

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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WALTER B. ADAMS
DEREK B. REDGATE
RICHARD L. SEEDEL

July 1, 2021

7:30 pm

Public Hearing, Juliani Meeting Room, Town Hall

Zoning Board of Appeals Members Present:

J. Randolph Becker
Robert W. Levy
David G. Sheffield
Richard L. Seegel
Walter B. Adams
Derek B. Redgate

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WITHDRAWN WITHOUT PREJUDICE

ZBA 2021-57, ROBERT & JEANNE CERULLE, 72 FAIRBANKS AVENUE

Present on behalf of the appellant was David Himmelberger, Esq. Mr. Himmelberger said that this is an appeal from a denial of an enforcement request for nonconforming air conditioners (ac) in a setback area that is not allowed. He said that three ac condensers are located between 11 and 20 feet in an el in the corner of the building that project onto his client's property. He said that Mr. Cerulle sought enforcement of the bylaw and the request was denied, citing chapter 40A, Section 7, which is generally known as the Safe Harbor provision in Zoning and provides that structures that are erected subject to a building permit but are in violation of Zoning cannot be the subject of an enforcement action after six years and structures that are built not subject to a building permit receive the same safe harbor after 10 years.

Mr. Himmelberger said that safe harbor does not apply to ac compressors because they are not structures or parts of structures. He said that the town had a bylaw for decades that prohibited structures in the setback. He said that in 2002, the town passed an amendment to the bylaw that specifically prohibited ac compressors in the setback. He said that the town would not have done that if ac compressors were considered to be structures or parts of structures. He said that he cited a Land Court case, which in construing a bylaw regarding location of ac condensers, that stated that ac units are not structures but rather property improvements and electrical devices providing service to the residence and are analogous to appliances.

Mr. Himmelberger said that as one reads Chapter 40A, Section 7, it is not broad enough to encompass ac compressors. He said that the Appellant is asking the Board to rule that there is no safe harbor for ac compressors.

Mr. Himmelberger said that there are three ac compressors from 2004. He said that their ratings are in the mid 70's for decibels, which is high for today's standards. He said that because they are located in an el

where the building acts as a backstop to them, it acts as an amplifier to his client's property. He said that this has become more acute with working from home. He said that Ms. Cerulle has progressive hearing loss and it becomes quite difficult to hear with the compressors on. He said that his client hoped that the neighbors would move them to the rear of house when they sold the house.

Mr. Himmelberger said that the ac condensers do not qualify as a structure or parts of structures and subject to enforcement, regardless of safe harbor.

Mr. Seegel said that he was not sitting on the panel for the case but was asked to give his input after reading everything. He said that he did not even get to Chapter 40A, Section 7. He said that Mr. Cerulle lived there when the building permit was issued and made no objection at the time when everything was being put in. He said that it is clear that what Mr. Cerulle is trying to do 17 years later is to have an enforcement action. He said that case law is clear that the appeal cannot go forward on that basis. He said that in a decision of the Appeals Court, Gallivan vs ZBA of Wellesley, the law was explicitly discussed. He said that at the very least this would laches. He said that Mr. Cerulle had 17 years to bring an enforcement action but chose not to.

Mr. Himmelberger said that his client became aware of it five years ago and due to circumstances that were ongoing in the family with the ac compressors, they chose not to pursue it. He said that hearing loss issue has worsened. He said that Mr. Cerulle thought that he was being a good neighbor by holding off. He said that when the property went up for sale, he thought that it was an appropriate time to make the neighborly request that was rejected. He said that he then requested the enforcement action.

Mr. Himmelberger said that he did not see this situation as something that Chapter 40A, Section 7 controls. He said that there were extenuating circumstances on waiting to bring the action now. He said that none of the compressors get quieter with age. He said that there are three units in close proximity, which does not seem right. He said that there is no evidence of which he is aware that shows that the units were installed pursuant to a building permit as much as they were installed contemporaneous with the addition that was put on. He said that they were visible when they went in but that should not preclude the enforcement action from going forward.

Mr. Levy said that even if the units were installed without a building permit, they fall under the 10 year statute. Mr. Himmelberger said that they only fall under that if they are structures or parts of structures. Mr. Levy said that they are attached to the house and it is not so easy to move them. He questioned the altruistic motivation when the property went on the market. He said that he does not condone work done without permits but he is also aware that of the 17 year delay from when the condensers were installed to the present time. He said that 17 years is a long life for condensers and the likelihood of their use will diminish in the near future. He said that new compressors are more efficient.

Mr. Becker said that Town Counsel and Mr. Himmelberger stated that structure is not defined in the Zoning Bylaw. He said that it is defined on Page 41 and Page 81.

Mr. Levy read Chapter 40A, Section 7. He said that ac units can be replaced if the Board finds that they are structures for a special permit. Mr. Adams said that the Board could put conditions on the decision.

Mr. Himmelberger said that the work was done impermissibly because the town passed the bylaw in 2002 and the units were installed in 2004 to 2005.

