



HOUSING BOARD OF REVIEW
City of Burlington

149 Church Street Room 11
Burlington, Vermont 05401
(802) 865-7122

**HOUSING BOARD OF REVIEW
CITY OF BURLINGTON
NOTICE OF DECISION**

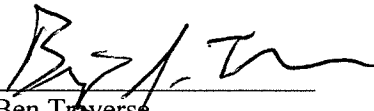
Enclosed is a copy of the “Findings of Fact, Conclusions of Law and Order” of the Burlington Housing Board of Review.

Please note that a person aggrieved by a decision of the Housing Board of Review is entitled to appeal to the Chittenden Superior Court. (See Housing Code Section 18-59 and Vermont Statutes Annotated, Title 24, Section 5006.) The court rules may require that such an appeal be commenced within thirty (30) days of the Board’s Order.

Unless an appeal is taken, the Board’s Order should be complied with before expiration of the thirty (30) day period.

DATED 6/30/16

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW



Ben Travers
Board Chair

cc: Will Towle, Esq.
Gene Bergman, Esq.

**STATE OF VERMONT
CHITTENDEN COUNTY, SS.**

In re: Request for Hearing of SOON KWON)
Regarding the Rental Property at) CITY OF BURLINGTON
34 COLCHESTER AVENUE) HOUSING BOARD OF REVIEW

DECISION AND ORDER

The above-named matter came before the Housing Board of Review (“Board”) for a hearing on March 7, 2016 and May 2, 2016. Board Chair Ben Traverse presided and Board Members Kirstin Daigle and Patrick Kearney were also present.¹ Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

BACKGROUND

1. Petitioner Soon Kwon is the owner of a multi-unit rental property at 34 Colchester Avenue, in the City of Burlington.
2. On November 6, 2015, Minimum Housing Inspector Ita Meno conducted an inspection of the premises. By order dated January 7, 2016, Ms. Meno set forth 11 alleged violations:
 - 1) Lead Paint EMP certification not provided to the City, in violation of Minimum Housing Code (“MHC”) § 18-112.
 - 2) Construction debris in the yard, in violation of MHC § 18-111.
 - 3) Paint chips found in outdoor areas of pre-1978 rental housing, in violation of MHC § 18-112(a)(3).
 - 4) Interior stairway lacks a handrail; lower handrail missing to front door from unit 2 and 3, in violation of MHC § 18-74.

¹ Board Member Jason L’Ecuyer was also present at the hearing on May 2, 2016 but did not take part in the deliberations on this matter, as he was not present at the hearing on March 7, 2016.

- 5) Interior wall framing the entryway to one unit not maintained in sound, sanitary and good repair; raw edged drywall; repair not completed in a skilled manner, in violation of MHC § 18-72.
- 6) Electrical appliance installed or maintained incorrectly; missing globe for light fixture, in violation of MHC § 18-85.
- 7) Interior wall facing an interior stairway not maintained in sound, sanitary and good repair; walls with hole and unfinished repairs, in violation of MHC § 18-72.
- 8) Interior wall not maintained in sound, sanitary and good repair; unfinished repairs, in violation of MHC § 18-72.
- 9) Plumbing fixture incorrectly installed or maintained; toilet is not flushing, in violation of MHC § 18-104.
- 10) Equipment or device incorrectly installed or maintained; broken toilet paper dispenser, in violation of MHC § 18-104.
- 11) Electrical equipment installed or maintained incorrectly; broken outlet cover, in violation of MHC § 18-85.

3. Petitioner Soon Kwon appealed Ms. Meno's order in its entirety by letter dated January 27, 2016, filed through Attorney William B. Towle. By this letter, petitioner indicated that the basis for his appeal was: "(1) inaccurate factual allegations; (2) allegations that are unrelated to the minimum housing code, and therefore are outside the jurisdiction of the housing inspector; and (3) any alleged violations related to lead paint are barred by res judicata as these alleged violations are subject to a separate enforcement action by the State of Vermont."

4. As indicated above, this matter first came before the Board for a hearing on March 7, 2016. Petitioner Kwon was present and represented by Attorney Towle. Bob Hartwick, a contractor hired to perform work at the property, was also present and testified on behalf of petitioner. Director of

Code Enforcement William Ward and Minimum Housing Inspector Ita Meno were also present and testified, and were represented by Assistant City Attorney Eugene Bergman.

