



KIMBERLEY DRISCOLL
MAYOR

CITY OF SALEM, MASSACHUSETTS

BOARD OF APPEALS

98 WASHINGTON STREET ♦ SALEM, MASSACHUSETTS 01970
TEL: 978-745-9595

April 3, 2019

Decision

City of Salem Board of Appeals

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CITY CLERK
SALEM, MASS.

Petition of JOHN FEMINO to appeal two decisions of the Building Commissioner regarding 80 MARGIN STREET, NAPA (Map 25, Lot 632) (R2 Zoning District). Appeal #1: regarding the alleged violations of sign ordinances. Appeal #2: regarding the presence of the direct vent exhaust pipe (commercial high capacity heating exhaust) on the expansion wall allegedly violating the 1997 ZBA decision conditions.

A public hearing on the above Petition was opened on March 20, 2019 pursuant to M.G.L. Ch. 40A, § 11 and closed on that date with the following Salem Board of Appeals members present: Mike Duffy (Chair), Peter A. Copelas, Jimmi Heiserman, Patrick Shea, Jimmy Tsitsinos, and Paul Viccica (Alternate).

The petitioner is appealing two decisions of the Building Commissioner. This decision is regarding Appeal #1, regarding the decision of Building Commissioner Tom St. Pierre not to take enforcement action regarding a sign at 80 Margin Street.

Statements of Fact:

1. In the petition date-stamped November 27, 2018, the petitioner appealed two decisions of the Building Commissioner.
2. One copy of the petition appears to have been submitted to the Department of Planning & Community Development ("DPCD") on October 31, 2018: parts of this petition were date-stamped by the DPCD on that date. The petition was not filed with or stamped by the City Clerk at this time. On November 26, 2018, Staff Planner Brennan Corriston emailed the petitioner informing him that additional copies of the application were required, and that the application must be stamped by the City Clerk. The petitioner then filed the petition with the City Clerk on November 27, 2018, and submitted the required, Clerk-stamped copies to the Department of Planning & Community Development on the same date.
3. On the application form, under "An application is being submitted to the Board of Appeal for the following reason(s):" the petitioner wrote, "I believe the B.C. is in error in interpretation of sign ordinances and the signs of concern." On the application form, under "Appeal of the Decision of the Building Inspector (described below):" the petitioner wrote, "Appeal Building Com. Letter dated 9-20-18 Stamped 10-17-18 (Signs)." The petitioner did not clearly state what he was appealing. Given that the letter stating the Building Commissioner's decision not to take enforcement action was included as the only documentation related to the sign submitted with the application on November 27, the Board understood Appeal #1 to be an appeal of the Building Commissioner's decision not to take enforcement action.
4. The petitioner lives at 90 Margin Street, next door to 80 Margin Street.

5. The petitioner had requested that Building Commissioner Tom St. Pierre enforce sign regulations against alleged sign ordinance violations at 80 Margin Street. This enforcement request was not included in the application submitted by the petitioner.
6. The petitioner submitted a letter from Mr. St. Pierre to the petitioner dated September 20, 2018, in which Mr. St. Pierre declined to enforce. The letter states in relevant part:

“The sign permit was issued in 1993 (copy provided to you). The sign was issued a building permit and 25 years have gone by since the issuance of the Building permit for a sign. Therefore, under Mass Zoning Law 40A, section 7. after six years, the City cannot take any enforcement actions regarding the sign... You have the right to Appeal my decision’ to not take any enforcement action’ on the sign. That Appeal needs to be filed within the Salem Zoning Board of Appeals within 30 days of this notice.”
7. Mr. St. Pierre noted that any appeal “needs to be filed with the Salem Zoning Board of Appeals within 30 days of this notice.” Massachusetts General Laws Chapter 40A, Section 15 states this requirement:

“Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.”
8. In the application packet submitted by the petitioner, the letter from Mr. St. Pierre – with the petitioner’s handwriting on the bottom of the page – is date-stamped by the Department of Planning & Community Development October 17, 2018, but that date-stamp is crossed out; there is a second date-stamp of October 31, 2018 (also by the DPCD). It is not noted in the application package why the October 17 date-stamp is crossed out.
9. In his letter dated September 20, 2018, Mr. St. Pierre referenced a six-year statute of limitations after which enforcement action cannot be taken. Upon Mr. St. Pierre’s request, City Solicitor Elizabeth Rennard sent Mr. St. Pierre a letter discussing relevant statutes of limitations. This letter states, in relevant part:

