118 through P-125 on the north side and P-128 and P-130 on the south side. Upon review of Exhibit 28, there was no basis for the Zoning Administrator to determine the width of the drive aisle and to confirm that it met the applicable requirements contained in Section 2117.5 and the other Zoning Regulations pertinent to this appeal. The Zoning Administrator, upon reviewing Exhibit 28, should have rejected it at the outset for noncompliance with Section 2100.2.

Sections 2100.2, 2100.3, 2117.1, and 2117.3

Sections 2100.2, 2100.3, 2100.4, and 2117.1 establish a logical and consistent fabric and framework for the application, approval, construction, occupancy, and maintenance of parking spaces under the Zoning Regulations. First, an Owner must apply for a building permit and submit the required parking plan, as set forth in Section 2100.2. When the construction is complete, a certificate of occupancy cannot be issued unless the required spaces have been

provided in accordance with the approved parking plan, as set forth in Section 2100.3. Once the construction has been completed, Section 2117.1 then requires that, "The parking spaces required by this chapter shall be provided and maintained so long as the structure that the parking spaces are designed to serve exists." Section 2117.3 is consistent with this, and requires, in pertinent part, that, "Striping shall be maintained for as long as the parking spaces requiring the striping are in existence."

This framework creates a progression whereby an Owner must designate the parking facility to be provided, obtain approval to construct that facility, construct that facility in accordance with the approval granted, and provide and maintain that facility "so long as the structure that the parking spaces are designed to serve exists." This process is incompatible with a decision 20 years later by an entity that does not own the parking spaces to reconfigure, alter, and change the nature and use of the parking spaces approved and provided initially.

Section 2115.5

Section 2115.5, which applies to "all parking spaces," requires that, "Except as provided in §§ 2115.6 and 2115.7, all parking spaces shall have a minimum vertical clearance of six feet, six inches (6 ft., 6 in.)."

Spaces 4 and 5 do not meet the minimum vertical clearance requirements. The required minimum vertical clearance as a "basically rectangular solid" (July 17, 2007 Hearing Trans. at 382.2-382.7) is not provided for either space. DCRA's only defense to this violation, that parking space P-143 (one of the originally approved spaces when the parking facility was constructed) also has a similar diagonal column that violates the minimum vertical clearance requirements, cannot excuse the violation in this instance.

Sections 2116.8 and 2116.9

Section 2116 of the Zoning Regulations is entitled, "Location of Parking Spaces." It contains certain requirements applicable to "accessory parking spaces." "Accessory parking spaces" are defined by Section 2102.2's reference to "accessory parking spaces in an amount which exceeds that required by § 2101.1." Thus, "accessory parking spaces" includes both required and non-required spaces.

Under Section 2116.8, "The 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." In this case, the insertion of parking spaces 2 and 3 create a situation in which "reasonable and convenient parking facilities" are not provided. Whether Mr. Harnett's space P-112 is deemed a required or a non-required (accessory) space, his use of P-112 is prevented by spaces 2 and 3, particularly when the occupants of spaces 2 and 3 pull their vehicles forward and beyond any imaginary end line for spaces 2 and 3.

Under Section 2116.9, "The Board may impose conditions on any accessory or non-accessory parking spaces as to screening, coping, setbacks, fences, the location of entrances and exists, or any other requirement it deems necessary to protect adjacent or nearby property. It may also impose other conditions it deems necessary to assure the continued provisions and

maintenance of the spaces.” In this case, it is necessary to protect P-112 and its related property rights from the encroachment through spaces 2 and 3. P-112 is, in fact, its own separate real property interest and it is entitled to protection under the Zoning Regulations as such.

In addition, WHCA’s placement of a sign within space P-116, which is also owned by Mr. Harnett, directing pedestrian traffic to the “Residential Elevators” through space P-116, violates Section 2116.8’s requirement for “reasonable and convenient parking facilities.” Furthermore, Section 2116.9 permits the Board to impose reasonable conditions that would include a prohibition on directing pedestrian traffic through space P-116.

