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October 19, 2006

Chairman Geoffrey Griffis  
Board of Zoning Adjustment  
441 Fourth Street, N.W.  
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Washington, D.C. 20001

BOARD OF ZONING ADJUSTMENT  
District of Columbia

CASE NO. 17317  
EXHIBIT NO. 21

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RE: BZA Appeal No. 17317, Washington Harbour Condominium Unit Owners' Association

Dear Chairman Griffis:

## Introduction

We write with regard to BZA Appeal No. 17317, which relates to the Notice of Violation and Notice to Abate issued on January 4, 2005 to the Washington Harbour Condominium Unit Owners Association ("WHCA") by the District of Columbia's Department of Consumer and Regulatory Affairs, Building and Land Regulation Administration. More specifically, our firm represents William J. Harnett, a resident of the Washington Harbour Condominium Association who has suffered specific and tangible injury as a result of the WHCA's illegal actions.

When Washington Harbour was built in the mid-1980's, WHCA applied for and received a permit to construct a parking garage containing 48 spaces. Although WHCA sought to include more spaces in the parking garage, that was never permitted. In 2004, without approval of the Condominium ownership, WHCA sold license rights to five "new" parking spaces. Now, if WHCA's actions are allowed to stand, it will mean that entities like WHCA can "create" so-called "new" parking spaces whenever and wherever they want, without review by any District Government agency, without regard for any of the applicable municipal regulations and other laws governing parking, without regard for public safety, without regard for the opposition of a majority of the Unit Owners, and without consideration of the impact upon Unit Owners such as Mr. Harnett – whose use of his own residential parking space, which he purchased over 20 years ago when the Condominium was built, is prevented by WHCA's actions.

Mr. Harnett is the owner of a residential condominium unit designated as "PH#206" at Washington Harbour, along with the parking unit designated as "P-112." Fundamentally at issue

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in BZA Appeal No. 17317 is Mr. Harnett's right and ability to use his parking spot and WHCA's noncompliance with applicable regulations designed for the protection and safety of the public. It is for these reasons that, by letter dated October 6, 2006, ANC 2E has recommended that BZA Appeal No. 17317 be denied.

The Notice of Violation and Notice to Abate stems from WHCA's attempt to create five new parking spaces in its residential parking garage without complying with applicable law, including the relevant laws and municipal regulations cited in the Notice of Violation and Notice to Abate. WHCA did not apply for a building permit, submit its plans for administrative review, or otherwise make any attempt to ensure that its "new" parking spaces were appropriate, lawful, and safe. The results for Mr. Harnett and other residents and members of the public have been dire.

Enclosure A depicts the relevant portion of the parking garage and the location of the "new," illegally created parking spaces. This is the same diagram that was presented to ANC 2E and considered and relied upon by the Commission when it made its recommendation that this appeal be denied. "New" parking spaces 2 and 3 are directly behind Mr. Harnett's parking spot and, when either is used, completely impede the use of Mr. Harnett's parking space. There is only **16 feet, 10 inches** between parking space #112 and new parking space 2, more than three feet less than is required. Indeed, Exhibit A to WHCA's own Pre-Hearing Statement indicates that there is less than the required 20 feet (WHCA erroneously claims there is 19 feet, five inches, which is clearly an overstatement that does not comply with applicable regulations, even if it were true – which it is not). Likewise, page 2 of Exhibit A to WHCA's submissions shows a vehicle diagonally stuck in the area between parking space 112 and parking spaces 2 and 3 – the vehicle, in fact, is shown hitting the wall as it tries to enter parking space 112 – the very same predicament faced by Mr. Harnett. (WHCA states that its Exhibit B represents the opinion of an undisclosed "parking expert," but no information is offered as to who the individual is, what qualifications he or she may possess, what investigation that individual conducted, or any other information that would provide a proper basis for the BZA to receive such evidence – thus, the BZA should not consider this assertion as "expert" testimony of any relevant fact.)

To demonstrate definitively that the area in question is much less than the regulations provide, and much less than the space that would permit Mr. Harnett to use parking space 112, Enclosure B to this letter includes a group of photographs showing the areas in question. These photographs show the space in which Mr. Harnett's vehicle would have to maneuver, and validate conclusively that WHCA's actions have prevented Mr. Harnett from using parking space 112.