“As you know, General Laws c. 40A, §7 contains two separate provisions that establish statutes of limitation for zoning violations. The first provision creates a six-year statute of limitations which applies to structures and uses that were “ostensibly authorized by a building permit.” See *Lord v. Zoning Bd. of Appeals of Somerset*, 30 Mass.App.Ct. 226, 227, 567 N.E.2d 954 (1991)... The limitations period runs in each case from the commencement of the alleged violation... When, as is the case for the NAPA sign, a permit was issued for the construction of a sign, the six-year statute of limitations applies. In this case, the permit was issued in 1993. As such, the enforcement period ended in 1999.”
10. This petition was on the agenda for the December 19, 2018 meeting of the Zoning Board of Appeals. At this time, the petitioner was represented by Attorney Chris Drucas. Attorney Drucas filed an extension request dated December 10, 2018 in order to give him more time to prepare the case. The request was to continue the petition from the December meeting of the Zoning Board of Appeals to the January meeting. Staff Planner Brennan Corrison received the extension request via email and

filed the request with the City Clerk on the same date. In the December 19, 2018 meeting of the Zoning Board of Appeals, the Board voted five (5) in favor (Peter Copelas, Patrick Shea, Mike Duffy (Chair), Jimmi Heiserman, and Jimmy Tsitsinos) and none (0) opposed to continue the petition to the next regularly scheduled meeting on January 16, 2019. No testimony was heard in the December 19, 2018 meeting.

11. Following the December 19, 2018 meeting, Attorney Drucas withdrew from representation of the petitioner on this case. The petitioner filed another extension request in order to have more time to prepare to present the petition to the Board. This request was to continue the petition from the January meeting of the Zoning Board of Appeals to the February meeting. Staff Planner Brennan Corriston received this extension request via email on December 27, 2018 and filed the request with the City Clerk on December 28, 2018.
12. In the January 16, 2019 meeting of the Zoning Board of Appeals, Mr. St. Pierre asked the Board to send the petitioner a letter stating that this item must be heard in February, as this would be the third extension and this was impacting other code issues and difficulties the Inspectional Services Department was having at that building. The Board discussed the procedure and decided that this should be a motion to continue with a special condition that such a letter be sent to the petitioner stating that the petition must be heard in February. The Board voted five (5) in favor (Peter Copelas, Mike Duffy (Chair), Jimmi Heiserman, Patrick Shea, and Jimmy Tsitsinos) and none (0) opposed to continue the petition to the next regularly scheduled meeting on February 20, 2019, with the aforementioned special condition. No testimony was heard in the January 16, 2019 meeting.
13. At the February 20, 2019 meeting of the Zoning Board of Appeals, four Board members were in attendance, rather than all five members. When there is not a full Board of five members for a meeting, the Board gives petitioners the opportunity to request to continue to the next regularly scheduled meeting, when there might be a full Board. The petitioner requested to continue to the next regularly scheduled meeting. The Board voted four (4) in favor (Peter Copelas, Mike Duffy (Chair), Patrick Shea, and Paul Viccica (Alternate)) and none (0) opposed to continue the petition to the regularly scheduled meeting on March 20, 2019.
14. At the March 20, 2019 meeting of the Zoning Board of Appeals, Attorney David L'Esperance, representing petitioner John Femino, presented the petition. Attorney L'Esperance noted that the property (80 Margin Street) is in the R2 (Residential Two-Family) zoning district, and that one sign is allowed in residential zoning districts. Attorney L'Esperance stated that there are signs in every window at 80 Margin Street. He added that there is no bond, though there is supposed to be a bond if there is a sign on the sidewalk. He added that the façade itself should have been a sign. Mr. Femino added that there is about 265 square feet of signage, when there should be no more than 70.
15. Board member Peter Copelas asked if Mr. Femino is appealing the decision regarding the sign, or a multitude of signs.
16. There was extensive discussion between Attorney L'Esperance, Mr. Femino, and the Board regarding signage. Attorney L'Esperance claimed that certain work done in 2014 in connection with the signage was not a repair but rather a new sign. He stated that Petitioner is contending that the sign should have gone through the Planning Department in 2014 and it never did. Mr. Copelas asked if there was evidence that the work done in 2014 was not a repair. Mr. Femino responded that he could present pictures, stating that they took the letters off and took the logos down and "put new stuff up." Mr. Copelas asked whether they were in the same place and of the same size. Attorney L'Esperance stated "No." Mr. Femino stated "they moved some of the letters" and discussed Section 4-54 of the Code of

Ordinances as well as the square footage. Attorney L'Esperance presented a sign permit application file for a property on Highland Avenue.

