

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Tidewater Fibre Corporation
Appeal No. 06-1

Decided: July 21, 2006

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 Statewide Fire Prevention Code (the "SFPC") and other regulations of the Department of Housing and Community Development. Enforcement of the SFPC in other than state-owned buildings is by local city, county or town fire prevention departments, when such localities choose to enforce the code. See § 27-98 of the Code of Virginia. An appeal under the SFPC is first heard by a local board of appeals and then may be further appealed to the Review Board. (Ibid.) The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.

II. CASE HISTORY

Tidewater Fibre Corporation ("TFC"), a recycling company with operations in Chesapeake, Virginia, appeals the conditional approval of a modification request under the SFPC by the City of Chesapeake Fire Marshal's Office (the "fire official").

TFC's Chesapeake operations are located at 1958 Diamond Hill Road where it has been in business for approximately 30 years. The plant operations are to receive recyclable materials including plastic, paper, bottles, aluminum cans and glass; separate and sort the materials using conveyors, screens and sorting equipment, and to bale the separated materials for shipping. Currently there are five buildings at the site, one of which is a small office building. The other four buildings are metal buildings, one functioning as a vehicle maintenance facility and dispatch office, two used for the sorting operations and the other used for storage, packing and shipping.

In July of 2004, there was a fairly significant fire in the main sorting building. After investigation, the fire official cited a number of SFPC violations and revoked their operational permit as a waste material handling facility under the SFPC.

Ongoing negotiations between TFC and the fire official resulted in the temporary approval for TFC to continue operations with certain limitations and conditions.

In September of 2005, the fire official informed TFC of a determination that the paper it recycled was considered wastepaper and fell within the definition of "combustible fiber" under the SFPC. The fire official based the determination on an advisory opinion received from the staff of the International Code Council ("ICC"), the organization which develops the nationally recognized model code incorporated as part of the SFPC, and on the review of previous model code provisions from the Building Officials and Code Administrators ("BOCA") model codes, which were used in the state's codes prior to the ICC organization's formation.

In October of 2005, the fire official cited new violations at the facility for noncompliance with the provisions of the SFPC relating to combustible fiber.

After a meeting with the fire official to discuss options for compliance with the code, TFC submitted a modification request to the fire official to install a number of fire safety systems and to implement operational conditions as a method of complying with the spirit and intent of the code under the modification provisions of the SFPC.

The fire official responded by letter in November of 2006 granting approval of the modification request contingent upon complying with twenty-three stipulated additional safety enhancements.

TFC initially agreed to the additional safety enhancements, but later filed an appeal of the fire official's response to the modification request seeking relief from certain operational limitations and conditions in the stipulations. The basis of TFC's appeal was that the fire official incorrectly determined that the paper products TFC recycles fall within the definition of combustible fiber.

TFC's appeal was heard by the City of Chesapeake Local Board of Fire Prevention Code Appeals (the "City appeals board") in January of 2006. The City appeals board ruled to deny TFC's appeal citing as the reason for the denial its agreement with the fire official that wastepaper is a combustible fiber.

TFC then further appealed to the Review Board in February of 2006.

In March of 2006, in processing the appeal to the Review Board, Review Board staff conducted an informal fact-finding conference attended by representatives of TFC, the fire official and their respective legal counsel. Subsequent to the conference, Review Board staff drafted a document outlining the appeal and the parties were given an opportunity to respond to the staff document and to submit additional documents and written arguments to the Review Board in preparation for a hearing.

The Review Board heard the appeal in July of 2006 and the hearing was attended by all parties and their legal counsel.

III. FINDINGS OF THE REVIEW BOARD

The fire official argues that TFC's appeal should be dismissed since (i) the modification request was approved by the fire official rather than denied, (ii) TFC did not appeal the fire official's response to the modification request, but instead only appealed the determination by the fire official that wastepaper is a combustible fiber, (iii) the fire official's determination that wastepaper is a combustible fiber is not, in and of itself, an application of the SFPC and therefore not something that may be appealed, and (iv) the City appeals board never heard the merits of the fire official's response to the modification request.

