

Meeting Minutes of the State Appeals Board
Appeal #09-02
Monday, September 21, 2009
Preliminaries 8:15 AM; Hearing 9:00 AM

Preliminaries:

- Appeals Board Members included Gary Hagedorn, Building Official for the City of Blaine; Roger Larson, Architect with BWBR Architects; Thomas Downs Jr., President and structural engineer with BKBM Structural Engineers; Kathi Osmonson, Building Official and Fire Marshal for the City of Mounds View; Scott McKown, Building Official for the City of Burnsville. The Ex-officio (non-voting) member was Scott McLellan from CCLD. Doug Nord also from CCLD took meeting notes. Bernie Johnson, Attorney with the Attorney Generals Office, represented CCLD.
- Scott McLellan welcomed the board members and handed out the rules of procedure. He thanked them for taking part in this appeal and reminded members to base decisions on the evidence submitted.
- Gary Hagedorn nominated Thomas Downs as chair of the meeting. Kathi Osmonson seconded. Motion carried.
- Scott McLellan provided an overview of the appeal. He also described the application information and touched on code sections that may be relevant.
- Roger Larson asked if there is direction in the code on how one addresses an occupancy group when it changes in the code. Scott said there is no direction but that the certificate of occupancy issued makes the use legal for the building. The question is if a change of use has occurred.
- Scott McKown asked Scott McLellan if the board is addressing two questions, one being a change of use and the other being issuance of a new certificate of occupancy. Scott McLellan said one would follow the other. He also said the new piece of equipment should be considered in the evaluation of a change the use.
- Bernie Johnson reminded the board to follow the rules of procedure. Although he said usually the applicant goes first, the board may decide. Usually 15 minutes is given to each side to make their argument. Bernie reminded all that it is an open meeting but the hearing begins when the chair calls the hearing to order.
- A short break was taken before the hearing began.
- Scott McLellan clarified that the Department of Labor and Industry facilitates the hearing but the board members vote on a final decision. The state appeals board is actually an extension of the municipality that has no board of appeals. Scott also explained that M.S. 326.139, that speaks to an appeal within 180 days, is another process that may take place after an appeals board rules on a hearing (the final determination of a municipality).

Hearing call to order:

- Thomas Downs called the meeting to order at 9:05 AM. He re-stated the application and said the board had been convened to decide if this change in tenant constitutes a change in use resulting in a new certificate of occupancy. In addition to those already introduced were now Robin Wolpert, Attorney with Greene Espel; David Fisher, Building Official for the City of Maplewood; Jill Clark, Attorney for the Appellant; Patty Gearin, Wipers LLC; Adam Richardson, Rich Law Firm; Dave Reddan, ACKS&P; Mike Godfrey, CCLD.
- Jill Clark asked Thomas Downs how the meeting will proceed. Thomas said the applicant will begin followed by the Building Official, and then others may provide testimony. The board will close open discussion and ask questions of the audience as necessary. Jill Clark also raised a question as to whether it was appropriate for Doug Nord to be part of the board because of his previous involvement with the issue. Scott McLellan answered the question stating that Doug Nord is not a board member but establishes the hearing and takes minutes.

Hearing Discussion with Appellant (Jill Clark):

- Jill Clark thanked Mr. McLellan for explaining code issues. She said she represents Patricia Gearin. Patricia had checked with Maplewood's City Planner and was told the building was ok for her business regarding zoning. The owner purchased the building based on this information. Jill Clark expressed concern as to whether the Building Official should enforce the code, requiring the spending of thousands of dollars, after the purchase of a building.
- According to Jill Clark, in July of 2007, Dave Fisher came to the building days after Patricia Gearin moved in. He did a 10 minute walk-through and had a conversation with Ms. Gearin. Based on this visit he determined the business needed a new certificate of occupancy and had to be brought 100 percent up to current code.
- Jill Clark said this building was previously used as a retail store and small engine repair shop and that this should have been reviewed better by the building official. If the existing sprinkler system and alarm system were ok for an engine fire, wouldn't it cover a grinder fire?
- Jill Clark then gave 3 handouts to the board. One being the testimony of Dave Fisher, another is a sign on the building showing a completion certificate for someone's small engine course, and one is a picture of the previously issued certificate of occupancy affixed to the wall.
- Further Jill Clark discussion: She challenges the "M" mercantile use as the primary use continues to be a B-2 as per the 1988 MN State Building Code under which the original certificate of occupancy was issued in 1991. Everything in the building falls under a B-2. Nothing has changed. The building is grandfathered in. Just because of a code change, one can't change the existing use classification. Requiring a new (administrative) certificate of occupancy is not a problem as long as it doesn't change the B-2 occupancy designation. Although the equipment didn't move in for months, the building official made his decision after visiting with the owner as she talked about future plans. The machine has only been used

in the testing phase. It is not in use yet but the business would like to and feels there would be no change in use from a B-2. The building official's position is that the machine itself necessitates a change of use, it is no longer a retail business, but manufacturing or an "F" occupancy under the current code which no longer recognizes "B-2" as an occupancy classification. However, the machine sits in the same area that the small engine repair took place. There was a fire in the machine that took place during the testing stage. The owner would like to use the machine and engage in her business.

