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June 3, 2008

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RECEIVED
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Mr. Richard Nero
District of Columbia Office of Zoning
441 4th Street, N.W.
Suite 210-S
Washington, D.C. 20001

Re: Washington Harbour Condominium Unit Owners Association, Inc.
Board of Zoning Adjustment Appeal No. 17615

Dear Mr. Nero:

Pursuant to your request, enclosed please find a copy of our letter dated September 7, 2007 to the Board of Zoning Adjustment as well as a copy of the Association's Proposed Findings of Fact and Conclusions of Law for the above-referenced appeal.

Please feel free to contact me if you should have any questions.

Sincerely,

LINOWES AND BLOCHER LLP



Emily J. Vaias

Enclosures

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17615

EXHIBIT NO. 44

L&B 1014934v1/10043.0002

LINOWES
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ATTORNEYS AT LAW

September 7, 2007

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Via Hand Delivery

Ruthanne G. Miller, Chairman
Board of Zoning Adjustment
441 Fourth St., NW
Suite 210 South
Washington, DC 20001

Re: Board of Zoning Adjustment Appeal No. 17615
Proposed Findings of Fact and Conclusions of Law

Dear Chairman and Members of the Board:

On behalf of Washington Harbour Condominium Unit Owners Association, Inc. (the "Association"), enclosed please find twenty (20) copies of the Association's Proposed Findings of Fact and Conclusions of Law for the above-referenced appeal along with a compact disc containing an electronic version of this document.

As the Board is aware, pursuant to 11 DCMR § 3119.2 the burden of proof rests with the Appellant to clearly evidence and substantiate his allegation of error in the decision of the Department of Consumer and Regulatory Affairs (DCRA) and the Zoning Administrator to issue Building Permit No. 101019 (the "Permit"). While the Appellant presented a lengthy case and made numerous and varied claims of error, the Association firmly believes, as reflected in the Proposed Findings of Fact and Conclusions of Law enclosed herewith, that the Appellant did not meet its burden on appeal to clearly establish error in the issuance of the Permit or the interpretation of any section of the zoning regulations by DCRA or the Zoning Administrator.

By copy of this letter, each party to the appeal is served with the Association's Proposed Findings of Fact and Conclusions of Law.

Ruthanne G. Miller, Chairman

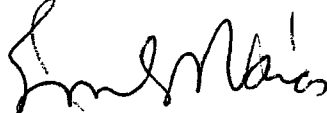
September 7, 2007

Page 2

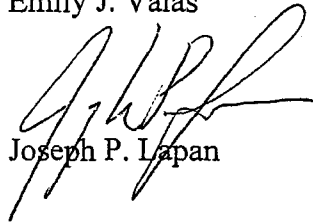
Please contact us if you have any questions or require additional information.

Sincerely,

LINOWES AND BLOCHER LLP



Emily J. Vaia



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.
Jill Stern, Esq.
Mr. Matthew LeGrant

Appeal No. 17615 of William J. Harnett, pursuant to 11 DCMR §§ 3100 and 3112, from the November 17, 2006 administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs to issue Building Permit No. 101019 permitting the striping of five (5) new parking spaces in the Washington Harbour Condominium parking garage, identified as parking spaces P-1 through P-5. The subject premises is located within the W-3 District and is located at 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

ORDER

PRELIMINARY MATTERS

On January 12, 2007, Appellant William J. Harnett ("Appellant") filed an appeal of the decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") to issue Building Permit No. 101019 ("Permit") to Washington Harbour Condominium Unit Owners Association, Inc. ("Owner") to stripe five (5) new parking spaces in the existing parking garage located at 3030 K Street, N.W. ("Subject Property"). The Permit, issued on November 17, 2006, permitted the Owner to perform the "striping of five (5) new parking spaces in Owner's parking garage identified in yellow as spaces P1-P5 on the attached plan". The Appellant claims that the Permit authorized the creation of parking spaces that are in violation of several provisions of Chapter 21 (Off-Street Parking Requirements) of Title 11 of the District of Columbia Municipal Regulations ("DCMR"), entitled "Zoning" (the "Zoning Regulations"), including those pertaining to access aisle width, vertical clearance, encroachment on private walkways and driveways, the provision of "reasonable and convenient" parking facilities and the requirements for building permit applications.

The Board heard the appeal at a hearing held on June 5, 2007, and continued on July 17, 2007 and July 31, 2007. The Appellant, DCRA and the Owner participated in the hearing.

At its October 2, 2007 public meeting, the Board deliberated on the considerable testimony and argument presented and voted to deny the appeal by a vote of _ _ - _ .

