BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPLICATION OF
JAMES AND LEE BUTERA,
4901 Quebec St., NW
Washington, D.C. 20016

On Referral From The Superior Court for the District of Columbia

APPLICATION FOR DETERMINATION OF SPECIAL QUESTIONS

This matter comes before the Board of Zoning Adjustment ("Board") pursuant to an Order of the Hon. Rhonda Winston, in Molm v. Butera, No. 99CA 2029 (June 14, 2000). In that order, the Court stayed the aforementioned lawsuit on the motion of Defendants James and M. Lee Butera to seek from the Board an authoritative administrative construction of the zoning regulations under which the plaintiffs sue. A copy of the Court's Order is attached as Exhibit 1.

Background

Plaintiffs John and Sue Molm have sued the Buteras, their next-door neighbors, who reside at 4901 Quebec St., NW (Lot 1475, Square 43). The Molms are dissatisfied with the Buteras' placement of outside, ground-based air conditioner units adjacent to the Buteras' home. The gravamen of the Complaint is that the air conditioner compressors violate D.C. zoning regulations and alleges theories of public and private nuisance.

Jurisdictional Statement

The underlying lawsuit challenges actions taken by the Buteras, in good faith reliance on statements made by D.C. zoning officials. At the heart of the case, which the Court's order implicitly recognizes, is the desirability, if not need for, an administrative

BZA
Case No. 16636
Exhibit No. 3

Board of Zoning Adjustment
District of Columbia
CASE NO.16636
EXHIBIT NO.3

KW

construction of the pertinent District of Columbia zoning regulations set forth below. No agency or court has previously construed these regulations.

A. The Board Has Jurisdiction To Review This Application.

The Board has power to review and construe such "special questions" as might be raised that implicate the zoning code.[1] This case meets those criteria.

B. Precedent Exists For The Board To Exercise Primary Jurisdiction.

The Buteras' motion, on which the Court agreed to stay the civil action and to refer this matter to the Board, is based on Brawner Building, Inc. v. Shehyn.[2] There the United States Court of Appeals for the District of Columbia Circuit found the trial court had "erred in determining the merits, and ordering a permanent injunction, without requiring recourse to the administrative remedies available to the parties that would have provided the guidance of administrative expertise which the courts should require."[3] The appellate court took pains to emphasize the unique and sensitive nature of zoning ordinances and the courts' traditional reluctance to entertain extraordinary writs, such as injunctive decrees, when there are available adequate administrative channels alleged to assess decisions that are claimed to be contrary to a zoning ordinance.[4]

The Brawner tribunal invoked the doctrine of primary jurisdiction, declaring that a trial level court confronted with such a zoning case should "wait while the agency that has 'primary jurisdiction' makes the initial determination – 'until the administrative

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1 5 D.C.Code § 5-424(f)-(g); 11 D.C.M.R. § 3105.2.

2 Brawner Building, Inc. v. Shehyn, 442 F.2d 847 (D.C.Cir. 1971).

3 Brawner Building, Inc. v. Shehyn, 442 F.2d at 852.

4 Brawner Building, Inc. v. Shehyn, 442 F.2d at 854-55.

agency that has special competence in the field has ruled on [the issues].'"[5] Additionally, Brawner held, courts – even when jurisdiction is clear – when "'confronted with problems within an agency's area of specialization should have the advantage of whatever contributions the agency can make to the solutions.'"[6] "Sound discretion," the panel explained, "leads the court to await the 'last word' of administrative expertise and perspective, complete with fully articulated reasoning where that is available, before the court exercises its limited role of judicial review."[7]

Issue Presented

The issue presented is one of law, for the facts are undisputed. May an air conditioner compressor unit under four feet in height be placed within the eight foot set back of a side yard within residential zoning district R-1-A?

Why An Administrative Construction Is Necessary

A. The Buteras Placed Their Air Conditioner Units In Their Current Location Based On An Informal Interpretation Of The Zoning Administrator's Office.

The Buteras installed three small (it is undisputed that each is less than four feet in height) air conditioner compressor units along the side of their home, between the parties' properties. These units were situated in October, 1999, following statements by

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[5] Brawner Building, Inc. v. Shehyn, 442 F.2d at 855 (quoting Best v. Humboldt Placer Mining Co., 83 S.Ct. 379, 383 (1963)).

[6] Brawner Building, Inc. v. Shehyn, 442 F.2d at 855-56 (quoting 3 K. Davis, Administraitive Law Treatise, § 19.09 at 53 (1958)).

[7] Brawner Building, Inc. v. Shehyn, 442 F.2d at 856-57 (citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

the Chief of Zoning Review of the D.C. Zoning Administrator's Office that placement in the side yard would not offend zoning regulations.[8]

B. The Molms Bypassed Obvious Available Administrative Remedies.

Instead of then appealing administratively through the Zoning Administrator's Office and, if necessary to the Board, the Molms – the parties claiming to be aggrieved - sued directly in the Superior Court. Because the Molms bypassed the Zoning Administrator and this Board, the Buteras were not in a position to seek administrative review and the Board's interpretation.[9] The only pragmatic way of doing so is the course the Buteras took, which was to request a stay of the judicial action and request for this Board's interpretation.

C. An Administrative Construction Of The Zoning Regulations Is Needed, Not Just To Resolve The Private Interests But Because The Lawsuit Indirectly Affects Homeowners Throughout The City

The Superior Court's order (Ex. 1) presents the Board with a "special question" which the Board is uniquely positioned to answer. The Board's guidance will have signal import for the important private and public interests involved.

1. Private Interests: The Molms' Position.

First is the presence of immediate private interests. The parties vie for an authoritative administrative construction of the pertinent regulations, which have, to our research, never been previously adjudicated.

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[8] L. Butera Aff., Molm v. Butera, ¶¶ 12-17 (May 12, 2000)(Ex. 2); Mem. From L. Butera-J.&S. Molm (Oct. 13, 1999)(Ex. 3); Notes of telephone conversations between L. Butera-Mr. Nunley (Ex. 4).

[9] For that reason, this case differs from decisions such as Wallick v. Board of Zoning Adjustment, 486 A.2d 1183 (D.C.App. 1985), where the aggrieved petitioners appealed to the Zoning Administrator and then to the Board and finally to the courts.