- Bernie Johnson asked the board if there were any questions.

Questions from the Board for the Appellant:

- Gary Hagedorn asked if they involved the building official when they were having conversations with the city Planner regarding purchasing the building. Jill Clark responded that the owner was never directed to the building official and he just stopped by in July of 2007 at which time he required the owner to pull a new certificate of occupancy.
- Gary asked if the building official walked-through prior to the purchase of the building. Jill Clark stated no.
- Roger Larson asked whether conversations with the planner or administrator regarding approvals were for zoning only. Jill Clark said not to her understanding. She said the administrator stated "it" was fine.

Hearing discussions with respondent (Robin Wolpert):

- Robin Wolpert stated that she and Dave Fisher were here as to the challenge of changing the certificate of occupancy to a mercantile (group M) and possible factory (group F) occupancy. She states there was in fact a change of use. She also wanted to bring to the board's attention that she feels this appeal is not timely.
She continues as follows:
- When Mr. Fisher was told the grinder was being brought in, shouldn't the building official believe what the owner says? Mr. Fisher was concerned with liability and that the sprinkler system was not set-up for combustibles. The concern was with the fire load that would be created by the installation of a grinder.
- The building owner moved into the then vacant building in summer of 2007. As to this building previously having a small engine repair, the original plan for this area showed no ventilation or repair shop. When Dave Fisher stopped by, the owner said they would be grinding shoes. The equipment was ordered in July of 2007. Mr. Fisher believed this process to be a change of use from retail to manufacturing. The code has requirements when there is a change of use. Ms. Gearin applied for and received a new certificate of occupancy for the group "M" use. Dave Fisher followed-up as to changes per the code. No permit has yet been applied for on the dust collection system. Dave Fisher noted there is an improper installation and a lot of combustibles stacked up. The owner installed the grinder without a permit.

- A fire occurred in the grinder. After the fire there was major clean-up that took place. After the clean-up, a group “M” certificate of occupancy was issued but nothing for a group “F” occupancy.
- The most recent correspondence from Dave Fisher was January of 2009. This final letter covered issues of code as well as fire and zoning. No installation instructions have been submitted to date for the grinder. An engineering review may yet be required to determine compliance with code requirements.
- Chapter 1300.0040 of Minnesota Rule requires existing buildings to be addressed under chapter 1311. Because the building official feels there is a change to an “M” and “F” occupancy, a new certificate of occupancy is required for this change of use to a different group. There is a change because of this grinder. Northern Hydraulics had retail. The B-2 designation was only for retail. Mr. Fisher believes the grinder is not part of retail. It changes the use and is required to get a new certificate of occupancy. The change is from its previous dominant use to its present factory use.
- The appellant believes the code doesn’t apply until the equipment is in place. However the code needs to be administered prior to installation. Ms. Clark implied the code doesn’t apply when a machine is in the testing mode. However, there is no basis in the code for that position.
- Ms. Clark said administration gave the green light for this business. The City administrator has no allowance to evaluate code enforcement. Zoning is one thing, but administration has no authority to waive building code or fire code.

Questions from the Board for the Respondent:

- Kathi Osmonson asked if the first time this business was noted was when the building official drove by and saw activity. Dave Fisher stated yes.
- Gary Hagedorn asked if the building official was contacted prior to this business moving into the building. Dave Fisher stated no.
- Roger Larson asked what was in the building prior to Northern Hydraulics. Dave Fisher said a racquet ball club was there prior to Northern Hydraulics in 1991.
- Roger Larson asked if there was a small engine repair in the Northern Hydraulics business. Dave Fisher said he wasn’t sure but if there was, it had to be very small or it would have had a different occupancy classification. Roger Larson asked Dave Fisher if he was the building official then. Dave Fisher said no.
- Roger Larson asked if the fire marshal had mentioned anything in regards to a small engine repair in that building. Dave Fisher stated no. Dave said he drove by the vacant building and saw some activity and then directed one of his inspectors to look into what was going on.
- Scott McLellan asked if they had received installation instructions for the grinder. Robin Wolpert stated yes. Scott McLellan then asked if they have what they need to evaluate compliance? Robin Wolpert said they need to verify compliance with the mechanical code.
- Scott McKown asked if this piece of equipment is labeled or tagged by an approved agency meeting approved standards. Robin Wolpert said the equipment is from Germany and directed the question to Jill Clark. Jill Clark said it meets standards.

