



HOUSING BOARD OF REVIEW

City of Burlington

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Burlington, Vermont 05401
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**HOUSING BOARD OF REVIEW
CITY OF BURLINGTON**

NOTICE OF DECISION

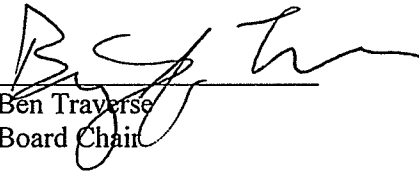
Enclosed is a copy of the "Findings of Fact, Conclusions of Law and Order" of the Burlington Housing Board of Review.

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
 41 SOUTH WILLARD STREET) 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 41 South Willard Street, in the City of Burlington.
2. On November 13, 2015, Minimum Housing Inspector Tim Ahonen conducted an inspection of the premises. By order dated January 8, 2016, Mr. Ahonen set forth 32 alleged violations:
 - 1) Bathroom floor in first floor rear unit not constructed and maintained impervious to water, in violation of MHC § 18-72.
 - 2) Interior equipment not maintained in sound, sanitary and in good repair; many replacement doors not painted or stained, in violation of MHC § 18-72.
 - 3) Stairway not maintained in sound condition and good repair; rough, splintered wood on handrails in rear porch, in violation of MHC § 18-74.
 - 4) Electrical equipment installed or maintained incorrectly; outlets damaged, in violation of MHC § 18-85.

- 5) Deteriorated painted surfaces found on more than 1 square foot (sf)(aggregate), in violation of MHC § 8-112 (1), (2).
- 6) Lead Paint EMP certification not provided to the City, in violation of MHC § 18-112.
- 7) Garbage, trash, recycling or debris in the yard, in violation of MHC § 18-111.
- 8) Interior equipment not maintained in sound, sanitary, and in good repair; splintered door jamb in second floor front unit, in violation of MHC § 18-72.
- 9) Unsanitary condition in dwelling unit; cobwebs, dirty window wells, and property not cleaned at tenant turnover, in violation of MHC § 18-106.
- 10) Unreasonable quantities of accumulated and stored materials on premises; cellar packed with disordered heaps of goods, in violation of MHC § 18-96.
- 11) Peeling interior paint in first floor bedroom and bathroom, in violation of MHC § 18-72.
- 12) Exterior wall condition admits rain or dampness; siding rotting on southwest corner where gable joins the wall, in violation of MHC § 18-71.
- 13) Floor not maintained in sound, sanitary, and in good repair; rugs near front and rear doors are worn out with ragged edges at rear, in violation of MHC § 18-72.
- 14) Defective heating equipment; baseboard in first floor bathroom is heavily damaged, in violation of MHC § 18-86.

- 15) Heating to adequate temperature in all rooms causes overheating in some areas; one unit gets down to the 50-degree range while another unit gets above 80 degrees, in violation of MHC § 18-86.
- 16) Interior wall/ceiling not maintained in sound, sanitary, and in good repair; plywood patches layered on interior hallway in first floor unit, in violation of MHC § 18-72.
- 17) Interior wall/ceiling not maintained in sound, sanitary, and in good repair; dryer closet back wall sheetrock not attached to studs, and not painted or finished, in violation of MHC § 18-72.
- 18) Floors not in sound condition and repair; surface uneven, and damaged or unsanitary gaps/holes under dryer closet that lead to cellar, in violation of MHC § 18-72.
- 19) Kitchen floor not constructed and maintained impervious to water in the first floor unit, in violation of MHC § 18-72.
- 20) Kitchen counters/cabinets falling apart; damaged surfaces, in violation of MHC § 18-72.
- 21) Exterior door pane cracked, broken, or absent; rear door to first floor unit missing glass pane, in violation of MHC § 18-73.
- 22) Unsafe condition of stairway; front porch steps worn out, sagging and separating from porch, in violation of MHC § 18-74.
- 23) No inspection tag on heating unit, in violation of MHC § 18-86.
- 24) Interior wall/ceiling with cracked or loose plaster; cracks, holes, and other damage on interior walls throughout the property, in violation of MHC § 18-72.
- 25) Dwelling infested with insects, rodents, or other pests; pigeons living in spaces inside rear stairway, in violation of § 18-107.

