

VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD  
(REVIEW BOARD)

IN RE: Appeal of Anthony Grant Jr.  
Appeal No. 18-10

**DECISION OF THE REVIEW BOARD**

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 regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

Case History

In May of 2015 the City of Suffolk Department of Planning and Community Development (City), the department responsible for code enforcement of Part I of the 2009 Virginia Uniform Statewide Building Code (Virginia Construction Code or VCC), issued a final inspection and a subsequent Certificate of Occupancy to KEBCO Enterprises, Inc. (KEBCO), the licensed Class A contractor for a single family dwelling built at 4281 Cole Avenue in the City of Suffolk.

Anthony and Ashley Grant Jr. purchased the home from KEBCO in June of 2015. In June of 2016 the City issued a summons to KEBCO listing three violations one of which was, VCC Section M1401.3 "Improper sizing of the heating and cooling equipment and appliance, Differences between original information submitted and 2nd re-evaluation submitted".

In November of 2016 Mr. Grant filed an appeal of the enforcement action under the Virginia Construction Code to the City appeals board which was heard in January of 2017. The

City appeals board modified the City building official's decision concerning VCC Section M1401.3 (Equipment and appliance sizing) requiring additional testing; and chose not to render a decision.

Review Board staff conducted an informal fact-finding conference (IFFC) in April of 2017. At the conference it was determined that since the City appeals board had modified, and not upheld or reversed the City building official's decision on the sizing of the heating and cooling system, that issue would not be included in the issues for consideration by the Review Board. In that regard, staff explained to the parties that once the City building official made a determination on that issue, specifically whether the heating and cooling system was properly sized for the home, Grant could then choose whether to appeal the issue to the City appeals board.

Grant further appealed to the Review Board on March 2, 2017. The appeal was heard at the June 15, 2017 Review Board meeting; however, as agreed upon at the IFFC in April of 2017, the Review Board did not hear the issue related to M1401.3 (Equipment and appliance sizing) as the local board has not yet ruled on the issue.

On March 28, 2017, through a memorandum from the Assistant Director of Community Development to the Chairman of the City appeals board, the City determined the size of the heating and cooling system was sufficient. Grant appealed the decision to the City appeals board.

In November of 2017, the City appeals board heard Grant's appeal and ruled to uphold the Assistant Director of Community Development's decision that the heating and cooling system was sized appropriately. Mr. Grant did not receive notification of the meeting; therefore, the City appeals board re-heard Grant's appeal in April of 2018 and again ruled to uphold the City Assistant Director of Community Development's decision that the heating and cooling system was sized appropriately. Grant further appealed to the Review Board on June 26, 2018

Appearing at the Review Board hearing for the City of Suffolk were Stanley Skinner, Assistant Director of Community Development; Sam Adams, Inspector; and Kalli Jackson, Assistant City Attorney. Mr. Grant appeared at the hearing on behalf of the Grants.

#### Findings of the Review Board

The City filed a preliminary motion arguing that the case should be dismissed because the memorandum from the City building official to the Chairman of the City appeals board was not an application by the City building official, but rather a result of a request from the City appeals board. The City further argued that the appeal should be dismissed because the appeal was not properly before the board because the action related to the sizing of the HVAC system was not through a notice of violation, but rather through a summons for civil penalty in the City of Suffolk General District Court. The City also argued that the appeal should be dismissed because the appeal was untimely based on the date Mr. Grant received the decision of the City appeals board and the date he filed the appeal with the Review Board.

A. Whether or not the memorandum from the Assistant Director of Planning and Community Development to the Chairman of the City appeal board constitutes an enforcement decision by the City building official.

The City argued that the memorandum was not an enforcement decision of the City building official but rather was a result of a local appeals board hearing. The City further argued that the memorandum was a response to the request of the City appeals board to provide more information after re-studying the HVAC system numbers and to provide the City appeals board with a second opinion. Mr. Grant argued that the memorandum was a decision of the building official. The Review Board finds that the memorandum did constitute an application by the City building official.

B. Whether or not to dismiss the Grant's appeal as not properly before the Review Board since the only action required related to the sizing of the heating and cooling system was not

through a notice of violation issued by the building official, but rather through a summons issued to KEBCO for a civil penalty in the city of Suffolk General District Court, and whether or not the decision of the City appeals board should be vacated.