- Gary Hagedorn asked if permits were pulled. Robin Wolpert said yes. There have been some inspections but the last inspection was in October of 2008.
- Scott McKown asked if there were any electrical or mechanical permits pulled. Dave Fisher said electrical were pulled in September of 2007. After the fire there was a permit for clean-up and electrical work. There have been no permits pulled for the grinder or its ductwork.
- Gary Hagedorn asked Dave Fisher who issues electrical permits for the city. Dave Fisher said they do and they have a contract electrical inspector.
- Robin Wolpert said the fire marshal works closely with Dave Fisher. They have not given a green light to go. The sprinkler system did not meet requirements at first. In December of 2007, the fire marshal worked with the attorney representing Ms. Gearin at that time and got the issues resolved.
- Kathi Osmonson asked if the sprinkler system is now approved Robin Wolpert said yes for an “M” occupancy.
- Roger Larson asked when the grinder was put in. Robin Wolpert said the electrical permit was pulled in September of 2007 and the grinder was ordered in July of 2007.
- Roger Larson asked when the fire occurred. Robin Wolpert was not sure.

Rebuttal for the Appellant (Jill Clark):

- Jill Clark said the fire marshal and Dave Fisher addressed height of storage and required an opinion from a sprinkler design firm. Olson Fire came out and stated storage could be 10 feet. Mr. Fisher had thought 5 feet.
- An electrical permit was required but as to ventilation, none was required. There is a dust collector that sits on the floor although it is not required by the manufacturer of the equipment. The equipment is not connected now and the owner is not sure she wants to reconnect until legal issues are resolved. Ms. Gearin told the city she was going to do this from the start. They have an e-bay business and sort shoes, but what does this have to do with a change?
- Mr. Fisher originally said the whole building had to meet the present code. Then he backed off as only a partial change. The prior attorney was working on addressing a few issues.
- It’s not accurate to say the fire marshal only signed off on an “M” occupancy. The fire marshal knew of and considered the equipment. As to when a building owner needs to pull a permit, not until equipment is installed.
- Jill Clark said she doesn’t believe the fire had anything to do with what her client did or didn’t do.
- Jill Clark said she disputes that the client wanted a new certificate of occupancy. She believes her client met all the uses of a B-2 occupancy.
- The sprinkler system did not require work but only a sign-off which was done by Olson Fire.

Questions from the Board for the Appellant:

- Gary Hagedorn asked Jill Clark if the dust collector was required for the grinder. Jill said it’s not required. It’s only recommended by the manufacturer.

- Gary Hagedorn asked if the machine produces dust. Jill Clark said yes, but very little.
- Gary Hagedorn asked if people can walk in and buy items. Jill said yes but that seldom happens.
- Gary Hagedorn asked if the machine creates a raw material which will be a new product for sale. Jill Clark said yes and that the owner would like to get into that.
- Gary Hagedorn asked if this raw product would be stored at the business. Jill Clark said yes, for a short period of time.
- Roger Larson asked if the fire marshal said they met code for a B-2 or an “M” occupancy. Jill Clark states she didn’t hear anything as to that.

Rebuttal for the Respondent (Robin Wolpert):

- Robin Wolpert said that although Mr. Fisher worked together with the fire marshal regarding the height of storage, it was the fire marshal that called for storage limitations, not Mr. Fisher. The fire marshal said they could stack items 5 feet high until they received a certification on the sprinkler as to its design regarding the storage issue. Olson Fire did that with other conditions.
- As to the grinder not needing a dust collector: Mr. Fisher had not determined that yet. The duct Mr. Fisher observed off of the dust collector was hanging from the ceiling and it was not sealed.

