



J. Raymond Miyares Thomas J. Harrington Christopher H. Heep Donna M. Brewer Jennie M. Merrill
Bryan Bertram Ivria Glass Fried Alexandra B. Rubin Ethan B. Dively Maurica D. Miller Rian Rossetti

June 25, 2021

Zoning Board of Appeals
Town of Wellesley
525 Washington Street
Wellesley, MA 02482

Re: Zoning Enforcement Request—72 Fairbanks Avenue

Dear Chair and Members of the Board,

Our office provided assistance to the Building Commissioner when he was considering the request for zoning enforcement that prompted the referenced appeal concerning 72 Fairbanks Avenue. I am providing this letter at the Building Commissioner's request, and for the reasons discussed below believe that the Building Commissioner reasonably declined the request for zoning enforcement.

Background

On April 21, 2021, the Building Commissioner received a Request for Enforcement (the "Request") from Rob Cerulle of 68 Fairbanks Avenue for an alleged violation of the Zoning Bylaw at 72 Fairbanks Avenue (the "Property"). The Property is owned by Dave and Diane Stemple and directly abuts Mr. Cerulle's property. The Request alleged that in 2005 the Stemples installed AC condensers within the 20-foot side yard setback. Mr. Cerulle asserted that an amendment of the Zoning Bylaw in 2002 prohibited the placement of air conditioning equipment and other noise-emitting equipment within yard setback areas. As such, Mr. Cerulle alleged that the AC condensers are in violation of the Bylaw. Mr. Cerulle further contended that AC condensers are not "structures," and therefore do not enjoy protection from zoning enforcement pursuant to G. L. c. 40A, § 7.

On April 23, 2021, the Building Commissioner declined the Request on the basis that the AC condensers were constructed pursuant to a building permit, and have been in place for more than six years. Therefore, he concluded the AC condensers are protected by G. L. c. 40A, § 7.

The Appeal

On May 18, 2021, counsel for Robert and Jeanne Cerulle (the “Appellants”) filed an appeal of the Building Commissioner’s decision, pursuant to Section 24 of the Bylaw. The Appellants allege the AC condensers were installed in violation of Section 19 of the Bylaw as they are located within the side yard setback. The Appellants note that neither the building permit application nor the as-built plot plan reference the AC condensers. They acknowledge that photographs provided by counsel for the Stemples show labels on the AC condensers indicating that they were manufactured in 2004 or 2005.

The Appellants assert that the noise from the AC condensers has increasingly become a nuisance over the years. The Stemples have allegedly rejected the Appellants’ requests to move the AC condensers, and upon the Appellants’ information and belief the Property is under agreement for sale. The Appellants further indicate that they received a communication on April 27, 2021, from the prospective purchasers of the Property regarding the AC condensers and an alleged offer to discuss solutions, but have not heard from the prospective purchasers since.

The Appellants’ sole argument on appeal is that the AC condensers are not “structures” and as therefore do not enjoy protection from zoning enforcement under G. L. c. 40A, § 7.

Discussion

General Laws c. 40A, § 7, provides, in relevant part, the following:

If real property has been improved and used in accordance with the terms of the original building permit, no criminal or civil action intended to compel the abandonment, limitation or modification of the use allowed by the permit or the removal, alteration or relocation of a structure erected in reliance upon the permit by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 6 years of the commencement of the alleged violation. No criminal or civil action intended to compel the removal, alteration, or relocation of a structure by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter or the conditions of a variance or special permit shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 10 years of the commencement of the alleged violation.

Based on this statutory language, a structure built in accordance with a building permit is immune from zoning enforcement after six (6) years, and a structure built without a building permit is immune from zoning enforcement after ten (10) years.

On appeal, Mr. Cerulle argues that AC condensers do not qualify as “structures,” and therefore are not immune from zoning enforcement pursuant to G. L. c. 40A, § 7. Mr. Cerulle principally relies upon *Waters v. Nixon*, 2007 WL 2948082 (Land Ct. 2007) (Lombardi, J.), which is discussed below.

