

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Building Code Appeals Board
Docket Nos. 05-473
05-474
05-475
05-476

David Fromm and David Perry,)
)
Appellants;)
)
v.)
)
City of Boston,)
Appellee.)
_____)

BOARD'S RULING ON APPEAL

Procedural History

These matters came before the State Building Code Appeals Board ("Board") on Appellant's appeals filed pursuant to 780 CMR §122.1. In accordance with 780 CMR §122.3, Appellant has requested that the Board review Appellee's decision to cite the Appellant for several violations. The matters were consolidated into a single hearing and decided together due to the common facts and issues of all of the cases.

On July 3, 2007, John Kennedy, Assistant Building Inspector for the City of Boston ("Boston") issued 11 notices of violation and orders in standard forms used by the Boston Inspectional Services Department, one for each street address. Each order form said in relevant part that the Appellant's property at each of the various addresses on Washington Street and Juniper Street in the Roxbury district

is in violation of the State Building Code 780 CMR 118.1, sixth edition, authorized under Chapter 143, Sections 93-94 of the Massachusetts General Laws, as amended to wit:

780 CMR _____:

The referenced section of the state building code, 780 CMR 118.1, states:

Unlawful acts: It shall be unlawful for any person, firm or corporation to use, occupy or change the use or *occupancy* of any *building* or *structure* or to erect, construct, alter extend repair, remove demolish any *building* or *structure* or any equipment regulated by 780 CMR, or cause same to be done, in conflict with or in violation of any of the provisions of 780 CMR.

Below this standard-form boilerplate was printed in dot matrix type:

TO WIT: USE OF PREMISES AS A ROOMING HOUSE AS DEFINED BY 105 CMR 410.020 WITHOUT PROPER USE OF PREMISES PERMIT/ CERTIFICATE OF OCCUPANCY.

105 CMR is part of the state sanitary code. Section 410.020 is a definitions section and says in relevant part:

Rooming House means every dwelling or part thereof which contains one or more rooming units in which space is let or sublet for compensation by the owner or operator to four or more persons not within the second degree of kindred to the person compensated. Boarding houses, hotels, inns, lodging houses, dormitories and other similar dwelling places are included, except to the extent that they are governed by stricter standards elsewhere created; provided that the provisions of 105 CMR 410.000 shall not apply to any hospital, sanitorium, convalescent or nursing home, infirmary or boarding home for the aged licensed by the Department of Public Health in accordance with the provisions of M.G.L. c. 111, § 51 or 71.

There are no enforcement or penalty provisions contained in 105 CMR 410.020. The printed standard form order then stated

TO REMEDY THIS CONDITION APPLY FOR AND SECURE A PERMIT TO REMEDY THE ABOVE DESCRIBED CONDITION OR TAKE THE ACTIONS DESCRIBED BELOW:

After which was filled in the dot matrix type:

VACATE AFFECTED AREA FORTHWITH OR APPLY WITHIN 10 DAYS FOR A PERMIT TO CHANGE OCCUPANCY FROM A LEGAL 1 FAMILY TO ROOMING HOUSE AND COMPLY WITH ALL REQUIREMENTS UNTIL A PERMIT IS SECURED. NRT INSP J KENNEDY

The order form concluded above a signature block for the Commissioner:

HEREOF FAIL NOT, under penalty of law to comply with said Building Code, within 30 days/24 hours (circle one) of the service of this Order.

The second page of the document had a standard-form section entitled "NOTICE," which read in relevant part:

Whoever violates and provision of the State Building Code shall be punished by fine of not more than one thousand dollars (\$1,000.00) or by imprisonment of not more than one (1) year or both for each such violation. Each day during which a violation exists shall constitute a separate offense. (780 CMR 118.4).

The imposition of the penalties described above shall not preclude the building official from instituting an appropriate civil action to restrain, correct, or abate a violation of the State Building Code (780 CMR 118.5)

You may have a right, as provided for in 780 CMR 122, to appeal this Order to either the local building code appeals board or the State Building Code Appeals Board.

Following these notices, on July 23, 2007, Assistant Building Inspector John Kennedy applied for complaints on a form "To the Housing Court Department, City of Boston Division . . . for the transaction of criminal business" which alleged that the Appellant:

Is the owner or in control of a building . . . as defined in the State Building Code, located in Boston, that said Defendant was given notice in accordance with Chapter 143 §51 did willfully, intentionally, recklessly or repeatedly on 7/3/07 and from that day and everyday thereafter to and including 7/23/07 and continuing violate the following provision of said Building Code in respect to said building or structure: build, alter or maintain said building or structure in violation of said Building Code as follows:

Thereinafter a section filled in by typewriter or laser printer said:

ARTICLE 4 SECTION 4-3 TO WIT USE OF PREMISES AS A ROOMING HOUSE AS DEFINED BY 105 CMR 410.020 WITHOUT PROPER USE OF PREMISES PERMIT/CERTIFICATE OF OCCUPANCY.

The reference to "ARTICLE 4 SECTION 4-3" apparently referred to that article and section of the Boston Zoning Code, which says:

SECTION 4-3. Building or Use Permit Required. It shall be unlawful to use, or permit the use of, any land or structure or part thereof hereafter erected, or altered wholly or partly, or the yards or other open spaces of which are in any way reduced,

until the Building Commissioner shall have certified on the building permit, or if no building permit is needed, shall have issued a use permit specifying, the use to which the land or the structure upon being sufficiently completed to comply with the provisions and regulations relating thereto, may be put.