The Molms' position that the Buteras' air conditioner compressing violate the regulations rests on an interpretation of *five* different D.C. zoning regulations, viz., 11 D.C.M.R. §§ 199.1; 405; 2502.1; & 2503.1-.2. As set forth in the Molm's brief to the Superior Court,[10] the Molms ultimately contend the air conditioner units are not "structures" as defined by 11 D.C.M.R. § 199.1. The Molms believe the regulations require back and side yards to be open and unobstructed to the sky from the ground up, except for structures under four feet in height.[11]

2. Private Interests: The Buteras' Position.

The Buteras, on the other hand, contend the air compressor units are "mechanical equipment" which is not prohibited from being in yards.[12]

The zoning regulations do not directly address the placement of these air conditioning units. The only specific mention of air conditioning units in the Code allows window units to project into protected areas for a distance of two feet. 11 D.C.M.R. § 2502.9. If the air conditioning units in this case are indeed "mechanical equipment," and are therefore not within § 199's definition of "structures," there is no prohibition against their placement in the present location. Indeed § 199's definition of "structure" tells us the concrete support slabs for each of the units is acceptable, even though they might cause the yard to be obstructed from the ground up.

Moreover, the Molms' position must be read against 11 D.C.M.R. §2503.2, which permits items less than four feet high to exist in a side yard. The only possible logical

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[10] Plaintiffs' Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Molm v. Butera, pp. 3-4 (May 9, 2000)(Ex. 5).

[11] Pltfs' Mem. at pp. 3-4.

[12] Defendants' Memorandum of Points and Authorities Opposing Motion For Summary Judgment, Molm v. Butera, pp. 9-10 (May 16, 2000)(Ex. 6).

conclusion is that air conditioning units are permitted in side yards under the zoning code. Such placement is consistent with the zoning code's recognition of "accessory buildings," defined as "[o]ther buildings or structures customarily incidental to the uses permitted in R-1 [residential] districts under provisions of this chapter." 11 D.C.M.R. § 204.1(c).

Futhermore, as the Molms' brief concedes, "structures" not exceeding four feet can be located in a set-back area under 11 D.C.M.R. § 2503.2[13] Under 11 D.C.M.R. § 199.1 a "structure" is defined as "anything ... attached to something having a permanent location on the ground...." The air conditioning units here are attached in just such a way.

If The Molms' Position Were Accurate Then Many Landowners In The District of Columbia Are Unwittingly Violating The Zoning Regulations.

There are also important public interests that favor an administrative construction of this matter under the Board's jurisdictional power to resolve special questions. If the Molms are correct, then homeowners in the city could not place air compressor units anywhere in their side yards without fear of litigation. The fact of the matter is many homeowners in D.C. do have outside air compressors in their yards. That can be confirmed readily by a drive through various residential neighborhoods.[14] The practical result of the Molms' expansive reading of the regulations, if left unaided by an administrative construction, would be to place a host of people in unwitting exposure to charges of violation of the zoning law.

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13 Pltfs' Mem. at p. 3.

14 L. Butera Aff., ¶ 23 (Ex. 2); J. Butera Aff., Molm v. Butera, ¶ 3 (May 16, 2000)(Ex. 7).

Conclusion

The Board of Zoning Adjustment has and should exercise its jurisdiction to decide the issues herein under its authority to address such special questions as are presented.

By: _____

Stephen Leckar, #281691
Dennis Hart, #935643
Butera & Andrews
Suite 500
1301 Pennsylvania Ave., NW
Washington, D.C. 20004
202.347.6875

Certificate of Service

I certify that a copy of the foregoing was served by first class mail this 28th day of June, 2000 on Benny Kass, Esq. and Adam Lipton, Esq., 1050-17th St., NW, Suite 1100, Washington, D.C. 20036.

_____
Stephen C. Leckar

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

JOHN AND SUE MOLM,	:	
	:	
Plaintiffs-Counterdefendants,	:	
	:	Civil Action No. 99CA9029
v.	:	Judge R. Reid Winston
	:	Calendar 12
JAMES AND LEE BUTERA,	:	
	:	
Defendants-Counterplaintiffs	:	

ORDER

Upon consideration of Defendants' Motion for a Stay, and Plaintiffs' opposition thereto, the Court hereby

ORDERS that Defendants' Motion be and hereby is **GRANTED** and the Court

FURTHER ORDERS that the Defendants, within four weeks of the date of this Order, file with the Court documentation 1) that they have formally sought from the Board of Zoning Adjustment ("the Board") its interpretation of whether the placement of Defendants' air conditioning units violates any zoning ordinance or regulation; 2) that the Board has acknowledged that the matter is within its jurisdiction and procedurally has been properly brought before it; and 3) of the status of any proceedings before the Board.

SO ORDERED.

6-14-00
Date

Rhonda Reid Winston
Associate Judge
Signed in chambers

DEFENDANT'S EXHIBIT 1

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOHN AND SUE MOLM, **Plaintiffs,** **vs.** **JAMES AND LEE BUTERA,** **Defendants**	**Case No.: No. 99CA009029** **Calendar #12-Judge Winston** **Next Event:** **None Scheduled**

AFFIDAVIT OF M. LEE BUTERA

M. Lee Butera, being duly sworn, states:

1. I am the co-owner of 4901 Quebec Street, NW, Washington, D.C.

2. Along with my husband and co-owner, James J. Butera, I have resided at the above-referenced property since 1986.

3. The final phase of renovation of our house began on or about March 1999.

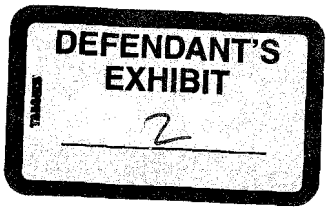
4. Included as part of the final renovation was a relocation of the air conditioning compressor units from our rear yard to our side yard. The side is adjacent to the Molms' property at 4911 Quebec Street, NW.

5. Prior to the commencement of construction, I was told by our architect, Keith Peeples of Robert Schwartz Associates, that it would be necessary to have the approval of the Molms in order to locate the air compressors in the side yard.

6. Sometime in the fall of 1998 I informed the Molms that I was told that we would need their permission to place the air compressors in the side yard. At that point, John Molm expressed surprise that their permission would be required and indicated appreciation of having been so informed. He further stated that we would "see how it went" or words to that effect.

7. After construction commenced and the compressors were relocated to the side yard, near the Molms' back porch, and activated, the Molms expressed concern about the noise level. We held several meetings with our builder and the Molms to discuss alternative/remedial plans.

8. One such plan included the erection of a simulated eight-foot wood fence along the side property line but the Molms rejected this.



9. We were then informed via our builder's foreman, Eric Matsen, that the Molms would not be granting permission to have the air compressors located in the side yard.