17. Attorney L'Esperance stated that NAPA Auto Parts did not use the correct form, which would have brought it to Planning Board. Building Commissioner Tom St. Pierre stated to the chair that it does not go to Planning Board, it goes to a staffer in Planning (Department) to review (the application) against the City sign ordinance. He said it does not go before Planning Board. Attorney L'Esperance stated that if it is a new sign it goes to the Planning Board. Staff Planner Brennan Corrison and Mr. St. Pierre both stated that that was incorrect. Mr. Femino stated that a "new sign whether it's altered, repaired, or erected, is supposed to go Planning, and there's a specific form" which he says "was bypassed, so apparently it didn't go to... Planning Department." Mr. St. Pierre responded that sign permit applications are reviewed by a staff planner and do not go to Planning Board. Mr. Corrison added that if there is a proposal for a nonconforming sign, there is a chance that it would be reviewed by the Planning Department and then sent to the Planning Board or the Zoning Board for further review, but for a standard sign permit application, review is by the Planning Department, then it is sent to the Inspectional Services Department.
18. Mr. St. Pierre stated that he believes Mr. Femino was appealing the original NAPA sign (from 1993) when he filed the application and that he has added on since filing. He added that it had gone well past the six years that the sign was appealable. Mr. St. Pierre stated that he explained to Mr. Femino that the sign was free from enforcement under (MGL) 40A. He added that no one here can represent what did or did not happen in 1993; they found a copy of a building permit, but no one knows that the application did not go to Planning.
19. Mr. Femino responded that he reviewed all the Planning Board minutes from 1993 and the sign did not go to the Planning Board.
20. Mr. St. Pierre responded that if the sign needed a dimensional variance, it would not have been before the Planning Board, but would have gone to the Zoning Board of Appeals after a denial by the Building Inspector.
21. Attorney L'Esperance asked Mr. St. Pierre how many signs are allowed in an R2 district at a business. Mr. St. Pierre responded that he does not know. Upon further questioning, Mr. St. Pierre stated that he does not review the sign ordinances, they go to Planning for review, and if they are approved by Planning, he issues the building permit. He added that he deliberately does not want to know, and that if there is a problem with the number or dimensions of signs, the Planning staff makes him aware and they take enforcement actions based on that.
22. Attorney L'Esperance stated that Mr. Femino has been asking for several months if not longer that the signage be looked at and enforced, and that there is more than one sign there.
23. Board member Paul Viccica stated that they needed to clarify what the Board is being asked to do. After more discussion, Attorney George Atkins of 65 Congress Street representing Joseph Fitzgerald, owner and operator of the NAPA Auto Parts, presented a response to Petitioner's appeal.
24. Attorney Atkins stated that there are four documents that are important: the building permit issued by a predecessor of Mr. St. Pierre in 1993 for the erection of a sign; the decisions by Tom St. Pierre regarding both the sign and the structural element of the exhaust; and an opinion from the City Solicitor. Attorney Atkins stated that the very last sentence of the City Solicitor's opinion reads, "When, as in the case for the NAPA sign, a permit was issued for the construction of a sign, the six-year statute of limitations applies. In this case, the permit was issued in 1993. As such, the enforcement period ended in 1999." Attorney Atkins noted that that was 20 years ago. Attorney

Atkins stated that the same is true of the Building Inspector's decision about the structure. (This is discussed in the decision regarding Appeal #2).