As was described to ANC 2E prior to its recommendation to deny Appeal No. 17317, Mr. Harnett has been unable to move his car for over a year and a half when parking spaces 2 or 3 are occupied. Moreover, parking spaces 2 and 3 lack required "wheel stops" for pedestrian safety

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and are incompletely striped so as to not fully delineate the area in which a vehicle should be parked. There are stripes painted on the sides along parking spaces 2 and 3, but no lines at either end to show where parking spaces 2 and 3 are supposed to begin and end. These issues are also demonstrated in the photographs at Enclosure B.

Before WHCA took its actions, parking spaces 2 and 3 were previously striped as no-parking so as to permit pedestrian access to WHCA's Residential Elevators. As a result of the "new" spaces, which simply painted over the prior walkway, pedestrians seeking to access the elevator must walk through narrow parking spaces in close proximity to vehicles, which in the case of new spaces 2 and 3, are parked in spaces lacking safety "wheel stops." WHCA also placed a sign on the wall adjacent to parking space 116 without obtaining the required permit, directing pedestrian traffic to the "Residential Elevators" by an arrow pointing them *through* parking space 116. The photographs in Enclosure B also illustrate this issue.

"New" parking spaces 1, 4, and 5 are no less hazardous. Those parking spaces are irregular shaped (with vertical junction boxes slanting down from the ceiling with access of less than six feet) and exceedingly narrow. Given their proximity to the entrance door for that portion of the garage, the angles of egress and ingress do not conform to the minimum distance required. Perhaps most importantly, however, these spaces are in an area of the garage in which electrical, gas, and water utility piping hang down from the ceiling. It is our understanding that this proximity to unprotected utilities was one of the reasons that the District of Columbia refused to permit the use of these areas as parking spaces when the Condominium was first constructed. Indeed, the original proposed plat for the garage submitted to the District included 50 spaces. The District later limited its approval to 48 parking spaces due to safety concerns related to the utility piping. The previous denial of these spaces may help to explain why WHCA did not seek a permit or submit its plans for administrative review in this instance.

There is a process that should have been followed, but WHCA simply decided to take this action without complying, or even seeking to comply, with the law. The building permit procedures and other requirements exist for many legitimate reasons, including, but not limited to, the protection of pedestrians, members of the community, and other unit owners from harm and interference with their real property interests. WHCA's disregard for those procedures should not be countenanced, especially in light of the harm inflicted upon Mr. Harnett's property and the general safety issues implicated by such unilateral action.

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## **SPECIFIC VIOLATIONS**

### **Vertical Clearance**

11 D.C.M.R. § 2115.5 provides that “all parking spaces shall have a minimum vertical clearance of six feet, six inches (6 ft., 6 in.).” In its Pre-Hearing Statement, WHCA concedes the applicability of this section. New spaces 1, 4, and 5 do not comply with Section 2115.5. Each space contains utility piping hanging down at a slant so as to limit vertical clearance to less than six feet, six inches. Exhibit A, submitted with WHCA’s Pre-Hearing Statement, acknowledges as much with the handwritten words “junction box,” despite the notable absence of any depiction of the extent to which the junction boxes hang down from the new parking spaces. Apparently, WHCA measured those parking spaces from a point in the slant on the utility boxes that would measure at least 6 feet, six inches. However, Section 2115.5 does not permit a parking space that only partially complies with vertical clearance of at least six feet, six inches. The entire space must comply.

Compliance in this case is particularly important because there are additional pipes and electrical utility piping which hang from the ceiling of these new spaces. It is imperative for the safety of the residents and the general public that the minimal clearances in this instance comply with Section 2115.5. Obviously, vehicles using these spaces would be dangerously close to electrical, plumbing, gas, and other areas that District law dictates should be given a wider berth. These regulations cannot and should not be ignored, as WHCA asks.

### **Reasonable and Convenient Parking Facilities**

11 D.C.M.R. § 2116.8 provides that “accessory parking spaces shall be located so as to furnish reasonable and convenient parking facilities for the occupants or guests of the building or structures they are designed to serve.” The parking spaces in this instance, such as new spaces 2 and 3, do not comply with Section 2116.8. New spaces 2 and 3 impede Mr. Harnett’s ingress and egress to his parking spot, #112. Mr. Harnett has literally been unable to remove his car for more than two years when spaces 2 and/or 3 are occupied.

### **Aisle Requirements**

11 D.C.M.R. § 2117.5 provides:

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

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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.

