

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re Appeal of:	)	
	)	
William J. Harnett	)	
	)	
v.	)	BZA Appeal No. 17615
	)	ANC 2E
Zoning Administrator	)	Public Hearing: July 31, 2007
Department of Consumer and Regulatory	)	(Continued from June 5, 2007
Affairs	)	And July 17, 2007)

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**APPELLANT'S MEMORANDUM IN RESPONSE TO INTERVENOR'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Submitted September 21, 2007

Appellant William J. Harnett hereby files this memorandum in response to the proposed findings of fact and conclusions of law filed by Intervenor Washington Harbour Condominium Unit Owners' Association, Inc. in this matter. As of the time that this memorandum was prepared and filed, the Department of Consumer and Regulatory Affairs had not filed any proposed findings of fact and conclusions of law. (Mr. Harnett had agreed to a brief extension to allow DCRA to make its filing through September 11, 2007, four days after the original due date. Now, several weeks later, DCRA has still not made that filing, nor any substantive filing, since the hearings in this case concluded.)

Under 12 DCMR Section 101, the Zoning Regulations are to be interpreted and applied as "minimum requirements." They cannot simply be ignored or marginalized. Where, as here, their plain language renders them applicable to the issues before the BZA, they must be upheld, applied, and enforced. WHCA often suggests that certain regulations can be construed selectively to render them inapplicable to this case. For example, WHCA suggests that the BZA should infer limitations into Sections 2116.8 and 2116.9 to render them applicable only in special exception applications relating to "proposals for off-site accessory parking." See WHCA

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Submission at 12. That interpretation, however, requires one to insert language into Sections 2116.8 and 2116.9 that is not there, to ignore that Section 2116 itself broadly encompasses “Location of Parking Spaces” (dealing with a wide range of concepts within that subject area), and to adopt a narrowly restrictive definition of “accessory parking” notwithstanding Section 2102.2’s reference to “accessory parking spaces in an amount which exceeds that required by § 2101.1.” Exercises like this would construe the Zoning Regulations out of existence, except in the most discrete and constricted circumstances. This is not how the Zoning Regulations are required to be applied, construed, and enforced.

In each instance, Mr. Harnett has cited the BZA to the relevant provisions of the Zoning Regulations and provided evidence to support each of the violations that are the subject of this appeal. For the most part, WHCA chooses to ignore the facts that were established at the hearing, and which were not contested by WHCA in the brief testimony that it presented. In a few instances, WHCA urges facts or interpretations of the evidence that are incorrect. Elsewhere, WHCA asks the BZA to afford the Zoning Regulations a narrow interpretation not supported by their plain language and inconsistent with Section 101’s mandate.

First, WHCA wants to imply that it is the “Owner” of the parking garage. *See* WHCA Submission at 5. WHCA claims that it is “the owner of all common elements on the Subject Property.” *See id.* This is incorrect, as a matter of law. WHCA, like any condominium association, does not “own” the common elements. Instead, the ownership interest in the common elements rests in the Unit Owners, each of whom owns their respective Unit interests in fee simple absolute along with an undivided interest in the common elements. *See Marlyn Condominium, Inc. v. McDowell*, 576 A.2d 1346, 1348 n. 6 (D.C. 1990) (stating that the typical division of property in a condominium involves the individual unit and the common elements,

“in which each individual owner has an undivided percentage interest”). Thus, the Unit Owners own their own Residential and Parking Units *and* they own the common elements.

In accordance with these principles, the Condominium Act provides that one required element of a condominium regime is that “the undivided interests in the common elements *are vested in the unit owners.*” D.C. Code § 42-1901.02 (2007) (emphasis added). The Act also defines a “condominium unit” as “a unit together with the undivided interest in the common elements appertaining to that unit.” *Id.* Similarly, D.C. Code § 42-1902.03 states that any description of a condominium unit (in a deed or other instrument) automatically includes the Unit itself as well as the undivided interest in the common elements. D.C. Code § 1902.11 states that a Unit owner’s undivided interest in the common elements shall not be altered, and D.C. Code § 1901.07 prohibits any agreement by which an association or developer might attempt to contract a Unit owner out of this right. In fact, if the condominium regime were terminated, then the association would only hold title to any real estate interest as trustee for the owners – title to the common elements would transfer to the unit owners. *See* D.C. Code § 1902.28(f) and (g).

WHCA would like to claim ownership status of the areas relevant to this appeal, because its only defense is to claim that its actions did not implicate “required” parking spaces and it knows that only an Owner can make the designation as to which parking spaces are “required” and which are “non-required.” Absent ownership status, WHCA had no legally viable claim that it had the right to make that distinction in 2006 – which included creating “new” parking spaces that it deems “non-required” and categorizing parking spaces such as those owned by Mr. Harnett as “non-required” more than twenty years after the Property was constructed and the condominium units were sold. Even apart from the issue of whether anyone could designate parking spaces as “non-required” more than twenty years after the condominium regime was

created and the Residential Units and Parking Units were sold, a non-owner of the parking spaces has no right to make such a designation under any circumstances. Thus, WHCA's behind closed doors discussions with the former Zoning Administrator in 2006, during which it tried to selectively designate only 12 parking spaces as worthy of enjoying "required" status, were invalid because WHCA did not own any of the parking spaces in question or any of the appurtenant common elements.