25. Attorney Atkins stated that he wanted to add context. He stated that this is a matter of abutters disagreeing, and that he thinks the matter is before the Board because of him. Attorney Atkins noted that in fall of 2018, he sent a letter in which he demanded that Mr. Femino remove certain encroachments from the property of Mr. Fitzgerald. As a result of that, a lawsuit was brought by Mr. Femino, and Attorney Atkins and Mr. Fitzgerald are vigorously opposing that lawsuit. Attorney Atkins stated that following that particular event, there has been what he considers to be a vendetta against Mr. Fitzgerald, and really verges on harassment. Attorney Atkins stated, "It doesn't verge on it, it's harassment. Also that harassment has involved the Building Inspector, the Mayor, the Police Department, City Councilors, you name it." Attorney Atkins presented a demonstrative exhibit of a stack of paper including the emails sent to City Officials about this matter (presumably from Mr. Femino) from September, October, and November of 2019 [2018]. (This stack of paper is several inches high, but was not submitted for the record.) Attorney Atkins added that Mr. Fitzgerald is a gentleman who reaches out to his neighbors to solve their problems. Attorney Atkins added, the real question is whether to support the decisions of the building inspector in denying enforcement in these two areas. Attorney Atkins stated that the Board cannot solve their larger problem around these harassment issues, but they would hope the Board would decide to support the building inspector in his decision and the analysis of the City Solicitor of this matter.
26. Attorney L'Esperance responded that Mr. Femino has been in that house (90 Margin Street) since 1966 and that he would hope a public body does not hold anything against his client for exercising his rights to do research and ascertain public records. Attorney L'Esperance stated that he would consider this prejudicial. He noted that Mr. Femino has done his research and has not been an easy client to deal with because he has done so much research. Attorney L'Esperance again claimed that in 2014, they put up a new sign, it was not a repair.
27. Attorney Atkins stated that the permit that was issued was for repair, and that his client has told him that is what they did. He added that they repaired an existing sign, and it is exactly the same as it was before the repair. He stated that they had to remove some rot and replace some letters that had blown off, but it is the same sign repaired as was issued in 1993.
28. At the March 20, 2019 public hearing, several members of the public spoke about the petition. Two (2) members of the public spoke in support of Joseph Fitzgerald, owner of the NAPA property. One other member of the public, Curtis [last name unclear] of 6 Prescott Street, stated that he lives closest to the vent [discussed in the decision for Appeal #2] and he has no problem with it. One other member of the public, Mr. Morris, stated that he lives at 90 Margin Street (which Mr. Femino lists as his own address) and stated that he does not want to be involved with this, but that the vent is loud on a Saturday or Sunday and that they are worried about breathing in the exhaust.
29. The petitioner, Mr. Femino, disputed some of the claims of the members of the public.
30. At the public hearing, Chair Duffy asked whether Mr. Femino was present and occupying and owning the property in 2014, when the sign was repaired. Mr. Femino stated that he was, and that he asked if there was a permit and they said there was a permit. Chair Duffy asked, "But there was no appeal filed in 2014, '15, '16, or '17?" Attorney L'Esperance responded, "No." Mr. Femino stated that he did not appeal because they told him there was a permit.
31. Chair Duffy read from letters from Joe Cultrea and Sarah Statz in support of the petition. Chair Duffy noted that he received another letter but the name was blacked out, so he did not read this letter.

Chair Duffy also read from letters from Marilyn Khoury, Nancy Perroni, Marie Munroe, Kevin Wessell, and Jen Wessell, all in opposition to the petition. Staff Planner Brennan Corriston noted that there were also older letters from Kevin Wessell and Jen Wessell in opposition to the petition.

32. Attorney Atkins asked the Chair if he could clarify the vote. Attorney Atkins stated that there are two decisions of the building inspector: one is a denial of enforcement because of the statute of limitations, and the other is a denial of enforcement on the basis that there is no structure involved. So a vote no is a vote to support the building inspector and not allow the appeal to be reopened.
33. Chair Duffy closed the public hearing. The Board discussed the appeal regarding signage. Chair Duffy stated, as he read the enforcement response that Tom wrote, he addressed a sign that was erected pursuant to a building permit issued in 1993. Chair Duffy noted that the Board has the letter from town Counsel providing the statutory reference and the case law with respect to what the enforcement powers are. Chair Duffy added, "It would appear to me that any issue with respect to that sign and that building permit falls outside of the statute of limitations, and my sense is that that's correct."
34. Peter Copelas stated that there has not been adequate evidence presented that the 2014 sign is a new sign. Mr. Copelas added that the building permit is for the repairs, and the repairs can involve substantial repairs, and there's been no indication that it was anything other than that; therefore, the decision from 1993 certainly seems to be the guiding decision here.
35. Chair Duffy added that while this technically does not become a statute of limitations issue, it concerned him that with respect to the repair of the sign, the work took place in 2014 and it only became an issue in 2018. Chair Duffy added, while he understands that that would not technically be barred if that had been a new permit, under the circumstances that it was a repair, and if there were certainly the same avenues in 2014, 2015, 2016, and 2017 to raise concerns that would have been perhaps more timely than what the Board is hearing now.

On the basis of the above statements of fact, the Salem Board of Appeals voted none (0) in favor and five (5) (Jimmy Tsitsinos, Patrick Shea, Jimmi Heiserman, Mike Duffy (Chair), and Peter Copelas) opposed to grant the requested appeal (Appeal #1) regarding signs. **As such, the appeal was denied, and the decision of the Building Commissioner not to take enforcement action on the signage at 80 Margin Street stands.**

 BJC

Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.