Nothing in the plain language of Section 2116, or particularly within Sections 2116.8 or 2116.9, renders these provisions applicable only to special exception applications. If this were the intent of the Zoning Commission, it would be expressed in these provisions – and it is not. There is no such limitation and we must apply the regulations according to their plain meaning. Similarly, the former Zoning Administrator’s opinion that these sections apply only to above ground “surface” parking is not supported by their plain meaning.

Furthermore, we do not read Sections 2116.8 and 2116.9 as being subordinate to Section 2116.5, which deals with special exception applications. Again, these provisions must be construed and applied according to their plain meaning, which gives straightforward direction to the Board that, for whatever reason the Board has purview over particular parking arrangements, the goal is for those spaces to be “reasonable and convenient,” with the Zoning Regulations proving explicit authorization for the Board to impose “conditions it deems necessary to assure the continued provision and maintenance of the spaces.”

Section 2117.2

Section 2117.2 establishes that, once required spaces are provided, they cannot be reduced except under specific circumstances: “Required parking spaces shall not be reduced in total extent after their provision except upon approval of the Board of Zoning Adjustment and then only after proof that the parking spaces provided are no longer needed by reason of a reduction of employees, seats, gross floor area, dwelling units, or any other standard applicable to the use set forth in the regulations; provided the Board may impose any condition it deems necessary to ensure the addition of parking spaces in case of a subsequent increase in employees, seats, gross floor area, dwelling units, or any other standard applicable to the use set forth in the regulations; provided the Board may impose any conditions it deems necessary to ensure the addition of parking spaces in case of a subsequent increase in employees, seats, gross floor area, dwelling units, or any other unit of measurement.”

An Owner has a decision at the outset to provide more than the minimum number of “required” parking spaces. Section 2101.2, in that vein, provides that, “Nothing contained in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount which exceeds that required by § 2101.1; provided, that each case complies with all other applicable provisions of this chapter and chapter 23.” In this case, the original Owner who developed the Condominium made a choice to create a parking facility in which all of the 48 spaces met the criteria and qualified as “required” spaces.

The provisions of Section 2117.2, by their plain and unambiguous language, apply to such "Required parking spaces" as the original Owner provided (in this case, the 48 spaces in the parking facility) – not strictly to the minimum number of required spaces that could have been proposed as part of the initial construction, in accordance with Section 2101.1. Once, however, the original Owner made the determination to go beyond Section 2101.1's minimum requirements, completed the construction, and sold the parking spaces, there is no basis for an entity that does not own the spaces to make its own decision 20 years later to alter the parking spaces so that they become "non-required" and can no longer meet the requirements for "required" spaces.

Rather, such action would require approval of the BZA and specific proof of the elements required by Section 2117.2. No application was made to the BZA in this case, and there would be no basis for any application under Section 2117.2. There has been no proof that the parking spaces provided are no longer needed for any reason set forth in Section 2117.2 or elsewhere under any standard applicable by the Zoning Regulations.

Section 2117.5

Under Section 2117.5, "Except as provided in §§ 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, or between a row of two (2) or more parking spaces and the perimeter of the area devoted to parking spaces, the aisle shall have a clear width of not less than twenty feet (20 ft.) or ninety degree (90 (degrees)) angle parking, and not less than seventeen feet (17 ft.) for angle parking that is sixty degrees (60 (degrees)) or less as measured from the center line of the aisle."

Section 2117.5 requires that the main drive aisle for the parking facility be at least 20 feet. This includes the area between spaces P-118 through P-126 on the north side of the main drive aisle (9 of the spaces designated as "required" by WHCA's counsel) and P-128 through P-130 on the south side of the main drive aisle (the other 3 spaces designated as "required" by WHCA's counsel).

