



Board of Appeals
Tuesday, May 30, 2023, 4:30p.m.
Room 22, Parks & Recreation Center
312 Washington Street

AGENDA

- I.** Introduction of Board Members
- II.** Minutes of the previous meeting: November 9, 2022
- III.** New Business

Continued FBOA 22-01: Petitioner, Toby Tousley, of Keene, has filed a petition for an Appeal of a Fire Code Notice of Violation for property located at 160 Emerald St., TMP 583-034-000-000-000, which is in the Downtown Growth District. The Petitioner is appealing the violations from National Fire Protection Codes: NFPA 101: 12.2.5.1.3, 12.3.4.3.3, 12.2.5.2, 12.2.3.8, 7.4.1.2, 12.3.5.2, 12.2.2.2.3, NFPA 10, 7.1.1, NFPA 101, 7.10.1.2, NFPA 25, 3.3.133.1, NFPA 1: 4.4.3.2.3, 4.4.3.1.1, 4.4.3, 14.5.1.2, and 14.9.1.2.

- IV.** **Adjourn**

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City of Keene
New Hampshire

BUILDING & FIRE CODE BOARD OF APPEALS
MEETING MINUTES

Wednesday November 9, 2022 5:00 PM Miller-Vincent Room, Keene Public Library

Members Present:

Malcolm Katz, Chair
Steve Walsh
Donald Flibotte
Doug Brown

Staff Present

John Rogers, Building & Health Official
Corinne Marcou, Administrative Assistant
Donald Farquhar, Fire Chief
Meghan Manke, Fire Prevention Officer
Steven Dumont, Sr., Fire Prevention Officer

Members Not Present:

1) **Call to Order**

Chair Katz called the meeting to order at 5:05 PM.

2) **New Business**

Chair Katz opened the public hearing, asking for introductions from those present.

Mr. Rogers suggested that the Fire Chief present the violation letter to the Board, and then hear from the applicant, Mr. Tousley. As Chief Farquhar was to begin, Mr. Tousley interrupted for clarification as to the order of the hearing, stating that this was his appeal and he should present first. Mr. Flibotte stated that the Fire Chief has the opportunity to present to the Board information from the agenda packet. Mr. Tousley stated that he isn't sure if the Fire Chief would present new information that he isn't aware of, hence not able to defend himself. Mr. Brown stated that the Board understands a lot of time was put into the compiling the information from both Mr. Tousley and the Fire Chief, hence the reason to hear from each individual, with each having the appropriate time to speak. With that, Mr. Brown directed the Chief to begin.

Chief Farquhar stated that he will direct his presentation to the Board with what is in the document, and if he deviates from such, to please let him know. He continued that the document in front of the Board is a notice violation order to correct letter sent to Mr. Tousley, delivered in hand by a City of Keene Police Officer, establishing formal notice. The document takes into account three separate inspections that happened over a period of time and as a conclusion, with Fire Department's overall feeling of the general status of the building.

Chief Farquhar continued that he would provide a high overview for context for each violation as the document is quite lengthy. He stated that the first inspection done on April 14, 2022 was an

inspection for the casino, which is part of that property and part of the Fire Departments annual assembly permit inspections. The first run of code has to do with that inspection and the sprinkler report provided to the Fire Department at the time of that inspection.

Chief Farquhar stated the next section of the document begins with Fire Incident #22-007193. He stated that this incident occurred on the other end of the building when a motor vehicle accident that penetrated the structural walls of the building. Part of the assessment of that structural stability by the Fire Department, access was gained by that particular area. He continued that as Fire Chief, under the RSA, he is obligated to inspect under certain times, one of those times he is obligated to inspect is when there is notification of a potential fire code issue. That notification of a fire code issue is also something that the Fire Chief or one of the sworn Fire Fighters see during an incident. The Chief continued that the Fire Department inspected the area localized that they had access to in the affected area, which is a carpet shop. He explained that the pictures presented to the Board are associated with each violation. Broadly speaking, there was a large cluster of violations, such as exit lights were out, fire extinguishers expired, and many electrical cords run as permanent wiring, which the Chief explained that annually, are the top three causes of fires. That is of great concern. He continued that the content of the building is mostly carpets, which is mostly synthetics, which has a great amount of BTU's if they burn. He also explained that there were partial walls constructed that the carpet rolls were laying against, clearly impeding sprinkler heads. Chief Farquhar explained that when a sprinkler head discharges, it puts out an umbrella of water and anything in that discharge pattern is considered to be an obstruction. An obstructed sprinkler head is a non-functioning sprinkler head. The Chief continued that in this particular area, there were many combustibles and many items that burn at a very high heat rate, impeded sprinklers, expired fire extinguishers, and exit signs that were all deficient. The Fire Chief continued that with a building such as this one, the building owner is obligated to have some sort of program for monthly evaluation of exit signs and annual battery tests. He continued that when items such as these violations are so obvious, it speaks to a potential broader issue of where the building owner is non-compliant with those inspections. He continued that there might be other problems that are present.

The Fire Chief stated that the third inspection occurred in one of the tenant spaces in the building as an inspection of a residential resources, occurring on July 8, 2022. That inspection was required because that particular occupancy is licensed by the State of New Hampshire as an adult day care; requiring an annual inspection. The Chief explained that the Fire Department was asked by the tenant to conduct the inspection. To conduct that inspection, they needed access to the common hallway, which was the first time the Fire Chief had been in that part of the building, walking in the common hallway. It was during this time that the Fire Chief explained they viewed some pretty frank fire code violations that were very concerning. Violations such as exit signs were out and locks on fire doors, which is an extreme risk. Chief Farquhar continued that they also saw fire extinguishers not properly tested. He stated that going into the occupancy, during the inspection, ceiling tiles were viewed for an above ceiling inspection; they saw a lot of HVAC ductwork that was impeding sprinkler head access. The Chief explained that there was the HVAC ductwork, then the sprinkler system above that, which has two negative effects in a fire where the ductwork shields the sprinkler heads from the temperature from the fire, delaying the activation of the sprinkler system. Once the system is activated, the water will not hit the fire as designed.