- 26) Handrail damaged, unstable, or otherwise unsafe; section of rear stairway handrail is broken off of building, in violation of MHC § 18-74.
- 27) Stair treads or risers worn, broken, warped, or loose; 4 stair treads missing on rear stairway, one loose, and a fifth damaged, in violation of MHC § 18-74.
- 28) Exterior wall condition admits rain or dampness; unpainted plywood exterior walls around entrance door to second floor unit, in violation of MHC § 18-71.
- 29) Floors not in sound condition and repair, surface uneven, damaged, or unsanitary; uneven floors where different materials meet, in violation of MHC § 18-72.
- 30) Exterior window does not fit frame and is not weather-tight; storm window on second floor unit, in violation of MHC § 18-73.
- 31) Smoke/CO detectors do not meet required standards, in violation of MHC § 18-99.
- 32) Path of egress is obstructed or otherwise unsafe; third floor egress window has broken off crank and cannot be opened, in violation of MHC § 18-95.

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 10, 31, and 32, as outlined above, which involve alleged violations under MHC §§ 18-95, 18-96, and 18-99.

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, 2, 3, 4, 6, 8, 11, 14, 17, 18, 20, 21, 23, 26, 27, 28, 29, and 30. 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.¹ The other items will be addressed as they appear in the order.

14. As regarding item 5, the Board finds that multiple painted surfaces at the subject property, well in excess of more than 1 square feet, are in a deteriorated condition, in violation of MHC § 18-112.

15. As regarding item 7, based on the evidence presented, the Board is unable to conclude that any garbage, trash, recycling, or other debris is present in the subject property's yard to an extent that warrants a citation under MHC § 18-111. At hearing, the Code Enforcement Office made repeated reference to a "broken" charcoal grill that has consistently appeared in the property's yard over the course of multiple inspections. Petitioner argued that the grill is not broken and, in fact, is available for tenant use. Broken or not, however, the Board declines to find that this single item exists in violation of the MHC.

16. With respect to item 9, the Board agrees that the evidence presented supports a conclusion that certain common areas at the subject property have accumulated a significant amount of dirt, cobwebs, and other debris, in violation of MHC § 18-106. The Board further agrees with the argument made by the Code Enforcement Office that petitioner was and is required to clean these areas at the time of each tenant turnover. See MHC § 18-112(h)(4).

17. Item 12 involves rotting exterior siding on the southwest corner of the property, where the wall meets the gable. The Board finds that the siding remains in a rotted condition, in violation of MHC § 18-71.

¹ 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.

18. Under item 13, petitioner was cited for rugs leading up to the front and rear doors of the property, which are worn out with ragged edges. The Board certainly agrees that the rugs are significantly worn 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 13.

19. As regarding item 15, the evidence presented by the parties at hearing was conflicting as to the extent to which the subject property's heating system is deficient. At the time of the Board's site visit, weather conditions were warm and the heating system was shutoff, meaning the Board was unable to review the issue at the time of the visit. The weight of the evidence favors a finding that the property's heating system is failing to sufficiently maintain an adequate temperature throughout the dwelling. However, because of the conflicting nature of the evidence before it, the Board does not view the repair or replacement of the property's heating system to be a proper remedy at this time. Rather, as set forth in the below order, if petitioner wishes to avoid having to repair or replace the property's heating system following a future reinspection, he must obtain and present a detailed, independent verification from a third-party professional indicating that the heating system is sufficiently heating the property. The Code Enforcement Office will then be in a better position to determine what, if any, precise remedial measures are necessary.