10. After further consultation with our builder, the air compressors were then relocated to alternative sites on the property. That cost us $3,600. Neither my husband nor I were satisfied with these alternative sites for aesthetic reasons.

11. On or about mid-summer, 1999, when discussing this matter with a neighbor who is an experienced real estate agent in the District of Columbia, I was informed that it was not uncommon for air compressors to be located in side yards in the District and that I should check with the Zoning Commission.

12. Immediately thereafter, I contacted Mr. Nunley (Edgar T. — Chief of Zoning Review) at the D.C. Zoning Commission and explained the precise situation to him. He informed me that property owners were allowed to place air compressors in their side yards.

13. Shortly thereafter, I contacted our architect, Robert Schwartz, to inform him of my conversation with Mr. Nunley. He said he would look into the matter.

14. To be on the safe side, I contacted Mr. Nunley a second time (late August or early September) and asked him if he was certain about our prior conversation. On this occasion, he spent considerable time with me citing specific sections of the zoning regulations and reading them to me. At the end of the conversation, I asked if he was completely sure that we did not need our neighbors' permission to locate air compressors in the side yard. His response was "Absolutely not."

15. I then inquired of our architect as to whether or not he had spoken to Mr. Nunley but he had not as yet reached him.

16. I subsequently had a third conversation with Mr. Nunley. I asked him to contact our architect and provided him with Mr. Schwartz' number.

17. Soon thereafter, I had a conversation with Mr. Schwartz. He told me he had spoken with Mr. Nunley who confirmed our neighbors' permission was never required in the first place.

18. Based on this information and further consultation with our builder, the air compressors were relocated to the side yard, between our house and the Molms' house. I wrote a note to the Molms explaining the rationale for our decision to locate the air compressors in the side yard, as was our legal right to do, according to the Zoning Commission.

19. In an effort to supplement the 20-foot Leyland Cypress trees that line the Molms' side of the property line between our residences, we also consulted with a landscaping contractor. We had additional shrubbery planted in December of

1999 on all three sides immediately adjacent to the air compressors to further baffle the outgoing sound of the mechanical devices. Additional landscaping with a view toward further soundproofing is also planned for installation on the brick wall constituting the fourth side of the air compressors.

20. The air conditioner compressors had been in our back yard for many years, long before the Molms moved in about four or five years ago. Prior to last summer the Molms never complained to us that they couldn't entertain in their back yard. If they are still concerned with this problem, even though we've relocated the units, and want us to temper the units so they could have a party or function in their back yard we'd be willing to try to accommodate them.

21. The Molms' baby's room is not directly opposite the air conditioner compressor units. It is situated on the second floor of their house. The windows in that room open approximately 15 feet above the units. (In fact, their first floor itself is above the units.)

22. Our master bedroom is right above the units in our side yard. We are not bothered by noise from these units. In fact, we have separate temperature control zones on the first floor. Most of the time the units don't run concurrently because we raise the thermostats in rooms and/or areas we don't use. That conserves energy and fuel costs. For instance the upstairs units only go on occasionally during daylight hours because we aren't upstairs very much at those times. The downstairs unit only rarely goes on at night while we are upstairs.

23. I have driven around the Spring Valley and American University Park areas of D.C. on May 11, 2000. I wanted to see whether other homeowners had air compressor units in their side yard setbacks. I looked especially for homes that appeared to be situated about the same distance from the property line as our home and the Molms. I noticed several homes which had air compressors located in the side yards that appeared to be about the same distance from the property line as ours.

I have read the foregoing and declare it to be true.

M. Lee Butera

Sworn to before me this 12 day of May, 2000.

Notary Public

Sonia M. Marquez
NOTARY PUBLIC DISTRICT OF COLUMBIA
My commission expires November 14, 2001

October 13, 1999

Dear John + Sue,

Sorry I didn't get to see you all before I left for Florida but things got chaotic the last few days. I will be down here until just before Thanksgiving. I'm very busy with a 9 hole course and constantly picking up after Winston - you know the drill!

We discovered that our architect and builder were incorrect in their assumption that we had to obtain your permission to place the AC units in our setback. After many calls with a specialist at Longboard with his assurances that we are within our legal limits, I believe Jim is moving the units moved back into the setback. I am truly sorry about this. We were very unhappy

DEFENDANT'S EXHIBIT 3



about me on our kitchen roof and two outside our sun porch, all being very visible. Jim has met with a landscaper who will be planting more acuba along the side yard to help reduce the noise. Jim has the name and number of the young specialist if you would like to speak with him.

Again, I am very sorry about the outcome and hope you understand.

Lee

Yes Butler

(1)

Edgardo Nunley 442-4675

Zoning 442-4560

1475 / 43

R1A — no permit

most restrictive

8 ft

4 ft

fence, gate, brick column

AC yes — 4 ft from fence — 18" - 6ft

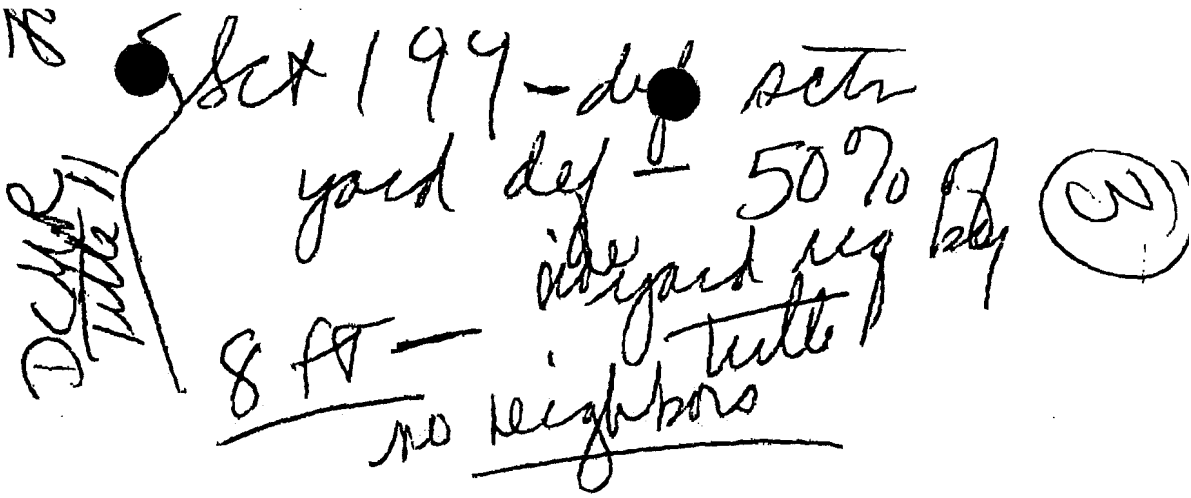
(2)

per phone 9/16/99

Mr Nunley will call Bob Schwartz

(at 2503 - 2 more apartments - 4' high)