FINDINGS OF FACT

1. The Subject Property is located at 3030 K Street, N.W. and is in the W-3 zoning district.
2. The Subject Property is an approximately 219,377 square-foot lot and is improved with a 35-unit multi-family dwelling structure and an underground parking garage.
3. Prior to the creation of parking spaces P-1 through P-5, the subject parking garage contained 48 parking spaces.
4. The areas from which parking spaces P-1 through P-5 were created are common elements of the condominium and are therefore subject to control by Owner.
5. Owner created parking spaces P-1 through P-5 on or about September 20, 2004.
6. By Notice of Violation and Notice to Abate dated January 4, 2005, DCRA cited Owner with two (2) violations related to spaces P-1 through P-5 (hereinafter, the "New Spaces"). The first violation cited was of 12 DCMR 105.1 (striping parking garage without approved plans/building permits). The second violation cited was of 11 DCMR 2117 (access, maintenance and operations).
7. By letter dated October 23, 2006, DCRA rescinded the violation with regard to 11 DCMR 2117. See Ex. 18.
8. On or about November 17, 2006, Owner applied for a building permit for the striping of the New Spaces.
9. On November 17, 2006, DCRA issued the Permit to the Owner for the New Spaces. See Ex. 22.
10. DCRA issued the Permit based on Owner's submission of the application materials, including the Parking Facility Plan (hereinafter referred to as the "Parking Plan", included in the record as Item #2 in Exhibit 22) as well as the Plat Plan (included in the record as Exhibit 28), which had previously been provided to the Zoning Administrator.
11. Appellant owns space P-112.
12. The New Spaces remain common elements of the condominium for which certain individuals residing in the building have been granted licenses to use, and Owner's authority to do so has been confirmed by the Superior Court of the District Columbia in Civil Action No. 2004-CA-007452-B. See Ex. 18.
13. The Appellant stipulated that all spaces in the garage, except for the New Spaces, meet all applicable provisions of the Zoning Regulations. See June 5, 2007 public hearing transcript at Page 128, Line 15-20.
14. Pursuant to § 2101.1, Schedule of Requirements, the W-3 Zone requires one (1) parking space for every three (3) residential units.
15. The Subject Property has 35 residential units, and accordingly, 12 parking spaces are required.
16. Section 2101.2 provides that accessory parking spaces in excess of the number of spaces required by § 2101.1, may be provided as long as they comply with "all other applicable provisions" of Chapter 21 and Chapter 23.

17. Section 2118.9 delineates the distinction between required and non-required parking spaces as follows:

“Except where otherwise indicated, wherever 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.”

18. The Plat Plan identified twelve (12) parking spaces within the parking garage that meet all relevant criteria for “required” parking spaces. Ex. 28.
19. The twelve (12) parking spaces identified on the Plat Plan as “required” parking spaces in the subject garage meet the following sections of the Zoning Regulations:
- 11 DCMR 2115.1, 11 DCMR 2115.5, 11 DCMR 2115.7, 11 DCMR 2116.1, 11 DCMR 2116.2, 11 DCMR 2116.4, and 11 DCMR 2117.1 through 11 DCMR 2117.5, and 11 DCMR 2117.7, and 11 DCMR 2117.8.
20. The non-required parking spaces within the subject garage meet the following provisions of the Zoning Regulations:
- 11 DCMR 2115.5, 11 DCMR 2115.7, 11 DCMR 2116.1, 11 DCMR 2116.2, and 11 DCMR 2117.7.
21. Based on the Plat Plan, the Parking Plan, the exhibits of DCRA and the stipulation of Appellant, parking spaces P-118 through P-126, and spaces P-128 through P-130, meet the “required” parking spaces criteria of the Zoning Regulations. See June 5, 2007 public hearing transcript at Page 128, Line 15-20.
22. For purposes of issuing the Permit, and based on the Plat Plan and relevant provisions of the Zoning Regulations, the New Spaces are not “required” spaces pursuant to the Zoning Regulations.
23. For purposes of issuing the Permit, and based on the Plat Plan and relevant provisions of the Zoning Regulations, the remaining parking spaces, that is all parking spaces except for P-118 through P-126 and P-128 through P-130, do not have to meet the criteria applicable to “required” spaces.
24. Based on the Plat Plan, the access aisle adjacent to parking spaces P-118 through P-126 and P-128 through P-130 is 22 feet wide.
25. Based on the Plat Plan, the Parking Plan and exhibits of DCRA (Ex. 22), the New Spaces meet the following code provisions:
- 11 DCMR 2115.5- (vertical clearance), 11 DCMR 2115.7- (vertical clearance), 11 DCMR 2116.1- (location on same lot), 11 DCMR 2116.2- (location in permitted garage), and 11 DCMR 2117.7-(no encroachment or projection)
26. The Subject Property is not subject to Code §§ 2115.9 through 2115.18 because these sections apply to commercial buildings or structures located in a C-3, C-4, C-5 (PAD), SP, W or CR District, where at least seventy-five (75) parking spaces are required.

27. With parking spaces P-1 through P-5, the subject parking garage contains 53 parking spaces.
28. The New Spaces do not preclude sufficient access to all previously existing parking spaces in the subject parking garage.