For the main drive aisle running through the parking facility, an aisle width of at least 20 feet is required by Section 2117.5. The aisle width requirements cannot be construed as requiring the 20 foot minimum only between the required spaces or in some sort of "rectangle" immediately adjacent to the required spaces. Section 2117.5's scope is not so narrow. The word "adjacent," or other language supporting such an interpretation of Section 2117.5 is not contained in the regulation, and we must interpret the regulation according to its plain meaning. Where, as here, there are required spaces, then a 20 foot drive aisle must be maintained for those spaces: this includes the distance between rows of required and non-required spaces; the distance between rows of required spaces; and the distance between required spaces and the perimeter of the area devoted to parking spaces. The former Zoning Administrator's conclusion that drive aisle width requirements "apply only to required parking spaces" is an overly narrow and incorrect interpretation of these provisions.

Here, the distance between the southern end of the stripe painted between spaces 2 and 3 and the northern end of the stripe painted between spaces P-142 and P-143 is 19 feet, 2 inches. (DCRA Exhibit No. 024.) The measurement from space 3 to P-143 is only 17 feet, 8 inches. In both instances, this is less than the required drive aisle, and the deficiency is caused by the creation of spaces 2 and 3. Thus, the former Zoning Administrator erred in approving a permit that authorized new parking spaces that interfered with the drive aisle for required parking spaces in the garage.

The former Zoning Administrator's conclusion that the creation of the new parking spaces at issue on this appeal "did not impede[] or reduce the existing aisle" was incorrect, as shown by his own subsequent measurements of the drive aisle. (DCRA Exhibit No. 024.) Nor was there sufficient information provided to the former Zoning Administrator from which he could have made such a determination at the time of permit approval, given that the information provided to him was silent on the length of the drive aisle between the southern end of the stripe painted between spaces 2 and 3 and the northern end of the stripe painted between spaces P-142 and P-143.

In addition, the requirement for a 20 foot drive aisle also applies between space P-112 and spaces 2 and 3. Prior to the actions of WHCA in 2004, P-112 met the criteria for and could have qualified as a required space. Neither P-112 nor any of the other 47 approved, constructed, and striped parking spaces in the parking facility were ever designated or approved as "non-required" spaces. Thus, they must qualify as "accessory" spaces under Section 2102.2, which could have been created as either "required" or "non-required" parking spaces. Here, the "accessory" spaces were given the dimensions of "required" spaces and must be maintained as "required" spaces.

This means that P-112 was entitled to a 20 foot drive aisle width. This result is not changed if spaces 2 and 3 are deemed "non-required," for required spaces enjoy the 20 foot drive aisle even between rows of required spaces and non-required spaces. The reference to the aisle "between rows of two (2) or more parking spaces" in Section 2117.5 covers both rows between required spaces, rows between required and non-required spaces, and any combination of the two – the reference to "parking spaces" without limitation must be so construed under Section 2118.9.

Here, the distance between P-112 and spaces 2 and 3 is no more than 19 feet 6 inches and can be 16 feet 10 inches or even less, depending upon how far forward the vehicles in spaces 2 and 3 are pulled.

Section 2117.7

Section 2117.7, which applies to "all parking spaces," requires that, "The public rights-of-way as well as private walkways and driveways shall be protected from vehicular encroachment from all parking spaces by wheel bumper guards, curbs, guard rails, or screening between the property line and the perimeter of the parking area. Parking shall be designated so that no vehicle or any part thereof shall project over any lot line or building line."

Spaces 2 and 3 were created in violation of Section 2117.7, in that no “wheel bumper guards, curbs, guard rails, or screening” was provided. There is no end point for either space, and no protection is provided from vehicular encroachment into the drive aisle, or interfering with the use of any of the parking spaces in the area. This includes not only space P-112, but also space P-113. If a car in space P-113 were to park so that it must back out of the space, it would have no way of knowing whether or not the cars parking in spaces 2 and 3 are pulling in at the same time, and, since there is no barrier to stop them from encroaching in the drive aisle, an unreasonably dangerous risk exists.