The City argued that the appeal was not properly before the Review Board because the action required related to the sizing of the HVAC system was not through a notice of violation issued by the building official, but rather through a summons issued to KEBCO for a civil penalty. The City further argued that this decision had been previously decided by the Review Board in the final order for Appeal No. 17-3 filed by the Grants in 2017. Mr. Grant argued that the appeal was properly before the Board because the summons was issued as a result of KEBCO's refusal to make the needed corrections to the HVAC system and that the City did not follow through with the summons to ensure the cited items were corrected. The Review Board finds that the City building official, in the memorandum to the City's appeal board, performed an intervening action related to the HVAC issue cited under VCC Section M1401.3, by restating and making the same determination indicated in the summons; therefore, making it appropriate to hear the appeal and not inconsistent with the decision of Appeal 17-3.

C. Whether or not the Grant's appeal should be dismissed as untimely and whether or not the decision of the City appeals board should be vacated

The City argued that Mr. Grant received a copy of the City appeals board decision on June 4, 2018 and did not file an appeal to the Review Board until June 26, 2018; therefore, the appeal was not filed within the 21 day deadline and is untimely. Mr. Grant argued that his attorney, Mr. Bell, received a copy of the City appeals board decision on June 6, 2018; therefore, the appeal was filed within 21 days and was timely. The City argued that it sent a copy of the decision to Mr. Bell, who represented Mr. Grant in other court proceedings, only as a courtesy. The City further argued that Mr. Grant filed the application to the City appeals board and represented himself at the City appeals board hearings; therefore, the date of record was when the decision was received by

Mr. Grant. The Review Board finds that the City created confusion by sending the decision to Mr. Bell, that because Mr. Grant was represented at the time the timeline should begin when his attorney received the copy, and further finds the appeal to be timely. Having ruled against the City's argument for procedural dismissal, the Board moved onto the arguments on merits.

- D. Whether or not to overturn the decision of the City building official and the City appeals board that a violation of VCC Section M1401.3 (Equipment and appliance sizing) does not exist concerning the sizing of the heating and cooling system.

The City argued that they relied on the design calculations provided by the HVAC contractor who installed the system, Wayne Able's Heating and A/C (Able's), the product ratings for the equipment that was installed in the home, and Able's testimony at the City appeals board hearing to make the decision of the adequacy of the system.

Mr. Grant argued that the HVAC system was not the correct size for the home and that a larger unit or a second unit was needed based on an inspection by a home inspector, the evaluation of the system by two other HVAC contractors that did not install the system, and the load calculations provided by a HVAC third contractor. The Review Board finds there to be insufficient information present to make an informed decision and remands the appeal back to the City appeals board for a better evaluation of the HVAC system.

#### Order

- A. Whether or not the memorandum from the Assistant Director of Planning and Community Development to the Chairman of the City appeal board constitutes an enforcement decision by the City building official.

The appeal having been given due regard, and for the reasons set out herein, the Review Board members order the decision of the City appeals board that the memorandum was an action of the City building official to be, and hereby is, upheld.

- B. Whether or not to dismiss the Grant's appeal as not properly before the Review Board since the only action required related to the sizing of the heating and cooling system was not

through a notice of violation issued by the building official, but rather through a summons issued to KEBCO for a civil penalty in the city of Suffolk General District Court, and whether or not the decision of the City appeals board should be vacated.

The appeal having been given due regard, and for the reasons set out herein, the Review Board members order the decision of the City appeals board that the appeal was properly before the Board to be, and hereby is, upheld.

C. Whether or not the Grant's appeal should be dismissed as untimely and whether or not the decision of the City appeal board should be vacated.

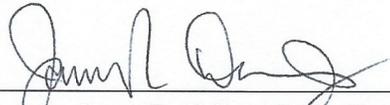
The appeal having been given due regard, and for the reasons set out herein, the Review Board members order the decision of the City appeals board that the appeal was timely to be, and hereby is, upheld.

D. Whether or not to overturn the decision of the City building official and the City appeals board that a violation of VCC Section M1401.3 (Equipment and appliance sizing) does not exist concerning the sizing of the heating and cooling system.

The appeal having been given due regard, and for the reasons set out herein, the Review Board members order the decision of the City appeals board that the HVAC system is properly sized to be, and hereby is, overturned.

#### Remand Order

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders this matter to be, and hereby is, remanded to the City appeals board for a better evaluation of the HVAC system based on the Manual S, J, and D calculations including all inputs to include but not limited to roof color, coefficient of shading, air changes per day, and insulated values of windows, doors, walls, ceilings and floors from the "as built" HVAC system conditions and calculations in order to make the determination as to the adequacy of the HVAC system within 60 days. The Review Board strongly suggests the City appeals board require this information from a third party HVAC contractor in addition to what may be provided by Able's.



Chairman, State Building Code Technical Review Board

Date entered: January 11, 2019

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 W. Travis Luter, Sr., 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.