

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2002-96  
Appeal of Edmun and Seunghee Mun  
9 Dearborn Street

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Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, November 7, 2002 at 7:30 p.m. in the Great Hall at the Town Hall, 525 Washington Street, Wellesley on the Appeal of EDMUND AND SEUNGHEE MUN pursuant to the provisions of Section XXIV-C and Section XXIV-D of the Zoning Bylaw of the decision of the Inspector of Buildings to decline to bring an enforcement action against SUN LIFE OF CANADA (US) for violations of the Zoning Bylaws in respect to the Executive Park decision of the Zoning Board of Appeals (ZBA 2000-34).

On September 3, 2001, the petitioner filed the appeal with the Town Clerk. The appeal was scheduled to be heard by the Board of Appeals at the Public Hearing to be held November 7, 2002, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Sanford Matathia, counsel of Rackemann, Sawyer & Brewster, representing Edmund and Seunghee Mun, who were also present. Mr. Matathia said that the sewer backup that occurred in the Mun's basement on June 4, 2002 is a serious situation. He contends that the sewer problem is a zoning issue, and that Sun Life has violated conditions of the Zoning Bylaw as well as permit conditions.

Section XVI of the Zoning Bylaw states that no building shall be altered, enlarged, or used, and no land shall be used, in any part of Town for any purpose by which the emission or discharge of fumes, vapor...offensive odors... refuse, organic matter or excrement...would be obnoxious, dangerous, or injurious to the public health or safety. The subsurface sewer line has been harmful to the Muns and is a risk to the public health of the Muns and their neighbors due to the discharge of refuse and excrement into the basement of the Muns' home.

Sun Life' operation of the office park constitutes a violation of both the provisions of the Special Permit granted by the Planning Board for a Project of Significant Impact (PSI) and Site Plan Approval granted by the Board of Appeals. The sewer information submitted for the PSI permit was grossly inaccurate, as the sewer is inadequate. The issue can be before both the ZBA and the Water Department. The Zoning Board has the authority to address issues of public health and safety. This is both a public health and safety issue as well as a violation of the DPW Sewer Regulations.

Enforcement has been denied by the Inspector of Buildings on the grounds that Sun Life had approval to construct the Executive Park. The Muns' position is that Sun Life's activities have caused violations of the permits granting approval.

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Mr. Matathia continued to give a history of the problem. On June 4, 2002, the Muns' sewer system erupted with backflow into their basement. In a letter to Sun Life, Mr. Duggan, Superintendent of Water & Sewer, stated that paper towels were found in the sewer connection in their investigation on June 4<sup>th</sup>. On June 5<sup>th</sup>, Sun Life also had a backflow problem, and again on June 27<sup>th</sup>. At both times, paper towels were found to be blocking the sewer manhole. This constitutes a violation of the sewer regulations, the Site Plan Approval conditions and the Zoning Bylaw.

The Board stated that Sun Life does not dispute the presence of paper towels, but does dispute that they caused the blockage, as stated in its letter of September 27, 2002 to Mr. Duggan. The Board asked how the blockage represents a violation of the Zoning Bylaw. Mr. Matathia said that the discharge led to injurious circumstances outlined in Section XVI of the Zoning Bylaw.

Mr. Matathia said the information required to be submitted for the PSI was specific and included performance standards. The Planning Board approval was based on the submitted data, which did not include slope or flow capacity. The requirements were not enforced, and the application by Sun Life contained errors.

The Board asked how the Building Inspector was incorrect. Mr. Matathia said the Building Inspector did not enforce the Building Permits. Under the bylaw, the sewer regulations must be enforced, which the Building Inspector did not do.

The Board asked if Mr. Matathia had reached this position by virtue of the incorporation of the PSI Special Permit in the Site Plan Approval decision. It is the opinion of the Board that permits issued by other Boards and/or departments may be included in the Site Plan Approval decision, but enforcement of conditions contained in these permits, or regulations of other departments, are the responsibility of said Board or department, and not of the Zoning Board.