Chief Farquhar continued that it looked like walls had been moved, which effects sprinkler head locations. He referred to the sprinkler system report, stating that the system had been inspected and there were a few minor issues, which could be resolved. The Chief continued that the largest issue with the sprinkler system is that the building has been modified over time and every time something is moved, such as moving a wall or adding an HVAC system, that changes the design of the sprinkler system. He stated that the sprinkler system is exactly as it was when it was owned by the previous occupant. The importance of permitting is if there were to have HVAC trunks installed, there would be a drawing of that work, and inspections, at which time the inspector would have notified the owner of the sprinkler heads being blocked. Fire Chief Farquhar continued that there had been three small slices of inspections on this building, with each one driving home the point that there are many unknowns in that building, there are a lot of occupants of the building. He continued that they believe there are at least two permitted assemblies occupying in the building. Chief Farquhar stated that there is no central fire detection system in the building, where this becomes very important is if someone is on the top floor of the building, and there is a raging fire below, that individual does not know the fire is happening. A building of this square footage needs to have a fire alarm system that notifies the occupants of a fire. Chief Farquhar gave the example of a mom with their children at the hair dressers on the second floor, and the wood working space is on fire, the building will burn adding smoke in the hair dressers with no one knowing until it is too late. He continued, that once smoke is seen, they need to get through corridors that are probably not code compliant, with a hodge podge of exit doors that may or may not be locked and exit signs that probably won't work. Chief Farquhar stated that it he and his colleagues have spent a lot of time researching and discussing this building as it is a dangerous building. He further stated that the central part of the violation document and the focus of this discussion, is that the fire code could only apply if the occupancies are known, what the firewall separation is, and if they know what the building is. The Fire Chief stated that he can't apply the fire code properly if he doesn't know what the fire separation is, if he doesn't know the exit discharge length is. He further stated that the request is to go through each violation one by one, but the heart of the matter was that through fire code, NFPA 1, the Fire Department has the authority to order Mr. Tousley, the property owner to hire a Fire Protection Engineer to do a complete building assessment. The Fire Chief stated that is the only meaningful way to move forward and that if this were not to happen there is the risk of misapplying a fire code and actions being taken that may not be needed, making it the cleanest place to start. Another benefit for Mr. Tousley, is with a complete fire protection review of the building, there are many ways to work around it. Fire code can only be waived or amended by one person and that is through the NH State Fire Marshall. Part of waiving a fire code is to offer equal level protection, such as with a long hallway, if there is a sprinkler system this makes an exchange. He continued that with a complex building that is so far down the road of bad when it comes to the fire code, it makes sense in a meaningful way to have a Fire Protection Engineer go through the building. In the end, the building will be safe; working with the Fire Protection Division of the Fire Department, where meaningful corrections can be made that will be accurate, defensible, and less expensive.

Chair Katz asked for questions for the Fire Chief. Mr. Brown asked that with a little guidance, there could be some decisions made, since the building is what it is. To some degree, the uses will always be mixed, further asking what the workout will be, if there is to be one. Fire Chief

Farquhar replied that it starts with a better understanding of the building, as the Fire Department has seen this building in slices. In his response to Mr. Tousley's appeal, the Fire Chief asked that if he wished, he could allow access to the State Fire Marshall's office to walk through the building, to gain a better understanding of the building, as there isn't one as of now. Ultimately, that building is so complex and has so many different occupants; it would be above the Fire Department's ability to look at, it would need to be someone formally trained, like a Fire Protection Engineer. For an example, the wood shop in the back of the building is an area of concern because if that wood shop is not properly separated from the rest of the building that is a big problem. He continued that in terms of fire protection, this wood shop is a really big risk, there can be help with proper fire wall protection. The Chief explained that with proper firewall protection, it becomes essentially two separate buildings. He continued by stating that this situation is very complex as this building has a ton of HVAC ductwork; HVAC systems pick up and move air. The reason why fire alarm systems, smoke detection and HVAC systems, if there is a small fire in a closet, with air, the HVAC system can be a giant distributor of smoke. He continued that the majority of fire deaths are smoke driven. The Fire Chief stated that the Department would need to look at where the firewalls are, to gain an understanding of where they are and are not. Each firewall would have to have a detection system that would be able to close a fire damper that is a complex system. The Chief continued that even if he were able to say exactly what it is, for the mediation phase, the property owner would still have to hire a professional to design an alarm system that is very complex as there are many moving parts in the building. They would still need to have the sprinkler system evaluated. The Chief stated that the very valid point of the sprinkler system, which this building does have and it is better than not having one; but if there are sprinkler heads blocked, the system is not as effective. He explained that a sprinkler system is designed to suppress, not extinguish a fire and that the way a system is designed is calculated for the use, such as if it is a low or high hazard use. The way the design is, only the flow to a couple of sprinkler heads occurs at one time. If a system were designed to flow to all of the sprinkler heads at one time, there would be a massive amount of piping on the ceiling. It is an engineered system; a system that includes what is on the walls, the size of the walls, and where the heads are located. The Chief continued that if there is a fire below the HVAC trunk on the ceiling, the heat from the fire won't get to the sprinkler system for a long time, causing a delay. When the heat does reach the sprinkler system, it will flow from one sprinkler head to another, causing the system to be overwhelmed. The Chief did say that it is half-correct in saying that the building has a suppression system, but there is no way to understand the efficacy of the system especially when the hazard is unknown. The Chief explained not knowing, for example, what is in the wood shop. He continued that on its face, there are assemblies that the Fire Department believes are operating that don't have permits that is frank violation of the RSA. Fire Chief Farquhar stated that if they were to move forward, establishing a functioning working relationship with Mr. Tousley, he would return to his original request to walk through the building with the State Fire Marshall. He continued that the items to happen immediately are to remove all the locks on the fire doors; locks on fire doors is one of the five deadly sins, and is an incredibly high risk. The Chief stated that there was no way the building was permitted with locks on the doors and it would have had to been permitted. He continued that it is such a large cluster of things that are wrong and that the building is in really bad shape.

