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*The Commonwealth of Massachusetts*  
*Executive Office of Public Safety and Security*  
*Fire Safety Commission*

*Automatic Sprinkler Appeals Board*

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CHAIR

PATRICIA BERRY  
VICE CHAIR

**Docket # 2019-06**  
**29 Nutting Street**  
**Fitchburg, Massachusetts**

**AUTOMATIC SPRINKLER APPEALS BOARD DECISION**

**A) Statutory and Regulatory Framework**

This administrative appeal is held in accordance with Massachusetts General Law, Chapter 30A; Chapter 148, section 26H and Chapter 6, section 201, to determine whether to affirm, reverse or modify the Order of the Fitchburg Fire Department requiring BAK Realty LLC and Mr. Donald Flagg (on behalf of Crossing Over, Inc.) to install automatic sprinklers in a house owned by BAK Realty at 29 Nutting Street, Fitchburg, Massachusetts. Said owner leases the house to Mr. Donald Flagg who operates Crossing Over, Inc.

**B) Procedural History**

By written Order dated November 15, 2019 and received by Mr. Donald Flagg on or about November 15, 2019, the Fitchburg Fire Department required automatic sprinklers to be installed throughout a building owned by BAK Realty and leased to Mr. Donald Flagg located at 29 Nutting Street, Fitchburg, Massachusetts. The Order was issued pursuant to the provisions of M.G.L. c. 148, section 26H. On December 26, 2019, BAK Realty and Mr. Donald Flagg (hereinafter referred to as "the Appellants") filed an appeal of the decision with the Automatic Sprinkler Appeals Board. By agreement with the Appellants, the Board held a hearing on February 12, 2020, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellants were: Mr. Donald Flagg, operator of Crossing Over, Inc. and Lessee of 29 Nutting Street and Attorney Andrew J. Tine on behalf of BAK Realty and Mr. Donald Flagg. Appearing on behalf of the Fitchburg Fire Department were: Vincent Pusateri, Fitchburg City Solicitor; Donna Pawlak, Fitchburg Assistant City Solicitor; Mark Barbadoro, Building Commissioner; Fire Chief Kevin D. Roy; Fire Lt. Phil Jordan; and Building Inspector Mark Sullivan.

Present for the Board were: Maurice M. Pilette, Chair; Patricia Berry, Vice Chair; Deputy Chief, Brian Tully; Alexander MacLeod; and Kristen Kelly. Glenn M. Rooney, Esquire, was the Attorney for the Board.

**C) Issue(s) to be Decided**

Whether the Order of the Fitchburg Fire Department requiring sprinklers in the house located at 29 Nutting Street, Fitchburg, Massachusetts pursuant to M.G.L. c. 148, section 26H, should be affirmed, reversed or modified?