In *Waters*, a property owner in Chatham constructed 3 exterior air conditioning units within the 20-foot side yard setback. The direct abutter sought to have them removed, arguing that the AC units were structures subject to the side yard setback requirement. 2007 WL 2948082 at *1. For context, it may be useful to note that the AC units were installed in August 2006, and the abutter requested zoning enforcement that same month. *Id.* at *1. The Land Court examined the definition of “structure” contained in the bylaw¹, and concluded that the AC units were not structures and therefore could continue to exist within the 20-foot side yard setback. *Id.* at *4-5. The Land Court reached this conclusion because the local definition of “structure” included several examples within the definition that did not seem analogous to air conditioning units: “buildings, tennis courts, swimming pools, and retaining walls.” *Id.* at *1. The Land Court stated “[a]ll three examples in the modifying clause are large scale improvements to the property surrounding a home. The air conditioner units are not similar in size to the examples in the limiting phrase. Rather than property improvements, the air conditioner units are electrical devices providing service to a residence and are analogous to appliances. Thus, the conclusion of the board that an air conditioner unit is not a structure is a reasonable one.” *Id.* at *4. In an unpublished decision, the Appeals Court upheld the Land Court’s ruling. *Waters v. Zoning Bd. of Appeals of Chatham*, 73 Mass. App. Ct. 1123 (2009) (Rule 23.0 Opinion). However, the Appeals Court noted that a different interpretation of the bylaw may also have been reasonable: “While a contrary interpretation of the by-law was possible, it was not required.” *Id.* (emphasis added).

Unlike the local bylaw in *Waters*, the Wellesley Zoning Bylaw does not define “structure.” The conclusion in *Waters* is not directly controlling here because the outcome of that case was specific to a particular definition of “structure” and the local board’s interpretation of its own bylaw. *Petrillo v. Zoning Bd. of Appeals of Cohasset*, 65 Mass. App. Ct. 453, 460 (2006) (where local bylaw ambiguous deference given to board’s interpretation of its own bylaw). In the absence of a definition in the Bylaw, AC condensers installed on the ground could reasonably be considered “structures” under a broad interpretation of the word. See *Leonard v. Zoning Board of Appeals of Hanover*, 96 Mass. App. Ct. 490, 496 (2019) (where local bylaw defined “structure” as “[a]nything

¹ The Chatham Zoning Bylaw defined “structure” as follows:

STRUCTURE means any combination of materials assembled or maintained at a location on or in the ground or attached to something located on the ground, including but not limited to buildings, tennis courts, swimming pools, and retaining walls.

constructed or erected, except a boundary wall or fence, the use of which requires location on the ground or attachment to something on the ground. Examples of structures include, but are not limited to, buildings, swimming pools . . . , retaining walls, sheds, vending or dispensing machines of twenty (20) square feet or more, and communications towers or structures”).

In addition, it is notable that the *Waters* case did not discuss the statute of limitations in M.G.L. c.40A, §7, and the Court did not have cause to analyze whether it could order the removal of AC condensers that had been in place for longer than 6 or 10 years.

The Appellants also argue that if AC condensers are structures, then the 2002 amendment to the Bylaw was unnecessary. Section 19 “Yard Regulations” provides the following at subsection B, paragraph 3, in relevant part, “Heating ventilation, air conditioning, swimming pool, electric generating, or other noise emitting equipment shall not be located in required setback areas.” However, Section 19.B, para. 3 may be read as clarifying language that enumerates types of structures that cannot be located in the setback area, which is particularly necessary where the Bylaw does not define structure.