The Appellant was also served with a "Notice of Show Cause Hearing" dated July 23, 2007, stating in relevant part:

A request for criminal complaint naming you as the defendant has been filed in this Court, and a copy of the proposed complaint is enclosed. Before any criminal process issues, the Clerk of the Court will hold a show cause hearing . . . at 10:00 o'clock, Monday, August 27, 2007.

The Appellants filed their appeals before this Board on August 16, 2007 after being served with the Notices of Show Cause Hearing in the Boston Housing Court by the Appellee.

In accordance with G. L. c. 30A, §§10 and 11; G. L. c. 143, §100; 801 CMR 1.02 et. seq.; and, the Board convened a public hearing on September 25, 2007 where all interested parties were provided with an opportunity to testify and present evidence to the Board.

Present and testifying at the hearing were the Appellants David Fromm and David Perry and Building Inspector Gary Moccia and Attorney Walter Parr, Jr. in behalf of the Appellee.

Exhibits in Evidence

- Exhibit 1: (Appellant's) Motion to Dismiss Violations Issued by the City of Boston Inspectional Services Department.
- Exhibit 2: State Building Code Appeals Board Appeal Application Form, dated August 16, 2007.
- Exhibit 3: Letter to the Board from Boston Inspectional Services Department dated August 29, 2007.

Findings of Fact

Based on the credited testimony of the witnesses and the exhibits submitted, the Board finds these facts:

1. The properties in question are 2591, 2593, 2595, 2597, 2599, and 2601 Washington Street and 31, 33, 35, 37 and 39 Juniper Street in the Roxbury district of Boston. The properties were designed, permitted and built as single family townhouses. The common set of allegations noticed by the Appellee is that the properties were unlawfully used as rooming houses.

2. The standard forms used by the Appellee and the Boston Housing Court made references to the "State Building Code, " "Building Code," "780 CMR 118.1," "780 CMR____,"

“780 CMR 122,” and “the State Building Code Appeals Board.” This caused the Appellants’ confusion and their appeal to the Board.

3. Despite the confusion and ambiguity caused by the standard-form notices and complaints served by Boston on the Appellants, it was the stated intent of the Appellee Boston to charge the Appellants with violations of the Boston Zoning Code by the show cause process in the Boston Housing Court. To the extent that the original notice and order of July 3, 2007 indicated a violation of the state building code, it was superseded by the Complaint applied for in the Boston Housing Court on July 23, 2007 which alleged violations of the Boston Zoning Code.

4. It is beyond the scope of the Board’s jurisdiction to rule on issues regarding the Boston Zoning Code or the scope of the Boston Housing Court’s jurisdiction to hear criminal complaints for violations of the Boston Zoning Code.

Decision

Pursuant to M.G.L. c. 143, § 100, the Board has the authority to decide appeals by those “aggrieved by an interpretation, order, requirement, direction or failure to act by any state or local agency or any person or state or local agency charged with the administration or enforcement of the state building code.”

The issue is whether the state building code applies to this case. Based on the original notice and order dated July 3, 2007 issued by Boston, the Appellant would have been justified in believing that a violation of the State Building Code was being alleged, see 780 CMR §§118.1, 120.2, 310.3 and 310.5. However, the notice and order dated July 3, 2007 was superseded by the allegations of the Complaint and Notice of Show Cause Hearing applied for in the Boston Housing Court on July 23, 2007. Despite the references to the State Building Code in the forms used by Boston, the specific allegation of Boston’s complaint in the Boston Housing Court was of a violation of the Boston Zoning Code. This is outside the scope of the Board’s jurisdiction.

Since it is beyond the scope of the Board’s jurisdiction to rule on issues regarding the Boston Zoning Code or the scope of the Boston Housing Court’s jurisdiction to hear criminal complaints for violations of the Boston Zoning Code, the Board cannot provide any remedy or interpretation to the Appellants.

The Board recommends that Boston examine its forms, notices and procedures for alleging and charging violations of the Boston Zoning Code, to remove or clarify any references to the State Building Code or this Board, to provide clear notice of violations and avoid future confusion.

The Chair entertained a motion to dismiss the appeals as being outside the jurisdiction of the Board's authority. The Board voted as indicated below on the motion.

X.....Dismissed.

The vote was:

X.....Unanimous

..... Majority

Brian Gale

Brian Gale

Keith Hoyle

Keith Hoyle

Sandy MacLeod

Sandy MacLeod

Any person aggrieved by a decision of the State Building Code Appeals Board may appeal to a court of competent jurisdiction in accordance with Chapter 30A, Section 14 of the Massachusetts General Laws.

A complete administrative record is on file at the office of the Board of Building Regulations and Standards.

A true copy attest, dated: July 10, 2008

Patricia Barry
Patricia Barry, Clerk

All hearings are audio recorded. The digital recording (which is on file at the office of the Board of Building Regulations and Standards) serves as the official record of the hearing. Copies of the recording are available from the Board for a fee of \$5.00 per copy. Please make requests for copies in writing and attach a check made payable to the Commonwealth of Massachusetts for the appropriate fee. Requests may be addressed to:

Patricia Barry, Coordinator
~~State Building Code Appeals Board~~
BBRS/Department of Public Safety
One Ashburton
Place - Room 1301
Boston, MA 02108