Mr. Flibotte asked if the casino is in this building. Fire Chief Farquhar replied yes. Mr. Flibotte asked if it had to be inspected before it could open. Chief Farquhar replied yes. Mr. Flibotte asked if it passed. The Chief replied that it did receive an assembly permit. Mr. Flibotte asked if the assembly permit was for a certain amount of people; the Chief replied yes. Mr. Flibotte asked whether the casino had a permit and inspection so that they can occupy the space. The Fire Chief replied that there is a new owner of the casino and that they have an assembly permit that has expired or is close to expiring. They were issued a temporary permit because the owner wanted the other fire code violations corrected. The Chief continued that to return to the question on the original permit, there is a defect in the permit and the way the numbers were calculated, which the Fire Department can work through with the casino. He continued that as constructed, there are not enough exit discharges in the casino the way that it is; they are too close to each other. There appears to be, from the last inspection, unpermitted work in the establishing of a wall in the rear discharge. The rear exit pathway has an unpermitted wall in it, which drives the other codes; the 20-foot bedding corridor, the exit discharge pathway. In addition, if so, there is a hurdle to overcome in establishing a properly functioning exit discharge that discharges into a very large hallway, which the Chief believes has two gyms in it. The Fire Department would need to aggregate the occupancy of the casino with the occupancy of the two assemblies. The Chief continued that if those numbers are what they believe to be, there is not enough exit discharge in that rear hallway. He stated that in one of the gyms it is the Fire Department's understanding that they host MMA events, which is a very dangerous construct. The Chief stated that a personal friend of his was a member of that gym, and has stated they exercise in the hallway, there is a large truck tire they roll that is in the exit discharge, which is all bad. He did continue that there are ways to remedy the casino that are not huge things to manage. He stated there was an error at the initial inspection, and there are constructive ways to work on that with the predication of what is on site. If there is not proper firewall separation, then the protective features of the building have to protect against the highest asset. The Chief continued, that for the other assemblies, they know that the fire separation for the license assembly is appropriate. If he has no idea what the other firewall separations are for what they believe the operative assemblies, and if they don't have the proper firewall separation, then the entire building, conceptionally would have to be brought up to standard of assembly. He understands no one has the money to do that. The Chief stated that the first place to start is getting a better look at the building and he would be grateful to establish a positive relationship with Mr. Tousley. He continued that fire code enforcement is about education and building a plan for compliance. The Chief stated that this building is not the only building with multiple fire code violations, knowing that this building is high on the top. He reiterated that understanding what the problems are, building a plan of action, and understanding what is the immediate hazard were important, which is why the Chief stated in the document under RSA 154, that he has the statutory authority to close the whole building. He continued that he has no desire to do that, but the Fire Department does need to get into the building eventually to take a look at what has been discussed, especially the locks on the fire doors, which can't be there.

Chair Katz asked for clarification that the Fire Department would prefer someone from the State or someone licensed to review for fire code violations, to review the building so that a reasonable approach can be found to solve some of these problems, or some problems don't exist such as the sprinkler heads, making minor adjustments to solve a great deal of problems.

Chief Farquhar stated yes, to develop a strategy. As an example if the wood shop in the back ends up being a problem, as it is a high hazard to protect against and that the firewall separation is the decision point. A proper firewall separation can be built, or equal value in safe fire suppression, or a decision can be made that it is not financially feasible to maintain that space as a rental and it can be turned into something else. He continued that those are decisions that would have to be made and there are no expectations these issues would have to be fixed tomorrow, and probably won't be fixed two years from now. But, the Chief explained that they need to move forward and that a problem can't be fixed if you don't know what the problem is. If the Chief were able to go through the building quickly with the State Fire Marshall's office to do an assessment; in the end, it is above the Fire Department, and there will need to be specialist to understand the building. The Fire Department can provide advice, but it may be misleading, and expensive, but wouldn't take advantage of a true design professional that would remedy strategies. He continued that there are Fire Protection Engineers who specialize in mixed use buildings, as this is what they do for a living. The Chief explained that in his previous position, there was something similar to this with the complexity and danger level, the Fire Protection Engineer ended up being helpful. It ended up being very positive, with some quick decisions as well as some good long-term decisions.

Chair Katz thanked the Chief for his testimony and asked if it would be appropriate to have Mr. Tousley present. Mr. Brown agreed.

Mr. Tousley stated that he is here to appeal the code violations that were presented. He continued that the Fire Chief just presented several new items that are not on the violation letter, that he wants due process, and this is what he was worried about. Mr. Flibotte asked for clarification on the location of the property in question. Mr. Tousley stated it is at 160 Emerald St., at the very end of Emerald St. If you drive down Emerald St. and don't turn, it's at the end. Carpet Clearance has been there for 30 years, Korvin Appliance was there before. There was discussion on the various business that occupy/have occupied the building.

Mr. Tousley stated that the Fire Chief brought up a number of items not on the violation letter, one of which is that there is something wrong with the permit for the casino, of which he had no prior knowledge. He continued that he is just hearing about the permit issue, the improper wall in the back, and the sprinkler heads, and a number of other items that were not in the letter. He stated that he would not discuss these issues, as he has not had an opportunity to prepare.

Chair Katz explained that one issue he has with having any inspector on a property for one item, and they see other things, they are required to express their opinion about whatever they see. Chair Katz then asked if that was why Mr. Tousley was here.

Mr. Tousley replied that he supposed. He continued that the Chief wrote specific things for the violation, that there were two State Fire Marshalls for what the Chief claims is the annual inspection for the casino, and none of these items came up then because Mr. Tousley was at that inspection. He continued that he is appealing the misinterpretation of the codes and asked if the Board would like to review them one by one, as it is a lengthy document. Mr. Brown stated that Mr. Tousley did put a lot of time into his appeal and he has the misfortune of being the first to appeal a fire code violation to this Board. Mr. Brown stated that this Board just received this

duty and he wanted to make sure that Mr. Tousley was not wasting his time on the wrong people. He then questioned if the Board can waive or interrupt the code. Chair Katz stated that he doesn't believe so. Mr. Brown stated that it is the purview of the Board for both Mr. Tousley and the Fire Chief to understand each other and that Mr. Tousley is operating in good faith. Mr. Brown asked for clarification that the Board is not here to adjudicate violations, as the Board is not qualified to do so. He continued that there was a lot of time put into the appeal responses, a lot of which is technical and in that regard, the Applicant may be in front of the wrong Board, though for some of the larger issues this Board may be able to assist with a resolution.

Mr. Walsh stated that he believes that there is a cross over between the Building Department and the Fire Department in terms of the codes and inspections, hence the reason why this Board is hearing this appeal.

Mr. Rogers stated that the State RSA is what puts the fire code and the building code in front of this Board. What the Applicant has the ability to appeal, is directly from the RSA, *"appeal shall be based on a claim that the true intent of the code or rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed or not accepted by the Code Official. The board shall have no authority to waive requirements of the state building code or the state fire code."* Mr. Rogers continued that the Applicant is before the Board, in reading the RSA and Mr. Tousley can speak to this, is that his appeal is that the code has been misinterpreted. This is what the Board would be deciding from what the Applicant puts forth: either that the code has been misinterpreted, that the Applicant has done something that is of equally good or better construction, or the provisions of the code don't apply. This is what the Board would be looking at for their decision.

Mr. Tousley stated that there is a ton of information in front of the Board and unfortunately, the Board members do not have all of the codes to make the interpretation. Mr. Brown stated that he is not a code person, though Chair Katz stated that as an architect, he is sort of a code person. He continued that he agrees that to understand the fire code takes a lot of effort. The proper response would be for the Applicant to respond to the code and then have a licensed professional help set a format so that the Applicant and the inspector or Fire Chief to go over each line item and hear what has been done, hear is what is proposed, and then to decide how to proceed.

