



The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
Fire Prevention Regulations Appeals Board
P.O. Box 1025 ~ State Road

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ANTHONY P. CAPUTO
CHAIRMAN

Docket # 2017-04
91-93 Harvard Street
Fitchburg, Massachusetts

FIRE PREVENTION REGULATIONS APPEALS BOARD

A) Statutory and Regulatory Framework

This matter relates to an application for an administrative appeal filed in accordance with Massachusetts General Laws Chapter 22D, section 5. The Appellant is seeking this Board's review of a determination of the City of Fitchburg Fire Department seeking compliance with the provisions of M.G.L. c. 148, s. 26 C., which required enhanced fire protection requirements to be installed in certain older residential structures. The structure which was the subject matter of the appeal is located at 91-93 Harvard Street, Fitchburg, MA and is owned by Benjamin Builders Realty Trust LLC. and managed by Mass. Avenue Rentals, L.L.C., (hereinafter referred to as the Appellants).

B) Procedural History

By an Order of Notice erroneously dated 12-19-17, but stipulated by the parties as actually 10-24-17, the Fitchburg Fire Department, through Lt. Phil Jordan, Fire Prevention Director, issued an Order of Notice to the Appellant requiring an existing structure that it owns to install an enhanced fire alarm system. On November 8, 2017, the Appellant filed an appeal of the Fire Department's determination with the Fire Prevention Regulations Appeals Board. The Board held a hearing on 12-19-17, at the Department of Fire Services, Stow, Massachusetts.

At the hearing, the Fitchburg Fire Department moved to dismiss the appeal based upon grounds relating to timeliness. The Appellant also moved to dismiss the appeal since it was their belief that the applicable fire protection requirements for this building are determined by the provisions of 780 CMR, the State Building Code. At the hearing the Board ruled on both party's motions, as stated. On its own initiative, the Board addressed a separate issue relating to its possible lack of jurisdiction to determine the issues raised by the appeal.

Appearing on behalf of the Appellants were Gary Lorden and Ali Lorden, Trustees of the Benjamin Builders Realty Trust LLC. Appearing on behalf of the Fitchburg Fire Department was Lt. Phil Jordan, Fire Prevention Director; Mark Barbadillo, Fitchburg Building Commissioner; Kevin Roy, Fire Chief and City of Fitchburg Attorney, Keith Higgins.

Present for the Board were members: Larry Fisher, Presiding Panel Member; Robert MacKendrick and Jeff Cox. Peter A. Senopoulos, Esq., was the Attorney for the Board.

C) Issue(s) to be Decided

- 1) Should the Board dismiss this case based upon timeliness?
- 2) Should this board dismiss this appeal based upon lack of jurisdiction to hear matters relating to the provisions of the State Building Code?
- 3) Should this Board dismiss this appeal since its lacks jurisdiction to render a decision relative to the issue before it?
- 4) If this Board possesses jurisdiction to hear the matter presented by the appeal, should it uphold, reverse or modify the decision of the Fitchburg Fire Department.

D) Evidence Received

- 1) Application for Appeal by Appellant
- 2) Business Entity Summary - Benjamin Equities Corp. from Mass. Secretary of State's Office
- 3) Business Entity Summary – Mass. Ave Rentals, LLC
- 4) Trustee's Certificate – Gary Lorden, Benjamin Builders Realty Trust
- 5) Deed Granting Interest in Mass. Ave. Rentals, LLC to Gary Lorden
- 6) Correspondence from Mass. Ave Rentals, LLC to Lt. Jordan of Fitchburg Fire Dept.
- 7) Correspondence/Order of Notice from Lt. Jordan of Fitchburg Fire Dept. to Mass. Ave Rentals, LLC
- 8) E-mail from Christopher Melite, Mass. Division of Fire Safety to Lt. Jordan of Fitchburg Fire Dept
- 9) 2nd Order of Violation, dated 12-19-17, from Lt. Jordan of Fitchburg Fire Dept. to Mass. Ave Rentals, LLC. (Stipulated by the Parties as actually dated 10-24-17)
- 10) Notice of Hearing to Appellant
- 11) Notice of Hearing to Fitchburg Fire Department
- 12) Copy of New Guidance Document that accompanies Hearing Notices
- 13) Order of Notice dated 12-21-16
- 14) 12-18-17 document from Norton Remmer P.E.
- 15) Opinion letter from Richard Hanks, Building Commissioner, Townsend Massachusetts

