



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 Traverse  
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  
      40-42 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 May 2, 2016. Board Chair Ben Traverse presided and Board Members Kirstin Daigle, Patrick Kearney, and Jason L’Ecuyer were also present. 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 40-42 Colchester Avenue, in the City of Burlington.
2. On August 31, 2015, Minimum Housing Inspector Tim Ahonen conducted an inspection of the premises. By order dated January 4, 2016, Mr. Ahonen set forth 25 alleged violations:
  - 1) Electrical appliance installed or maintained incorrectly, ceiling fixtures missing lenses/globes throughout building, in violation of Minimum Housing Code (“MHC”) § 18-85.
  - 2) Light well for unit 40a has no means of escape, in violation of MHC § 18-95
  - 3) Exterior door not maintained in sound condition and good repair; cracked and loose concrete on stoops; thresholds improperly repaired, in violation of MHC § 18-95.

- 4a/4b) Exterior windows in unit 40b leaking rainwater causing interior ceiling and wall to be damaged, in violation of MHC § 18-72 and § 18-73.
- 5) Water intrusion into basement unit causing carpeting to grow mold, in violation of MHC § 18-72.
- 6) Egress stairways without handrails in unit 40b, in violation of MHC § 18-95.
- 7) Required egress path in unit 40b unsafe or unusable, in violation of MHC § 18-95.
- 8) Unreasonable quantities of accumulated and stored materials on premises, in violation of MHC § 18-96.
- 9) Path of egress from rear exit of unit 40b is obstructed or otherwise unsafe, in violation of MHC § 18-95.
- 10) Light in closet at the rear of unit 40a is hanging from the wall by an exposed wire and does not work, in violation of MHC § 18-85.
- 11) Unit 42 has construction that was never completed with loose plaster or sheetrock mud present, in violation of MHC § 18-72.
- 12) Plumbing drain not connected and maintained in good working order in unit 42, staining the ceiling in unit 40b, in violation of MHC § 18-79.
- 13) Alarm units in unit 42 not talking to each other, in violation of MHC § 18-99.
- 14) Electrical outlets throughout the building missing cover plates; thermostat covers missing in unit 42, in violation of MHC § 18-85.

- 15) Hot water radiator baseboards in all units missing, damaged, or dirty, in violation of MHC § 18-86.
- 16) Tears and runs in carpets, paint stains, in violation of MHC § 18-72.
- 17) Electrical appliance installed or maintained incorrectly; specifically the dryer vents are clogged with lint and a flexible hose is not acceptable, in violation of MHC § 18-85.
- 18) Unpainted plywood on property's exterior, in violation of MHC § 18-71.
- 19) Fire alarm system not maintained in proper operating condition, in violation of MHC § 18-98.
- 20) Expiring inspection tags on the property's heating units, in violation of MHC § 18-86.
- 21) Paint chips found in outdoor areas of pre-1978 rental housing, in violation of MHC § 18-112.
- 22) Plumbing drain with obstruction, leak, or defect, in violation of MHC § 18-79.
- 23) Numerous holes, cracks, gouges, dents, and stains in sheetrock throughout all units in the building, in violation of MHC § 18-72.
- 24) Exterior windowpanes on two skylights in unit 40a appear broken; inner pane only intact, in violation of MHC § 18-73.
- 25) Garbage, trash, recycling, or debris in the yard and around the dumpster; inadequate recycling receptacle for a 3-unit building, in violation of MHC § 18-111.

3. Petitioner Soon Kwon appealed Mr. Ahonen'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. 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.

5. Two of petitioner's appeals were first heard by the Board at a hearing on March 7, 2016. At the conclusion of that hearing, 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.

6. 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 William Ward and various minimum housing inspectors were also present, along with Assistant City Attorney Eugene Bergman.

7. The full Board reconvened for a hearing on this and other matters on May 2, 2016. At the hearing, 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. 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. 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**

8. Prior to reaching the substance of petitioner’s appeal, the Board must address various threshold issues raised by both parties 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; (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; and (3) the City argued that violations cited under the MHC’s “Fire Safety Requirements,” see §§ 18-94 – 18-101, should be heard by the Department of Public Works, rather than this Board.

9. 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.

10. 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 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.

11. Additionally, the Board agrees with the City that appeals from violations cited under the MHC's "Fire Safety Requirements," see §§ 18-94 – 18-101, are properly within the jurisdiction of the Department of Public Works. The state vested municipalities with the authority to establish a minimum housing code and housing board of review under 24 V.S.A. § 5003 and § 5005, respectively. The state's statutory language goes on to set forth that when, as in Burlington, a minimum housing code is established, any person aggrieved by an order issued by the enforcing officer may appeal the order to the housing board of review. See 24 V.S.A. § 5005(b)(1). Burlington's MHC includes the so-called "Fire Safety Requirements" and, as such, the Board acknowledges that applicable statutory language under state law can be read as extending the Board's jurisdiction to hear appeals from violations cited under these requirements. However, the Board's authority is further delineated within the MHC itself. Therein, the MHC expressly requires that appeals from violations cited under the "Fire Safety Requirements" be heard by the Department of Public Works. See MHC § 18-94; see also id. § 18-42(b). It is not the place of this Board to extend its jurisdiction beyond that set forth under the MHC. Moreover, the Board notes that the enacting provisions of relevant state law further state that the statutory chapter "shall be construed most favorably to municipalities, its intention being to give them the fullest and most complete powers possible concerning the subject matter hereof." 24 V.S.A. § 5009. Under these circumstances, the Board declines to exercise jurisdiction over items 2, 3, 6, 7, 8, 9, 13, and 19 which involve alleged violations of "Fire Safety Requirements."