Mr. Tousley stated that he can appreciate the Chair's statement, but he continued that his argument is that the reason the Fire Department wants to do this is because of these code violations, and he said virtually all of them do not exist. He continued that for this Board to decide that he should spend \$20-\$30,000 on a 100,000 square foot building for a re-evaluation, based on the intent on codes that don't exist, would not be correct. He stated that is why he feels he needs to get into the true intent of what these violations are listed on the letter and how they have been misapplied. Mr. Tousley stated that is the unfortunate thing, that he understands it is a ton of work, but he believes that the requirements of the Fire Chief are virtually non-existent. He stated that when he posted his responses why, he left all the information to look-up. Unfortunately, it's not that easy; it's a ton of work with hours and hours spent on preparing for the meeting.

Mr. Brown suggested, since there is a lot of information, to take one of these instances for Mr. Tousley to lead the Board through his reasoning. He stated that he has read the appeal and that Mr. Tousley does understand what the Board is there to do. He continued that he would like Mr. Tousley to take one violation, present his rationale to the Board then move on to the next one. Mr. Brown stated this would help the Board discern a pattern as well.

Mr. Rogers made the Board aware that after the Applicant had presented, the Board did not have to make a decision at this meeting. He continued that the Board can take the information under advisement to do some additional research of the codes if need be, schedule another public meeting, with the deliberations having to occur in public with the Applicant present. Mr. Rogers reiterated that the Board does not need to come to a decision at this meeting. Mr. Rogers confirmed that doing so would not jeopardize the clock for the Applicant, not unless it was something the Fire Department determined was a life/safety issue, which had already likely been handled.

Mr. Flibotte asked how many code violations there were. Mr. Tousley counted and replied that there were 16 violations. Mr. Flibotte asked if “each one of these codes was a code?” Mr. Tousley said no, that some are not codes, they are just definitions or a heading or a subsection. He continued that every single NFPA has a definition in Chapter Three, which were listed as a definition of a State violation code.

Mr. Flibotte asked if Mr. Tousley had insurance on this building. Mr. Tousley said of course. Mr. Flibotte asked if the insurance adjusters had been in the building and Mr. Tousley said of course they had. He said the National Grand Mutual Insurance Company had rented that building for decades and said they installed the air conditioning system that [the Fire Chief] was all worried about. Chair Katz asked if a change of use had occurred since. Mr. Tousley said no, it is an office space; he said it is a day care, but it is a “day care home” that is under 12 people, which is the same as a business use/office space. As Chair Katz (1:04:45) understood, every time there is an occupancy change—for example, from business to residence—it changes what one must do to make it comply with the residence use. Mr. Tousley said “well, sure it may, yes, absolutely,” and continued that those were two separate changes. Mr. Tousley presented the example of it being the same mercantile, stating that you can change different mercantiles. He said there had been issues where some mercantile had come in and needed to be inspected because there may need to be a mop sink installed by a plumber, which would go through code and be checked, but would still be a mercantile. Mr. Tousley said they had 35 offices since Jack Bradshaw put the building up in the 1980’s, stating that it does not change. Mr. Tousley said there had been storage all that time and that is what this building is. Thus, he said that when something happens, like needing a sink put in, then they get a permit and go through planning and review.

Chair Katz asked whether design professionals were involved, and Mr. Tousley said that was correct, it was Tim Sampson, who Mr. Tousley confirmed signed-off. Mr. Tousley presented a document, stating that this was for the casino. Mr. Tousley said that [Mr. Sampson] is one of those professionals, stating “they like to see do this and now they are saying it’s wrong I guess, I don’t know.” Chair Katz asked if someone did the work on the documents to get the permit “and the City is now saying what he did was wrong?” Mr. Tousley stated that he did not think the City was. Chair Katz asked whom. Mr. Tousley said the [Fire] Chief just said that which was the first

he had heard about it. Mr. Flibotte said he brought it up when asking whether there was an inspection done for the casino. Mr. Tousley said they had several inspections. He continued stating that this was a complaint driven inspection and they responded because someone spilled oil at The Cobblestone [fire] and the proprietors were really concerned like everyone else was. Mr. Tousley said they spilled the oil in the kitchen and called and did the right thing, informing them that there was no fire or danger, and that the spill was cleaned-up. Mr. Tousley said [they] responded and saw the ceiling tiles and did not think they were correct, because they were meltable ceiling tiles below the sprinkler heads so that, “if heat goes up it melts, falls out, and so the sprinkler heads can come through.” Mr. Tousley said two fire marshals did an inspection based on that and said it was allowable; Mr. Tousley said they went through the place with a fine-tooth comb and stated that none of this came up at that point. Mr. Tousley continued that they could not find anything wrong and that is when this came up all of the sudden, five months later, “because there was such imminent danger that five months it took them to respond to me on this.”

Mr. Flibotte asked the Applicant to continue reviewing [one of the violations]. Mr. Tousley said the very first one was the dead-end corridors and then asked where there were any, stating that he did not know of any. He said he was provided no explanation or indication of where these exist. Chair Katz said that a dead-end corridor is any one of greater than 20 feet in length that has no door at the end of it. Mr. Tousley asked where the dead-end corridors were. Chair Katz said that was what the drawings should have said. Mr. Tousley said the drawings made no such indication, stating “there are no dead-end corridors in the entire building, I have no idea what they are talking about here. It is completely fabricated.” Chair Katz said [their] complaint never mentions where the dead-end corridors are. Mr. Tousley said no, it was not explained anywhere, stating that it was just codes on a piece of paper “copied and pasted out of space. They did a Google search and found a code and copied and pasted there because it fit something to make it sound important.”

Mr. Tousley continued with the next violation, which states that, “Occupant notification shall be by means of voice announcements in accordance with 9639 initiated by the person in the constantly attended retrieving station.” Mr. Tousley thought this was about the latter half of the preceding quote. He was unsure if they were trying to make it sound like there was a room where someone must sit constantly in attendance. He said they also list NFPA 12, but he said this was about NFPA 72, which is a national fire alarm that designates what this was all about, the fire alarm. Mr. Tousley continued that the constantly attended receiving station is the electronically sent signal to mutual aid letting them know there is a fire. He said they have that and that it had been approved. Chair Katz asked if the building was fully equipped. Mr. Tousley said it was “fully equipped with all that, of course it is.” Chair Katz asked if there were sound devices and lights. Mr. Tousley said no, not in the entire building, “the only assembly place we have has horns and alarms in it. The rest of it: we’ve got three six-inch risers, all three risers have signal flows, which sends an alarm.” He said that if any flow on any of those three risers goes, a signal gets sent to mutual aid.