Second, WHCA refers throughout its submissions to Exhibit 28 as a so-called "Plat Plan." No witness testified at the hearing that the document ever was or was intended as a formal "Plat Plan." No witness even called it a "Plat Plan." It was undisputed that it was merely a copy of a scaled drawing, taken from the original Public Offering Statement, with handwriting placed on it by WHCA's counsel and without the knowledge or approval of WHCA's Board of Directors. Calling this document a "Plat Plan" may be designed to imply that it was a formal drawing that meets Section 2100.2's requirement for a "parking plan" with specific information contained in it. Exhibit 28, however, did not comply with Section 2100.2, does not contain the specific information required, and, in any event, was not included with the Application for the building permit. Nor is Section 2100.2 confined only to cases involving new construction, as WHCA urges. *See* WHCA Submission at 15.

Third, WHCA misconstrues the aisle width requirements contained in Section 2117.5. Those requirements apply not only between rows of "required" spaces, but they mandate that all "required" spaces have a minimum drive aisle of twenty feet. This means that the twenty feet must be provided wherever "required parking spaces are so arranged that an aisle is required for accessibility or maneuvering space." That aisle includes the space "between rows of two (2) or more parking spaces." Because the language does not restrict this provision to a drive aisle

between rows of required spaces, it applies *both* to the aisle between required spaces *and* to an aisle between required and non-required spaces. In fact, a required space must be given a twenty foot drive aisle under all circumstances, including “between a row of two (2) or more parking spaces and the perimeter of the area devoted to parking spaces.”

In a similar vein, the twenty foot drive aisle has to apply within the entire aisle. Although WHCA creates another category of aisle width requirements for what it calls an “Access Aisle Extension,” *see* WHCA Submission at 10, there is no evidence or legal support for that fiction. The aisle itself can only properly be construed as the entire aisle – *i.e.*, the entire drive aisle providing “accessibility or maneuvering space” for the required spaces – and not as a fictional subset of or “extension” to the drive aisle. (Notably, WHCA does not contest that the entire drive aisle for the spaces it admits are “required” is rendered less than twenty feet by the creation of Parking Spaces 2 and 3 – on this key point, the violation of the Zoning Regulations was proven and is uncontested.)

WHCA also claims that Mr. Harnett’s evidence supports that the drive aisle width requirements do not apply, citing to the July 17, 2007 Hearing Transcript at page 345, lines 17-23. WHCA claims that Ms. McCarthy’s testify was such that the aisle width provisions did not apply. This is inaccurate. Ms. McCarthy’s testimony was that if the original parking plan submitted by the then-owner had designated the parking spaces in question as “non-required,” and if such designation had been approved originally, then Section 2117.5’s aisle width requirements would not apply. This hypothetical does not fit Mr. Harnett’s appeal, however, and Ms. McCarthy’s testimony and the other evidence were very clear on that. There was never any designation of “non-required” spaces until 2006, when WHCA’s counsel made that designation

by making hash marks on a drawing without approval of the Unit Owners or even the Board of Directors.

Fourth, WHCA's statement that Parking Spaces 2 and 3 are 15 feet, 10 inches wide is inaccurate. *See* WHCA Submission at 6. The distance WHCA refers to is merely the length of the painted stripe that runs between, *and clearly within*, Parking Spaces 2 and 3. There is and cannot be any defined "length" of Parking Space 2 or Parking Space 3 because neither space has an endline at either side. (This poses the problem of further encroachment into P-112's drive aisle, when the cars parking in Parking Spaces 2 and 3 move far forward and leave a drive aisle of less than seventeen feet.)

Fifth, WHCA claims that there is no violation in this case of the vertical height requirements imposed by Section 2115.5. *See* WHCA Submission at 4. This is incorrect. There was no dispute at the hearing that the vertical height requirements are not met – instead, DCRA claimed 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. This, of course, cannot excuse the violation in this case. In Paragraph 35 of its proposed findings of fact, WHCA cites to Page 203 of the June 5, 2007 Hearing Transcript and Page 356 of the July 31, 2007 transcript. Neither citation, nor any other evidence in the record, supports WHCA's claim of compliance with the vertical height requirements.

Sixth, in discussing Mr. Harnett's motion to compel, WHCA neglects to mention that its counsel clearly indicated at the July 17, 2007 hearing that WHCA intended to place all of the communications with the former Zoning Administrator into the record. *See, e.g.*, July 17, 2007 Hearing Trans. at 470.