Parking Dimensions

29. Based on the Plat Plan and DCRA exhibits, parking space P-1 is 9 ft. in width and 19 ft., 4 in. in length. See Ex. 28 and Ex. 22, Items 6 & 7.
30. Based on the Plat Plan, the Parking Plan and DCRA exhibits, parking space P-2 is 9 ft., 7 in. in width and 15 ft., 10 in. in length. See Ex. 28 and Ex. 22, Items 2 & 20.
31. Based on the Plat Plan, the Parking Plan and DCRA exhibits, parking space P-3 is 11 ft., 2 in. in width and at least 15 ft., 10 in. in length. See Ex. 28 and Ex. 22, Items 2 & 20.
32. Based on the Plat Plan, parking space P-4 is 9 ft., 2 in. in width and 19 ft. in length. See Ex. 28.
33. Based on the Plat Plan, parking space P-5 is 9 ft. in width and 19 ft. in length. See Ex. 28.
34. Parking spaces P-1 through P-5 all contain at least 6 ft, 6 in. of vertical clearance. See Ex. 28; see also June 5, 2007 public hearing transcript at Page 203, Lines 4-9 and July 17, 2007 public hearing transcript at Page 356, Lines 7-9
35. Based on the Plat Plan, Parking spaces P-118 through P-126 and spaces P-128 through P-130 all are at least 9 ft. in width, 19 ft. in length and contain at least 6 ft., 6 in. of vertical clearance. Ex. 28.
36. Parking spaces P-118 through P-126 and spaces P-128 through P-130 are clearly striped and lined in accordance with their respective dimensions.
37. Based on the Plat Plan, the access aisle adjacent to parking spaces P-118 through P-126 and spaces P-128 through P-130 is 22 ft. wide. See Ex. 28.
38. Based on the Plat Plan, the access aisle adjacent to and between parking spaces P-2/P-3 and P-111/P-112 is 19 ft., 5 in. wide. See Ex. 28 and Ex. 22, Item 2.
39. Based on DCRA exhibits, the access aisle adjacent to and between parking spaces P-2/P-3 and P-142/P-143 is 19 ft., 2 in. wide. See Ex. 22, Item 24.
40. A wheel stop exists at the end of parking space P-116. See Ex. 22, Items 3 & 4.
41. All parking spaces in the subject parking garage are located on the same lot as the residential building they are intended to serve.
42. None of the parking spaces in the subject parking garage are located in an area between a building line and lot line abutting a street.

CONCLUSIONS OF LAW

The Appeal was Timely and the Board has Jurisdiction

By motion dated May 8, 2007, Owner moved to dismiss the appeal as untimely and improper due to lack of jurisdiction. The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) provide that the Board shall "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration of the Zoning Regulations" (11 DCMR § 3100.2). Accordingly, because Appellant alleged that DCRA's decision to issue the Permit was in error as a result of violations of the Zoning Regulations, the appeal is properly under the Board's jurisdiction.

With respect to the timeliness of the appeal, 11 DCMR § 3112.2(a) states "an appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." The Permit was issued by DCRA on November 17, 2006. The Appellant filed this appeal on January 12, 2007, which was within sixty (60) days of the administrative decision and, therefore, timely.

At its June 5, 2007 public hearing, the Board voted to deny the Owner's motion to dismiss by a vote of 3-0-2.

The Owner is a Party to the Appeal and has Duly Authorized Legal Counsel to Appear on its Behalf

By motion dated June 5, 2007, the Owner moved to intervene as a party to the appeal. However, as the applicant for the Permit, and the owner of all common elements on the Subject Property, including those common elements comprising parking spaces P-1 through P-5, the Owner is a party to the appeal pursuant to the definition of "party" contained in 11 DCMR § 3199. Therefore, the Owner withdrew its motion to intervene at the June 5, 2007 public hearing.

Because the Owner is a party to the appeal as a matter of right pursuant to 11 DCMR § 3199, 11 DCMR § 3106.2 regarding appearance and representation is inapplicable to the Owner. Nonetheless, the Owner testified at the June 5, 2007 hearing and provided additional correspondence dated June 27, 2007 confirming that Emily J. Vaia, Joseph P. Lapan and the law firm of Linowes and Blocher LLP have been and are duly authorized to represent the Owner and appear on its behalf with respect to the appeal (Ex. 25).

DCRA and the Owner Are Not Compelled to Produce Correspondence

By motion dated July 30, 2007, the Appellant moved to compel all correspondence between the Owner, the Zoning Administrator and DCRA related to the appeal and all correspondence between the Owner, DCRA and other parties related to the appeal. Appellant alleged that at the hearing on July 17, 2007, the Board had required DCRA or Owner to produce such correspondence. However, the Board did not impose such a requirement. Further, the Zoning

Regulations do not provide the Board with the authority to compel correspondence. Based on the testimony of DCRA and the Zoning Administrator, the Board is satisfied, that all documents and information relied upon by DCRA and the Zoning Administrator in making the decision to issue the Permit are before the Board and part of the appeal record.

Therefore, at its July 31, 2007 public hearing, the Board voted to deny the Appellant's motion to compel by a vote of 3-0-2.

The Merits of the Appeal

Appellant's Burden of Proof

The Board's authority on appeal is to determine whether there was an error made by DCRA and the Zoning Administrator in the administration of the Zoning Regulations. (11 DCMR § 3100.2.) The Zoning Regulations are clear that in all appeals and applications, the burden of proof rests with the appellant or applicant. (11 DCMR § 3119.2.) Therefore, in order to determine that an error was made in the issuance of the Permit, as alleged by the Appellant, the Board must conclude that the Appellant has met its burden of proof in clearly establishing such error.

The Appellant has made several arguments on appeal, which will be addressed in turn below.

Access Aisle Width 2117.5 (2115.14)

The Appellant contends that the issuance of the Permit and the creation of parking spaces P-2 and P-3 violate minimum access aisle width requirements contained in 11 DCMR § 2117.5. DCRA and the Owner maintain that access aisles are sufficiently wide and in compliance with the Zoning Regulations at all points within the subject parking garage. 11 DCMR § 2117.5 states:

“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 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.) for ninety degree (90°) angle parking, and not less than seventeen (17 ft.) for angle parking that is sixty degrees (60°) or less as measured from the center line of the aisle.”