Even if, for argument’s sake, the AC condensers are not considered to be structures, the Board may wish to consider whether the doctrine of laches bars the Appellants’ Request. See *Colony of Wellfleet, Inc. v. Harris*, 71 Mass. App. Ct. 522, 5331 (2008)(“Laches is an ‘unjustified, unreasonable, and prejudicial delay in raising a claim.’”) The AC condensers existed on the Property for 16 years before the Appellants filed a complaint. In *Garabedian v. Westland*, 59 Mass. App. Ct. 427, 437-438 (2003) relevant to this discussion, a landowner constructed an airstrip on his property in a residential zoning district and characterized the airstrip (and a barn/hangar) as accessory to his residence. 59 Mass. App. Ct. at 429. He used the airstrip for 10 years without incident. *Id.* In the 1990s, as the landowner increasingly extended the runway his neighbors began protesting, leading to a cease and desist order from the building inspector. *Id.* at 429-430. The Appeals Court concluded that the airstrip did not meet the definition of “structure” either under the local zoning bylaw or case law and, therefore, could not “enjoy the benefit of the ten-year limitations period under G. L. c. 40A, § 7, for *structures* erected without a permit (emphasis in original).” *Garabedian*, 59 Mass. App. Ct. at 437. However, the Appeals Court agreed with the trial judge’s finding “that the neighbors had slept on their rights for eleven years before filing a complaint, and that Garabedian has changed position by improving and maintaining his airstrip and buying airplanes to use on it. To that degree, the inactivity of the neighbors contributed to a prejudicial change of position by Garabedian.” *Id.* at 438 (noting the town did not challenge the existence or use of the existing airstrip). Similarly, here, the AC condensers have been in place for 16 years. Indeed, the Appellants allege that “[o]ver the years the increasing noise from the air conditioning condensers . . . has become more and more of a nuisance.” Memorandum in Support of Appeal at p. 1. To the extent the Appellants sat by silently for a significant term without seeking any form of remedy or relief, and then filed a request for zoning enforcement for the first time when the Property may be under agreement for sale, it may be reasonable for the Board to decline enforcement based on the doctrine of laches.

Zoning Board of Appeals

June 25, 2021

Page 5 of 5

Please let me know if I can provide any additional information concerning this appeal.

Sincerely,



Christopher H. Heep

cc: Michael Grant, Building Commissioner

Grant, Michael

From: Grant, Michael
Sent: Friday, April 23, 2021 9:23 AM
To: ROBERT & JEANNE CERULLE
Cc: Chris Heep (cheep@miyares-harrington.com)
Subject: RE: Online Form Submittal: Request For Enforcement

Rob

I have reviewed your request for zoning enforcement with respect to the property at 72 Fairbanks Ave.

The condenser was constructed pursuant to a building permit and has been in place for more than six years. For the reasons stated in M.G.L. c.40A, §7, I decline your request for zoning enforcement.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: noreply@civicplus.com [mailto:noreply@civicplus.com]
Sent: Wednesday, April 21, 2021 3:02 PM
To: Grant, Michael <mgrant@wellesleyma.gov>
Subject: Online Form Submittal: Request For Enforcement

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Request For Enforcement

Town of Wellesley - Building Department
Request for Enforcement

(Section Break)

Alleged Violation Information
I am basing my allegations on the facts below, and understand that as the complainant, I may be asked to participate with the Inspector of Buildings/Zoning

Enforcement Officer by appearing jointly with him/her at court in the event the Inspector of Buildings/Zoning Enforcement Officer is personally unable to verify my allegations, there by requiring legal proceedings to enforce the regulation referenced below. Pursuant to the below allegations I am requesting an investigation and enforcement if applicable.

I believe the following is Zoning Bylaws
being violated:

Describe Violation

Our next-door neighbor located at 72 Fairbanks Ave has 3 AC condenser units installed within the 20-foot side setback on their property.

My interpretation is that the zoning bylaws were amended in 2002 to prohibit the placement of air conditioning equipment and other noise-emitting equipment in setbacks. The Stemples' air conditioning condensers were installed in 2005, in their side yard setback, closer than 20 feet to our property.