The parking aisle between Mr. Harnett's space (#112) and newly created spaces 2 and 3 clearly does not comply with the requirements of Section 2117.5. The parking angle width does not meet the requirements for a ninety degree parking angle (or sixty-degree angle). WHCA does not contest this point, as evidenced by its own Exhibit A to its Pre-Hearing Statement, which erroneously depicts the distance between space #112 and the newly created spaces as 19 feet, five inches (although, it should be noted that even that measurement is erroneous – given that there is only 16 feet, 10 inches between the spaces – and is a byproduct of the fact that WHCA intentionally did not paint an ending point for new parking space 2 so as to permit more favorable measurements). Rather than claim compliance, WHCA erroneously asserts that Section 2117.5 does not apply.

More specifically, WHCA claims that Section 2117.5 only applies to “required” spaces and that no “required” spaces are implicated by the newly created parking spaces. However, that myopic reading of the regulations only highlights WHCA's noncompliance. Section 2115.14, a section not cited by WHCA, provides “[w]here aisles are provided, the aisles shall meet the design requirements stipulated in § § 2117.5 and 2117.6.” Section 2115.14, and thus Section 2117.5 by reference, is not limited to “required” parking spaces, but is applicable more generally.

In this case, the new parking spaces clearly create a parking aisle between existing spaces #111 and #112 on the one side and newly created spaces 2 and 3 on the other. As such, the aisle must comply with the requirements of Section 2117.5, which it plainly does not.

It should also be noted that Mr. Harnett's parking space, #112, is a required parking space. WHCA's self-serving identification of which parking spaces are “required” and which ones are not is not entitled to any deference. There is no reason why Mr. Harnett's space is not considered one of the “required” spaces. Mr. Harnett was one of the first individuals to purchase a parking space, and space 112 is one of the originally designated, approved, and platted spaces at Washington Harbour. There is no regulatory procedure that was followed by WHCA in selecting what it now says should be characterized as “required,” other than its own self-interest. As such, the selection that is represented in Exhibit A of WHCA's Pre-Hearing Statement is a breach of WHCA's fiduciary duties to Mr. Harnett and is clearly designed as a post-hoc attack upon the Notice of Violation. In addition, allowing WHCA to manipulate the facts in this manner would mean that whenever WHCA chooses at its whim to label parking spaces as “required” or as “not required,” it can maneuver its way around the applicable legal requirements.

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**Pedestrian Walkway**

11 D.C.M.R. § 2117.7 provides:

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.

Not surprisingly, WHCA does not quote Section 2117.7 in its entirety in its Pre-Hearing Statement and merely makes a conclusory declaration of compliance. It is undisputed that new parking spaces 2 and 3 were previously a pedestrian walkway. In fact, that area was previously painted with diagonal striped lines designating it as no-parking because it was used to access the Residential Elevators in the parking garage. The new parking spaces do not have “wheel bumper guards” and are not painted so as to delineate the beginning and end of the parking spots (and thus permitting WHCA’s creative measurements, noted above). Put more simply, there is no painted line depicting where a car using spaces 2 and 3 must stop in order to protect rights-of-way. In addition, WHCA has directed pedestrian traffic *through* parking space 116, by placing a sign (without proper authority) directing pedestrians to the “Residential Elevators.”

**Additional Requirements Deemed Necessary**

11 D.C.M.R. § 2116.9 provides that:

The Board may impose conditions on any accessory or non-accessory parking spaces as to screening, coping, setbacks, fences, the location of entrances and exits, 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 provision and maintenance of the spaces.

The BZA is empowered to impose any condition it deems necessary for the continued provision and maintenance of parking spaces. In this case, Mr. Harnett’s property rights are impaired by the newly created spaces. Further, some of the newly created spaces are the very ones that the District of Columbia has previously refused. If unconvinced that the previous provisions are applicable, Mr. Harnett respectfully requests that Section 2116.9 be invoked to protect his property and the safety of the residents.

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**ANC 2E'S RECOMMENDATION THAT APPEAL No. 17317 BE DENIED**

On October 3, 2006, Advisory Neighborhood Committee (ANC) 2E considered the present appeal and recommended that it be denied. ANC 2E's recommendation was issued after presentations by counsel both for WHCA and Mr. Harnett. The members of ANC 2E were given depictions of the parking garage and the Notice of Violation and carefully considered the issues.

Contrary to the representation in WHCA's Pre-Hearing Brief, ANC 2E members considered the relevant factual and legal issues. Indeed, counsel for WHCA specifically addressed questions from ANC members regarding the issues set forth in its appeal. Further, counsel for WHCA stated the legal basis for its appeal by arguing that a permit was not required and that the spaces implicated were not "required" spaces under applicable regulations. Counsel for WHCA was in no way limited in his presentation or responses to questioning from the members.