**D) Evidence Received**

1. Application for Appeal by Appellant
2. Appellants Submission Package in Support of Appeal
- 2-1. Order of Notice of the Fitchburg Fire Department (dated 11/15/2019)
- 2-2. Correspondence from Appellants to Fitchburg Fire Department re: Order (dated 11/21/2019)
- 2-3. Response of Fitchburg Fire Department to Appellants (dated 12/5/2019)
- 2-4. "Affidavit as to Disability" from residents of subject building
- 2-5. Request for Reasonable Accommodation from Appellants to Fitchburg Building Insp. (dated 7/6/19)
- 2-6. Appellants Memorandum in Support of Application for Relief to the Fitchburg Board Of Zoning Appeals (Undated)
- 2-7. List of Certified Sober Homes in Fitchburg
3. Notice of Hearing to Appellant (dated 1/13/20)
4. Notice of Hearing to Fitchburg Fire Department (dated 1/13/20)
5. Copies of two Memoranda that accompany Hearing Notices
6. Fitchburg Fire Department's Submission Package in Support of Order of Notice
- 6-1. Violation Notice from the Fitchburg Building Commissioner to the Appellant (dated 6/25/19)
- 6-2. Order of Notice of the Fitchburg Fire Department (dated 11/15/19)
- 6-3. Building Code Review/Order to Install Fire Sprinklers from the Fitchburg Building Commissioner (dated 1/21/20)
- 6-4. City of Fitchburg adoption of M.G.L. c. 148, s. 26H (dated 9/4/02)
- 6-5. Property Classification card
- 6-6. List of Certified Sober Homes in Fitchburg from MASH
- 6-7. Crossing Over Program Information from website
- 6-8. Untitled Boston Globe Article about Crossing Over and its fees (Undated)
- 6-9. Copy Court Decision – Mass. Sober Housing Corp. v. Automatic Sprinkler Appeals Board & another (66 Mass. App. Ct., 701)
- 6-10. Sprinkler Appeals Board Decision, Case 2017-04 – 44 Mt. Vernon Street, Fitchburg (dated 7/14/17)
- 6-11. Sprinkler Appeals Board Decision case 2017-03 – 76 Mechanic Street, Fitchburg (dated 8/3/17)
- 6-12. Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings, Crossing Over, Inc. & others v. City of Fitchburg & others (dated 1/31/19)
- 6-13. Judgment for Defendants in Jeffrey D. Summers v. City of Fitchburg, et. al., U.S. District Court of Massachusetts (dated 6/27/18)
7. Correspondence to the Board from Attorney Tine (dated 2/10/20)
8. Correspondence to the Board from the Law Department of the City of Fitchburg (dated 2/12/2020)

9. Sprinkler estimate from Augusto Sprinkler Co., Inc. submitted by Appellant
10. Merriam Webster Definition of “House” as submitted by City of Fitchburg

**E) Subsidiary Findings of Fact**

- 1) By written Order dated November 15, 2019 and received by Mr. Donald Flagg on or about November 15, 2019, the Fitchburg Fire Department required automatic sprinklers to be installed throughout a building owned by BAK Realty and leased to Mr. Donald Flagg to operate Crossing Over, Inc., located at 29 Nutting Street, Fitchburg, Massachusetts. The Order was issued pursuant to the provisions of M.G.L. c. 148, section 26H. On December 26, 2019, the Appellants filed an appeal of the Order with the Automatic Sprinkler Appeals Board. By agreement with the Appellants, the Board held a hearing on February 12, 2020, at the Department of Fire Services, Stow, Massachusetts.
- 2) According to testimony and documentation provided by the Fitchburg Fire Department, the City of Fitchburg, accepted the provisions of M.G.L. c. 148, section 26H on or about September 3, 2002. The Appellants do not challenge the legality of the City’s acceptance of the statute. The provisions of M.G.L. c. 148, section 26H provide for enhanced fire protection requirements for certain buildings that are considered lodging or boarding houses. Section 26H states, in pertinent part: “For the purposes of this section “lodging house” or “boarding house” shall mean a house where lodgings are let to six or more persons not within the second degree of kindred to the person conducting it, but shall not include fraternity houses or dormitories, rest homes or group residences licensed or regulated by agencies of the commonwealth.” According to the third paragraph of the statute, any lodging house subject to the law shall be equipped with automatic sprinklers within five years of the statute’s acceptance by a city or town.
- 3) It is undisputed by the parties that more than six unrelated persons reside at 29 Nutting Street, that the house is not licensed by the State of Massachusetts and that the City of Fitchburg accepted the provisions of Section 26H in 2002.
- 4) According to testimony and documentation provided by Appellants, 29 Nutting Street is owned by BAK Realty and is rented to Mr. Donald Flagg on behalf of Crossing Over, Inc. Crossing Over, Inc., a non-profit organization, pays BAK Realty \$2,400.00 per month in rent for use of the entire property.
- 5) At the subject property, Crossing Over, Inc. provides congregate living arrangements to thirteen individuals, as part of a supportive environment for those recovering from issues with drugs or alcohol. The program does not provide on-site treatment, but does assist the occupants in coordinating outside treatment/counseling activities. At the subject property, one individual is considered the house manager who provides general enforcement of “house rules” and on-site supervision. Crossing Over, Inc. requires occupants to conform to “house rules” that include: abstinence from use of drugs and/or alcohol in the house, attending community meetings and active participation in alcohol and/or substance abuse counseling. Failure to comply with the rules may result in release from the house/program.