The former Zoning Administrator’s conclusion that Section 2117.7 applies only to above ground surface parking is not consistent with the plain meaning of this provision. We also note that the Acting Zoning Administrator does not view Section 2117.7 as applying exclusively to above ground surface parking.

The Acting Zoning Administrator’s contention that for the subject Property, the only parking space to implicate Section 2117.7 is P-116, is inaccurate. There is no legal or logical basis why Section 2117.7 would not apply to spaces 2 and 3. In addition, there are wheel stops not only in P-116 (DCRA Exhibit Nos. 003, 004) but in spaces P-114 and P-115. (Appellant’s Prehearing Statement, Exhibit 6, at pages 9, 16.)

In addition, as part of the restriping and alteration, WHCA placed a sign in space P-116, which is also owned by Mr. Harnett, directing pedestrian traffic to the “Residential Elevators” through space P-116. (Appellant’s Prehearing Statement, Exhibit 6 at 7.) Directing pedestrian traffic through a space, without any protection from vehicular encroachment, is not permitted.

“Required” and “Non-required” Parking Spaces

The Zoning Regulations permit an Owner to designate at the outset both “required” parking spaces and “non-required” spaces. They do not authorize an entity that is no longer the Owner to make a new designation, 20 years after the original approval, construction, and permitting, and for the Zoning Administrator to recognize such actions without BZA approval.

Here, counsel for the Intervenor apparently prepared the Exhibit 28 drawing and gave it to the Zoning Administrator, and the Zoning Administrator approved the drawing even though it was not included with the Permit application. The handwritten unauthorized modification to the original “Parking Facility Plan of Condominium Subdivision,” done by counsel acting without authority and not on behalf of the then Owners, is and was invalid. Intervenor’s position in the case is that it or someone acting for it is empowered to make the “non-required” designation at any time, and for any spaces it chooses, as long as it picks 12 spaces to enjoy the designation and protection of “required spaces.” (Intervenor’s Prehearing Statement at page 4, footnote 2.)

This position is not supported by the Zoning Regulations. Neither Linowes and Blocher nor WHCA has the right to make any designation of parking spaces as “non-required.” Only the Owners of the parking spaces can make that designation. Normally, this is done by the Developer, when it is the Owner and submits drawings for approval and to obtain a Certificate of Occupancy. It cannot be done years later after the parking spaces have been approved, created,

and sold to Unit Owners. WHCA is not the Owner of the parking garage or the spaces within it. It has no right to decide which parking spaces it might want to call "required" or "non-required." Once the parking facility was approved and constructed, and the parking units sold to those who are now the Owners, spaces cannot be redesignated as "non-required."

In addition, allowing someone to designate parking spaces as "required" or "non-required," for the first time, 20 years after the original approval, is not in accordance with 11 DCMR Section 101's goals, including the "Encouragement of the stability of districts and of land values in those districts."

The Position of ANC 2E and the "Great Weight" to Which it is Entitled

Pursuant to Section 13 of the Advisory Neighborhood Commission Act (D.C. Code § 1-309.10(d)(3)(A) (2007)), the Board has given "great weight" to the issues and concerns raised by ANC 2E and the position taken by ANC 2E on this appeal.

For the reasons stated above, it is hereby **ORDERED** that the appeal is granted and the decision of the Zoning Administrator is reversed.

VOTE: _____

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

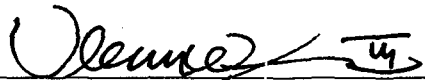
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2007, I caused to be mailed, via first class mail, postage prepaid, a copy of this Appellant's Proposed Findings of Fact, Conclusions of Law, and Order to the following:

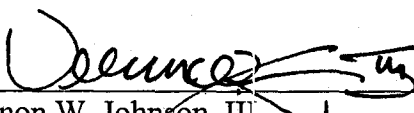
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