5. Both parties were offered and exercised a full and fair opportunity to present legal arguments, testimony and evidence, and to question evidence presented by the other side. This opportunity extended to, but was certainly not limited to permitting each party to use a projector and screen to display numerous photographs and videos of the subject property.

6. It bears noting that this matter was one of four appeals filed by petitioner with respect to separate properties subject to minimum housing orders. The appeals are related to each other only through a common property owner and were heard together solely to serve the purposes of judicial economy.

7. At the conclusion of the hearing on 34 Colchester Avenue, the Board determined that the most prudent course of conduct for each appeal was to schedule an in-person site visit at each of the subject properties, rather than solely relying on dueling factual accounts.

8. The Board held its site visit on April 27, 2016. Board Chair Traverse and Board Members Daigle and Kearney were present. Petitioner Kwon and Attorney Towle, Code Enforcement Director Ward and various minimum housing inspectors were also present, along with Assistant City Attorney Bergman.

9. The Board reconvened for a hearing on May 2, 2016. Again, Petitioner Kwon was present and represented by Attorney Towle, and Code Enforcement Director Ward and representatives from his office were present and represented by Assistant City Attorney Bergman. Again, both parties were offered and exercised a full and fair opportunity to present their respective cases. At the conclusion of the hearing, the Board took this matter under advisement and is now prepared to issue a decision on all outstanding issues.

LEGAL ARGUMENTS

10. Prior to reaching the substance of petitioner's appeal, the Board heard various threshold issues in the form of general legal arguments. For the purposes of this appeal, the arguments were limited to the following: (1) petitioner argued that the Board was precluded from considering various violations, including those related to lead paint, on the ground of res judicata; and (2) the City claimed that petitioner's appeal should be dismissed on the ground that he failed to sufficiently state the grounds for his appeal.²

11. First, as regarding petitioner's arguments, the doctrine of res judicata holds "that matters once tried shall be considered forever settled as between the parties." Iannarone v. Limoggio, 2011 VT 91, ¶ 14 (quotations omitted). This doctrine, also known as claim preclusion, provides that a claim will be barred from being litigated if "(1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the same proceeding." Id. ¶ 15 (quotation omitted). Here, petitioner's arguments failed to indicate that any of the specific violations at issue were ever subject to another enforcement proceeding; let alone one in which a final judgment was rendered. Accordingly, petitioner's arguments under the doctrine of res judicata must be denied.

12. Second, as regarding the City's arguments, the MHC states that requests for appeal "shall specify the grounds for the appeal and the relief which is requested." MHC § 18-49. The City contends that when petitioner appealed the minimum housing order at issue by merely stating that it contained "inaccurate factual allegations," he failed to properly "specify the grounds for the appeal." However, whereas the Board certainly acknowledges that greater specificity may have mercifully narrowed the issues to be considered, it declines to extend this reasoning to the denial of petitioner's appeal. It is well-established that the law prefers the resolution of cases on the merits, after a hearing at which each party

² The Board also heard arguments on whether violations of the MHC's "Fire Safety Requirements," see §§ 18-94 – 18-101, should be heard by this Board or the Department of Public Works. This argument is not addressed herein, though, because none of the cited violations at the subject property are properly classified as a "Fire Safety Requirement."

has adequate notice and an opportunity to appear. See Courtyard Partners v. Tanner, 157 Vt. 638 (1991). Here, when the City appeared at hearing, it was well prepared to present evidence supporting each of the cited violations and was in no way prejudiced by the form of petitioner's request for an appeal.

FINDINGS OF FACT

13. As is applicable to this matter, the Board is vested with the authority to: “[R]everse or affirm, in whole or in part, any order or other action of the inspector and to make such order, requirement, decision or determination as ought to be made, and to that end, the board shall have all the powers of the inspector.” MHC § 18-42(d).

14. During the hearing on this appeal, without conceding that violations existed at the time of the original inspections, officials from the Code Enforcement Office agreed that based on the evidence presented, Petitioner had acted to bring the following items into compliance with the MHC: 1, 2, 4, 6, 9, 10, and 11. Accordingly, there is no relief to be granted on these items, thereby rendering them moot. The Board declines to engage in the academic exercise of considering whether the items were violations in the first instance.³ The other items will be addressed as they appear in the order.