- 6) Crossing Over, Inc. charges the occupants approximately \$130.00 per week, which pays for Crossing Over, Inc.'s rent owed to BAK Realty, house utilities, general upkeep and maintenance of the property and for drug testing for the occupants of the house. The Appellant testified that they also offer "scholarships" for clients in the house/program. The failure of any individual to pay the weekly rent may result in eviction but more commonly has resulted in Crossing Over, Inc. subsidizing the weekly/monthly costs for that individual.
- 7) The Appellants assert that M.G.L. c. 148, s. 26H does not apply to the present congregate living arrangement at 29 Nutting Street, Fitchburg, Massachusetts since: 1) the subject property is zoned as a three-family house; 2) the subject property is being operated as three separate and distinct sober homes; 3) although lodgings are let to persons not within the second degree of kindred to the person conducting it, the number of individuals occupying each level of the three-family house does not exceed six.
- 8) The Appellants testified that each individual living at 29 Nutting Street occupies a bed and at times there are multiple occupants assigned to one bedroom. The three levels of the house are separated by locked doors but occupants can and do give access to one another for use and enjoyment of the entire property.
- 9) The Appellants produced an estimate for installation of automatic sprinklers and testified that it would cost approximately \$33,000.00. The Appellant indicated that he could not afford to pay this cost and imposing said costs on BAK Realty would likely lead to the removal of Crossing Over, Inc. as a tenant.
- 10) The Appellants requested that the City of Fitchburg treat this property and its residents like three separate families in three separate houses and that the sprinkler requirements should be waived completely.
- 11) The City of Fitchburg argued that every house, whether it be a single-family or in this instance a three-family, that is conducted as a lodging house with groups of six or more unrelated individuals in the City of Fitchburg is required to install sprinklers. In support of its argument, the City of Fitchburg argued that the entire building located at 29 Nutting Street constitutes a lodging house where lodgings are let to six or more persons not within the second degree of kindred to the person conducting it.

**F) Ultimate Findings of Fact and Conclusions of Law**

- 1) The Board finds that on or about September 3, 2002, the City of Fitchburg adopted the provisions of M.G.L. c. 148, section 26H.
- 2) Section 26H requires the installation of an adequate system of automatic sprinklers in accordance with the state building code in certain lodging or boarding houses. The statute requires installation of said system in all applicable houses within five years after acceptance of the law by a City or Town. The statute defines a "lodging house" or "boarding house" as a house ". . . where lodgings are let to six or more persons not within the second degree of kindred to the person conducting it . . ."