Chair Katz said he agreed with Mr. Tousley that some of this has been pulled out of the book and “applied to your project, maybe questionably.” The Chair suggested that Mr. Tousley walk through the building with a Fire Department representative to go through each violation and

remove those that do not apply to this facility; maybe there would be three instead of 16. Mr. Tousley said sure. Mr. Tousley said he appreciated that but said, "do you know how many hours I have stayed up 'til two or three in the morning working on this thing. I'm not going to go through that again because they are too incompetent to go through my building with me and with another list on top of it. I'm not interested in doing that quite frankly." Chair Katz said, "I think you should be interested in doing it with the list that you have." Mr. Tousley said he was interested in arguing this to show "that they don't know what they're talking about and to show there is no reason for them to order me to have a complete analysis of my building for no reason at all, it's absurd for them to ask me this." Chair Katz said that one question might be concern for the life/health/safety of the people in the building. The Chair had not been in the building in 25 years and did not know what was there. He thought it might be beneficial for everyone, including the insurance agent, to have the three of them (Mr. Tousley, Fire Department representative, and insurance agent) walk through the building together so that anything not applicable is crossed off in this case.

Mr. Brown said he read through it and some things appeared to be maintenance issues, like exit signs, emergency lights, and extension cords that he did not think were worth arguing about, stating that "they got to work, and wiring has got to be right. I think you and I would both agree that you know what those things exist out there and when you can fix it, you do. I want to push the ticky tacky off the table a little bit and get to where I think the time and the money and some of the bigger disagreements may exits." Mr. Brown said he got the sense that the fire protection aspect of this was not that big but more so that it was structural, meaning separations and uses. He saw a record of maintenance and someone in charge, stating that he had been involved with worse and there was probably not a lot there and the uses, egresses, doors, and separations were likely the most issues. He asked if that was fair. Mr. Tousley thought that was fair but said he thought [they] were misinterpreting some of the doors and more.

Chair Katz asked about if there is a plan with the doors and corridors and what the egress method is. Mr. Tousley said that was in the application package. Mr. Tousley continued explaining that the casino opened and then it had an expansion that was approved once. He showed the most recent expansion plan, which showed that the number of means of egress specifically for the casino. He continued that for an occupancy load of 500 or more, there must be three means of egress. He did not know where they came up with an occupant load of 500. He showed the whole casino compared to the new expansion and new calculations for exits and occupancy load; pointing out the exits Chair Katz asked about. Mr. Tousley showed that two exits were too closed together to be considered an exit, but stated that he only needed two exits claimed on the stamped plans and three doors to meet the load, all of which he pointed out. Mr. Flibotte that those exits are to the front of the building. Mr. Tousley responded that that was all is needed with 250 feet of travel as stated on the stamped plans. Mr. Flibotte questioned if someone was at a distance from the exit. Mr. Tousley responded that since the building is sprinkled, these exits are all that is needed. Mr. Tousley said, "So, we don't even need to go out that back door that he claims has all that bad stuff going on." He said the [Fire Department] misinterpreted everything. Mr. Flibotte asked if something on the plans was block, and Mr. Tousley said it was block all the way up. To his knowledge, everything in the building he had seen was to his knowledge was 5/8th fire code. Mr. Tousley noted that Jack Bradshaw put this building together. Mr. Flibotte noted that was some time ago. Mr. Tousley asked him if the fire code had changed since 1984

and Mr. Flibotte said probably. Mr. Tousley said that is the same stuff as the high hazard sprinkler.

Mr. Flibotte said he worked with Mr. Tousley before and knew he put a lot into these things and said, "I know you really get pissed, okay, and nobody, once you get this in your head. Do you remember dumpsters? You were going to paint them things green, and you were going to put waste management signs on it." Mr. Flibotte continued saying that he had known Mr. Tousley for years and said, "I know once you get this in your head this is it. You know, you've got to work together. We've got to get this settled down." Mr. Tousley asked how to work to work with [the Fire Department] when they are "just making stuff up." Mr. Flibotte said that Mr. Tousley was already "pissed" but said that is the way it is, and that "you guys need to work together, we all have to work together on this." Mr. Flibotte said this Board did not know that much about Fire Codes but that members of the Fire Department go to school and train for it. Still, Mr. Flibotte said he thought the [Fire Department 1:16:53] was going overboard on this. Mr. Tousley said that if the [Fire Department] had just called him to begin with (and he did not conclude his statement). Mr. Flibotte said, "let's work it out, let's do it now. Don't say, I've got these answers and I stayed up 'til two in the morning, I did this. Let's get this taken care of."

Chair Katz said Mr. Tousley's method of going line item by line item to make sure everything is right was good, but should be done with a representative of the Fire Department; to walk through the building and see each issue to understand it clearly and settle each matter line-by-line. He said that again, there could possibly be three items that Mr. Tousley would need to work on over the next several years to resolve this issue. Chair Katz said that regardless of what is in the initial complaint, he said building inspectors are required to document whatever they see, regardless of what they are present for, because down the line they would be responsible for it. In this case, if the Fire Department says there is a sprinkler head above the duct work, we know that needs to be taken care of. Mr. Tousley said it does not need to be, that it is supposed to be 18 inches above and his measurement proved that is what it is. Still, Chair Katz said the duct work below it would interfere potentially. Mr. Tousley repeated that the code says 18 inches above and that is where it is. The Chair said this is why he suggested walking through the building with the Fire Department because perhaps they found one that was not in the right position and assumed that there are more. Again, he said the rational approach is to walk through the building together and come back to this Board in 30 days with a resolution. Mr. Tousley said he might agree to that if "you would have them stand down and not make me do a \$20,000–\$30,000 assessment of my building, just because he doesn't know what stuff is." Chair Katz was not suggesting that Mr. Tousley hire a paid professional, but rather to walk through with the Fire Department to resolve some of these things so that if a paid professional were needed to revise something, it would be for just a few line items, not 16. He said it was a massive building to look at. Mr. Tousley said he wanted the Board to understand that he appealed initially to Fire Chief on this and addressed it all with him, and he said the [Fire Chief] was adamant that Mr. Tousley had to have [the professional inspection] and that was why he was before the Board. Mr. Tousley said he would not be here if it were just a few things, stating that he "could care less," Mr. Tousley provided an example, stating that the car smashing into Carpet Warehouse notified the [Fire Chief] that day saying the work was done, "it was done in a week and no problem. I'm assuming they showed a picture of a finger on our thing and so we changed the battery. It was that simple. I don't have a problem with that. What I have a problem with is paying tens of thousands of dollars

unnecessarily for codes that are made up, that are not correct.” Chair Katz did not think Mr. Tousley needed to pay to have someone come in when he could just walk through the project with the Fire Department, who generated this list, to go line-by-line and take care of this.