While I have reviewed G.L. 41A, Section 7, my reading of that provision is that it provides a six-year statute of limitations for enforcement actions seeking the removal of structures.

However, the AC condenser is not a structure and therefore not protected from an enforcement action for its relocation outside the setback area.

My understanding is that the building department has always construed structures to be things that protect people, property, or animals from the elements. The AC condenser is not a structure, but rather is a noise-emitting piece of equipment under our zoning bylaws, and I believe that it is therefore not exempt from the six-year statute of limitations for structures.

We have tried to work with the owners without filing a formal complaint but unfortunately, that has not worked out.

The AC units face our back deck and are very loud while operating. When we are sitting on our back deck during the summer months, we must raise our voices a bit when they come on. We also can hear them inside our house all during the summer as well.

Thank you for your attention in this matter.

Sincerely,

Rob Cerulle

Address of Alleged
Violation

72 Fairbanks Ave. Wellesley

Name of Property Owner Dave and Diane Stemple
(if known)

(Section Break)

Complainant Information

The following information is required. Failure to provide your name, address, and telephone number will result in the Inspector of Buildings/Zoning Enforcement Officer to process the complaint at his/her discretion.

First Name Rob

Last Name Cerulle

Address 68 Fairbanks Ave

City Wellesley

State MA

Zip Code 02481

Phone Number 508-308-2224

Email Address cerullej@comcast.net

Certification By checking this box, I am certifying under the pains and penalties of perjury that the information provided above is true and correct.

Email not displaying correctly? [View it in your browser.](#)

Grant, Michael

From: Grant, Michael
Sent: Tuesday, April 27, 2021 10:32 AM
To: Hunter, Marcey
Cc: Petrone, Beth
Subject: RE: 72 Fairbanks Avenue Wellesley

Marcey

If they were to replace a unit in the same location they would need a permit but it could remain in that location.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: Hunter, Marcey [mailto:Marcey.Hunter@NEMoves.com]
Sent: Tuesday, April 27, 2021 9:11 AM
To: Grant, Michael <mgrant@wellesleyma.gov>
Cc: Petrone, Beth <Beth.Petrone@nemoves.com>
Subject: Re: 72 Fairbanks Avenue Wellesley

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Thank you Michael quick question. If these condensers were too break tomorrow and needed to be replaced would they be able to be put in the same spot or would they need to be moved at that point. Thank you!

Marcey Hunter
Petrone-Hunter Realty Group
Coldwell Banker
International President's Circle
marcey.hunter@nemoves.com
617-633-4407
www.marceywellesleyrealestate.com

We'll help you find your way home!

On Apr 27, 2021, at 8:34 AM, Grant, Michael <mgrant@wellesleyma.gov> wrote:

Marcey

You will want to look at section 24 (C.) of the zoning bylaws. https://www.wellesleyma.gov/DocumentCenter/View/573/Section-24_Permit-Granting-Authority?bidId=

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: Hunter, Marcey [<mailto:Marcey.Hunter@NEMoves.com>]
Sent: Monday, April 26, 2021 6:25 PM
To: Grant, Michael <mgrant@wellesleyma.gov>
Cc: Petrone, Beth <Beth.Petrone@nemoves.com>
Subject: Re: 72 Fairbanks Avenue Wellesley

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Hi Michael

Thank you for your prompt responses on the Stempels' Fairbanks sale. If the neighbor instructs their attorney to move forward and petition zoning who would they be in touch with. Need to understand the process here. We were supposed to sign the purchase and sales agreement with a great buyer and now in this unfortunate position. Hard to believe the actions of this neighbor. Thanks again.