Mr. Matathia said that the Zoning Board has a broader scope of authority than individual departments, and the only avenue of enforcement is the Building Inspector.

The Board responded that the permits issued by the Planning Board and Zoning Board were validly issued. The poor functioning of what was permitted does create a zoning issue. Although Mr. Matathia is of the opinion that the ZBA has a plenary platform of enforcement, the Board questions whether it actually has jurisdiction.

The Board stated that Mr. Matathia claims that when the ZBA inserts conditions in a Site Plan Approval, the conditions are thereafter enforceable by the ZBA rather than some other Board, and asked if he did not agree that certain conditions are clearly to be enforced by some other Board.

Mr. Matathia responded that if the ZBA is incorporating some other body of law such as DPW rules, or Board of Health rules, there could be exceptions. When DPW has authority, the ZBA has a broader scope of authority, which can be invoked, not only under the Zoning Bylaw, but also under the conditions, some of which may be issued by different bodies. The Zoning Enabling Act, Section VIII, and the Wellesley Zoning Bylaw instruct that the only avenue by which to seek enforcement of the Zoning Bylaw or zoning permit is by appeal for enforcement by the Building Inspector.

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The Board stated that there is a difference between enforcing a permit and a bylaw. The permit that was issued by various town boards was validly issued, and everything was built according to the submitted plans. Mr. Matathia is saying that because it doesn't function the way the Boards thought and the applicant said it was going to function, creates a zoning issue over which the ZBA can exercise jurisdiction.

Mr. Matathia discussed the presence of gravel, bricks, etc. that were found in the sewer line, and suggested that the connections to the sewer line from the homes demolished by Sun Life and the sewer line relocated on the Sun Life property might not have been properly cut, which has resulted in the debris. He asked the Board to consider what was the cause.

The Board stated that this is not a zoning issue. The Board is not equipped to make such a finding. Mr. Matathia is requesting that the Board address each of the issues in terms of the episode in early June; and determine the cause of the episode in regard to slope, capacity and condition of the sewer line. These are not zoning issues over which the Board has jurisdiction.

Edmund Mun, the appellant, said they bought the house in May 2001. The backup occurred in June 2002. They cannot use the basement, and it has not been remodeled because they cannot get assurance that the backup will not occur again. Sun Life has taken no responsibility, even when DPW clearly showed that the problem came from the Sun Life campus. They are asking the Board to help them because it has the authority and jurisdiction.

Gabrielle Miller, 11 Dearborn Street, said that when they purchased their home, they planned to finish their basement. Knowing there is a problem with the sewer lines, this is not being done. She feels she was sold a house with a potential that can't be met, and is asking the Board for help.

### **Sun Life Presentation**

Brian Levey of Bowdith & Dewley, representing Sun Life, introduced John Mulvahill and Scott Davis of Sun Life, and Richard Cutts of John G. Crowe Associates. Mr. Levey said that Sun Life is not convinced it is at fault, but is ready to help the Town investigate the problem and help to fix the sewer line. The issue is to fix the sewer line, which is not a zoning issue. The ZBA has no jurisdiction here.

Mr. Mulvahill said he was responsible for the construction project and the operation of the Sun Life campus. Everything done during the demolition and construction process was inspected and permitted. Sun Life is not convinced it caused the sewer backup problem.

Using enlargements of CX1.1 and 1.2 which represented the Sun Life campus and were submitted for Site Plan Approval in 2000, Mr. Cutts, Site Engineer, explained that prior to 2000, the campus consisted of 3 buildings which were serviced by a sewer line running to Manhole C. As the location of the new building would have sat on the existing sewer line, the line had to be relocated.

Using enlargements of Utility Plans 4.1 and 4.2, Mr. Cutts said the line was relocated to tie into Manhole D, which is also the manhole the Muns tie into. In November 2000 the new sewer system was completed and approved, after which Building 4 was constructed. Building 4 was occupied in November 2001. There were no sewer backups for 13 months. For some reason, during June 4<sup>th</sup> and 5<sup>th</sup>, backups occurred.