DEFENDANT'S EXHIBIT 4


Sec 199 - dec acc
yard def ± 50%
adjacent neighbor
8 ft —
no neighbors
DCMR Title 11

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

John Molm **Sue Molm** **Plaintiffs,** **vs.** **James Butera** **Lee Butera** **Defendants.**	**Civil No.: 99-9029** **Calendar 12** **Judge Rhonda Reid Winston** **Next Event: Witness Lists Due 5/24/00**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

BACKGROUND

Plaintiffs, John and Sue Molm (the "Molms") and Defendants, James and Lee Butera (the "Buteras") are next door neighbors on Quebec Street, N.W., in the District of Columbia. Both properties are designated as residential and zoned as "R-1-A" on the District of Columbia's zoning map. This dispute between these neighbors erupted during the construction by the Buteras of an addition to their home when, in June of 1999, the Buteras installed three (3) air conditioning units along the side of their home facing the Molms' property.

The Molms found the noise produced by these air conditioning units to be extremely disturbing and substantially destructive of the peace and quiet of their garden, back yard as well as the rooms on the side of the house facing the Buteras property and, especially, their baby's room. See Affidavit of John Molm at ¶¶ 4-8 (attached hereto as Exhibit A). Accordingly, the

approached the Buteras and engaged in a series of discussions in which shielding of the

DEFENDANT'S EXHIBIT 5

units in their current location as well as alternative locations for the air conditioning units were discussed. Various attempts to reduce the noise were unsuccessful in preventing disturbing levels of noise from entering upon the Molms' property. See Id. at ¶ 4. Finally, the Buteras agreed to move the three offending units. In July of 1999, one of the three units was moved to the Buteras' roof and the other two units were moved to the opposite side of the Buteras' home. Id. As a result, the unreasonable noise ceased and the Molms were satisfied.

Without any advance notice, however, on October 15, 1999, the Buteras moved all three air conditioning units back to their original location facing the Molms' property. Id. The following day, the Molms received a letter from Lee Butera in which she stated that her architect and builder had been incorrect when they told her that they needed to obtain the Molms' permission to put the air conditioning units facing the Molms' property. See Butera letter (attached hereto as Exhibit B). Ms. Butera further stated that they had had conversations with an individual in the District of Columbia's Zoning Department who assured them that the positioning of the air conditioning units was legal. Id. Finally, Ms. Butera stated that she did not believe the air conditioning units were aesthetically pleasing in their alternative locations away from the Molms' property. Id.

11 DCMR 405 states that side yards within residential zoning district R-1-A must have a minimum width of eight (8) feet. See Relevant Zoning Regulations (attached jointly hereto as Exhibit C). The three air conditioning units at issue are located within this eight foot set-back area directly across from the Molms' house and property. See Molm Affidavit at ¶ 3. With air conditioning season fast approaching, it is not unreasonable to assume that the Buteras will soon begin using these air conditioning units and that the noise which unreasonably disturbed the

Molms last summer will once again begin interfering with the use and enjoyment of their property. As a result of the operation of these air conditioning units, the Molms have suffered, and will continue to suffer irreparable harm.

ARGUMENT

The three air conditioning units at issue are located within the eight foot set-back along the side of the Buteras' house and adjacent to the Molms' property. 11 DCMR 2502.1 states that except for certain encroachments specified in that section and in §2503, "every part of a required yard or court or other required open space shall be open and unobstructed to the sky." None of the exceptions set forth in 11 DCMR 2502 can be said to include the three air conditioning units at issue in this case.

Section 2503 addresses "structures and required open spaces." Section 2503.1 restates that except for certain exceptions set forth in that section, "every part of a yard required under the provisions of this title shall be open and unobstructed to the sky from the ground up." Section 2503.2 is the only provision which – upon first glance – might be said to apply to three air conditioning units at issue. That section reads:

> A structure, not including a building, no part of which is more than four feet (4 ft.) above the grade at any point may occupy any yard required under the provisions of this title. Any railing required by the D.C. Building Code shall not be calculated in the measurement of this height.

While this section allows a structure other than a building, it does not include any definition of the term "structure." In order to obtain the definition of the term "structure," one must refer to 11 DCMR 199.1. It is within the title's definitions section that the word "structure" is defined as follows:

> Anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls. The term structure shall not include mechanical equipment, but shall include the supports for mechanical equipment.

(emphasis added). While this definition is exceedingly broad, it does specifically exclude "mechanical equipment."

Excluding mechanical equipment from the definition of a structure is understandable, given that mechanical equipment typically will produce large volumes of noise. While the other items set forth under the definition of the term "structure" can be silent, or nearly silent neighbors, mechanical equipment has the potential to be loud enough to disturb neighboring property owners. In this case, the three air conditioning units on the Buteras' property are clearly pieces of "mechanical equipment." Indeed, this case is a perfect example of why the zoning regulations specifically exclude mechanical equipment from side yard set-backs because of the potential for noise and disturbance to neighbors.

Under D.C. Code §5-426, neighboring property owners are empowered to institute legal action seeking an injunction or other appropriate action to correct or abate zoning violations if the neighboring property owner "would be specially damaged by any such violation." This Code provision reflects the common law rule that "a private party may sustain an action to enjoin or recover damages for a public nuisance if that party can allege and prove 'special damage distinct from that common to the public.'" V&W Management Inc. v. Tasea Investment

Co., 451 A.2d 879, 882 (D.C. 1982), quoting, Holloway v. Bristol-Myers Corp., 327 F.Supp. 17, 24 (D.D.C. 1971), affd, 385 F.2d 986 (D.C. Cir. 1973).

In this case, the Molms quite clearly have damages "distinct from that common to the public" as a result of the Buteras' violation of the zoning regulations. Specifically, it is the Molms' property which lies directly adjacent to the three air conditioning units illegally erected by the Buteras near the Molms' property line. See also, Brawner Building Inc. v. Shehwn, 442 F.2d 847, 854 (D.C. Cir. 1971) ("there is no doubt of the right of property owners to seek to enjoin a use or proposed use of nearby or neighboring land that is both unlawful and adversely affects their interest.").