The Appellant contends that two access aisles in the subject parking garage do not contain sufficient width per 11 DCMR § 2117.5. Specifically, the two access aisles for which the Appellant asserts noncompliance are:

1. The access aisle between parking spaces P-2/P-3 and parking spaces P-111/P-112; and
2. The access aisle between parking spaces P-2/P-3 and parking spaces P-142/P-143.

Before making its finding on the Appellant's assertions of inadequate access aisle width, the Board must determine the applicable minimum access aisle width requirement for these access aisles per 11 DCMR § 2117.5. The Appellant contends that per 11 DCMR § 2117.5, the minimum required access aisle width for both access aisles is twenty feet (20 ft.). The Appellant bases this assertion on the following arguments:

1. With respect to both access aisles, the Appellant argues that the incorporation of 11 DCMR §§ 2115.9 through 2115.18 into 11 DCMR § 2117.5, specifically 11 DCMR § 2115.14, renders the twenty-foot (20 ft.) minimum access aisle width requirement contained in 11 DCMR § 2117.5 applicable to access aisles between all parking spaces;
2. With respect to the access aisle between parking spaces P-2/P-3 and P-111/P-112, the Appellant argues that, in any event, parking space P-112 owned by the Appellant is a "required" parking space per the Zoning Regulations and, therefore, 11 DCMR § 2117.5 requires a minimum twenty-foot (20 ft.) access aisle width.
3. With respect to the access aisle between parking spaces P-2/P-3 and P-142/P-143, the Appellant argues that because this access aisle is an extension of an access aisle that provides accessibility between two or more "required" parking spaces, the entire access aisle must provide a minimum twenty-foot (20 ft.) access aisle width per 11 DCMR § 2117.5.

In response to these arguments, DCRA and the Owner maintain that 11 DCMR § 2115.14 is not applicable to the Subject Property because it is not a commercial structure and that neither of the allegedly noncompliant access aisles are required to have minimum twenty-foot (20 ft.) wide access aisles because neither is serving "required" parking spaces per the Zoning Regulations. The Board takes each of the Appellant's assertions in turn:

1. 11 DCMR § 2117.5 and 11 DCMR § 2115.14. The Appellant asserts that by incorporating 11 DCMR § 2115.14, 11 DCMR § 2117.5 requires twenty-foot (20 ft.) access aisles in all cases. However, the Appellant misreads the relationship between 11 DCMR § 2117.5 and 11 DCMR § 2115.14. 11 DCMR § 2117.5 is clearly aimed at access aisles between rows of "required" parking spaces, except as provided in 11 DCMR §§ 2115.9 through 2115.18. 11 DCMR §§ 2115.9 through 2115.18 are clearly applicable only for a "commercial building or structure" located in certain zones. Because the Subject Property is not a commercial building or structure, the provisions of 11 DCMR §§ 2115.9 through 2115.18, including 2115.14, are inapplicable in this instance and the provisions of 11 DCMR § 2117.5 are applicable. As stated, 11 DCMR § 2117.5 clearly intends that only access aisles between "required" spaces contain minimum twenty-foot (20 ft.) widths and, therefore, is not applicable to access aisles serving non-required parking spaces.

2. Parking Space P-112. The Appellant next asserts that P-112 is a "required" parking space, or should be a "required" parking space, per the Zoning Regulations and, therefore, the access aisle serving parking space P-112 must be a minimum of twenty feet (20 ft.). DCRA and the Owner contend that the Zoning Regulations do not provide for the designation of individual parking spaces as "required" or "non-required" and, instead, only mandate the provision of a certain

number of “required” parking spaces at all times. DCRA and the Owner maintain, therefore, that parking space P-112 is not, and has never been, a “required” parking space in its own right and, as with any other parking space, is not entitled to such a designation for zoning purposes. Further, as indicated on the Plat Plan, there are twelve spaces within the garage that meet the “required” code criteria, and that is sufficient. Therefore, they maintain, the access aisle between parking spaces P-2/P-3 and parking spaces P-111/P-112 is not required to be twenty feet (20 ft.) in width.

There has been much discussion and testimony regarding the nature of “required” vs. “non-required” parking spaces in the Zoning Regulations and the process by which that distinction is determined and applied. The Appellant’s expert zoning witness has acknowledged the existence of the distinction between “required” and “non-required” parking spaces in the Zoning Regulations and has further acknowledged that if, in fact, parking spaces P-2, P-3, P-110, P-111 and P-112 are “non-required” parking spaces, the minimum aisle width requirements of 11 DCMR § 2117.5 do not apply. See July 17, 2007 public hearing transcript at Page 345, Lines 17-23.

Therefore, the core question for the Board’s consideration in this regard is whether parking space P-112 is, or should have been, designated a “required” parking space per the Zoning Regulations. In determining whether parking space P-112 is, in fact, a “required” parking space, and whether error was made by DCRA and the Zoning Administrator in interpreting the relevant provisions of the Zoning Regulations, the Board relies on the express language of the Zoning Regulations, as well as the testimony by DCRA and the Zoning Administrator regarding the City’s policies and practices in this regard.