With respect to issue (i) above, the Review Board finds that the fire official's response to the modification request was tantamount to a refusal to grant a modification since in order for the request to be approved, TFC was required to comply with twenty-three stipulations which were above and beyond what TFC offered in the modification request.

With respect to issues (ii) and (iii) above, the Review Board finds that while TFC did state that its appeal was of the fire official's determination that wastepaper is a combustible

fiber, it also stated in its appeal letter to the City appeals board that it sought relief from the operational restrictions imposed by the fire official in response to the modification request.

With respect to issue (iv) above, the Review Board finds that TFC provided testimony to the City appeals board concerning the merits of the modification request and why it disagreed with the stipulations imposed by the fire official. In addition, the Review Board finds that the testimony at the City appeals board hearing indicates that the City appeals board members understood that the modification request, the classification of the facility as Group H3, F1 or S1 under the SFPC and the determination of whether wastepaper is a combustible fiber were all intertwined. Further, the Review Board notes that irrespective of whether the City appeals board specifically ruled on the fire official's refusal to grant the modification, appeals before the Review Board are in a proceeding de novo and the Review Board is not precluded from hearing that issue. See § 36-115 of the Code of Virginia and Strawbridge v. County of Chesterfield, 23 Va. App. 493, 499, 477 S.E.2d 789, 792 (1996).

With respect to the merits of TFC's appeal of the fire official's refusal to grant a modification, the Review Board finds as follows:

The fire official relies on a staff opinion from ICC concerning the International Fire Code (the "IFC"), the model code used in the SFPC, as the basis for the denial of the modification. The staff opinion essentially states that because the word "wastepaper" is included in the definition of the term "combustible fibers" in the IFC, any operation involving wastepaper must meet the requirements in the IFC applicable to combustible fibers.

The definition in question from the 2003 edition of the IFC, which is used in the current edition of the SFPC, is set out below:

"Combustible fibers. Readily ignitable and free-burning fibers, such as coca fiber, cloth, cotton, excelsior, hay, hemp, henequen, istle, jute, kapok, oakum, rags, sisal, Spanish moss, straw, tow, wastepaper, certain synthetic fibers or other like materials."

The modification provisions from the SFPC are also set out in pertinent part below:

"106.5. Modifications. The fire official may grant modifications to any provision of the SFPC upon application by the owner or the owner's agent provided the spirit and intent of the SFPC are observed and public health, welfare, and safety are assured.

Note: The current editions of many nationally recognized model codes and standards are referenced by the SFPC. Future amendments to such codes and standards do not automatically become part of the SFPC; however, the fire official should consider such amendments in deciding whether a modification request should be granted."

TFC argues that the wording of the definition includes only those products listed if they are in fibrous form rather than in whole form. In support of this argument, TFC notes that the definition was amended in the 2006 edition of the IFC and in the International Building Code (the "IBC"), the International Code setting standards for the construction of buildings. The 2006 IFC and IBC definition is set out below:

"Combustible fibers. Readily ignitable and free-burning materials in a fibrous or shredded form, such as coca fiber, cloth, cotton, excelsior, hay, hemp, henequen, istle, jute, kapok, oakum, rags, sisal, Spanish moss, straw, tow, wastepaper, certain synthetic fibers or other like materials. This definition does not include densely packed baled cotton." (Emphasis added.)

Since the modification provisions of the SFPC specifically note that a fire official should consider newer amendments to the model codes in deciding whether to grant a modification and in this case the newer definition clarifies that materials must be in fibrous or shredded form to be combustible fibers, the fire official's denial of the modification request is unreasonable.