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Mr. Cutts explained that before Building 4 was built, the sewer line on Dearborn Street ran from Manhole C to E. Sun Life built Manhole D into the line. In reviewing the SITEC memo submitted by Mr. Matathia, everyone agrees to the capacity – what the sewer line will carry with the slope. Although the slope appears to be flat, the pipe has not been changed. Peak flow from Sun Life comes during the business day. Peak flow from the Dearborn Street homes occurs early morning and/or early evening. So, this line can take all the capacity and function properly.

The Board asked why the sewer backed up. Mr. Cutts said he believes the real problem is the sewer bricks found in the manhole and in the line between Manhole D and E. When an independent firm videoed the manhole and the line, an obstruction was found in the line. DPW flushed the system and found old bricks. Sewer Manhole D was built with new bricks.

The Board asked how the data submitted for the PSI and Site Plan Approval had been collected. Mr. Cutts said that knowing there was an erroneous invert, which showed a 1 foot drop in the manhole, they visited the site. They opened the manhole and found there was not a 1 foot drop across the manhole. The inverts were verified before construction. No inspection of the sewer line between Manholes C and E was done prior to submission of the data. Historically, DPW had not had a problem with blockage during the past 20 years. The sewer line is about 50 years old and should last for another 50 years.

The Board asked if it was not possible that one or two disgruntled Sun Life employees had sabotaged the sewer system. Mr. Cutts said it might be possible with bricks in the line, but questioned how it would be possible to put enough paper towels into the Sun Life toilets to create the blockage.

The Board asked how many times the blockages had occurred. Mr. Cutts said there was one on June 4<sup>th</sup> in the Mun's house; on June 5<sup>th</sup> in the line from Building 4; and a reoccurrence in that line on June 26<sup>th</sup>. All backups occurred before the first video, which was halted by blockage determined to be bricks, sand and gravel.

The Board asked if there were any written records on the sewer laterals on the homes taken down on the Sun Life side of Dearborn Street. Mr. Cutts said there have been conversations with the contractor who had done the work. The laterals were capped at the foundation lines and inspected by the town.

Mr. Levey said that in the appeal, the Muns have asked that the Board order Sun Life to take remedial measures to ensure there is no future blockage of the line. The Town owns the sewer line. As the Town designed it, built it and maintained it, Sun Life submits that the Zoning Board has no authority to order Sun Life to repair, maintain or replace a sewer line that is not owned or controlled by either the Zoning Board or by Sun Life.

The Board said that Chapter 40A, Section 3 states that the Zoning Bylaws are prohibited from regulating the use of materials or methods of construction regulated by the Building Code. Therefore, where the Zoning Board has no authority over the particular type of structure and how it is built, it certainly does not have the authority to regulate how a sewer is built.

Mr. Levey said that when the Board permits a large project, there are a series of permit conditions relating to issues that are outside the ken of the Zoning Board, such as sewer, septic, etc. If a problem arises under a particular condition, the responsible department would be charged with reviewing the issue and working

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out a resolution with the applicant. In this case, a Notice of Violation was sent to Sun Life by the DPW. A permit condition is not a peg on which the Muns can rely to gain jurisdiction before the Board of Appeals. A reference to Sewer Regulations in a zoning permit does not make the Sewer Regulations part of the Zoning Bylaw, enforceable by the Zoning Board. It is an issue for the DPW.

Mr. Levey said the appeal challenges the use of Buildings 1, 2 and 3 as a noxious use under the Zoning Bylaw. This section of the Zoning Bylaw is not applicable, as it is barred by the six year Statute of Limitations in raising a "use" issue in respect to buildings. The Zoning Bylaw allows for office parks to be constructed in certain districts. Invoking Section XVI of the Zoning Bylaw does not apply to a one-time incident of malfunction. A single incident does not rise to the level of a noxious use.