Turning to the relevant provisions of the Zoning Regulations, 11 § DCMR 2101.1 provides the “Schedule of Requirements for Parking Spaces”, which dictates the number of parking spaces that are “required” for a given use in a given zone. 11 § DCMR 2101.1 provides that for residential uses in the W zoning district, one (1) parking space for each three (3) dwelling units is “required”. Therefore, because the Subject Property is in the W-3 Zone and contains 35 residential dwelling units, 11 DCMR § 2101.1 dictates that twelve (12) parking spaces are “required” for the Subject Property. 11 DCMR § 2101.2 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.” The Board concludes that this section clearly allows for the provision of additional accessory parking spaces (i.e., parking spaces that serve a primary use) beyond those that are “required” (i.e., non-required parking spaces). Therefore, with respect to the Subject Property, any parking space provided in addition to the twelve (12) “required” parking spaces is “non-required” pursuant to 11 DCMR § 2101.2.

The distinction between “required” and “non-required” parking spaces is significant because the Zoning Regulations apply a heightened set of standards with respect to size and access to “required” parking spaces. 11 DCMR § 2118.9 is instructive in clearly stating the rule of interpretation in this regard, stating “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.” By clear implication, therefore, where the Zoning Regulations contain a provision applicable only to “required” spaces, that provision is inapplicable to “non-required” parking spaces. Applying this rule of interpretation as it relates to this case, this distinction means that 11 DCMR § 2115.1, as to minimum parking space size, and 11 DCMR §2117.5, as to minimum access aisle width, apply only to “required” parking spaces.

The Zoning Regulations indeed call for the provision of a certain number of “required” parking spaces, and further provide 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” (11 DCMR § 2117.1), however the Zoning Regulations do not state that the locations of individual “required” parking spaces are to be specifically designated. The testimony of former Zoning Commissioner Lindsley Williams and current Zoning Administrator Matthew LeGrant also confirm that the Zoning Regulations do not require such designation. See July 17, 2007 public hearing transcript at Page 383, Lines 16-20 and July 31, 2007 public hearing transcript at Pages 181-185. While both Mr. Williams and Mr. LeGrant indicated that some type of demarcation or highlighting of parking spaces that meet the “required” standards is helpful, Mr. LeGrant explained that it is the job of the Zoning Administrator to review parking space dimensions and make a determination that the minimum number of “required” spaces are provided based on those dimensions. In this regard, it is not the designation of individual spaces as “required” that is necessary, but instead it is the determination by the Zoning Administrator that a sufficient number of parking spaces meet the standards for “required” parking spaces that dictates compliance or noncompliance with the Zoning Regulations.

Just as the Zoning Regulations require an initial determination of compliance with the provision of the minimum number of “required” parking spaces at the time of building construction, the Zoning Regulations require the ongoing provision of a sufficient number of “required” parking spaces. 11 DCMR 2117.2 states “required parking 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...”. The phrase “in total extent” can be clearly interpreted to mean the total number of “required” parking spaces and means that a building cannot provide less “required” spaces than is dictated by 11 DCMR § 2101.1, but, their actual location or designation is not relevant. In this instance, where the Owner applied for the Permit to add five additional non-required parking spaces, DCRA and the Zoning Administrator reviewed the Parking Plan, Plat Plan and related materials and concluded that the subject parking garage continued to provide twelve (12) “required” parking spaces in full compliance with the standards applicable to “required” spaces. In so doing, DCRA and the Zoning Administrator ensured compliance with 11 DCMR §§ 2117.1 and 2117.2.

The Appellant’s argument that parking space P-112 is, or should be, a “required” parking space, and is therefore entitled to minimum twenty-foot (20 ft.) access aisle width, boils down to the contention that (1) he purchased space P-112 with the expectation that it was a “required” parking space and (2) that DCRA and the Owner do not have the right or authority to designate other parking spaces in the subject parking garage as “required” spaces without designating space P-112 as “required” as well. Appellant’s argument fails for multiple reasons.

With respect to the Appellant's first argument, Appellant's expectations or perception that conditions in the parking garage could not be altered do not bear on the Board's determination of whether there was an error in the interpretation or administration of the Zoning Regulations by issuing the Permit. With respect to the Appellant's second argument, the Board finds that the Zoning Regulations do not require the specific designation of certain "required" parking spaces, but instead simply require that the minimum number of "required" parking spaces continue to be maintained at all times. The Board finds that DCRA and the Zoning Administrator, in issuing the Permit, properly concluded that the creation of the New Spaces did not impact or prohibit the continuing ability of the subject parking garage to provide the minimum number of "required" parking spaces and the "non-required" spaces met the relevant Zoning Regulations; therefore, the garage was in compliance with all applicable provisions of the Zoning Regulations. For these reasons, it was not necessary or required that parking space P-112 be designated as a "required" parking space and, therefore, the aisle between parking spaces P-2/P-3 and parking spaces P-111/P-112 is not required to be twenty feet (20 ft.).

3. Access Aisle Extension. The Appellant finally asserts that the aisle between parking spaces P-2/P-3 and P-142/P-143 is required to be a minimum of twenty feet (20 ft.) wide, per 11 DCMR § 2117.5, because it is an extension of an aisle that provides accessibility or maneuvering space between two or more "required" parking spaces. Specifically, Appellant asserts that because the access aisle serving parking spaces P-1 through P-5 and P-114 through P-143 provides access to "required" parking spaces, the entire access aisle must be twenty feet (20 ft.) wide even where it is not directly serving "required" spaces. Thus, according to Appellant, when the aisle goes down to 19 feet, 2 inches wide at the western end it violates 11 DCMR § 2117.5.

