



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
 66-68 SOUTH UNION STREET) 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 66-68 South Union Street, in the City of Burlington.
2. On November 20, 2015, Minimum Housing Inspector Ted Miles conducted an inspection of the premises. By order dated February 19, 2016, Mr. Miles set forth 18 alleged violations:
 - 1) Unsound or unsanitary roof condition; roof leaks into bathroom of unit 4 upstairs, in violation of Minimum Housing Code (“MHC”) § 18-71.
 - 2) Deteriorated painted surfaces found on more than 1 square foot; exterior trim needs painting, in violation of MHC § 18-112(a)(1), (2).
 - 3) Rubbish, junk, refuse, garbage, metal or recyclables in basement area, in violation of MHC § 18-106.
 - 4) Plumbing drain with obstruction, leak or defect in basement, in violation of MHC § 18-79.

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) Electrical appliance installed or maintained incorrectly; plug missing from junction box, in violation of MHC § 18-85.
- 6) Plumbing facilities and fixtures not provided and maintained; plumbing leak on south side of basement, in violation of MHC § 18-78.
- 7) Path of egress is obstructed or otherwise unsafe, debris at top of stairs to basement not allowing door to open fully, in violation of MHC § 18-95.
- 8) Exterior door not constructed and maintained weather-tight; door sweep at front door to unit 1 worn or missing, in violation of MHC § 18-73.
- 9) Garbage, trash, recycling or debris in the yard at rear porch, in violation of MHC § 18-111.
- 10) No evidence of compliance with lead paint essential maintenance practices, in violation of MHC § 18-106.
- 11) Roof conditions or defects might admit rain or roof drainage; roof leak into unit 2 in bedroom and bathroom, in violation of MHC § 18-71.
- 12) Exterior door pane cracked, broken or absent; rear door panel has crack in panel exposing light and air, in violation of MHC § 18-73.
- 13) Plumbing facilities and fixtures not provided and maintained; toilet tank cover broken, in violation of MHC § 18-78.
- 14) Interior door pane cracked, broken or absent; glass on bedroom door to unit 3 cracked, in violation of MHC § 18-73.
- 15) Defective heating equipment; cover on baseboard unit missing in kitchen, in violation of MHC § 18-86.
- 16) Electrical wiring installed or maintained incorrectly; outlets in living room not working, in violation of MHC § 18-85.

17) Roof conditions or defects might admit rain or roof drainage; potential roof leak at rear, causing water protrusion into unit 4 upper hallway, in violation of MHC § 18-71.

18) Electrical equipment installed or maintained incorrectly; outlet cover missing from side of heating unit in living room to unit 4, in violation of MHC § 18-85.

3. Petitioner Soon Kwon appealed Mr. Miles's order in its entirety by letter dated February 24, 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. Officials from the Code Enforcement Office, including Director William Ward, 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 the subject property, 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; (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.

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. 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.

13. 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. Statutory language goes on to state 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 item 7, as outlined above, which involves an alleged violation under MHC § 18-95.

FINDINGS OF FACT

14. 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).

15. 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, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, and 18. 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.² The other items will be addressed as they appear in the order.

16. As regarding item 2, the Board finds that the exterior trim of the subject property involves deteriorated painted surfaces of more than 1 square foot, in violation of MHC § 18-112.

² 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.

17. With respect to item 3, the Board notes that whereas the basement is certainly cluttered with debris, the area is inaccessible to the property's tenants. The door leading down to the basement is regularly locked, and the Board credits petitioner's testimony that no tenant has access to a key. Under MHC § 18-106, petitioner is required to maintain "the shared or public areas of the dwelling unit or units or yard in a clean and sanitary condition." The subject property's basement is not a "shared or public area." Therefore, the Board must reverse violation outlined under item 3.

18. Item 11 involves alleged leaks in the roof above unit 2. The Board finds that water damage is present on portions of the unit's ceiling, indicating that water is leaking through the property's roof, in violation of MHC § 18-71.

ORDER

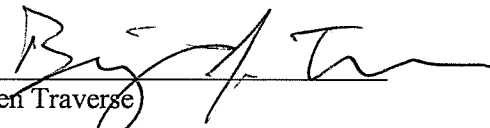
Accordingly, it is hereby ORDERED:

19. Item 3, as set forth in the minimum housing order dated February 19, 2016, is **REVERSED**.

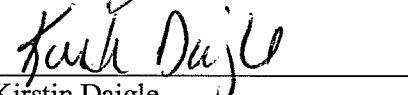
20. The findings and required remedies for items 2 and 11 are hereby incorporated into this Decision and Order. This Decision and Order shall replace and supersede the minimum housing order dated February 19, 2016. The Code Enforcement Office shall schedule items 2 and 11 for reinspection no earlier 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.

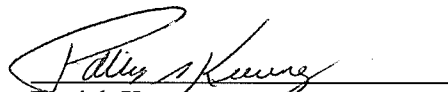
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Ben Traverse



Kirstin Daigle



Patrick Kearney