

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Richard Clayton
Appeal No. 08-2

Hearing Date: July 17, 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 Uniform Statewide Building Code ("USBC") and other regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. Enforcement of the USBC in other than state-owned buildings is by local city, county or town building departments. See § 36-105 of the Code of Virginia. An appeal under the USBC is first heard by a local board of building code appeals and then may be further appealed to the Review Board. See § 36-105 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.

II. CASE HISTORY

Richard Clayton ("Clayton"), owner of condominium unit #300/120 Roberts Lane, in the Fort Ellsworth Condominiums in Alexandria, appeals determinations by the City of Alexandria USBC official (the "code official") relative to the migration of cigarette smoke into his unit.

In October of 2007, after inspection of Clayton's unit and investigating a complaint by Clayton that cigarette smoke from other parts of the building containing his unit was infiltrating his unit, the code official informed Clayton that no violations of the Part III of the USBC, known as the Virginia Maintenance Code ("VMC") were present.

Clayton appealed the code official's determination to the City of Alexandria Building Code Board of Appeals ("City USBC board"), which ruled to uphold the code official's determination. Clayton then further appealed to the Review Board.

In August of 2008, staff of the Review Board conducted an informal fact-finding conference to clarify the issues in Clayton's appeal. The conference was attended by Clayton and the code official. At the conference, Clayton raised issues concerning possible fire safety violations in the original construction of the building containing his unit.

Review Board staff advised Clayton and the code official that the issue of whether or not there were fire safety violations may not be properly under appeal. At the conference, Review Board staff established a time frame for Clayton to submit documentation that he had alleged fire safety violations and received a decision from the code official that no fire safety violations existed prior to his appeal to the City USBC board.

Clayton did not provide further documentation, so the Review Board staff summary of the appeal, prepared for the Review Board members for the hearing of Clayton's appeal, included an issue of whether Clayton's appeal of whether fire safety violations were present was properly before the Review Board.

Clayton, the code official and representatives of the Fort Ellsworth Condominium Association were present at the hearing before the Review Board.

III. FINDINGS OF THE REVIEW BOARD

Whether any fire safety issues are properly before the Review Board.

Representations were made at the hearing before the Review Board by Clayton and the code official that subsequent to Clayton's filing the appeal to the City USBC board, Clayton raised issues concerning whether the original construction of the building containing his condominium unit was in violation of the

code in effect at the time of construction of the building, specifically alleging that the code required firestopping materials between floor levels which were not present and prohibited the recirculation of air from one dwelling unit to another. Further, representations were made that the code official determined that the lack of firestopping was not a violation of the VMC and communicated this determination to the City USBC board, which upheld the determination.

Based on those representations, the Review Board finds that the issue of whether violations of the VMC exist relative to the lack of firestopping between floors is properly before the Review Board. No other fire safety issues were decided and appealed.

Whether the lack of firestopping between floors is a violation of the VMC.

Based on the evidence and testimony, Clayton's condominium building was constructed in 1974 and was not subject to the USBC when constructed. The initial edition of the USBC was effective on September 1, 1973; however, the enabling legislation for the USBC permitted local building codes to remain in effect for up to two years after the effective date of the USBC and also provided that buildings for which a building permit had been obtained or on which construction had commenced prior to the effective date of the USBC would remain subject to the codes in effect at the time of construction.

The VMC was made part of the USBC by authorizing legislation in 1982 to establish minimum regulations for existing buildings to insure the protection of the public health, safety and welfare. The VMC, from its inception, took into consideration that existing buildings could fall into one of three categories: a building constructed where no codes were in effect at the time of construction; a building constructed where a local building code was in effect at the time of construction; and, a building which was subject to the USBC when constructed. The VMC sets different standards for those three categories of buildings.

Clayton's condominium building is subject to the category of VMC provisions for buildings subject to a local building code at the time of construction. Accordingly, Section 105.3 of the VMC provides limitations in addressing potentially unsafe conditions in such buildings and states as follows:

105.3 Unsafe conditions not related to maintenance. When the code official finds a condition that constitutes a serious and dangerous hazard to life or health in a building or structure constructed prior to the initial edition of the USBC and when that condition is of a cause other than improper maintenance or failure to comply with state or local building codes which were in effect when the building or structure was constructed, then the code official shall be permitted to order those minimum changes to the design or construction of the building or structure to remedy the condition. (Emphasis added.)

As is made clear by the above language and in accordance with §§ 103.2 and 105.3.1 of the VMC, which further address limitations in the use of the VMC to require alterations to the design or

construction of existing buildings, conditions in buildings subject to a local building code when constructed which are caused by the lack of compliance with that code may not be treated as violations of the VMC.

Therefore, as the issue in Clayton's appeal is that the local building code in effect when Clayton's condominium building was constructed required firestopping between floor levels and that such firestopping is not present in certain areas between floor levels in Clayton's condominium building, the code official was correct in determining that the VMC cannot be used to require the firestopping to be retroactively installed.

In addition, the code official's determination that the lack of firestopping is not a condition which in and of itself rises to the level of meeting the definition of an unsafe structure in § 202 of the VMC is correct. Accepted practices at the time of construction of the building may have permitted the use of alternative materials or methods of construction negating or minimizing the need for the firestopping.

Further, Clayton's argument that the phrase "shall be maintained" where used in the VMC means "to comply with the code in effect at the time of construction" is incorrect. Section 201.4 of the VMC states that "[w]here terms are not defined through the methods authorized by this section, such terms shall have ordinarily accepted meanings such the context implies."

The common, ordinary meaning of the term "maintained" is "to keep in an appropriate condition" and "to keep in a condition of good repair or efficiency."¹

Whether the migration of cigarette smoke into Clayton's condominium unit from other parts of the building is a violation of the VMC.

As previously stated, the purpose of the VMC is to require the maintenance of existing buildings. Therefore, unless there is an underlying condition caused by a lack of maintenance which is causing the migration of cigarette smoke into Clayton's unit, there is no violation of the VMC. No such conditions were identified.

Further, even the current USBC for the construction of new buildings does not contain provisions specifically for preventing the migration of cigarette smoke in buildings. Therefore, while modern construction techniques and provisions of the USBC addressing the tightness of walls and floors for fire safety and energy efficiency purposes may to some extent prevent or limit the movement of air through building components and areas, the evidence of migration of cigarette smoke in a building does not, in and of itself, constitute a violation of the USBC.

IV. FINAL ORDER

¹ See Random House Dictionary and American Heritage Dictionary of the English Language, Fourth Edition

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the decisions of the code official and the City UBC board that no violation of the VMC are present relative to firestopping or the migration of cigarette smoke in the building containing Clayton's condominium unit to be, and hereby are, upheld.

/s/*

Chairman, State Technical Review Board

Sept. 18, 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.**