Seventh, WHCA continues to voice the position that the “required” spaces can change over time. *See* WHCA Submission at 9. There was no legal or evidentiary support for the notion that “required” spaces are an organic concept such that the “required” spaces can be shuffled, reshuffled, and relocated over time. Nor is this at all consistent with providing the minimum protections of the Zoning Regulations for required spaces and parking spaces.

Eighth, WHCA misconstrues and again marginalizes the requirements of Section 2117.7, which are plainly designed to protect pedestrians, vehicles, and other persons and property from encroachment by vehicles using parking spaces. WHCA states that Mr. Harnett’s parking expert, Michael Albers, offered testimony about the applicable requirements for “walkways.” *See* WHCA Submission at 12. This is incorrect. Not only does the cited testimony Page 189 of the June 5, 2007 Hearing Transcript not support WHCA’s claims, it is not that of Mr. Albers. Plainly, Section 2117.7 is designed to provide protection where parking spaces border on areas that are used by pedestrians and other vehicles. In this case, WHCA created Parking Spaces 2 and 3 without providing any such protections, which violates the Zoning Regulations.

Ninth, WHCA misconstrues Mr. Albers’ other testimony by suggesting that the reasonableness and convenience considerations are not affected by the drive aisle width. The arguments, in fact, are separate and independent. The drive aisle width requirements are imposed by Section 2117.5, and WHCA’s actions violated them in a number of ways and in a number of locations in the parking garage. Section 2116.8’s requirement of “reasonable and convenient parking facilities” is separate, and Mr. Albers’ cited testimony at pages 167-170 of the June 5, 2007 Hearing Transcript demonstrates his additional – and uncontradicted – opinion that, as a separate and independent matter, WHCA’s actions have abolished “reasonable and convenient parking facilities,” particularly with respect to Space P-112 which is rendered

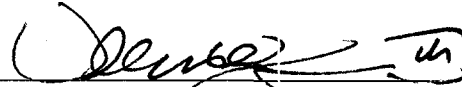
unusable under the circumstances. Section 2116.8 is not restricted to “required” parking spaces. This is a further independent violation of the Zoning Regulations.

Tenth, WHCA’s proposed finding of fact no. 28 states: “The New Spaces do not preclude sufficient access to all previously existing parking spaces in the subject parking garage.” This is false. Both Mr. Harnett and Mr. Albers testified that Space P-112 is unusable under the circumstances. Mr. Albers provided *uncontradicted* expert testimony, including the use of the computer program “AutoTurn,” in this regard. No expert was called to contest Mr. Albers’ testimony. In fact, WHCA submitted materials to the BZA previously, which include a drawing that its expert prepared with the AutoTurn program, and which shows that the parking maneuver is impossible. *See* Appellant’s Prehearing Statement, Exhibit 5. No doubt this is why WHCA ultimately chose not to call its expert, Wes Guckert, at the hearing although he was present during the proceedings.

WHCA’s entire defense hinges on its ability, in 2006, in private communications with the former Zoning Administrator, to designate only twelve “required” parking spaces and to deprive all of the other parking spaces of the protections afforded to “required” parking spaces under the Zoning Regulations. The Zoning Regulations prescribe a process for proposing parking spaces, obtaining approval of the plans, constructing parking facilities based on the plans, obtaining a certificate of occupancy, and then maintaining the related striping “so long as the structure that the parking spaces are designed to serve exists.” There is no provision in the Zoning Regulations whereby parking spaces can be changed to “non-required” status twenty years after their creation and sale. Allowing WHCA to evade the requirements, twenty years after the parking garage was built, renders them meaningless. Such a result is untenable.

Under the circumstances, Mr. Harnett respectfully submits that he has met his burden of proof as to all of the numerous violations of the Zoning Regulations presented at the hearing.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Vernon W. Johnson, III", written over a horizontal line.

Vernon W. Johnson, III
Nixon Peabody LLP
401 Ninth Street, N.W.
Suite 900
Washington, D.C. 20004-2128
(202) 585-8401

Counsel for Appellant William J. Harnett

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2007, I caused to be mailed, via first class mail, postage prepaid, a copy of this Appellant's Memorandum in Response to Intervenor's Proposed Findings of Fact and Conclusions of Law to the following:

Matthew LeGrant
Zoning Administrator
District of Columbia
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.W.
Suite 2000
Washington, D.C. 20002

Dennis Taylor, Esq.
District of Columbia
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.W.
Room 9401
Washington, D.C. 20002

Ed Solomon, Chair
Advisory Neighborhood Commission 2E
3265 S Street, N.W.
Washington, D.C. 20007

Washington Harbour Condominium Unit Owners Association
c/o Emily J. Vaias, Esq., Counsel
Linowes and Blocher LLP
7200 Wisconsin Avenue
Suite 800
Bethesda, MD 20814

Robert Pence, Cathi Bostic, Peter Bernad, and Lynne Wasserman
c/o Raymond B. Via, Esq., Counsel
Linowes and Blocher LLP
7200 Wisconsin Avenue
Suite 800
Bethesda, MD 20814


Vernon W. Johnson, III