15. As regarding item 3, the Board finds that a limited number of paint chips remain in some outdoor areas around the subject property. Whereas the property appears to have been recently painted and Petitioner contended that no lead paint is present, the property is a pre-1978 structure, meaning any paint chips must be “presumed to be lead-based paint.” MHC § 18-112(b). Petitioner must keep the outdoors areas of the property free from visible paint chips. To the extent petitioner wishes to be exempt

³ While not ruling on the question, the Board notes that Petitioner's remedial measures on these items indicate an understanding that the items existed in violation of the Minimum Housing Code. If that is the case, the Board must admit to some confusion as to why Petitioner resorted to appealing these items. To the extent Petitioner required additional time to correct the noticed violations, a more appropriate course would have been to first request that the Code Enforcement Office extend the time within which to comply. As a general matter, a request for a hearing before this Board “shall stay the effectiveness of the action of the inspector forming the basis for the request for hearing.” MHC § 18-53. However, an appeal to this Board should not be used as a delaying tactic for items that a property owner acknowledges to be in violation of the Minimum Housing Code.

from lead-based paint compliance activities, he must submit a copy of a state-certified inspectors' written report showing the dwelling to be free of lead-based paint. See id.

16. With respect to item 5, there is no dispute that the doorway to unit 2 is merely framed with raw-edged drywall. The drywall is not smooth, could easily breakaway, and the Board agrees that it exists in violation of MHC § 18-72(b), which requires that interior walls be maintained in sound condition and good repair.

17. Item 7 presents a closer question. There is no dispute that at one point in time, a number of holes were present in the interior walls of the front stairway. The parties are also in agreement that petitioner has since taken remedial steps to patch the holes. At the time of the Board's site visit, however, the wall had not been painted and the patched areas remained visible. Petitioner argued at hearing that the wall remained unfinished because of ongoing construction on an upper floor and concerns that the carrying of various tools and materials through the stairway would further damage the wall. The Code Enforcement Office noted that the walls had remained in state of disrepair for a number of months and argued that, notwithstanding petitioner's efforts to patch the holes, "[a]ll repairs, maintenance work, alterations or installations which are caused directly or indirectly by the enforcement of these standards shall be performed and installed in a skilled manner." MHC § 18-70. The MHC elsewhere defines "skilled manner" to mean:

[E]xecuted in a skilled manner; e.g., generally plumb, level, square, in line, undamaged and without marring adjacent work. To be executed in a "skilled manner," maintenance or repair work must be performed in a manner consistent with work done by a skilled craftsman. In general, floors should be level, walls plumb and square and windows installed so that they operate easily and fit within the rough opening to exclude the elements. The use of proper tools, methods and materials is necessary for skilled manner work unless unusual circumstances exist.

See id. § 18-2. Petitioner responded by arguing that the MHC's "skilled manner" provisions effectively permit the Code Enforcement Office to require remedial measures above and beyond the minimum standards set by the MHC. The Board is sympathetic to Petitioner's argument, as it would not otherwise find the front stairway's repaired walls, in their current condition, to be in violation of § 18-72(b),

regarding the sound condition and good repair of interior walls. The Board must read the MHC in its entirety, though, and is bound to issued orders in accordance with each of its provisions, including the above-referenced “skilled manner” provisions. Consequently, the Board agrees with the Code Enforcement Office and concludes that a “skilled craftsman” would not have left the front stairway’s walls in their current condition. Petitioner must act to finish his repairs in a “skilled manner,” including by painting the interior walls.

18. Item 8 involves the interior walls along the property’s rear stairway, which the Board finds as still having a number of visible holes. This is a violation of MHC § 18-72(b) and petitioner must act to repair the walls.

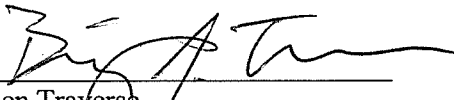
ORDER

Accordingly, it is hereby ORDERED:

19. The findings and required remedies for items 3, 5, 7, and 8, as set forth in the minimum housing order dated January 7, 2016 are hereby incorporated into this Decision and Order. This Decision and Order shall replace and supersede the minimum housing order dated January 7, 2016. The Code Enforcement Office shall schedule items 3, 5, 7, and 8 for reinspection no earlier than thirty (30) days from the date of this Decision and Order. Petitioner is expected to bring these items into compliance by the time of the scheduled reinspection.

DATED at Burlington, Vermont this 30th day of June, 2016.

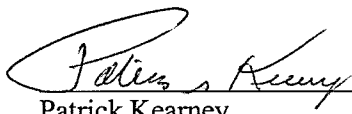
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Ben Traverse



Kirstin Daigle



Patrick Kearney