Mr. Levey said that even if the paper towels had been the cause of the problem, this was not an issue for the Zoning Board. It is an issue for the DPW. Sun Life is ready and willing to work with DPW to resolve the problem.

With respect to the slope of the pipe, Sun Life has given the Board information that there is no reverse flow. The pipe is adequate to handle the capacity from the office park, and there is no evidence to the contrary. The Board also has information before it that the addition of the extra 7,000 gallons from Building 4 would not overload the pipe.

In summary, the Board agreed that the issue is whether or not the Building Inspector was correct in his opinion that there were no zoning violations. The Board agrees with the Building Inspector that, although there might be violations of other regulations, they are not zoning violations, and therefore not within the Board's jurisdiction to review or the Building Inspector's jurisdiction to enforce.

The Board expressed the hope that regardless of its decision, Sun Life would made every effort to resolve the problem with the DPW and the Muns without the necessity for any party to seek court action.

#### Statement of Facts

The subject property, owned by Edmund and Seunghee Mun, is located at 9 Dearborn Street, in a Single Residence District, directly across the street from One Sun Life Executive Park, the U.S. corporate headquarters of Sun Life Assurance Company of Canada (U.S.) ("Sun Life").

On March 3, 2000, the Planning Board issued a Special Permit for a Project of Significant Impact to Sun Life to construct an office building (Building 4) containing 94,000 square feet of floor area with parking under the building, expansion of the existing parking garage and related site work.

A municipal systems impact analysis, prepared by engineers registered in the Commonwealth of Massachusetts is required to be submitted to the Planning Board. The water, sewer, fire alarm, refuse disposal and storm drainage portions shall be prepared by engineers having expertise in civil engineering.

On May 9, 2000, the Board of Appeals (ZBA) issued Site Plan Approval to construct a three-story office building with garage space for 105 cars on the ground floor and office space on the additional two floors.

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The proposed footprint was 46,687 square feet, and the proposed floor area was 94,000 square feet. Addendum A of the decision incorporated the Development Agreement dated April 5, 1999 between Sun Life and the Board of Selectmen; the three Orders of Conditions issued by the Wetlands Protection Committee on December 9, 1999, and the Special Permit for a Project of Significant Impact issued by the Planning Board in order to provide a complete record of all actions taken and permits granted for the project.

No appeal was filed in respect to any of the above decisions.

On November 30, 2001, the Inspector of Buildings issued a Certificate of Occupancy for Building 4 on the Sun Life campus.

On June 4, 2002, a sewer backup occurred in the basement of the Appellants home. Upon investigation, the DPW sewer cleaning crew "found the ten-inch diameter town sewer on Dearborn Street to be blocked by paper towels in the segment between the first and second (i.e. into which Sun Life Discharges) manholes up from Worcester Street". A Notice of Sewer Violation was sent by Joseph Duggan, Superintendent of the Water & Sewer Division of DPW to Sun Life on June 27, 2002.

In a letter dated July 31, 2002, the Muns, through their attorney, Sanford Matathia, requested the Inspector of Buildings and the Water & Sewer Superintendent find that "Sun Life has violated the Zoning Laws and/or the Sewer Rules as identified above, and take appropriate enforcement action against Sun Life to rectify these violations and assure that there are no further sewer backflows into the Muns' home or any other residence in the Dearborn Street neighborhood."

The Inspector of Buildings responded to the above request in a letter dated August 8, 2002, stating that he firmly believed that "the design and construction is not in violation of the Town of Wellesley Zoning Bylaws. The buildings were constructed after the review and approval given by the Planning Board, the Zoning Board of Appeals, the Engineering Department and the Water & Sewer Division of the DPW".

On September 3, 2002, Edmund and Seunghee Mun, through their attorney, filed an Appeal of the decision of the Inspector of Buildings to decline to bring an enforcement action against Sun Life for violations of the Zoning Bylaws with respect to the Executive Park (the "Decision").

