



KIMBERLEY DRISCOLL  
MAYOR

# CITY OF SALEM, MASSACHUSETTS

## BOARD OF APPEALS

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April 3, 2019

### Decision

### City of Salem Board of Appeals

2019 APR -3 PM 3:47  
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 #2, regarding the decision of Building Commissioner Tom St. Pierre that the direct vent exhaust pipe on the building at 80 Margin Street is not a structure and is therefore not subject to zoning setbacks.

#### **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 Corrison 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. [Building Commissioner] is not enforcing intention of the 1997 B.O.A. decision for NAPA's extension & expansion there is quality of life issues" [*sic*]. On the application form, under "Appeal of the Decision of the Building Inspector (described below):" the petitioner wrote, "Appeal Building Com. Letter dated 10-1-18 heating exhaust pipe."
4. In the letter dated October 1, 2018, from Building Commissioner Tom St. Pierre to Mr. Femino, Mr. St. Pierre responded to Petitioner Mr. Femino's complaint "about the direct vent exhaust pipe on the NAPA building [80 Margin Street] that abuts your property," which Mr. Femino claims is a zoning violation. The letter states in relevant part:

“You have complained about the direct vent exhaust pipe on the NAPA building that abuts your property. You have complained about the noise. I explained that sound would be the purview of the Health Department. You have also complained that the pipe constitutes a zoning violation. My answer, to your zoning complaint, is that I have consistently ruled that the direct vent pipes are not structures and therefore not subject zoning setbacks. I have also shown you documentation from my Plumbing Inspector that the exhaust pipe is installed per the Gas code. If you wish to Appeal my zoning interpretation, your Appeal is to the Salem Zoning Board of Appeals.”

5. The petitioner lives at 90 Margin Street, next door to 80 Margin Street.
6. 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.
7. Following the December 19, 2018 meeting, Attorney Drucas withdrew from representing 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 Corrison received this extension request via email on December 27, 2018 and filed the request with the City Clerk on December 28, 2018.
8. 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.
9. 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.
10. At the March 20, 2019 meeting of the Zoning Board of Appeals, Attorney David L'Esperance, representing petitioner John Femino, presented the petition. He stated that Mr. Femino has had ongoing issues with the owner of the NAPA building. Attorney L'Esperance noted that there was a new part of the building with a new heating system. Attorney L'Esperance stated that one of the

problems has been the noise with the exhaust pipe, which goes on Mr. Femino's building. He noted that the Health Department has been on site and after NAPA did some work, the pipe still exceeds 10 decibels over the accepted limit. Chair Duffy noted that there are two issues, and that since Attorney L'Esperance started speaking about the vent, they should take that issue up first. Chair Duffy asked Attorney L'Esperance what is the position with respect to whether the Building Inspector was incorrect.

11. Attorney L'Esperance responded that there is supposed to be a two-foot setback, and the wall is set back one and a half feet. He added that "the noise level is the key thing." He noted that there are letters they can submit to the Board [addressed below]. Attorney L'Esperance stated that some neighbors do not understand why the heat could not be exhausted out on the other parking lot. Attorney L'Esperance added that Mr. Femino has done extensive research and apparently the pipe is six inches too long. He noted that the opposition's counsel stated that the Board of Health was refused entry to come back and measure the sound of the pipe. Attorney L'Esperance said that that is not so; that Mr. Femino wanted them to come on the weekend to measure the ambient noise on a Sunday.
12. Board member Peter Copelas stated to the chair that noise violations are not within the purview of this Board. He added that they can discuss the setback issue, but it is not the Board's purview to be concerned with noise issue. The Chair stated that he tended to agree. He asked if there is more testimony on the vent.
13. Mr. Femino stated that the vent is very unsightly, eight to nine feet high in the backyard facing outward, and it is what he sees. He stated that they "used to have a green space out there," but now there is a "wall that the neighbors allowed back in 1997" "out of goodness to Mr. Fitzgerald [the owner of NAPA]." Mr. Femino stated that as far as he knows, there was no heating system put in back then [1997], and no heating plan submitted to the Board at the time; he stated that the HVAC plan is supposed to be submitted at the time. He stated that as far as he knows, there was no heat in the addition for "all these years." He added that they do not like the exhaust and his tenants and he are concerned about breathing. Mr. Femino added that it is high volume and heats approximately five thousand square feet of fourteen-foot high space.
14. Chair Duffy asked if there were other questions from Board members. Mr. Copelas stated to counsel, the Board has consistently understood vents to not have been considered a structure, and not being a structure therefore would not be subject to the setback violation. He asked Attorney L'Esperance to address this. Attorney L'Esperance stated, "obviously we disagree. It is a part of the structure. It was done during construction, much like a chimney or siding or anything else that you'd put on the house as construction so I respectfully think it does fall under the purview." Board member Jimmy Tsitsinos stated that he disagreed: it is part of the heating system and has nothing to do with the building.
15. Mr. Femino stated that he submitted the definition of a structure, "anything that is attached to the building, anything that goes down to the ground." He stated that he was not sure the Board understood that in 1997, instead of a 10-foot side setback, the Zoning Board allowed a 2-foot setback. He noted that he submitted that a measurement was done with a recent survey that shows that the wall is one and a half feet away from the line; he stated that anything that goes on the wall would be in violation automatically. There was more discussion between the Board and Attorney L'Esperance about the vent and whether it is a structure.
16. Attorney George Atkins of 65 Congress Street representing Joseph Fitzgerald, owner and operator of the NAPA Auto Parts, presented his argument.

17. 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. Attorney Atkins stated that the structure, which extended this nonconforming building, was the result of a Board of Appeals decision both granting variances and special permits in 1997. He stated that the building permit was issued by the then-building inspector in 1998 for the construction of that building. Attorney Atkins noted that the same time period of statute of limitations applies to that building.
18. 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 Councillors, 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.
19. 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.
20. 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 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.
21. The petitioner, Mr. Femino, disputed some of the claims of the members of the public.
22. 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.

23. 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.
24. Chair Duffy closed the public hearing. The Board discussed the appeal regarding the pipe. Chair Duffy stated that there is a timing issue with the vent pipe. He added that the Building Inspector's opinion, which the Building Inspector states has been consistent, is that the vent pipe itself does not constitute a structure that would come within the ambit of zoning enforcement on the setback issue. Board member Jimmy Tsitsinos stated that he agreed with that. Chair Duffy noted that the points about noise and exhaust are not the Board's jurisdiction.
25. The Board reviewed the procedure for the vote, noting that the motion is made in the affirmative.

On the basis of the above statements of fact, the Salem Board of Appeals voted none (0) in favor and five (5) (Peter A. Copelas, Mike Duffy (Chair), Jimmi Heiserman, Patrick Shea, and Jimmy Tsitsinos) opposed to grant the requested appeal (Appeal #2) regarding the exhaust pipe. **As such, the appeal was denied, and the decision of the Building Commissioner regarding the exhaust pipe at 80 Margin Street stands.**

  
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.*