Tom Downs asked if there were any other comments. There were none so he closed the comment period and opened up board discussion

Board Discussion:

- Gary Hagedorn said it’s not unusual for a building official to stop by a new business when activity is noted. As a building official, they do that all the time in his jurisdiction. Once the grinder was brought into the building, it is a change of use. It falls under the current code and would require a new certificate of occupancy.
- Roger Larson said he didn’t know what all building owners do when moving into a new building but most clients he works with will check with a building official or have an architect to review what they intend to do and need to do prior to moving in or at least very early on in the process.
- Kathi Osmonson said one would be looking to see if there is a change of use. Roger asked if that is a change to 1991. Kathi said you would look at what code it was built under but as to safety, you need to use the current code. She feels the true intent of the code is to use the current code. She has seen an existing business change just by what they do.
- Scott McKown said regarding the definition of change of occupancy: It was aB-2 occupancy under the 1988 code and would be an F-1 today. He doesn’t believe it’s an issue whether it’s a B-2 or F-1. An F-1 can be in a non-separated use today. He feels it was a B-2 previously and a B-2 today. He said, how far do you go? The 1311 definition must be used.

- Roger Larson said nothing in the code says you have to bring a building up to current code if it continues to be used the same. He was inclined to believe that it was always an F-1 because of the small motor repair..
- Tom Downs said the one question to debate as to the 1988 B-2 was: Does the use today fall into that same occupancy group? He thought it does, the use today still falls into a B-2.
- Kathi Osmonson said that in a B-2 there are no products of high combustibility. When grinding that changes to highly combustible material.
- Gary Hagedorn said he agrees with Kathi that when you create combustible dust you change the dynamics and it places you into a new category. An F-1 is what it falls into as dust produces more of a hazard.
- Tom Downs asked if the sprinkler system is good for today. Gary Hagedorn said yes for retail.
- Kathi Osmonson said she would like to see the Olson Fire letter as to combustible products. Gary Hagedorn said dust is an issue; combustibility changes it to a higher hazard.
- Kathi Osmonson said the use in character changed when they started the grinder.
- Roger Larson said if it was always manufacturing it would be ok but being it was actually retail, a change is required.
- Scott McKown said if Dave Fisher had confirmed it was a B-1 regarding small engine repair it would be easy, but it was given a B-2 designation.
- Tom Downs agreed that fire life safety issues are a concern, but it is still a B-2 factory use whether there are sprinkler changes or other changes.
- Gary Hagedorn said the code directs you to specific uses. Occupancy classifications may or may not have similarities. The character has changed since the initial use of the building.
- Scott McKown said 1311 does call out hazards and has tables comparing occupancies. Scott McLellan gave Scott McKown a copy of 1311.
- Scott McLellan asked if the installation of a grinder changed it to a different use? Gary Hagedorn said he feels they have changed the building from the original use. Regarding the original use: It looks like a change in use to the space. It may still meet the old B-2 but there is a change of actual use.
- Tom Downs said as to Scott McLellan's thought that this is definitely a change of use: Feels a building official can issue a certificate of occupancy to track the use. He would have given a new certificate of occupancy, but does that mean present code has to be addressed? It's a B-2 but not sure of what it was used for.
- Kathi Osmonson states it's a change of use to an F-1.
- Tom Downs asked the board for a motion.
- Gary Hagedorn moved and said it is a change of use and a new certificate of occupancy is required.
- Tom Downs asked if there was a second to that motion.
- Kathi Osmonson seconded the motion.
- Tom Downs asked Doug Nord to read the motion.

- Doug Nord said that Gary Hagedorn made a motion that there is a change of use and a new certificate of occupancy is required. Kathi Osmonson seconded the motion.
- Scott McLellan asked the board if they want to call out an occupancy classification.
- Scott McKown states that should be the call of the designated building official.
- Gary Hagedorn and Kathi Osmonson stated their agreement with Scott McKown.
- Scott McLellan said he believed it was important to answer whether the new classification had been changed from a B-2 because it is now either an “M” or an F-1.
- Gary Hagedorn calls it to be an F-1.
- Roger Larson states he would rather not classify but agrees there is a change of use. If he was to classify he would say an F-1 if there is combustible material.
- Bernie Johnson requested Gary Hagedorn to restate F-1 as it covers all occupancies.
- Gary Hagedorn made a motion to clarify that it is a change of occupancy to an F-1 and a new certificate of occupancy is required.
- Kathi Osmonson seconded the motion but noted she would still like the building official to classify the occupancy.
- Thomas Downs asked the board if there were any further discussion and then asked the board to vote on the motion by Gary Hagedorn.
- All board members were in favor of the motion. Motion carried.
- The audience requested a repeat of the final decision of the board.
- Thomas Downs asked Doug Nord to re-read the final decision of the board.
- Doug Nord read the final motion as approved by the board, which stated, this is a change of occupancy to an F-1 and a new certificate of occupancy is required.

Thomas Downs adjourned the meeting at 10:50 am.

Respectfully submitted,

Doug Nord
Scott McLellan