#### Decision

This Authority has made a careful study of the materials submitted and the information presented at the Public Hearing on November 7, 2002.

The Board makes the following findings:

- The Site Plan Approval process, pursuant to Section XVIA of the Zoning Bylaw, requires that copies of all submitted plans and information be distributed to the Planning Board, Design Review Board, Wetlands Protection Committee, the Town Engineer, the Board of Health, and the Fire Department, and that comments and recommendations from each be sent to the Board of Appeals in a timely manner.

It is the practice of the Board to continue a Site Plan Approval hearing if all Boards and Departments have not approved the submitted plans and information. Therefore, Site Plan Approval is not given until all plans and information comply with the regulations of each reviewing Board.

It is the practice of the Board that the Site Plan Approval decision shall contain all prior permits and conditions placed on the project by other Boards and/or Departments in order that a complete record of the project be maintained. This record does not in any manner imply that enforcement of conditions by other Boards and Departments is the responsibility of, or under the jurisdiction of the Board of Appeals.

**Therefore, it is the finding of this Authority that the purported violation of the Sewer Regulations of the Department of Public Works is not a Zoning violation to be enforced by the Inspector of Buildings.**

- Section XVI of the Zoning Bylaw has been invoked by the Appellants to claim that “no building or structure, or part thereof, shall be altered, enlarged, reconstructed or used, and no land shall be used, in any part of the Town: A. for any purpose by which the emission or discharge of fumes, vapor...offensive odors...refuse, organic matter, or excrement...would be obnoxious, dangerous or injurious to the public health or safety.”

In this instance, neither the building nor the land has been used for any purpose that would be obnoxious, dangerous or injurious to the public health or safety. There has been a blockage in the sewer line leading, once to backup in the basement of the Muns' dwelling, and twice on the Sun Life campus. No backup has been reported since June 27, 2002.

To date, no conclusive evidence has been submitted to determine whether the paper towels reputed to be emanating from the Sun Life campus or the bricks, sand and gravel of unknown origin are responsible for the sewer backup. In any event, the malfunction of the approved sewer line is not the responsibility or under the jurisdiction of the Board of Appeals. The Board of Appeals is not responsible for the maintenance of a town sewer line, which operated without defect for 13 months from the date of occupancy of Building 4 by Sun Life. The defect should be investigated and remediated by Sun Life and the DPW, working in conjunction to resolve the problem.

**It is the finding of this Authority that it does not have the jurisdiction to determine the reason for the malfunctioning of the sewer line. Site Plan Approval given by the Board for the construction of Building 4 on the Sun Life campus involved a review of the construction on the site and not its impact on the town infrastructure. The approval denoted the appropriate use of the land for an office building, and the plans for construction of the office building, which had been approved previously by all the aforementioned Boards and departments.**

**It is the finding of this Authority that the public health and safety potentially at risk by the malfunctioning of the sewer line is not a violation of the Zoning Bylaw to be enforced by the Inspector of Buildings.**

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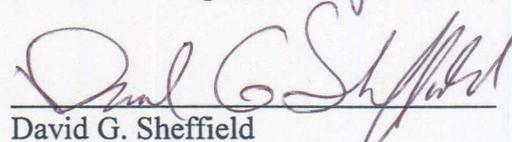
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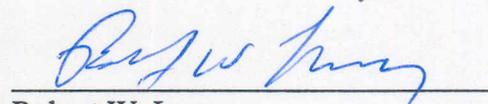
Therefore, as voted unanimously by this Authority at the Public Hearing, this Appeal is denied, as the Inspector of Buildings had no violations of the Zoning Bylaw to enforce in regard to this Appeal and this case is dismissed.

APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN  
THE OFFICE OF THE TOWN CLERK.

Cc: Planning Board  
Joseph Duggan, Superintendent  
Board of Selectmen  
Inspector of Buildings  
edg

  
Richard L. Seegel, Chairman

  
David G. Sheffield

  
Robert W. Levy

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