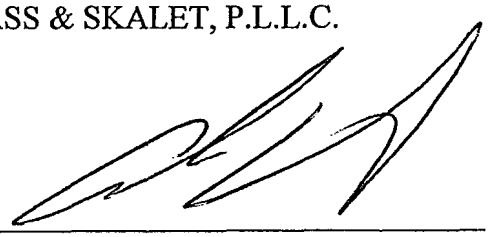
In addition to being a violation of the District of Columbia Zoning regulations and a public nuisance, the air conditioning units at question also qualify as a private nuisance under more traditional common law criteria. A nuisance has been defined as "anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property or that which renders the ordinary use and occupation by a person of his property uncomfortable to him." Reese v. Wells, 73 A.2d 899, 903 n.6 (D.C. 1950); Levy v. Bryce, 46 A.2d 765, 766 (D.C. 1946) (same); District of Columbia v. Totten, 5 F.2d 374, 380 (D.C. Cir. 1925) cert denied 269 U.S. 562 (1925) (same). It does not take a team of acoustic experts measuring decibels to reach the conclusion that three air conditioning units located illegally close to the Molms' property line will cause the Molms inconvenience, annoyance, discomfort and other damages to the legitimate enjoyment of their property and home. See also Molm Affidavit at ¶¶ 4-8.

Defendants' justification for their illegal placement of the three units is that they were allegedly told by an official of the District of Columbia government that this placement was proper. Even assuming, *arguendo*, the giving of bad informal advice by a District of Columbia official, that allegation is neither a defense to Plaintiffs' action nor is it a defense to this Motion. No District official has the right to unilaterally abrogate duly adopted zoning regulations.

In conclusion, Plaintiffs respectfully request that this Court grant them judgment on the Complaint alleging that Defendants have created a public and private nuisance. In addition, Plaintiffs respectfully request that this Court enjoin Defendants from operating any of the three air conditioning units in question in their current location and order Defendants to move the three air conditioning units to a location which is allowable under the District of Columbia's zoning regulations.

Respectfully submitted,

KASS & SKALET, P.L.L.C.



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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOHN AND SUE MOLM, **Plaintiffs** **vs.** **JAMES AND LEE BUTERA,** **Defendants**	**Case No.: No. 99CA009029** **Calendar #12-Judge Winston** **Next Event: Witness Statements 5/24/2000**

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants explain how Plaintiffs' misconstruction of the District of Columbia zoning regulations at issue confirms this case should be referred to the Board of Zoning adjustment. Furthermore genuine issues of material fact preclude summary judgment on the Amended Complaint.

Preliminary Statement

The poet Robert Frost only had it half-right in writing that "[g]ood fences make good neighbors."[1] Last fall Defendants unsuccessfully sought to persuade Plaintiffs, their next-door neighbors, to do just that: to agree to Defendants' erecting a fence surrounding the ground-based air conditioner compressor units situated in Defendants' side yard.[2] Instead Plaintiffs have sued and claimed the air conditioner compressors violate D.C. zoning regulations and are noisy. Plaintiffs charge theories of public and private nuisance.[3]

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1 Bartlett's Familiar Quotations, 926a (14th ed. Rev. 1968).

2 L. Butera Aff., ¶ 8 (May 12, 2000). See also Molm Aff., ¶ 4 (May 8, 2000)(concurring that efforts were made to buffer alleged noise).

3 Amended Complaint, Cts. I (Private Nuisance); II (Public Nuisance).

DEFENDANT'S EXHIBIT 6

Defendants have moved for a stay under the doctrine of primary jurisdiction[4] or to dismiss for Plaintiffs' failure to exhaust available administrative remedies.[5] Those motions, which Plaintiffs oppose, are pending.

Now Plaintiffs have countered by seeking a summary judgment. This motion is meritless:

1. Plaintiffs incorrectly assume the existence of a zoning regulation violation is a per se public nuisance. Actually Plaintiffs' construction of the zoning regulations at issue is unreasonable.

2. Apart from whether the air conditioning units violate the zoning code, a public nuisance theory also requires showing an unreasonable interference with the use or enjoyment of land. At the core, Plaintiffs say the units are noisy. Defendants, who live alongside the units, say they aren't noisy. Apart from the fact that Plaintiffs are trading on outdated information, nowhere have Plaintiffs' self-serving professions been buttressed by objective verification, such as by showing the compressors emit noise exceeding those permitted under the District of Columbia Noise Control Regulations.[6] The parties' conflict over the degree of noise can only be resolved by a trial.

3. Plaintiffs cannot obtain a summary judgment on their private nuisance theory, either. Here again the issue of reasonableness assumes

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4 Defs' Motion to Stay (May 4, 2000).

5 Defs' Motion to Dismiss (May 4, 2000).

6 20 D.C.M.R., Ch. 27, § 2701 et seq.

significance. Material issues of fact over whether the air conditioners emit excessive noise under a standard of reasonableness preclude the relief sought.

This brief focuses first on those facts as to which a genuine issue exists and then reviews the standards governing summary judgment motions. Afterwards Defendants prove that no zoning violation exists and that in any event there is a material dispute over the noise allegedly being emitted.

Counterstatement of Facts

Plaintiffs' claims largely focus on alleged noise transmitted from the air compressors last June and July, before the units were relocated in their current configuration.

A. D.C. Zoning Officials Assured Defendants They Could Relocate The Units In Their Current Location.

Defendants have installed three air conditioner compressor units along the side of their home, between the parties' properties. These units were situated in their current location last October, following statements by the Chief of Zoning Review of the D.C. Zoning Administrator that placement there would not offend zoning regulations.[7]

Plaintiffs claim these units emit noise that is annoying and makes it nearly impossible to entertain in their backyard. They also contend its use deprives them of the use of a side of their house and interferes with their use of their baby's room.[8] (This latter statement is sufficiently ambiguous as to warrant an observation. The Molms'

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7 L. Butera Aff., ¶¶ 12-17; Mem. From L. Butera-J.&S. Molm (Oct. 13, 1999)(Pltfs' Ex. B).