The Board finds that this is an overly broad and untenable reading of 11 DCMR § 2117.5. The Board agrees with the interpretation of 11 DCMR § 2117.5 provided by Zoning Administrator LeGrant that the twenty-foot (20 ft.) aisle width requirement applies only where an aisle is adjacent to "required" parking spaces. See July 31, 2007 public hearing transcript at Page 201, Lines 1-19. To interpret 11 DCMR § 2117.5 otherwise, as suggested by the Appellant, would mean all aisles which may at some point provide access to a "required" space be 20 feet wide, which makes the whole distinction between "required" and "non-required" spaces superfluous. Further, clearly 11 DCMR § 2117.5 provides that access aisle width for angled parking spaces need only be a minimum of seventeen feet (17 ft.) and there are undoubtedly situations where perpendicular "required" spaces would be on the same access aisle as angled spaces. Therefore, to extend the 20-foot access aisle width requirement beyond the area adjacent to the "required" spaces would be an unreasonable interpretation of the regulations. Accordingly, the Board finds that the access aisle between non-required spaces P-2/P-3 and P-142/143 does not have to be twenty feet (20 ft.) wide.

Vertical Clearance

The Appellant claims that parking spaces P-1, P-4 and P-5 violate the minimum vertical clearance requirement of the Zoning Regulations. DCRA and the Owner maintain that vertical clearance for these spaces is sufficient. 11 DCMR § 2115.5 requires that "all parking spaces shall have a minimum vertical clearance of six feet, six inches (6 ft., 6 in.)". From the testimony and evidence of record, the Appellant bases its claim that spaces P-1, P-4 and P-5 do not meet

minimum vertical clearance requirements on the facts that (1) each referenced parking space contains utility piping above it so as to limit vertical clearance and (2) parking space P-5 contains a slanted column that restricts vertical clearance at the left edge of the parking space.

The Board acknowledges from photographs placed into the record by the Appellant and by DCRA that parking spaces P-1, P-4 and P-5 do appear to contain certain piping and other building infrastructure overhead. However, the Appellant does not provide any evidence of record that these overhead items encroach on the required minimum vertical clearance of six feet, six inches, and in fact, Appellant's zoning expert testified that the utility lines over spaces P-4 and P-5 are "not necessarily within the 6 foot 6 inch requirement". See June 5, 2007 public hearing transcript at Page 203, Lines 4-9; see also July 17, 2007 public hearing transcript at Page 356, Lines 7-9. The Board also acknowledges the existence of the slanted column adjacent to parking space P-5, but does not find sufficient specific evidence in the record that this column encroaches on the required vertical clearance for parking space P-5.

As to actual vertical clearance measurements for parking spaces P-1, P-4 and P-5, the evidence of record includes the Plat Plan (Ex. 28) and the testimony of former Zoning Administrator Crews. Exhibit 28, the Plat Plan, denotes 6'6" vertical clearance for space P-4 and 6'8" vertical clearance for space P-5, in compliance with 11 DCMR § 2115.5. Further, former Zoning Administrator Bill Crews and DCRA counsel testified that the sufficiency of vertical clearance for parking spaces P-1 through P-5 was confirmed as part of the photographs and measurements taken in preparation for the appeal hearing. See July 31, 2007 public hearing transcript at Pages 134-146. Based on the uncontested evidence of record that parking spaces P-1 through P-5 have the minimum vertical clearance required by 11 DCMR § 2115.5, the Board must conclude that the Appellant has not met its burden of showing clear evidence of error that a vertical clearance violation exists on this basis.

Encroachment on Private Walkways and Driveways

The Appellant contends that the issuance of the Permit and the creation of parking spaces P-2 and P-3 permit vehicular encroachment into pedestrian walkways in violation of 11 DCMR § 2117.7. DCRA and the Owner maintain that the area of the parking garage where spaces P-2 and P-3 were created and the areas adjoining spaces P-2 and P-3 are not, and have never been, pedestrian walkways within the meaning of 11 DCMR § 2117.7 and, therefore, no encroachment into such a walkway has been permitted. 11 DCMR § 2117.7 states:

"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 designed so that no vehicle or any part thereof shall project over any lot line or building line."

For 11 DCMR § 2117.7 to be applicable to parking spaces P-2 and P-3, the Board must first determine whether these spaces adjoin, and therefore could potentially encroach on, "private walkways and driveways". These terms are not defined by the Zoning Regulations. However, reading these terms within the context of 11 DCMR § 2117.7, and other provisions of the Zoning

Regulations, it is apparent that 11 DCMR § 2117.7 is concerned with the relationship between surface parking areas and adjoining public rights-of-way or private walkways and driveways that are across a property line. The Board agrees with Zoning Administrator LeGrant's testimony that the only area in the subject parking garage that could even be considered a "private walkway" would be that area between parking space P-113 and the nearby wall, such area being already protected by a wheel stop at the end of parking space P-116. See July 31, 2007 public hearing testimony at Pages 186-187. Further, Appellant's parking expert, Michael P. Albers, testified that the subject garage is not required to have walkways. See June 5, 2007 public hearing transcript at Page 189, Line 8-9.