<image001.png>

Marcey Hunter
Premier Agent

Petrone-Hunter Realty Group
Coldwell Banker
71 Central Street

On Apr 26, 2021, at 8:29 AM, Grant, Michael <mgrant@wellesleyma.gov> wrote:

Dan

I have responded to the request for enforcement. If they disagree with the interpretation they can file an appeal with the ZBA. I have spoken with Town Counsel and they agree with my reading of the state law. Thank you for the update.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: Dan Stempel [<mailto:dstempel@mdconnectinc.com>]
Sent: Friday, April 23, 2021 5:11 PM
To: Grant, Michael <mgrant@wellesleyma.gov>
Cc: Hunter, Marcey <Marcey.Hunter@nemoves.com>; Tammy Macherides <tammy@maclawllc.com>; Petrone, Beth <Beth.Petrone@nemoves.com>; diane stempel <distempel@gmail.com>
Subject: FW: 72 Fairbanks Avenue Wellesley

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Hi Mr. Grant,

Just keeping you in the loop on a response we received from neighbor's counsel. Seems to be again questioning the issue of 'structures', for which we shared your/the Town's response (and thought again was settled). Don't know if you had responded to Mr. Cerulle (or his attorney) directly on the matter, but thought you should know.

Regards,

Dan Stempel

From: Tammy Macherides <tammy@maclawllc.com>
Sent: Friday, April 23, 2021 2:29 PM
To: Dan Stempel <dstempel@mdconnectinc.com>
Cc: Hunter, Marcey <Marcey.Hunter@NEMoves.com>; Petrone, Beth <Beth.Petrone@nemoves.com>; Diane Stempel <distempel@gmail.com>
Subject: Re: 72 Fairbanks Avenue Wellesley

I just received a response from the neighbor's attorney:

"Hi Tammy: I respectfully disagree as to what Ch 41A, s 7 says. It speaks to structures, which the Building Inspector has previously characterized as things which protect people, property, and animals from the elements. Moreover, there would have been no reason for Wellesley to have enacted the bylaw prohibiting hvac equipment if it was always considered a structure, as then it would already have been prohibited by our bylaws. I will speak with my client and advise as to whether he plans to appeal to the ZBA. My clients are just trying to have the condensers moved as part of the sale of the house. Best, David"

I think this is unfounded however, can you send this to Mr. Grant and ask what his response is on Himmelberger's opinion as to whether the AC condenser falls under this statute?

Thank you,
tammy

Tammy Macherides, Esq.

<image001.png> cell: 617-283-3224
office: 617-203-6200
fax: 617-219-9050
e-mail: tammy@maclawllc.com

MAC LAW LLC
40 Grove Street, Suite 350
Wellesley, MA 02482

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<image002.jpg>

From: Grant, Michael <mgrant@wellesleyma.gov>
Sent: Friday, April 23, 2021 9:28 AM

To: Dan Stempel <dstempel@mdconnectinc.com>; marcey hunter <marcey.hunter@me.com>; diane stempel <distempel@gmail.com>
Cc: Beth Petrone <Beth.Petrone@nemoves.com>; Christopher Heep <cheep@miyares-harrington.com>
Subject: RE: 72 Fairbanks Avenue Wellesley

Dan

I have spoken with Town Counsel and they concurred with my reading of MGL c.40A § 7.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: Grant, Michael
Sent: Thursday, April 22, 2021 9:40 AM
To: Dan Stempel <dstempel@mdconnectinc.com>; marcey hunter <marcey.hunter@me.com>; diane stempel <distempel@gmail.com>
Cc: Beth Petrone <Beth.Petrone@nemoves.com>
Subject: RE: 72 Fairbanks Avenue Wellesley

Dan

I have received a request for enforcement from your neighbor. I am going to contact town counsel to confirm my reading of MGL c. 40A§7. I will get back to you once I have spoken with Town Counsel.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
mgrant@wellesleyma.gov

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From: Dan Stempel [<mailto:dstempel@mdconnectinc.com>]
Sent: Wednesday, April 21, 2021 6:07 PM
To: Grant, Michael <mgrant@wellesleyma.gov>; marcey hunter <marcey.hunter@me.com>; diane stempel <distempel@gmail.com>
Cc: Beth Petrone <Beth.Petrone@nemoves.com>
Subject: RE: 72 Fairbanks Avenue Wellesley

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Hi Mr. Grant,

Thank you so much for getting back to us on this issue and confirming that we did (or do) not need to move the A/C condensers given the expiration of the 6-year statute of limitations (without any comment from said neighbor prior to that). We had thought the issue had been settled and in fact are in the process of moving forward with a potential buyer.