8 J. Molm Aff., ¶ 8.

child's room is not directly opposite the units, which are situated on the ground. Instead the child's room windows open about 15 feet above the ground.[9]

B. Plaintiffs' Facts Are Stale. Defendants' Units Were Not Re-Situated In Their Original Location.

Plaintiffs' factual recitals happen to be outdated. Mr. Molm's affidavit implies that the noise is on-going and so substantial as to affect his use of his property. What he omits to say is that his account speaks to the past. In fact Plaintiffs didn't complain that they couldn't entertain in their back yard until this litigation, although Defendants had units situated by Plaintiffs' back deck for years before Plaintiffs even moved to their house. Defendants moved the three units to their side yard last October and placed the units farther from the Molms' back porch.[10] Thus, while Mr. Molm now claims he perceived it to be difficult to entertain in his backyard last June-July, there is no evidence that noise has prevented his entertaining since the units were reconfigured. Certainly his affidavit points to no recent instance in which he found himself unable to hear others in his backyard.[11]

C. The Parties Disagree Over Whether The Units Emit Unreasonable Noisy.

Defendants live alongside the air compressor units. In fact, the units are closer to Defendants' house than the Plaintiffs' property. Defendants sleep right above the units, as well. Defendants do not find these units noisy.[12]

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9 L. Butera Aff., ¶ 21.

10 L. Butera Aff., ¶¶ 7, 20.

11 See Molm Aff., ¶ 8.

12 L. Butera Aff., ¶ 22; J. Butera Aff., ¶ 2 (May 15, 2000).

Interestingly, Plaintiffs, who have the burden of proving their claim, scoff at the notion of seeking an objective measurement of the noise.[13] Their failure to take advantage of such an opportunity should weigh against them in the summary judgment calculus.

D. Defendants Have Sought To Accommodate Plaintiffs' Idiosyncrasies.

While Defendants deny their air compressor units are noisy, let alone excessively so, they have sought to accommodate their fretful neighbors. Last fall the Molms rebuffed Defendants' offer to erect a tasteful fence as a buffer.[14] So, Defendants planted shrubbery in front of the units. And they have taken pains not to have all three units operating at once by maintaining different temperature control zones.[15] Indeed if Plaintiffs were to plan outdoor parties, they need only advise Defendants, who stand prepared to accommodate their neighbors.[16]

Standards Governing Summary Judgment Motions

A brief review of summary judgment standards is appropriate, since Plaintiffs did not address this threshold issue. "Summary judgment is properly granted only when the pleadings and other materials on file demonstrate that no genuine issue of material fact remains for trial and that the movant is entitled to judgment as a matter of law."[17]

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[13] Plts' Mem. at 5 ("It does not take a team of acoustic experts measuring decibels to reach the conclusion that three ... units ... will cause inconvenience, annoyance," etc).

[14] L. Butera Aff., ¶ 8.

[15] L. Butera Aff., ¶ 19.

[16] Id.

[17] McCoy v. Quadrangle Dev. Co., 470 A.2d 1256, 1258 (D.C.App. 1983)(citing Burch v. Amsterdam Corp., 366 A.2d 1079, 1083-84 (D.C.App. 1976)). See also Young v. Delaney, 647 A.2d 784, 788 (D.C.App. 1994).

Because summary judgment is an "extreme remedy,"[18] only after the moving party has made the requisite showing does the burden shift to the opponent to show "'sufficient evidence to support the claimed factual dispute ... to require a jury or judge to resolve the parties' differing versions of the truth at trial.'"[19] Even then, the opposing party is entitled to the benefit of all favorable inferences from the evidentiary materials.[20]

The Necessary Elements Of A Nuisance Theory

Having canvassed the core elements of summary judgment jurisprudence it is necessary to analyze the elements of the law of nuisance – a topic the D.C. Court of Appeals once characterized as an "'impenetrable jungle.'"[21]

A. Public Nuisance.

The law defines a public nuisance as "an unreasonable interference with a right common to the general public."[22] Normally "only governmental authorities or other representatives of the general public have standing to attack a public nuisance in court (absent statutory authorization)."[23] There is an exception to this general rule, however,

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18 McCoy v. Quadrangle Dev. Co., 470 A.2d at 1258.

19 Osbourne v. Capital City Mortgage Corp., 667 A.2d 1321, 1324 (D.C.App. 1995)(quoting Clay Properties v. Washington Post Co., 604 A.2d 890, 894 (D.C.App. 1992)(*en banc*)(internal citations omitted)); Franklin Investmen Co. v. Huffman, 393 A.2d 119, 122 (D.C.App. 1978).

20 McCoy v. Quadrangle Dev. Co., 470 A.2d at 1259.

21 Bernstein v. Fernandez, 649 A.2d 1064, 1073 n.9 (D.C.App. 1991)(quoting W. Keeton, Prosser & Keeton On The Law of Torts, §86, at 616 (5th ed 1984)).

22 B&W Management, Inc. v. Tasea Investment Co., 451 A.2d 879, 881 (D.C.App. 1982)(citing Restatement (2d), Torts, § 821B(1).

23 B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 882.

for a party able to allege and prove "'special damages, distinct from that common to the public.'"[24]

Neighboring property owners, such as Plaintiffs, who claim they would be specially damaged by a zoning-type violation, have standing to sue, at least under § 5-426, to challenge an alleged public nuisance.[25] But standing is one thing and the merits quite another. As the District of Columbia Court of Appeals stated in President and Directors of Georgetown College v. Diavatis, the statute "does not require the issuance of an injunction on a showing of special damage, but merely authorizes "'any neighboring property owner or occupant' who can make such a showing to sue for an injunction."[26]

Put another way, "the statute enables affected neighboring property owners (unlike other ordinary citizens) to enter the courthouse, but it does not guarantee them a victory in the courtroom."[27] And while a plaintiff may claim a zoning violation exists– a threshold issue in serious dispute here - far more is needed to prevail. The District of Columbia Court of Appeals "ha[s] never held that a showing of a violation of a zoning order *per se* is sufficient as a matter of law to establish special damage under D.C. Code §5-426."[28] In fact it held otherwise in B&W Management, Inc. v. Tasea Investment Co.[29]

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[24] National Telephone Co-Operative Ass'n v. Exxon Corp., 38 F.Supp.2d 1, 13 (D.D.C. 1998)(quoting Holloway v. Bristol-Myers Corp., 327 F.Supp. 17, 24 (D.D.C. 1971), aff'd, 385 F.2d 986 (D.C.Cir. 1967)).

[25] President and Directors of Georgetown College v. Diavatis, 470 A.2d 1248, 1250 (D.C.App. 1983).

[26] President and Directors of Georgetown College v. Diavatis, 470 A.2d at 1250 (quoting D.C. Code § 5-406).

[27] President and Directors of Georgetown College v. Diavatis, 470 A.2d at 1251.

[28] Lund v. Watergate Investors Partnership, 728 A.2d 77, 83 (D.C.App. 1999).

[29] B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 882 n. 7 (citing authorities).