Mr. Flibotte said that during the walk through, they should only focus on these 16 line items. Mr. Tousley said that was not what the [Fire Chief] was saying. Mr. Flibotte said these were the 16 violations and there would be nothing else to evaluate during the walk through.

Chair Katz requested comments from the Fire Chief, who asked if Mr. Tousley would leave the stamped plans on the table for his rebuttal. Chair Katz said all of this might not be resolved at this meeting. Mr. Tousley said he was happy to come back. Mr. Brown stated that the most important part was resolving the relationship so everyone could get to work on this. Mr. Tousley said he worked well with the Fire Department in the past.

Chair Katz requested follow-up comments from the Fire Chief.

The Fire Chief began with the first part of the complaint, stating that they had already talked about dead-end corridors, occupant notification, and access errors; the Chief said they are all relevant and they apply. He agreed that Chapter 3 of the NFPA is definitions. He said these were properly cited per the NFPA. The Fire Chief said the standard to cite someone with is to write the code and the description. Chief Farquhar said that Mr. Tousley stated that he had no idea what the Fire Department was talking about and yet in Mr. Tousley’s response about the middle corridor width, Mr. Tousley responded that, “This was heavily discussed with the marshals during inspection in splitting hairs.” Mr. Tousley asked where that dead-end corridor was. A lively discussion ensued while Mr. Tousley and the Fire Chief looked at the plans and debated where there was a dead-end corridor, which the Fire Chief said was where a wall had been built. Mr. Tousley said there should be no issue because there is a door in that wall. The Fire Chief said that if that door were closed, it becomes a wall. Mr. Tousley said, “Oh, come on, wow.” Chair Katz asked if the door was locked. The Fire Chief said the door had a lock on it. Mr. Tousley asked the Fire Chief if he knew the definition of a corridor and the Chief said he did. Mr. Tousley added that the door is not locked, and it swings right open. Mr. Tousley said this was about means of egress and this is not means of egress. Chair Katz referred to a dead-end corridor to a room, stating that if the corridor is more than 20 feet, it is not allowed. So, the Chair said that if Mr. Tousley had moved the wall in question to be shorter, it would not have been an issue. Mr. Tousley asked what a dead-end corridor is, stating that it is one without a way out. The Chair said that if in a room behind that wall and you need to leave and there is a 20-foot corridor to contend with, and the Fire Chief agreed. Mr. Tousley said there are doors on both sides.

The Fire Chief said the most salient point was that the wall in question was constructed without a permit, which renders the design professional’s signature null and void. The Chief said [his] plan was altered, and he did not sign-off on that plan. The Chief continued that for each one of these properly cited codes, which he said are exactly right, that [Mr. Tousley’s] discharge numbers were improperly calculated. When properly calculated, the Chief said it showed that [Mr. Tousley] was short on overall exit discharge width, but the Chief said there were ways to overcome that. Chief Farquhar said the largest issue was the distance; he showed two exits on a plan and said they are not remote from each other. Mr. Tousley looked at the plans and said there

were three exits. He said he did not need three exits because the occupant load is 325, which only requires two exits, as shown on the drawing. The Fire Chief said the drawing was invalid because Mr. Tousley altered it. The Chief continued that the aggregate 500 number comes from the Fire Department believing these are illegally operating assemblies. The Chief continued that by aggregating the people discharging from one exit with the people discharging from the second exit, the higher number was reached.

The Fire Chief continued saying the separate point of all of this was that the Fire Department does not know what is behind the stated walls. So, the Chief said this was a simple thing right before they focus on the casino, adding that this was the least of the dangerous places there. However, Chief Farquhar said there had been a lot of illegal renovations in this building, including to a door, that rapidly altered how that building behaves. The Chief said he understood the definitions of corridors from the NFPA, and he pointed out where Mr. Tousley has a table and chairs that are restricted in front of a door, making it an incompetent point of exit discharge. Mr. Tousley said this was all new information and asked why it had not been explained. Chair Katz said that is why he believes a walk-thru the building with the Fire Department is needed. Mr. Tousley said the Fire Chief was saying that he knows more than a licensed professional and that this guy was wrong. The Fire Chief said yes, Mr. Tousley was wrong in doing this. Chair Katz said the drawing was modified, but not by the person who drew it. Still, Mr. Tousley said that the door in question was not a means of egress; he showed where he believed the means of egresses to be. The Fire Chief said those egresses are not remote from each other and Mr. Tousley disagreed. The Fire Chief said Mr. Tousley was using the wrong calculation. Mr. Tousley proceeded to question the Fire Chief's knowledge about the correct calculation and occupancy number, stating that the Fire Chief believed he knew more than the licensed professional. The Fire Chief said he would never say he knows more. Mr. Tousley continued questioning the Fire Chief, who said he did not know who did the miscalculation. Mr. Tousley asked if a certain door changed the occupancy load and the Fire Chief said no.

Chair Katz did not believe this conversation would resolve itself at this meeting but rather when Mr. Tousley and a representative of the Fire Department work together rationally at the site to walk through together and understand each other's points. Mr. Tousley said the Fire Chief would not stand down and that he also would not stand down. Chair Katz agreed that the Fire Chief would not stand down to the fact that it is a partial drawing and looks as if areas are not fully defined as what they are involved with or the occupancy. The Chair thought this would be resolved by a walk through at the job site.

Mr. Rogers said that when the Fire Chief sent the notice of violation, Mr. Tousley responded back. Mr. Rogers referred to a letter dated October 12, 2022, from Chief Farquhar to Mr. Tousley, in which the second to last paragraph suggested what the Chair was suggesting, it states: *"As an interim step I feel that it would be mutually beneficial to have a more thorough evaluation if the building were allowed. To perform such an evaluation, I would need the help of the State Fire Marshall's office for a competent baseline assessment. The inspection team would need full access to the building for 6–8 hours. If you are amenable to allowing us to perform such an assessment, we would make arrangements to do so within the next week."* So, Mr. Rogers said the Fire Chief had put this proposal forward. After this quoted letter was sent, Mr.

Tousley filed the appeal to this Board. Chair Katz thought the Fire Chief's suggestion in the letter was the best way to go about it.

