

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Neil Mack Fleming and Melanie Fleming
Appeal No. 09-9

Hearing Date: January 22, 2010

DECISION OF THE REVIEW BOARD

I. PROCEDURAL BACKGROUND

The State Building Code Technical Review Board ("Review Board") is a Governor-appointed board established to rule on disputes arising from application of the Virginia Uniform Statewide Building Code ("USBC") and other regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. Enforcement of the USBC in other than state-owned buildings is by local city, county or town building departments. See § 36-105 of the Code of Virginia. An appeal under the USBC is first heard by a local board of building code appeals and then may be further appealed to the Review Board. See § 36-105 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.

II. CASE HISTORY

Neil Mack Fleming and Melanie Fleming (the "Flemings") appeal the refusal of the Dickenson County USBC official (the "building official") to issue a certificate of occupancy under the USBC for their newly constructed home, located at 493 Rose Ridge.

The building official's decision not to issue the certificate of occupancy was based on the conclusion that the roof of the Flemings' home was too close to a high voltage electrical transmission line (the "transmission line") owned by the Appalachian Power Company and located on the Flemings' property by easement.

During the construction of the Flemings' home, in 2008, the building official questioned whether the placement of the home on the easement for the transmission line was proper. The Flemings advised the building official that they had been in touch with Appalachian Power Company and encroachment into the easement was permitted provided there was proper clearances to the transmission line.

The building official met with a representative of Appalachian Power Company, but was unable to confirm that the placement of the Flemings' home and its proximity to the transmission line complied with standards applying to the power company.

The building official received correspondence in August of 2008 from Appalachian Power Company confirming that the roof of the home was too close to the transmission line and that they were in negotiations with the Flemings concerning a solution.

By letter dated December 4, 2008, the building official informed the Flemings that the USBC certificate of occupancy could not be issued for their home until the roof was modified to achieve the required clearance from the transmission line.

At the hearing before the Review Board, Melanie Fleming testified that she asked Dickenson County representatives what her rights were if disagreeing with the building official's decision. Ms. Fleming stated that no one informed her of her right to appeal the decision to the Dickenson County Local Board of Building Code Appeals ("County USBC board").

Ms. Fleming further testified that after further inquiry, she was given the name of the Chairman of the County USBC board and in contacting him, was informed that she had ninety days to appeal the building official's decision.

The Flemings then filed an appeal with the County USBC board by letter dated January 22, 2009. The County USBC board heard their appeal in March of 2009 and ruled to uphold the building official's decision.

The Flemings then filed a timely appeal of the County USBC board's decision to the Review Board.

In processing the appeal to the Review Board, Review Board staff identified an issue of whether the Flemings' appeal to the County USBC board was timely. The USBC provisions for appeals when a building official's decision is made requires appeals to be filed within 30 days. The Flemings' appeal was filed approximately 49 days after the decision of the building official.

Review Board staff informed the parties of past cases heard by the Review Board where this issue was addressed. Where the local building official agrees to waive the timeframes for appeal, appeals are accepted under the premise that the building official is free to make a new decision at any time, thereby resetting the required timeframes.

The building official, through his legal counsel, responded that the building official declined to waive the timeframe.

The Flemings' appeal was set for hearing before the Review Board with a preliminary issue concerning the timeframes for appeal identified for resolution.

The parties were given opportunity to submit additional documents for the record and written arguments prior to the hearing before the Review Board. The Flemings' and their legal counsel and the building official's legal counsel were present at the hearing before the Review Board.

III. FINDINGS OF THE REVIEW BOARD

Concerning the issue of timeliness, the Review Board finds that the Flemings made a good faith attempt to file a timely appeal. Ms. Fleming contacted County staff but was not given the appropriate information. Finally, when Ms. Fleming contacted the Chairman of the County USBC board, she was informed of an incorrect timeframe for filing an appeal.¹ The Review Board therefore declines to dismiss the appeal as untimely.

Concerning the merits of the appeal, USBC § 116.1 states in pertinent part:

"[A] certificate [of occupancy] shall be issued after completion of the final inspection and when the building or structure is in compliance with this code and any pertinent laws or ordinances, or when otherwise entitled."

One of the purposes of this provision is to prevent a USBC certificate of occupancy from being issued should there be a law or ordinance which has not been complied with which would affect the use of a building. Such is the case here. Appalachian Power Company informed the building official that the roof of the Flemings' home was too close to the transmission line, thereby creating a violation of the laws the power company is bound by, specifically § 56-46.2 of the Code of Virginia, which references

¹The USBC in effect when the Flemings' building permit was issued permitted 90 days to file an appeal; however, the USBC provision for appeals changed to 30 days effective May 1, 2008 and the building official's decision was not made until December 4, 2008.

electrical standards addressing the distances necessary between buildings and overhead electrical transmission lines.

Accordingly, the building official was correct in withholding the certificate of occupancy until this situation is resolved to the satisfaction of the power company.

IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the decision of the building official to be, and hereby is, upheld.

/s/*

Chairman, State Technical Review Board

4/16/10

Date Entered

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Vernon W. Hodge, Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

***Note: The original signed final order is available from Review Board staff.**