To recover under a public nuisance theory, then, the plaintiff must show not only special injury but also an unreasonable interference with the property.[30] That interference, in turn, must cause harm that a normal person would deem significant or definitely offensive.[31] As we shall also show, Plaintiffs haven't come close here.

B. Private Nuisance.

Plaintiffs also sue under a private nuisance theory. In the District of Columbia a private nuisance is defined as "'a nontrespassory invasion of another's interest in the private use and enjoyment of property.'"[32] It is not necessary to show special injury to satisfy this tort theory[33] although a private nuisance and special damage from a public nuisance coincide when dealing with interference with land use.[34]

Nonetheless a private nuisance claim, like the public nuisance theory, also is governed by a standard of reasonableness rather than idiosyncrasy.[35] Here, too, the plaintiff must establish "'a substantial and unreasonable interference with private use and enjoyment of one's land.'"[36]

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30 Restatement (2d), Torts, § 821B(1), cmt. e. The Restatement's delineation of nuisances has been cited in several D.C. cases. E.g., National Telehone Co-Op. Ass'n v. Exxon Corp., 38 F.Supp. 2d at 13.; District of Columbia v. Fowler, 497 A.2d 456, 460, 462 n. 11 (D.C.App. 1985); B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 882; Carrigan v. Purkhiser, 466 A.2d 1243, 1244 (D.C.App. 1983).

31 Restatement (2d), Torts, § 821F, cmt. d.

32 Daily v. Exxon Corp., 930 F.Supp. 1, 2 (D.D.C. 1996)(quoting Carrigan v. Parkhiser, 406 A.2d at 1243 & B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 882).

33 Carrigan v. Purkhiser, 466 A.2d at 1244-45.

34 B&W Management, nc. V. Tasea Inv. Co., 451 A.2d at 882.

35 Restatement (2d), Torts, § 822(a).

36 National Telephone Co-Operative Ass'n v. Exxon Corp., 38 F.Supp.2d at 14 (quoting Restatement (2d), Torts, § 821(D)); B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 883 (requiring *substantial* interference)(emphasis original); Reese v. Wells, 73 A.2d. at 903-04 (nuisance must be of "real and substantial character"); Levy v. Bryce, 46 A.2d 765, 766 (D.C.Mun.App. 1946)(nuisance is reviewed under standard of reasonableness).

The Zoning Regulations Support Defendants' Interpretation

The legal issues are nowhere near as clear as Plaintiffs contend. If anything, they support Defendants. At the very least, an administrative construction of the regulations would benefit the court, notwithstanding Plaintiffs' dogged refusal to seek that.

A. Plaintiffs' Interpretation Of The Zoning Regulations Is Strained.

Plaintiffs' contention that Defendants' air conditioner compressing requires parsing through no less than *five* different D.C. zoning regulations, viz., 11 D.C.M.R. §§ 199.1; 405; 2502.1; & 2503.1-.2. Ultimately Plaintiffs conclude that Defendants' air conditioner units are not "structures" as defined by 11 D.C.M.R. § 199.1. Plaintiffs believe the regulations require back and side yards to be open and unobstructed to the sky from the ground up, except for structures under four feet in height.[37]

The zoning regulations do not directly address the placement of these air conditioning units. The only specific mention of air conditioning units in the Code allows window units to project into protected areas for a distance of two feet. 11 D.C.M.R. § 2502.9. If the air conditioning units in this case are indeed "mechanical equipment," and are therefore not within § 199's definition of "structures," there is no zoning prohibition against their placement in the present location. Indeed § 199's definition of "structure" tells us the concrete support slabs for each of the units is acceptable, even though they cause the yard to be obstructed from the ground up.

Moreover, Plaintiffs' convoluted interpretations of the code must be read against 11 D.C.M.R. §2503.2, which permits items less than four feet high to exist in a side yard. (There is no dispute that the present units are less than four feet high, as Exhibit 1 to Mr.

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[37] Pltfs' Mem. at pp. 3-4.

Butera's declaration proves.[38]) The only possible logical conclusion is that air conditioning units are permitted in side yards under the zoning code. Such placement is consistent with the zoning code's recognition of "accessory buildings," defined as "[o]ther buildings or structures customarily incidental to the uses permitted in R-1 [residential] districts under provisions of this chapter." 11 D.C.M.R. § 204.1(c).

B. Defendants' Position Is Consistent With The Governing Regulations And Is Based On What The D.C. Zoning Commission Officials Advised Them.

As Plaintiffs' brief concedes, "structures" not exceeding four feet can be located in a set-back area under 11 D.C.M.R. § 2503.2.[39] Under 11 D.C.M.R. § 199.1 a "structure" is defined as "anything ... attached to something having a permanent location on the ground...." The air conditioning units here are attached in just such a way.

Although Plaintiffs state the zoning regulations exclude mechanical equipment from side yard set backs,[40] that isn't entirely correct. There are examples in 11 D.C.M.R. § 199.1 for "structures" which include items that *are* mechanical in nature, such as "radio and television towers."

Defendants did not arrive at their position lightly: a Zoning Commission official so advised them. Before they placed the compressor units in their current location, Defendants and their architect separately made disclosures to Mr. Edgar Nunley, a senior D.C. Zoning Commission review official, and sought his views. He stated it was proper for Defendants to locate the units in their yard.[41]

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38 J. Butera Aff., ¶ 2 & Ex. 1 thereto.

39 Pltfs' Mem. at p. 3.

40 Id. at p. 4.

41 L. Butera Aff., ¶¶ 2, 14, 17.

In this respect, Plaintiffs' statement that no one has the right to abrogate the zoning regulations is a red herring. D.C. zoning officials are competent to interpret their own regulations. They do that every day for citizens.

C. If Plaintiffs' Position Were Accurate Then Many Landowners In The District of Columbia Are Violating The Zoning Regulations.

If Plaintiffs are correct, then a lot of homeowners in this city could not place air compressor units in their yards. The fact of the matter is many homeowners in D.C. have outside air compressors. That can be confirmed readily by a drive through local residential neighborhoods.[42] The practical result of Plaintiffs' expansive reading of the regulations, if left unaided by an administrative construction, would be to place a host of people in unwitting violation of the law.

Even If Plaintiffs Correctly Read The Zoning Regulations Material Issues Of Fact As To The Alleged Noise Preclude Summary Judgment

The existence of zoning violations, even if proved, does not constitute nuisance *per se*, under governing precedent.[43] Thus Plaintiffs still must prove their case of "special damage." Where, as here, suit is brought under public and private nuisance theories, the special damage necessary to show a public nuisance is the same as the nature and degree of injury required to sustain a claim for a private nuisance.[44] So, too, must the nature and degree of injury be substantial[45] and unreasonable to the average person.