## **FINDINGS OF FACT**

12. As is applicable to this matter, with the exception of matters related to “Fire Safety Requirements,” 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.” Id. § 18-42(d).

13. 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, 4a, 5, 15, 18, 20, 24, and 25. 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.<sup>1</sup> The other items will be addressed as they appear in the order.

14. As regarding item 4b, the Board agrees that signs of water damage are still present along the interior ceiling and wall surrounding the north side windows in unit 40b, in violation of MHC § 18-72.

15. With respect to item 10, the evidence presented at hearing indicates that to the extent the light in the rear closet of unit 40a was ever hanging from the wall by an exposed wire, the situation has been addressed. The Code Enforcement Office argues that the light remains out of compliance with the MHC as the fixture plugs into a standard outlet, rather than being hardwired. However, the evidence does not sufficiently support this contention. Because the Board concludes that the initially cited violation has been remediated, there is no relief to be ordered and the Board otherwise declines to issue a decision with respect to item 10.

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<sup>1</sup> 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.



16. As regarding item 11, the Board agrees that there are areas of the subject property with what appears to be unfinished construction, including loose plaster or exposed sheetrock mud present. The Board concludes that this is a violation of MHC § 18-72.

17. Item 12 involves alleged plumbing leaks in unit 42 that appear to have caused water damage to the floor of that unit and the ceiling of unit 40b below. Whereas the evidence at hearing indicated that any water leaks have been fixed since the issuance of the minimum housing order, the evidence further demonstrated that extensive water damage still exists. To properly repair the plumbing leaks, petitioner must also repair any associated water damage. Accordingly, the Board concludes that item 12 properly sets forth a violation of MHC § 18-79.

18. Item 14 sets forth that electrical outlets and thermostats throughout the subject property are missing cover plates. The Board's factual review supports a finding that some electrical outlets are missing cover plates, in violation of MHC § 18-85.

19. Under item 16, petitioner was cited for tears, runs, and paint stains on various carpets throughout the subject property. The Board certainly agrees that certain carpets are showing signs of significant wear and tear and strongly recommends their replacement. However, the Board views this issue more as a cosmetic deficiency than a violation of the minimum health and safety standards outlined under the MHC. Accordingly, the Board is unable to conclude that a violation exists under item 16.

20. Under item 17, the Code Enforcement Office cited petitioner for using flexible hosing to ventilate dryer units at the subject property. At hearing, the Code Enforcement Office presented evidence from the dryer's manufacturer indicating that flexible hosing is not a proper means of ventilation. Indeed, the evidence further demonstrated this deficiency through, among other things, the present of burn marks in the flexible hosing utilized by petitioner. Accordingly, the property remains in violation of MHC § 18-85.

21. As regarding item 21, 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 contends 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 outdoor areas of the property free from visible paint chips. To the extent petitioner wishes to be exempt from lead-based paint compliance activities, he must submit a copy of a state-certified inspector’s written report showing the dwelling to be free of lead-based paint. See id.

22. Item 22 cites petitioner for plumbing drains in the basement with an obstruction, leak or defect. The evidence presented at hearing indicates that plumbing issues remain at the subject property. This finding is supported by, among other things, the presence of water damage and a green basin under the basement’s kitchen sink to catch water backups.

23. Item 23 cites petitioner for numerous holes, cracks, gouges, dents, and stains in sheetrock throughout all units at the subject property. The evidence presented at hearing supports this finding. At hearing and in the minimum housing order, the Code Enforcement Office argues that repairs to damaged sheetrock must be made in a “workmanlike” manner. The Code Enforcement Office cited to the section of the MHC requiring that “[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 argued 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 must read the MHC in its entirety, though, and is bound to issue 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 the property’s sheetrock must be repaired as a “skilled craftsman” would.

**ORDER**

Accordingly, it is hereby ORDERED:

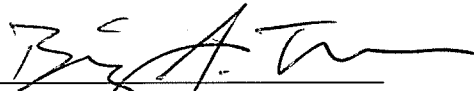
24. Item 16, as set forth in the minimum housing order dated January 4, 2016, is

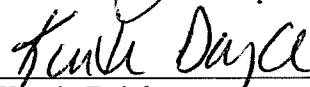
**REVERSED.**

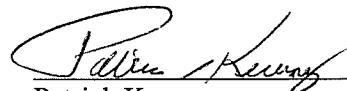
25. The findings and required remedies for items 4b, 11, 12, 14, 17, 21, 22, 23 are hereby incorporated into this Decision and Order. This Decision and Order shall replace and supersede the minimum housing order dated January 4, 2016. The Code Enforcement Office shall schedule items 4b, 11, 12, 14, 17, 21, 22, 23 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.

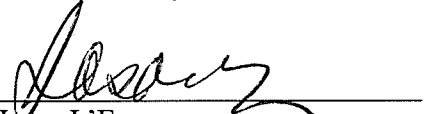
DATED at Burlington, Vermont this 30<sup>th</sup> day of June, 2016.

CITY OF BURLINGTON  
HOUSING BOARD OF REVIEW

  
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Ben Traverse

  
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Kirstin Daigle

  
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Patrick Kearney

  
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Jason L'Ecuyer