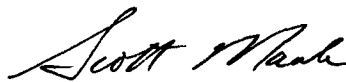
ANC 2E's recommendation is entitled to great weight. WHCA's attempt to characterize ANC 2E's proceeding as anything other than careful consideration of all factual and legal issues is without basis. The requirements of D.C. Code § 1-309.10 are quite explicit, and require that the Commission's recommendation be given great weight, including a written explanation stating "with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances." *See D.C. Code* § 1-309.10(d)(3)(B) (which further requires a statement of "specific findings and conclusions with respect to each issue and concern raised by the Commission" and specific support for the position ultimately taken). Indeed, in the case cited by WHCA in its papers, the Court of Appeals reversed in part, and remanded to the Zoning Commission for specific consideration of one of the ANC's recommendations. *See Spring Valley - Wesley Heights Citizens Ass'n v. District of Columbia Zoning Comm'n*, 856 A.2d 1174, 1180-1182 (D.C. 2004).

Mr. Harnett respectfully requests that the BZA follow the recommendation of ANC 2E and deny appeal No. 17317.

Sincerely,



Vernon W. Johnson, III



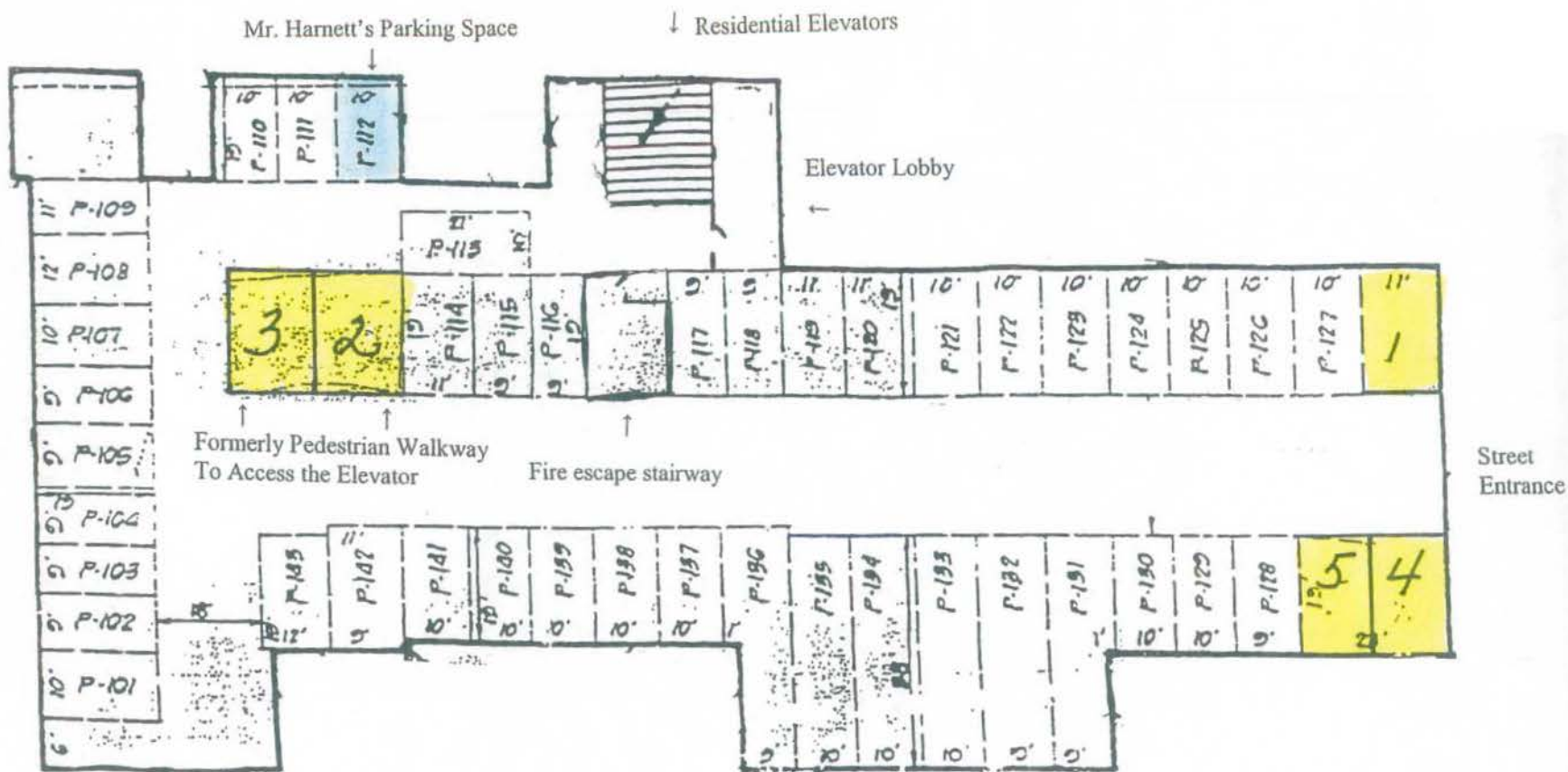
Scott Maule

Enclosures A and B (as stated)

