

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Fairfax Propane
Appeal No. 06-5

Hearing Date: January 23, 2009

DECISION OF THE REVIEW BOARD

I. PROCEDURAL BACKGROUND

The State Building Code Technical Review Board ("Review Board") is a Governor-appointed board established to rule on disputes arising from application of the Virginia Statewide Fire Prevention Code (the "SFPC") and other regulations of the Department of Housing and Community Development. Enforcement of the SFPC in other than state-owned buildings is by local city, county or town fire prevention departments, when such localities choose to enforce the code. See § 27-98 of the Code of Virginia. An appeal under the SFPC is first heard by a local board of appeals and then may be further appealed to the Review Board. (Ibid.) The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.

II. CASE HISTORY

The appeal is made by Christopher F. DeCarlo, President of DeCarlo Enterprises, Inc., trading as Fairfax Propane (collectively, "Fairfax Propane").

Fairfax Propane is a liquefied petroleum gas (LP-gas) distribution company operating tank trucks for the delivery of LP-gas to homes and businesses. When not delivering LP-gas, the tank trucks are normally parked at two industrial locations in Fairfax County, the same county where its retail business is located.

In or around 2004, Fairfax Propane purchased property at 420 Mill Street, NE, in the town of Vienna, which is within Fairfax County. Fairfax Propane was in negotiation with the town zoning officials to use the property in association with its LP-gas operations; however, the buildings on the property were not approved for such purposes.

Fairfax Propane also sought to park its LP-gas tank trucks at the property and contacted the Fairfax County Fire and Rescue Department ("County fire marshal") through several letters in 2005 and 2006 requesting approval. The County fire marshal responded to each letter stating approval could not be granted as the parking of the tank trucks would constitute a violation of the SFPC.

In response to the last letter from the County fire marshal, Fairfax Propane filed an appeal to the Fairfax County SFPC appeals board ("County SFPC board"). The County SFPC board heard Fairfax Propane's appeal and ruled to deny its appeal.

Fairfax Propane then further appealed to the Review Board.

In processing the appeal to the Review Board, Review Board staff conducted a conference call with the parties through counsel to discuss the issues in the appeal. Based on prior cases of the Review Board, Review Board staff raised the issue of whether the determination of the County fire marshal constituted an application of the SFPC as no permit is required under the SFPC for the parking of LP-gas tank trucks. Copies of the prior decisions were distributed to the parties.

Fairfax Propane submitted subsequent correspondence to the Review Board requesting the scheduling of an appeal hearing. Counsel for Fairfax Propane also requested an additional conference call with Review Board staff to further clarify issues and procedures. During the conference call, an additional issue was raised as to whether the appeal was moot due to the enactment by Fairfax County of a more restrictive local fire prevention regulation which appeared to have the effect of clearly preventing the parking of Fairfax Propane's LP-gas tank trucks at the property. Counsel for the parties agreed to a briefing schedule for the submittal of written

arguments concerning the issues in the appeal and for the submittal of additional documents for the record. An appeal hearing was then scheduled and held and was attended by both parties and their respective counsel.

III. FINDINGS OF THE REVIEW BOARD

The Review Board first considers the issue of whether the appeal is moot due to Fairfax County's enactment of a local fire prevention regulation which appears to prevent Fairfax Propane from parking its LP-gas tank trucks at the property in question.

Fairfax Propane argues the appeal is not moot since (i) it filed its appeal prior to the enactment of the local fire prevention regulation, thus creating a vested right to park its LP-gas tank trucks at the property if prevailing on the merits of the appeal, and (ii) the local fire prevention regulation is invalid as it effectively deletes a provision in the SFPC rather than operating within the statutory authority for local fire prevention regulations, which may only be more restrictive or more extensive in scope than the SFPC.¹

The Review Board has consistently held that it has no authority to rule on the application or legality of local regulations.² This case is no different. In its argument that

¹ The second argument was not briefed by Fairfax Propane but made during oral arguments at the hearing.

² See Appeal Nos. 98-9, 99-1, 99-12, 01-1, 04-2 and 05-11.

it complies with the SFPC, Fairfax Propane is relying on an exception to § 3811.2, which permits the use of a provision in the National Fire Protection Association's Standard No. 58 to govern the parking of LP-gas tank trucks as an acceptable alternative to the provisions in the SFPC. The local fire prevention regulation adopted by Fairfax County effectively deletes that exception.

The County fire marshal indicated at the hearing before the Review Board that even if the Review Board ruled that Fairfax Propane complied with the SFPC, Fairfax Propane would be cited for a violation of the local fire prevention regulation if parking its tank trucks at the property in question.

Therefore, this dispute is between Fairfax Propane and Fairfax County and Fairfax Propane must seek resolution using the proper venue for challenging the local fire prevention regulation.

IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the appeal of Fairfax Propane to be, and hereby is, dismissed as moot.

/s/*

Vice Chairman, State Technical Review Board

March 20, 2009

Date Entered

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Vernon W. Hodge, Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

***Note: The original signed final order is available from Review Board staff.**