E) Subsidiary Findings of Fact

- 1) By an Order of Notice erroneously dated 12-19-17, but stipulated by the parties as actually 10-24-17, the Fitchburg Fire Department, through Lt. Phil Jordan, Fire Prevention Director, issued an Order of Notice to the Appellant requiring an existing structure that it owns to comply with the provisions of M.G.L. c. 148, s. 26C. On 11-8-17, the Appellant filed an appeal of the Department's determination with the Fire Prevention Regulations Appeals Board. The Board held a hearing on 12-19-17, at the Department of Fire Services, Stow, Massachusetts.
- 2) At the hearing, the Fitchburg Fire Department moved to dismiss the appeal on grounds relating to timeliness. The Appellant also moved to dismiss the appeal since it was their belief that the applicable fire protection requirements for this building are based upon the

provisions of 780 CMR, the State Building Code. At the hearing the Board ruled on both party's motions and, on its own initiative, questioned its jurisdiction to hear the matter since the appeal ultimately involves matters directly relating to the enforcement of M.G.L. c. 148, s. 26C.

F) Ultimate Findings of Fact, Conclusions of Law and Rulings on Motions

- 1) With respect to Fitchburg Fire Department's request to dismiss the appeal based upon timeliness, the Board finds that the City of Fitchburg originally issued an Order to the Appellant requiring an upgrade to the subject building's fire protection system on 12-21-16. The Fire Department then issued another Order to install enhanced fire protection in the building on 10-24-17, the date as stipulated by the parties.
- 2) In accordance with the provisions of M.G.L. c. 22D, s. 5: "Whoever is aggrieved by any act, rule, order...may appeal to the appeals board within 45 days following the service of the notice of such act, rule, order, decision, requirement or directive". The board finds that the Fire Department's position that the 10-24-17 notice merely relates back to the 12-21-16 Order has no merit. It is clear that the Fire Department, after issuing the 12-21-16 Order, continued to discuss compliance options with the Appellant, including a meeting in which the Appellant reasonably could have believed resolved the matter by installing a system different from that originally ordered. The Fire Department's issuance of the latest Order, in effect "retriggered" the Appellant's ability to file its 11-8-17 application for appeal, clearly within the 45 day statutory limit. The fact that neither of the Fire Department notices contained information about the Appellant's ability to file an appeal with this board is also a consideration in this determination. Accordingly, the Fire Department's request to dismiss the appeal based upon timeliness is denied.
- 3) The board next addressed Appellant's Motion to Dismiss the appeal based upon their opinion that the fire protection considerations for this building should be based upon provisions of 780 CMR, the State Building Code. The board believes that the motion may have merit, albeit limited, with respect to only those issues raised by the City's Building Official that may trigger provisions of the State Building Code, particularly relating to permitting requirements and the technical installation specifications of a newly installed fire alarm system based upon the characteristics of the building at issue. However, this board is without jurisdiction to render determinations regarding Building Code requirements, if any, since such jurisdiction lies with another appellate board. Accordingly, the Board, allows the Appellant's motion to dismiss those portions of the appeal that present issues involving the State Building Code.
- 4) A review of the actions and various correspondence between the parties could explain some confusion about the basis of the Fire Department's determination to require a fire protection upgrade to this building. However, upon review of the various documents, characteristics of this building, including the date of construction and consideration of applicable laws and related regulations, as presented at the hearing, the legal basis for the Fire Department's Order relates to the provisions of M.G.L. c. 148, s. 26C. Said statute, last amended by c. 527, sec.1 of the Acts of 1989, states: "**Apartment houses containing six or more dwelling units**, hotels, boarding or lodging houses, or family hotels which are **not** regulated by section twenty-six A or twenty-six B shall be equipped with automatic smoke or heat detectors as provided by **the rules and regulations of the board of fire prevention regulations**". (emphasis added).