In any event, it appears clear from the Zoning Regulations that access aisles between parking spaces in a parking lot are not, and cannot, be synonymous with "private walkways and driveways" by virtue of the fact that these terms are used distinctly from one another in the Zoning Regulations. For example, 11 DCMR § 2115.7 treats the terms "access aisles" and "driveways" as independent from one another for purposes of vertical clearance requirements. Simply because people walk through an area to reach their destination does not make it a walkway. To say otherwise would make an entire parking lot a walkway. Because parking spaces P-2 and P-3 were not created in a "private walkway or driveway", nor do they adjoin a "private walkway or driveway", 11 DCMR § 2117.7 is not applicable in the way suggested by the Appellant. Therefore, the Board concludes that the issuance of the Permit does not violate 11 DCMR § 2117.7 and no error was made by DCRA in this regard.

"Reasonable and Convenient" Parking Facilities

The Appellant contends that the issuance of the Permit and the creation of parking spaces P-2 and P-3 violate 11 DCMR § 2116.8 by impeding ingress and egress to parking space P-112. DCRA and the Owner maintain that 11 DCMR § 2116.8 does not apply to the subject parking spaces and argue that 11 DCMR § 2116.8 only applies when accessory parking spaces are located off-site. 11 DCMR § 2116.8 states:

"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."

DCRA has provided evidence in the record of legislative history indicating that 11 DCMR § 2116.8 is meant to be subordinate to 11 DCMR § 2116.5 and only apply when the Board is approving off-site accessory parking spaces, however the Board does not believe this legislative history is required to make this conclusion. The Board believes that the legislative structure and language of 11 DCMR §§ 2116.5 through 2116.9 clearly intends that the provisions of 11 DCMR § 2116.8 only apply in the special exception context when reviewing proposals for off-site accessory parking. 11 DCMR § 2116.5 states:

"Except as provided in § 2117.9, if approved by the Board of Zoning Adjustment pursuant to § 3104 for special exceptions, open parking spaces accessory to any building or structure may be located anywhere on the lot

upon which the building or structure is located, or elsewhere, except in the case of a one-family dwelling, in accordance with §§ 2116.6 through 2116.9”

11 DCMR § 2116.5 clearly addresses the process for Board approval of off-site accessory parking spaces and identifies §§ 2116.6 through 2116.9 as the provisions applicable to such approval. A review of §§ 2116.6 through 2116.9 clearly shows that these sections directly address the provision of off-site accessory parking spaces and are not intended to be general provisions applicable to all accessory spaces. Specifically, 11 DCMR § 2116.8 references “the” accessory parking spaces, in specific reference to those accessory parking spaces provided off-site pursuant to 11 DCMR § 2116.5.

As a matter of legislative drafting and statutory interpretation, had 11 DCMR § 2116.8 been intended to apply to any and all accessory parking spaces instead of certain accessory parking spaces, 11 DCMR § 2116.8 would not begin with the word “the”, but would instead begin with “any” like 11 DCMR § 2115.2 or would simply not have a preceding qualifier such as “the” or “any” as is the case with 11 DCMR § 2101.2. This interpretation is supported by the testimony of former Zoning Commissioner Lindsay Williams and current Zoning Administrator LeGrant. See July 17, 2007 public hearing testimony at Pages 396-399 and July 31, 2007 public hearing transcript at Pages 188-198. Therefore, the Board concludes that 11 DCMR § 2116.8 is not applicable in the current instance and that the issuance of the Permit does not violate 11 DCMR § 2116.8. Appellant has not clearly established that an error was made by DCRA in this regard.

Nonetheless, the Board notes that despite the inapplicability of 11 DCMR § 2116.8, the creation of the New Spaces does not change either the reasonableness or convenience of any of the existing spaces in the subject parking garage. With respect to parking space P-112 specifically, Appellant’s parking expert himself testified that it is the existing wall and column that impact maneuverability in and out of parking spaces P-112 and that marginal differences in the width of the access aisle would not impact maneuverability. See June 5, 2007 public hearing transcript at Pages 167-170.

General “Framework” of the Zoning Regulations

In addition to the specific contentions of substantive error made by the Appellant discussed above, the Appellant has argued that the general “framework” of the Zoning Regulations provide a basis for the Board to find error in the issuance of the Permit. More specifically, the Appellant has argued that various provisions of 11 DCMR §§ 2100, 2101 and 2117 establish a framework that require the Owner to designate certain parking spaces within the subject parking garage as “required”, but prohibit the Owner from unilaterally altering which individual spaces are “required” without Board approval.

The Board does not accept the Appellant’s argument that a combination or amalgamation of multiple sections of the Zoning Regulations somehow implicitly establish a requirement or prohibition that does not explicitly exist and, instead, examines each of the individual sections referenced by the Appellant to determine whether a specific error in the administration of the Zoning Regulations has been made by DCRA in issuing the Permit. Certain provisions of the Zoning Regulations discussed below are also discussed in previous sections of this Order.

11 DCMR § 2100.2. This section of the Zoning Regulations, which is addressed in more detail below, is procedural in nature and establishes requirements for building permit applications for buildings and structures. It is not relevant to the distinction or process for determination of “required” vs. non-required parking spaces.

11 DCMR § 2100.3. This section of the Zoning Regulations is also procedural in nature and establishes requirements for the issuance of a certificate of occupancy. The Appellant has not claimed any error with respect to the issuance of a certificate of occupancy for the Subject Property and, therefore, this section is irrelevant and inapplicable to this appeal.