Moreover, there is a fundamental flaw in the fire official's general application of the SFPC to TFC's facilities involving the statutory and regulatory relationship of the SFPC to the Virginia Uniform Statewide Building Code (the "USBC"), as outlined below.¹

In accordance with § 36-98 of the Code of Virginia, the USBC generally supersedes regulations of local governments and state

¹See also prior Review Board Appeal No. 99-16 (Appeal of Capitol Technigraphics Corporation).

agencies which relate to construction, reconstruction, alteration, conversion, repair, maintenance or use of structures and buildings. See also the definition of the term "building regulations" in § 36-97 of the Code of Virginia.

In the establishment of the SFPC, § 36-119.1 of the Code of Virginia provides that the USBC does not supersede the provisions of the SFPC that prescribe standards to be complied with in existing buildings and structures, provided that such regulations shall not impose requirements that are more restrictive than those of the USBC under which the buildings or structures were constructed. It further provides that subsequent alteration, enlargement, rehabilitation, repair or conversion of the occupancy classification of such buildings and structures shall be subject to the USBC.

The purpose of the SFPC in relation to existing buildings is only to require that the life safety and fire prevention and protection materials, devices and systems within the buildings be properly maintained. See also § 27-96 of the Code of Virginia and § 101.3 of the SFPC.

The SFPC also provides regulations for the unsafe storage, handling and use of substances, materials and devices, including fireworks, explosives and blasting agents, wherever located. See § 27-96 of the Code of Virginia and 101.3 of the SFPC. However, in accordance with §§ 36-98 and 36-119.1 of the Code of Virginia,

if the storage, handling and use of such substances, materials and devices is within buildings or structures, then the SFPC regulations are valid only to the extent that they do not affect the manner of construction of the building or structure. See also § 101.4 of the SFPC stating that any provision of the SFPC found to be in conflict with the USBC is invalid.

In applying the SFPC and the USBC to TFC's facilities, the USBC governs the initial construction of the buildings and any subsequent alterations, reconstruction or change of occupancy in the buildings and the SFPC governs the maintenance of the fire protection and prevention systems and devices which are present in the buildings. The SFPC also governs the storage, handling and use of substances and materials inside and outside of the buildings provided that such requirements do not affect the manner of construction of the buildings.

TFC's buildings were constructed as storage and factory uses under the USBC using the criteria established under the BOCA National Building Code (the "BOCA Code"), the model building code used as part of the USBC from 1973 until September of 2003. At the time TFC's buildings were built, no restrictions were present concerning the processing of paper which came in as part of recyclable materials. The BOCA Code did, in its 1978 to 1981 edition, identify the processing of paper in loose form and wastepaper sorting, shredding, storage or baling as a high hazard

use, not as a factory use. However, in the 1984 through 1996 BOCA codes, paper mills and paper products were included in the factory uses and the high hazard uses were identified not by products, but by definitions of materials, such as combustible dust, combustible fibers, combustible liquids, explosive materials, etc. The term "combustible fibers" in those codes included the term "baled wastepaper," but not just the word "wastepaper."

In addition, the BOCA Codes and the current International Codes contain a provision acknowledging that the use classifications have overlapping characteristics. In such cases, the codes provide that the enforcing agency is to classify a building in the category it most nearly resembles.

TFC's buildings, using the classification categories outlined in both the BOCA Code and the IBC, when looked at in whole, most nearly resemble the factory and storage use and do not fall within the high hazard category. The officials in charge of the USBC when TFC's buildings were constructed recognized this when they classified TFC's buildings as factory or storage, rather than as high-hazard use, even though there was some paper mixed in with other recyclable materials.

Accordingly, the SFPC only requires TFC's buildings to be maintained as they were originally approved under the USBC and since such original approval authorized the same processing

operations currently used by TFC, the SFPC may not be used to require alterations to TFC's operations.

Therefore, given all of the above, there is no basis for the denial of a modification request by TFC to voluntarily upgrade its facilities beyond that required by the USBC or the SFPC.

IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the fire official's denial of TFC's modification request to be, and hereby is, overturned.

The appeal is granted.

/s/*

Chairman, State Technical Review Board

Oct. 20, 2006

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.**