The specific exemptions to said law found in s. 26A and 26B of c. 148, relate to fire protection requirements for those buildings built or substantially altered **after** the effective date of the State Building Code.

In summary, the provisions of s. 26C applied retroactively to larger, older apartments buildings built and/or not altered prior to 1-1-75, the effective date of the State Building Code, 780 CMR. In accordance with the enabling legislation, the statute, which enforced by the head of the fire department, was approved by the governor as of 11-17-89 (see c. 527, secs. 3 and 4, Acts of 1989) and included the following specific compliance deadlines:

- a. Communities with a population greater than 100,000: 5 years from eff. date of law.
- b. Communities with a population of 50,000 to 100,000: 3 years from eff. date of law.
- c. Communities with a population of less than 50,000: 1 year from eff. date of law.

- 5) According to the evidence, the subject building was built in 1900, has six apartment units and has not been substantially altered in any manner that would have triggered fire protection upgrades in accordance with the State Building Code. Additionally, there was no evidence provided that said building featured smoke detectors installed and approved by the Fire Department prior to the effective date of the statute (see section 3 of the Act for this possible exemption). According to the representative's of the City of Fitchburg, the City, as of the effective date of the statute (and as of today) has a population of less than 50,000. Therefore, it is clear that the subject building was subject to the mandatory retroactive fire safety provisions of s. 26C and the specific technical provisions of the State Fire Code in accordance with the applicable deadline. Well over 25 years ago.
- 6) Based upon the submissions and evidence, the issue presented by this appeal relates to the enforcement of a statutory requirement: M.G.L. c. 148, s. 26C. Pursuant to the provisions of 527 CMR 1.00: 1.10.1.2 (5), this board is without jurisdiction to hear appeals relating to "... Matters arising out of the enforcement of a violation of statute, including the provisions of M.G.L. c. 148...". Accordingly, this appeal is dismissed. The Board notes that the technical requirements for complying with M.G.L c. 148, s. 26C were for many years after the compliance deadline, found in the State Fire Code, (527 CMR 24.00) and the recently revised Code (527 CMR 1.00: 13.7.4). However, the Appellant failed to raise any substantive issues relative to said applicable standard, as applied to the subject building. To the contrary, the Appellant argued that any requirement relative to fire protection in this building was subject to the State Building Code, 780 CMR, a code over which this board has no jurisdiction as discussed previously.
- 7) Since this Board denies jurisdiction to hear this appeal for the reasons stated above, it need not decide whether to uphold, reverse or modify the decision of the Fitchburg Fire Department.

G) Decision and Order

Based upon the evidence and the reasons stated herein:

- 1) The Board denies the Fire Department's motion to dismiss the appeal as untimely.

- 2) The Board allows Appellant's motion to dismiss the appeal with respect to those particular issues raised which may involve provisions of The State Building Code, 780 CMR, since such issues are not within the appellate jurisdiction of this board.
- 3) The Board on its own initiative denies jurisdiction to hear this particular appeal, since the appeal raised issues solely related to the enforcement of a statute, M.G.L. c. 26C. The Board notes that the method and manner of compliance with s. 26C is based, at a minimum, upon the version of the Fire Code, in effect as of the date of the compliance deadline specified in said statute (see chapter 527, sections 3 and 4 of the Acts of 1989).

H) Vote of the Board

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|--------------------------------------|----------|
| Larry Fisher, Presiding Panel Member | In Favor |
| Robert MacKendrick | In Favor |
| Jeff Cox | In Favor |

I) Right of Appeal

You are hereby advised you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Larry Fisher, Presiding Panel Member
Fire Prevention Regulations Appeals Board

Dated: January 25, 2018

**A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY
CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO:**

Mr. Gary Lorden
Mass. Ave. Rentals, LLC
69 Massachusetts Avenue
Lunenburg, Massachusetts 01462

Chief Kevin D. Roy
Fitchburg Fire Department
33 North Street
Fitchburg, Massachusetts 01420