## Enclosure A

## Washington Harbour Condominium Residential Parking Garage

(new spaces are marked with handwritten numbers 1 through 5)





← 16' 10" →

(taken from aisle between parking space #112 and spaces 2 and 3)

(top photo taken from parking spaces 2 and 3)



Photos taken 10/18/06 demonstrating inability to use parking space #112 when parking spaces 2 and/or 3 are occupied.



(bottom photo taken from space #112 looking back at spaces 2 and 3. The dust is the result of being unable to move the car for over two years)



Additional photos showing interference with use of parking space #112





Additional photos showing interference with use of parking space #112 (pictures taken from the perspective of "new" parking space 2).





Additional photos showing interference with use of parking space #112 (pictures taken from the perspective of "new" parking space 2).





Photos showing room to move from parking space #112 when unimpeded (such as when parking spaces 2 and 3 were a pedestrian walkway)





Photos taken 9/16/06 showing unpermitted sign directing pedestrian traffic through narrow parking space 116 to residential elevators, instead of prior pedestrian walkway that is now parking spaces 2 and 3.

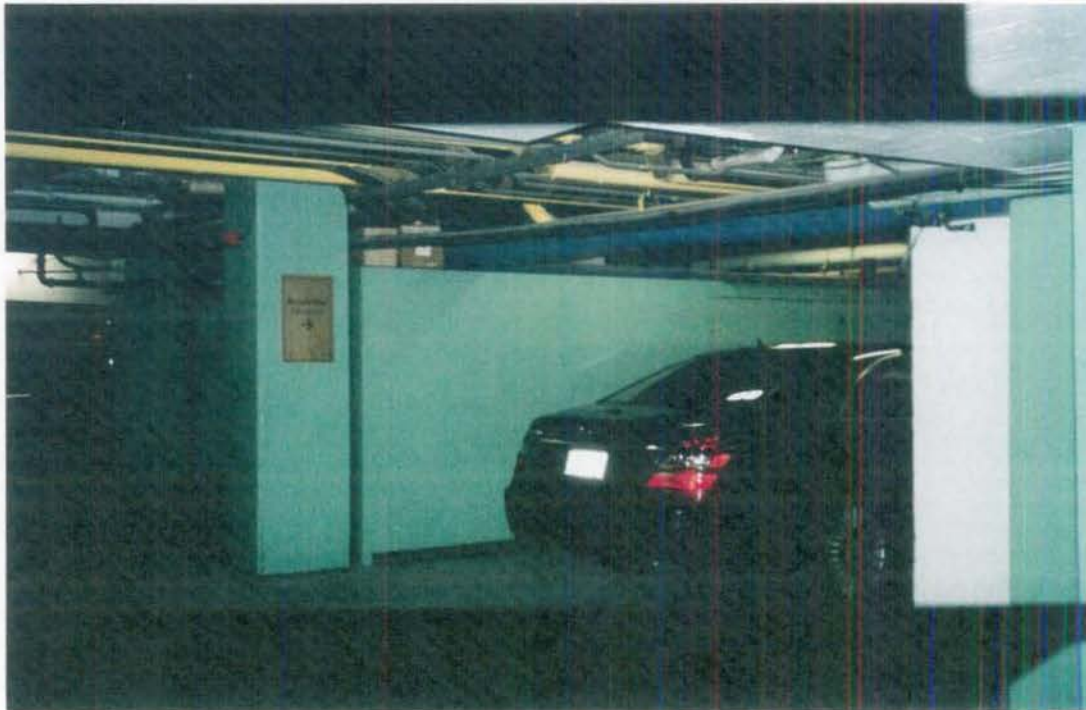




Photo showing lack of striping and wheel stops at the end of parking spaces 2 and 3.



Example of wheel stop used in legal parking space.



Photo taken 9/21/06 showing column extending below 6' 6" on parking space 5, as well as overhanging plumbing and electrical utilities.





Photos showing high voltage electrical, plumbing, and gas utility facilities over parking space 4.