11 DCMR §§ 2100.4, 2100. 6 and 2100.7. These sections of the Zoning Regulations address the provision of “required” parking spaces where the use or intensity of use of a building changes. Specifically, these sections dictate if and how many additional parking spaces may be required when building use or intensity of use changes or is increased. No change in the use or intensity of the use of the Subject Property has occurred in this case and no additional parking spaces are “required”, therefore these section are irrelevant and inapplicable to the Permit.

11 DCMR §§ 2101.1 and 2101.2. 11 DCMR § 2101.1 sets the schedule of “required” parking depending on the zoning classification and use of a particular property. Per 11 DCMR § 2101.1, residential uses in the W Zone require one parking space for each three dwelling units. Because the Subject Property contains 35 dwelling units, 11 DCMR §2101.1 dictates that 12 parking spaces are “required”. 11 DCMR § 2101.1 does not contain any further provisions addressing the designation of certain parking spaces as “required”. 11 DCMR § 2101.2 simply allows for the provision of additional accessory parking spaces in an amount that exceeds the number of “required” parking spaces (i.e. non-required parking spaces). Neither of these sections provides the basis for a claim of error in the issuance of the Permit.

11 DCMR § 2117.1. This section states that the parking spaces “required” by the Zoning Regulations (i.e. per 11 DCMR § 2101.1) “shall be provided and maintained so long as the structure that the parking spaces are designed to serve exists.” This section plainly states that the number of “required” parking spaces for the Subject Property (12) must be maintained. The issuance of the Permit does not violate or create noncompliance with this section.

11 DCMR § 2117.2. In addition to the requirement of 11 DCMR § 2117.1 that “required” parking spaces must be maintained, this section provides that “required” parking spaces “shall not be reduced in total extent” except upon approval by the Board. This section clearly provides that the total number of “required” spaces may not be reduced below what is required by 11 DCMR § 2101.1 without Board approval pursuant to certain criteria. The issuance of the Permit did not reduce the total number of “required” parking spaces for the Subject Property and, therefore, did not require Board approval or violate this section.

11 DCMR § 2117.3. This section simply states that all “required” parking spaces “shall be clearly striped and lined” according to the dimensions for “required” parking spaces. This section does not dictate the designation of “required” spaces, but instead simply requires their physical striping and lining. The Permit was not for the striping of “required” spaces and the

Appellant has not claimed that “required” parking spaces are not striped and/or lined. In fact, Appellant stipulated that all other spaces within the garage other than the New Spaces are compliant. Therefore, this section does not provide a basis for the Appellant’s claims of error in the issuance of the Permit.

In summary, the Board does not find any explicit provision in these sections of the Zoning Regulations that, either separately or combined, provides the basis for a finding of error in the issuance of the Permit and the Appellant has not met its burden of clearly establishing the existence of such an error.

Permit Application Plans

In addition to the Appellant’s claims of substantive error, addressed above, the Appellant has alleged procedural error in the application for and issuance of the Permit. Specifically, the Appellant asserts that the Parking Plan that accompanied the Permit application was insufficient in its contents and did not contain all items required by 11 DCMR § 2100.2. DCRA and the Owner maintain that a plan containing the dimensions of all parking spaces in the subject parking garage is not required by the Zoning Regulations in this instance and that, in any event, DCRA and the Zoning Administrator had all required and necessary information to interpret and apply the Zoning Regulations and issue the Permit. 11 DCMR § 2100.2 states:

“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.”

The Appellant contends that because the Parking Plan that accompanied the Permit application did not contain the location, dimension and grades of all parking spaces in the subject parking garage, the Permit was issued in error and the decision of DCRA and the Zoning Administrator should be reversed. The Board disagrees with the Appellant’s suggested interpretation and application of 11 DCMR § 2100.2 and also disagrees with the Appellant’s suggested remedy.

First, 11 DCMR § 2100.2 provides the application requirements for a building permit “for a building or structure to be erected on or after May 12, 1958”. Presumably, this provision is intended to establish the application requirements for new construction in order to ensure that a fully dimensioned parking plan is available for the City to review. However, in this instance the Owner applied for the Permit to stripe five (5) new spaces in an existing parking garage for an existing building without proposing the erection of any building or structure¹. In such an instance, 11 DCMR § 2100.2 does not explicitly apply and full dimensions for all parking spaces are not required. Further, the Owner, DCRA and former Zoning Administrator Crews all testified as to the lengthy background and history of this case and, specifically, testified that with the

¹ It should be noted that the need to even obtain a building permit pursuant to 12 DCMR 105.1 was questioned by the Owner in this instance, however Owner acquiesced to the Zoning Administrator’s request to do so as part of the resolution of this matter.

Permit application materials, Parking Plan, Plat Plan and other documents, DCRA and former Zoning Administrator Crews had all necessary information and dimensions in order to make the necessary findings and conclusions. See July 17, 2007 public hearing transcript at Pages 405-428; See July 31, 2007 public hearing transcript at Pages 64-73, 153-155; See also Ex. 18. Therefore, the Board does not believe that there was a procedural error in the administration of the Zoning Regulations in this regard and that the Permit was issued with full availability and consideration of all relevant information.

For the reasons stated above, the Board concludes that the Appellant has not met his burden of proof in demonstrating that DCRA erred in issuing the Permit allowing the Owner to stripe and create parking spaces P-1 through P-5. Therefore it is hereby **ORDERED** that this appeal is **DENIED**.

VOTE: -- -- (_____)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
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.

BZA APPEAL NO. 17615

As Director of the Office of Zoning, I hereby certify and attest that on _____, 2007, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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

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