- 3) Appellant, BAK Realty, rents the house at 29 Nutting Street to Crossing Over, Inc., a non-profit organization operated by Mr. Donald Flagg that provides communal living arrangements to thirteen individuals who are not related “within the second degree of kindred to the person conducting it”. The organization provides a supportive environment for those recovering from issues with drugs or alcohol. One individual is considered the house manager who provides general enforcement of “house rules” and on site supervision. The individuals are charged approximately \$130.00 by Crossing Over, Inc. on a weekly basis. The amounts charged pay for utilities, general upkeep and maintenance of the property and, at times; scholarships for the clients of Crossing Over and for drug testing. Residents do not sign individual leases for the property.
- 4) The Board finds that the house located at 29 Nutting Street is, in its entirety, a lodging house for purposes of requiring automatic sprinklers in lodging houses, where each individual occupant pays a weekly amount in exchange for a bed and the ability to share the rest of the house for as long as he lives by the principles of the house. No occupants have any property interest in the house, and the right of any occupant to remain in the house is subject to the house rules. The “house rules” include: abstinence from use of drugs and/or alcohol in the house, attending community meetings and active participation in alcohol and/or substance abuse counseling. Those who violate the rules may be subject to being released from the house and program.
- 5) The Board is owed deference in its reasonable interpretation of its own statute. *See AT&T v. Automatic Sprinkler Appeals Board*, 52 Mass. App. Ct. 11, 15 (2001). The Board is an agency with expertise and experience in the technical aspects of fire safety. *See MA Sober Housing Corp. v. ASAB, et al*, 66 Mass. App Ct. 701, 708 (2006).
- 6) The Board rejects the Appellants’ argument that 29 Nutting Street is being operated as three separate and distinct sober homes.
- 7) Instead, 29 Nutting Street is leased solely to Crossing Over, Inc., as a commercial enterprise, which operates a drug and alcohol support program uniformly throughout the subject property vis-à-vis one house manager who is charged with enforcing “house rules” and general care for the other twelve individuals. No individual within 29 Nutting Street acquires a property interest, or possession in housing accommodations, but only the right in accordance with an agreement with Crossing Over, Inc., to live in and occupy a room or other designated portion therein that still remains in BAK Realty’s possession. The right of any occupant to remain at 29 Nutting Street is subject to the “house rules”. The Board finds that the occupancy in the manner contemplated by Donald Flagg and Crossing Over, Inc. results in use of the property which is different from that which is ordinary and expected in a single, two or three-family structure.
- 8) In its entirety, 29 Nutting Street, although zoned as a three-family structure, houses thirteen unrelated men in a non-institutional setting, in a residential neighborhood, in a large structure with many bedrooms. The house at 29 Nutting Street has two stairways leading down from the third floor and no fire escapes or additional fire protection between units. Construing 29 Nutting Street as three separate and distinct homes and not as one lodging house in its entirety would lead to absurd results. The increased risk of fire or injury associated with traditional lodging or boarding house arrangements in a single-family

home is further amplified in this purported three-family home which is being operated as a lodging house in its entirety.

- 9) The Board also finds that the subject house and the arrangement does not fall within any of the specific exceptions enumerated in the second paragraph of section 26H.
- 10) This Board has decided many appeals of fire department orders enforcing the provisions of M.G.L. c. 148, s. 26H. Once this Massachusetts statute is accepted by a municipality, it requires enhanced protection for boarders by means of an adequate system of automatic sprinklers installed in accordance with the State Building Code. A significant number of these appeals involve houses that are leased or owned and operated by various organizations or persons that provide, usually at a cost to the occupants, communal living accommodations and support to persons who seek recovery from substance abuse issues. The Board has consistently determined that the provisions of M.G.L. c.148, s. 26H applies to all such houses that fit the criteria of the statute. These decisions have been upheld upon appeal, including a case decided by Massachusetts Appeals Court (see *Mass Sober House Corp. v. Automatic Sprinkler Appeals Board*, 66 Mass. App. Ct. 701.
- 11) The purpose of the automatic sprinkler requirement is to protect the boarders of a house in the event of a fire. The purpose of M.G.L. c. 148, s. 26H is to protect unrelated groups of persons living in a lodging or boarding house, as defined, from the deadly consequences of fire. Although the statute requires a monetary expenditure related to the installation of a fire sprinkler system, it clearly does not prohibit the intended use of the house by the Appellants.

**G) Decision and Order of the Automatic Sprinkler Appeals Board**

Based upon the aforementioned findings and reasoning, the Board hereby **upholds** the Order of the Fitchburg Fire Department and requires the installation of an adequate system of sprinklers throughout all portions of the subject building used and/or occupied for boarding or lodging purposes in accordance with the provisions of M.G.L. Chapter 148, section 26H. This decision is subject to the following conditions:

1. Plans for the installation of sprinklers shall be submitted to the Head of the Fitchburg Fire Department within six (6) months from the date of this decision; and
2. The installation of adequate sprinkler system shall be completed within twelve (12) months from the date of this decision.

**H) Vote of the Board**

Maurice Pilette, Chairman	In Favor
Patricia Berry, Vice Chair	In Favor
Brian Tully, Boston Fire Marshal	In Favor
Alexander MacLeod	Opposed
Kristin Kelly	In Favor

**I) Right of Appeal**

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

SO ORDERED,

A handwritten signature in black ink, appearing to read "Maurice Pilette", is written over a horizontal line.

Maurice Pilette, P.E., Chairman

Dated: February 18, 2020

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

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