20. Item 16 involves a citation for raw plywood patches layered over the first floor interior hallway. The Board agrees that this condition exists and concludes that it is a violation of MHC § 18-72.

21. As regarding item 19, the Board also agrees that the kitchen floor is not constructed and maintained in way that is impervious to water and other liquids, in violation of MHC § 18-72.

22. Item 22 relates to the stairway leading up to the property's front porch. There is no dispute that at one point in time, certain stairs were sagging and separating from the porch. Some steps also exhibit significant wear and tear. The parties are also in agreement that petitioner has since taken temporary remedial steps by propping up the sagging steps through the placement of small wooden pieces at various places along the stairway. These pieces have been painted to match the color of the stairway.

The Code Enforcement Office argued that notwithstanding petitioner's efforts to fix the stairway, "[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 craftsperson. 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 agrees with the Code Enforcement Office, though, and concludes that a "skilled craftsperson" would not have left the front stairway in its current condition. Petitioner must act to finish his repairs in a "skilled manner."²

23. Under item 24, the Code Enforcement Office alleged that virtually every room in the subject property has various cracks, holes, and other damage in the walls and ceilings. The Board agrees that a number of interior walls and ceilings are in disrepair, in violation of MHC § 18-72.

24. Under item 25, the Code Enforcement Office alleged that pigeons are roosting in the exterior rear stairway, thereby violating MHC § 18-107, which generally requires that property owners exterminate any insects, rodents, or other pests whenever such infestation exists. Certainly, pigeons would fall under the definition of "other pests." Moreover, whereas no pigeons were present at the time of the Board's site visit, the testimony of Code Enforcement officials and the presence of visible bird droppings along the rear stairway support a finding of an infestation. However, as outlined in the below

² At hearing, petitioner voiced concern that if he is required to complete more extensive repairs to the stairway, he will effectively be required to replace the entire stairway with a staircase in compliance with current building codes, thereby infringing upon the historical nature of the subject property. These are not issues for the Board to consider, though, and petitioner should instead raise any concerns with appropriate City officials in the process of repairing the stairway.

order, the Board will modify the Code Enforcement Office's order to clarify that petitioner must take remedial steps not only towards eradicating any current infestation but also towards preventing any future issues.

ORDER

Accordingly, it is hereby ORDERED:

25. Items 7 and 13, as set forth in the minimum housing order dated January 8, 2016, are **REVERSED**.

26. The findings and required remedies for items 5, 9, 12, 16, 19, 22, and 24 are hereby incorporated into this Decision and Order.

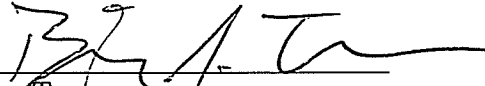
27. The findings for items 15 and 25 are also incorporated into this Decision and Order. For item 15, regarding the subject property's heating system, the Board modifies the remedy to require that petitioner obtain and present to the Code Enforcement Office a detailed, independent verification from a third-party professional indicating that the heating system is sufficiently heating the property.³ For item 25, regarding the property's pigeon infestation, the Board modifies the remedy to more specifically require that petitioner take remedial measures to ensure pigeons are generally unable to roost in the rear stairway, in addition to exterminating any current infestation.

28. This Decision and Order shall replace and supersede the minimum housing order dated January 8, 2016. The Code Enforcement Office shall schedule items 5, 9, 12, 15, 16, 19, 22, 24, and 25 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.

³ If petitioner obtains such verification and the Code Enforcement Office has good faith reasons to doubt its veracity, it may still cite the heating system as a violation of the MHC.

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

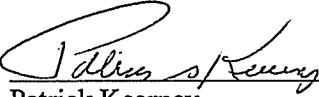
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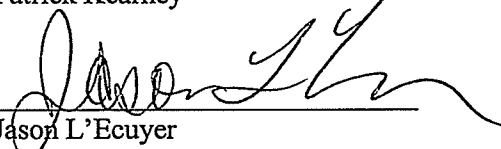
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