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42 J. Butera Aff., ¶ 3; L. Butera Aff., ¶ 23.

43 B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 882 n. 7. See also Lund v. Watergate Investors Partnership, 728 A.2d at 83.

44 B&W Management, Inc. v. Tasea Inv. Co., 451 A.2d at 882 (citing 1 F. Harper & F. James, The Law of Torts, § 1.23 at 65 (1956)).

45 National Telephone Co-Operative Ass'n v. Exxon Corp., 38 F.Supp.2d at 14; B&W Management, Inc. v. Tasea Investment Co., 451 A.2d at 883.

On the current record, the gravity of the injury alleged and the extent, if any, to which a reasonable person would find the air conditioners unduly noisy cannot be resolved favorably to Plaintiffs. They have offered nothing more than their naked word that the compressor units are so noisy as to be annoying. They certainly have the ability to commission noise tests and their failure to do so must be counted against them. Conversely Defendants, who also live next to the units, say the units situated farther away than before and these units are not noisy.

It is clear, then, that a genuine dispute over a material fact exists. That material conflict having been identified,[46] Plaintiffs' subjective assessment that the noise is, in effect, so substantial as to be a nuisance, is not capable of resolution by way of summary judgment.

Conclusion

Plaintiffs' summary judgment motion should be denied.

Dated this 16th day of May, 2000

By: _____

Stephen Leckar, #281691
Dennis Hart, #935643
Butera & Andrews
Suite 500
1301 Pennsylvania Ave., NW
Washington, D.C. 20004
202.347.6875

[46] McCoy v. Quadrangle Development Corp., 470 A.2d at 1259 (citing International Underwriters, Inc. v. Boyle, 365 A.2d 779, 782 (D.C.App. 1976)).

Certificate of Service

I certify that a copy of the foregoing was served by first class mail this 16 day of May, 2000 on Benny Kass, Esq. and Adam Lipton, Esq., 1050-17th St., NW, Suite 1100, Washington, D.C. 20036.

Stephen C. Leckar

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JOHN AND SUE MOLM, **Plaintiffs**	**Case No.: No. 99CA009029**
vs.	**Calendar #12-Judge Winston**
JAMES AND LEE BUTERA, **Defendants**	**Next Event:** **None Scheduled**

AFFIDAVIT OF JAMES J. BUTERA

James J. Butera, being duly sworn, states:

1. I am the co-owner of 4901 Quebec Street, NW, Washington, D.C.

2. Along with my wife and co-owner, M. Lee Butera, I have resided at the above-referenced property since 1986. The air compressor units at issue are closer to our house than the Molms' property, as reflected by the photographs attached as Exhibit 1. My wife and I sleep right above the units, as well. We do not find these units noisy.

3. I have conducted a visual survey of homes in the Spring Valley neighborhood of D.C. I have seen a number of homes with outside heat pumps, air conditioners, and compressor units located within the set back area between their neighbors. In other words the configuration of our units is not unusual for our neighborhood.

I have read the foregoing and declare it to be true.

James J. Butera

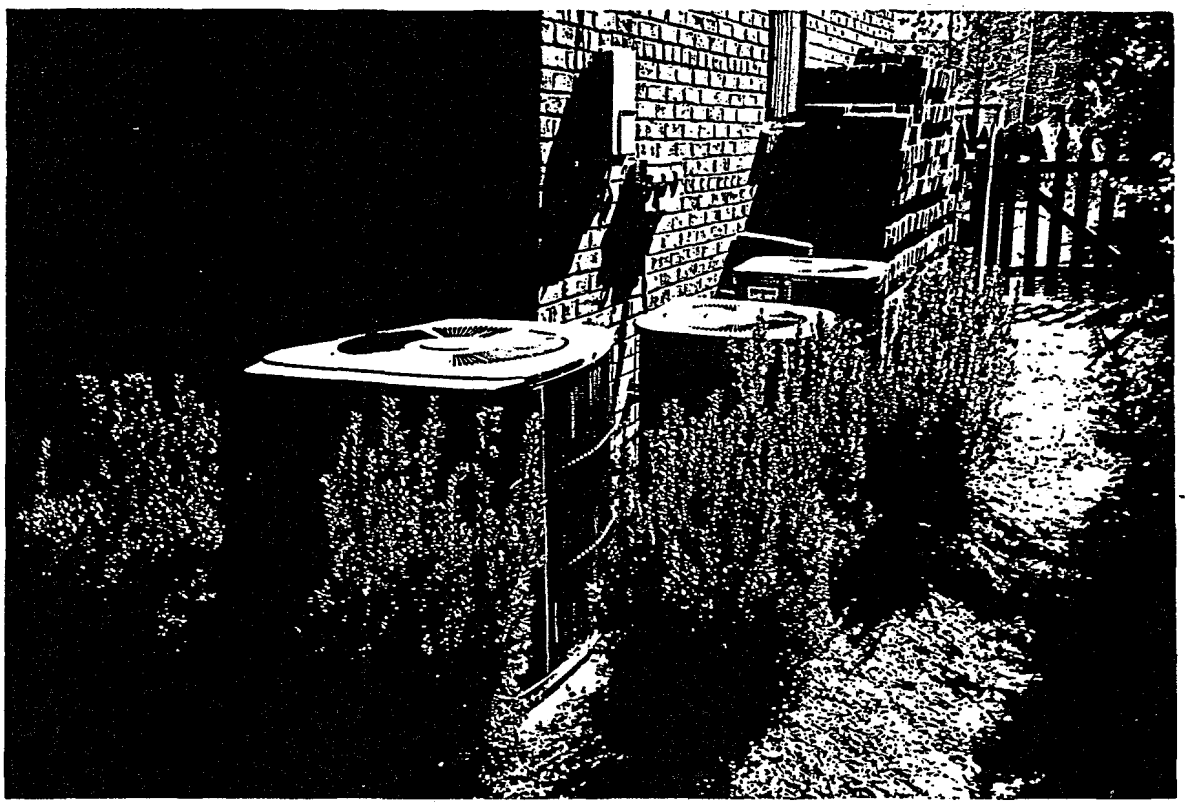
Sworn to before me this 10th day of May, 2000.

Notary Public

BERNARD G. FORD
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires 10-31-2000

DEFENDANT'S EXHIBIT
7





DEFENDANT'S EXHIBIT
GRX1