Unfortunately, we just today received the attached communication from neighbor's attorney still disputing the issue. I don't know if you've yet received the request for zoning enforcement they mention or perhaps have responded to it. If not, perhaps you can re-confirm (with either us or them) the position you have laid out below vis-à-vis their opinion that A/C condensers are not structures and subject to the statute of limitations. Appreciate your help on the matter and sorry to bother you again.

Regards,
Dan Stempel (current owner at 72 Fairbanks)
781-223-7443 (cell)

From: Grant, Michael <mgrant@wellesleyma.gov>
Sent: Wednesday, April 14, 2021 11:24 AM
To: marcey hunter <marcey.hunter@me.com>; Dan Stempel <dstempel@mdconnectinc.com>; diane stempel <distempel@gmail.com>
Cc: Beth Petrone <Beth.Petrone@NEMoves.com>
Subject: RE: 72 Fairbanks Avenue Wellesley

Marcey

After reviewing the department records and MGL c.40A § 7 the A/C condensers can remain in their current location as they are considered pre-existing non-conforming. The A/C condensers were installed in connection with the addition that was permitted in 2005 and had the final inspection approved in 2006 the 6 years of statute of limitations on zoning violations for work done with a building permit as laid out in MGL c.40A § 7.

Michael Grant
Inspector of Buildings/Zoning Enforcement Officer
525 Washington Street
Wellesley, MA 02482
781-431-1019 Ext 2220
Direct Dial 781-489-7452

mgrant@wellesleyma.gov

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From: marcey hunter <marcey.hunter@me.com>
Sent: Tuesday, April 13, 2021 2:40 PM
To: Grant, Michael <mgrant@wellesleyma.gov>; Dan Stempel <dstempel@mdconnectinc.com>; diane stempel <distempel@gmail.com>
Cc: Beth Petrone <Beth.Petrone@NEMoves.com>
Subject: 72 Fairbanks Avenue Wellesley

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Hi Michael

Thank you so much for promptly returning my call. The owner of 72 Fairbanks Ave, Dan & Diane Stempel, are also copied on this email. We look forward to hearing from you once you are able to review the property, permits and legal aspects. As mentioned, the Stempels did an extensive 3-story addition in 2005. The permits are on the Wellesley portal and have been closed during that time. Thank you for enlightening me that sheet metal work did not require a permit until 2010 and would have been included in the building permit.

Their next door neighbor just recently contacted them upon hearing that they are selling their home and stated that the HVAC equipment is within the 20 ft setback and needs to be moved. He said he has been in touch with you and sent the owner a letter requesting a written statement that they will comply and move the units.

The addition is completely within the 20 ft setback and the 3 a/c units are aligned perpendicularly to the addition wall and back of the garage. Keep in mind that the garage is part of the original structure from 1931 and is non conforming. The

garage side wall on the neighbor's side of the house juts out further than the A/C equipment. Obviously this is extremely concerning and a little overwhelming as we go to put the house on the market. The house is a beautiful Tudor home and would like to preserve the integrity. We look forward to hearing from you as soon as you are able. Thank you again very much for your time and attention to this matter.

Marcey



**Marcey Hunter
Premier Agent**

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***Wire Fraud is Real*. Before wiring any money, call the intended recipient at a number you know is valid to confirm the instructions.** Additionally, please note that the sender does not have authority to bind a party to a real estate contract via written or verbal communication.