Chair Katz said he appreciated the interests and concerns of both parties—the Fire Department and Mr. Tousley—but the Chair wanted to make sure the life/safety/health concerns for everyone in the building were addressed. Mr. Tousley said he appreciated that but that he wanted to point out some other things he was dealing with. Mr. Tousley showed a photo of some wires and he said that he was told that multi-plugs are illegal; he said the photo was deliberately taken by [the inspectors] to make it look like a room full of wires, when it was really just an area under a desk. He said most of them were communication wires. He pointed out the corner of the room with a hard-wired receptacle and multi-plug. Mr. Tousley said the first code on top of that said multi-plugs are allowed to be used. Mr. Tousley insinuated that the [Fire Chief] made it look like a problem. Mr. Tousley asked how he can even do a walk through “when they're going to pull all this stuff into it. This is what I'm concerned about. This continues, there's more stuff I can show you about this. It's like they show these doors that can't be used. Well, if they backed-up the camera, the out-swinging door is there.” Mr. Tousley continued calling this a “deliberate attempt to make it look worse than it is.”

Mr. Brown thought the only way to move forward and avoid hiring a professional engineer was for—as hard as it may be—Mr. Tousley and the Fire Department to work together because it would only get worse if they do not. Mr. Tousley said [the Fire Chief] had been adamant and would not concede. Chair Katz thought the Fire Chief had backed down by saying that the State Fire Marshal could come and spend six hours on the job site walking through with Mr. Tousley. Mr. Tousley said he would be happy to work with Steve Noolan, who Mr. Tousley thought knew more than whoever wrote the original list of violations. Chair Katz thought the local Fire Chief would likely approve the decision made between the Fire Marshal and Mr. Tousley to resolve this issue. Chair Katz said 90% of the stuff could possibly be taken right out. Mr. Tousley said 90% of it should not have been mentioned in the first place. Chair Katz said this could be resolved. Mr. Brown said this was just the beginning and would happen all over town in the next few years, “so it is time to figure out what the program is going to be.”

Chair Katz recalled that this was the first time this Board had addressed these issues and he thought the proper way to do it was for the Applicant and the City to work together and come back in 30 days or more with a resolution. Mr. Brown said to “get the low hanging fruit taken care of” because he thinks there is stuff everyone would agree needs to be squared away better, judging from the sprinkler reports, it seemed Mr. Tousley was already working on that. Mr. Brown said the tour with the Fire Marshall would help with the bigger structural issues. He thought there would be losers on both sides if everyone played hardball against each other.

Mr. Walsh asked if there was anything included that was previously inspected by the Fire Department that is now considered a violation. Mr. Tousley said yes. Mr. Walsh said he was appreciative because he thought Mr. Tousley would set an example for other violations that come before this Board. Mr. Walsh appreciated everything Mr. Tousley had done and the time he had taken to understand the codes. Mr. Walsh thought there could be some violations but said the City had a shared responsibility if there is something in the building that a previous City inspector said was ok but were now calling a violation; that the City should bear some

responsibility in fixing that. Mr. Walsh said he admired Mr. Tousley coming before the Board because he agreed with Mr. Tousley that a lot of this would be happening in town. While Mr. Walsh cares about life/safety/health, he also thinks it is important for the City to be reasonable.

Mr. Tousley said that when the casino came it was an assembly use; Captain Bates came to him and said there was a previous sprinkler system tied-in and a monitoring service through Standard and Captain Bates told them what they needed to move into the future, which Mr. Tousley said he did. He referred to the current Fire Department Staff and said they do not do such things, that they, “show-up with their giant stick and say you shall get \$30,000 worth of stuff from some special engineer and I don’t care what you say you can’t prove it. Then they start changing the game while they’re going. There may be two sides to this but I have every right to be pissed off over this.” Mr. Tousley said someone was trying to be a “big fish in a small town.”

Mr. Flibotte asked what was going to happen next. Mr. Tousley continued that if the Fire Chief agreed to not force him go through a professional engineer and if the Chief would, “genuinely and honestly tell me that that is not a dead-end corridor.” Chair Katz thought half of that could be done. The Chair was unsure whether the Fire Chief could say such things until he is at the job site and the parties discuss the matter. The Chair thought the Chief had said that the Fire Marshal would send a group down and it did not sound as if any money were involved. Mr. Tousley said the Fire Chief had not yet agreed to not require the professional engineer. The Chair thought Mr. Tousley and the Fire Marshall would walk through the building and address the 16 violations cited and if anything else is seen, it could be discussed. Mr. Brown stated this would also be the time to gain an understanding of the various uses in the building. Mr. Tousley stated that the walk-thru would be limited to the 16 violations. Chair Katz responded that he didn’t believe the Fire Chief stated that. He continued that there will be a walk-thru of the property, address the 16 violations and if there are any other violations seen by either parties, a resolution will be made like rational human beings. Mr. Tousley asked to start with the 16 violations he was appealing; he did not want to say he could not appeal anything else they find down the road. The Chair thought starting there was the way to go about it, but if going through the process and in the procedure the Fire Marshal sees an issue, they could discuss then. The Chair said that if a building inspector comes into a property for one issue and sees something else, they are responsible and liable to document every issue seen. After said inspection occurs, the Chair expects the parties to return to this Board clarifying whether the issue is resolved or what issues remain. Discussing 16 items and the level of work Mr. Tousley did to respond was a lot. Now, Chair Katz said Mr. Tousley had done his work and it was time for the Fire Marshal and Fire Department to work one-on-one with Mr. Tousley going through the building.

The Fire Chief stated that he takes his job very seriously and he runs a very talented Fire Department. The Fire Chief said he would “greatly stand against any sort of connotation that we are these crazy people whipping big sticks. That is inappropriate. You’ll never see that from my Department, it is the most professional Department on earth.” The Chief continued that he is obligated to report and cite any issue he sees, not just want he is at a site to inspect, per State RSA 154-2 that says he cannot just walk past a problem. That does not mean he goes into buildings looking for more things to find or creating problems. Chief Farquhar said Mr. Tousley’s building is far from the only building in town that has Fire Code violations and in almost every other instance, the Chief said they had complete compliance and a good