Mr. Levy said that Mr. Cerulle sat on his rights for 17 years. He said that the Gallivan Case specifically discusses the dichotomy between a Section 7 appeal and a failure to appeal a building permit within 30 days of its issuance. Mr. Himmelberger said that there is no evidence of a building permit in this case.

Mr. Levy asked if anything that was submitted shows that the condensers violate the setback. Mr. Himmelberger said that Exhibit C is the certified plot plan that shows the construction of the addition with a 20.4 foot setback. He said that the compressors are located in the nook. He said that his client has run a tape measure to the units and they are less than 20 feet to the property line. He said that he provided the building permit and there is no mention of the compressors.

Mr. Levy asked if there has been any discussion among the parties for mitigating measures such as soundproofing. He said that the compressors will soon outlive their useful life and will need to be replaced with modern equipment that is much more sound efficient.

Mr. Becker said that the Board was told at a previous hearing for another case that the life expectancy of ac units is eight years. Mr. Levy said that the Board has also seen evidence that the decibel levels of newer equipment is not greater than other devices that are allowed in the setback area.

Mr. Adams said that as a former building inspector himself, he knows that permits for making alterations to a house do not always list the ac unit as an element of the building permit. He said that the units did get installed and there is no evidence to say that were not done at the same time as the construction. He said that it is reasonable to consider them as structures under the sunseting provisions for taking action for something that has been built.

Mr. Himmelberger said that if they were structures, there would have been no need for the 2002 bylaw. He said that when construing acts and bylaws, you have to give the words their ordinary meaning and not find them to be surplus. He said that the town would never have needed to enact a specific bylaw prohibiting ac compressors from the setback if, in fact they were already deemed to be structures because there was already a prohibition against that. Mr. Adams said that laws are often enacted or revised to clarify the original intent, which this may be a good example of.

Mr. Himmelberger said that his client would be willing to continue this to next month to have further efforts at resolution with the abutter.

Mr. Levy discussed concerns about setting precedence.

Mr. Becker said that a discussion between the neighbors should take place sometime between tonight and the next hearing. He said that this case seems to be more about the law rather than the bylaw.

Mr. Grant said that Town Counsel was also not in agreement with Mr. Himmelberger's opinion. He said that not all of the permits list everything put into a house, such as type of heating or cooling systems. He said that it was never disputed in all of his conversations with the owners that the condensers were put in with the 2005 permit. He said that there was a plot plan that does not show the units located in the setback. He said that it may have been missed during an inspection but no complaint was filed in a timely manner. He said that based on the photographs that Mr. Himmelberger provided, it is clear that the units are located in the setback. He said that the 2010 sheet metal laws now require that the specific location of ac condensers be shown on a certified plot plan. He said that from 2003-2010, it was hit or miss. He said that the units were found to be in the setback when the inspector walked the property with the as-built, the property owner would be told to move them. He said that somehow this was missed.

Mr. Levy asked if there is any basis for a variance. Mr. Himmelberger said that he did not think so.

Dan Stempel, 72 Fairbanks Avenue, –said that all three condensers were installed in 2005 along with an addition. He said that they thought that they did everything by the book. He said that they had a licensed architect, general contractor and subcontractor. He said that the condensers are behind a pre-existing nonconforming garage and do not stick out. He said that they assumed that everything was okay. He said

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that the units were new and did not replace existing units. He said that the same units have been there for 17 years. He said that they have been friendly with the Cerulle's and saw no reason why they could not speak to them about the issue. He said that the first that he heard of the issue was after they put the home on the market. He said that the town did inspections and issued permits and they thought everything was up to code. He said that there some discussion about alternatives to address noise. He said that, knowing that it would likely be difficult and expensive to move the condensers, he offered noise fencing to offer noise and visual relief. He said that moving the condensers to the rear will still be in the Cerulle's line of sight. He said that fencing would be a better solution. He said that Mr. Cerulle declined that option and chose to pursue the appeal.

Mr. Levy asked if Mr. Stempel lost his buyer as a result of this appeal. Mr. Stempel said that has not happened yet but his understanding is that his buyers have been in communication with the Cerulles, which was concerning. He said that the buyers started delaying elements of the same process and the sale has not closed yet. Mr. Levy asked if the contract is contingent on the outcome of the appeal. Mr. Stempel said that there are some elements of that. Mr. Levy said that the Board does not want to delay things if it will affect the sale of the house. He said that it was suggested that the parties get together to try to work something out. Mr. Stempel said that he already tried to reconcile it.

Mr. Adams asked if the aggrieved party would be willing to contribute to the cost of sound attenuation devices.

The hearing temporarily adjourned at 9:38 and reconvened at 8 pm.

Mr. Himmelberger said that Mr. Stempel and Mr. Cerulle reached an agreement by which Mr. Stempel is going to contribute \$,1000 for sound attenuation and in exchange, Mr. Cerulle authorizes Mr. Himmelberger to seek leave to withdraw his appeal.

Mr. Levy moved, Mr. Adams seconded the motion, and the Board voted unanimously to allow the appeal to be withdrawn without prejudice.