relationship, which is key. Chief Farquhar said part of that relationship is extending his professionalism to Mr. Tousley. The Chief said there is no one who cares more about public safety than he does or understands his role in the community better than he does. Chief Farquhar said he is a very good person and does his job very well. To the other points brought forward, the Fire Chief said there is no doubt there are a lot of other Fire Code violations in the City that the Fire Department would get through. Chief Farquhar understood the Board's approach to this particular building and said it was the proper one. Still, Chief Farquhar wanted to be on record saying that, "he was properly cited with the RSA 154, which says if I believe there is an immediate danger in that building, I have the authority to close it down." The Chief said he also has the authority to issue an administrative warrant and go on his own. The Chief said he wished to avoid all of that. So, the Chief said he made his offer to Mr. Tousley, who was more than welcome to choose someone else from the Fire Department to be on the site visit other than the Chief. Chief Farquhar stated that he does not care what Mr. Tousley or the Board think of him, he cares about keeping people in the City safe. Chief Farquhar had been a public servant for a long time, and he was deeply offended by previous comments, especially the assertion that the Fire Chief was drumming things up or staging pictures. He said that was not true and speaks to his character. The Chief remains concerned about this building, which is why he offered Mr. Tousley the best approach to walk through it, because the Fire Department does not know what is behind those doors. When Chief Farquhar was asked directly whether Mr. Tousley was operating two unpermitted gyms in his building, Mr. Tousley asked for the definition of a gymnasium and asked whether the Chief was insinuating there was a more than 50 people assembly use. Chief Farquhar said the space needed to be measured and if the operators were selling tickets or hosting an event like an MMA, that is an assembly. The Fire Chief said he could not help Mr. Tousley fix problems without knowing the problems. The Fire Chief was willing to start building a relationship with Mr. Tousley.

Mr. Tousley said the Fire Chief was not building a relationship by pulling this all up after the fact and not putting all this information in with the violations. The Fire Chief said the Fire Department is what it is and must be able to get into that building. The Chief would love Mr. Tousley's cooperation. Still, the Chief has every legal right to do it on his own, but that is not how he was trying to start building a relationship. Mr. Tousley said he agreed to start with the first 16 citations. The Chief said that was fine, stating that some of the issues were systemic and spoke to program management, like testing exit lights and extinguishers, clear articulation between Mr. Tousley and who rents from him and what their obligations are, and permitting work. He said it was much more complex. He said that 100 of 100 fire protection engineers would call the corridor in question a dead-end, which changes things radically, and there are constructive ways to fix it, which was all the Chief was looking for. All the Fire Department sought was to get into that building and start taking corrective actions.

Mr. Brown thought it was important that Mr. Tousley walk that corridor with someone other than Chief Farquhar, which the Chief was amenable to. Chair Farquhar said he did not care how they got there, but the Fire Department had to get into that building. Mr. Walsh thought Mr. Tousley and the Fire Chief should walk through together, especially if there is a shared responsibility for something once approved that is now not approved, that needed to be fixed with a shared expense. Mr. Walsh thought the simple thing was to handle the easier issues and then see a walk through versus an expense on a professional engineer. Mr. Brown thought this Board would be

hearing from a lot of building owners in similar ways and should get used to handling it now until there is a case where the expertise of a professional engineer is the only way.

Mr. Walsh asked Chief Farquhar if a walkthrough with Mr. Tousley would omit the need for a professional engineer and whether when walking through together, the two parties could try to find simple solutions to some of the violations, where possible. Chief Farquhar said yes but recalled they were talking about the strength of the building. Chair Katz thought both parties were interested in the life/safety/health of the general public. Chief Farquhar added that, “the strong walls of that Mill building now have HVAC ducts put into them, meaning they are no longer fire walls, and the only thing that becomes a fire wall is the fire alarm system to actually rain fire damper to reseal that wall.” Chair Katz thought there were a lot of those little concerns that could be addressed. Chair Katz asked if the Chief recommended that someone from the State Fire Marshall’s office do this inspection. Chief Farquhar said he would reach out to them for technical assistance under the RSA and the Chief could be present or not. He said they would run through things that are very complex and they would have to speak to OPSC about some mechanical things. Chair Katz asked whether someone local could do this versus getting the State involved. Chief Farquhar said Captains Dumont and Megan Manke were both highly certified Fire Marshals. Mr. Tousley and Mr. Walsh agreed and were happy with that and Mr. Tousley stated was looking forward to keeping it at the local level.

Mr. Tousley said he was concerned about how this was ending. He asked if the appeal was being put off for 30 days. Chair Katz said the Board was saying that he was appealing these issues and they could spend all night going through it, but it might be best to appeal directly with the Fire Department and come back with a resolution. Mr. Tousley said he tried that once and his concern was that they would walk through, and he would never get to finish his appeal. Mr. Brown reiterated that he heard Mr. Tousley and understood he had the misfortune of being the first one here. Mr. Brown thought the Board needed to see if this could move forward in the manner discussed before continuing the appeals process if they cannot come to a resolution; he did not think there was a strict time frame for returning with a resolution. Mr. Rogers agreed, stating that if the inspection occurs and the Fire Department still feels there is the need for a professional engineering evaluation, then Mr. Tousley’s appeal would still be standing. Mr. Brown thought it was better for everyone to figure out how they could start working this stuff out because it is not unique.

Mr. Tousley said he looked forward to working with Captains Dumont and Ms. Menke on this. Chair Katz asked if this was acceptable of both parties agreed to try to resolve the 16 violations on site. The Chief said it provided him some relief but said the Fire Department still needs to get to the rest of the building and see behind those walls, know the uses in the building, and know the occupancies. Mr. Tousley asked if they could start with the 16 violations presented, stating that the Chief kept getting sidetracked. Chief Farquhar said he was not sidetracked, but that in the appeal, Mr. Tousley cited the last Chapter under NFPA 1, “that his building does not meet the basics of Fire Code. Although we have talked about specifics, the entire building does not meet Fire Code. So, the citation is the entire building.” Chair Katz said some of the conversation on site would be on this issue, and perhaps that is all they return to this Board with. Chief Farquhar said some things were easy, like getting locks off the doors. In the end, the Chief said

whether Mr. Tousley agrees or not, the Fire Department needs to get into that whole building and look at it.

Mr. Tousley agreed it was appropriate to work with the local Fire Staff who understand the Code and then to return to this Board with an update. The Chair thought most issues would be resolved on the job site. Chair Katz did not know how the Board recommended that so that Mr. Tousley could return saying some issues had been resolved but a few remained for his appeal. Mr. Rogers said yes to that idea. Mr. Brown agreed it was worth trying to get a working relationship between Mr. Tousley and the Fire Department and that the only alternative would be bad.

A motion by Mr. Brown to recommend that both parties set a working group, tour the building, make sure the Fire Department understands the uses present, and discuss the 16 citations was duly seconded by Mr. Flibotte. The motion carried unanimously.

Adjournment

There being no further business, Chair Katz adjourned the meeting at 6:30 PM.

Respectfully submitted by,
Corinne Marcou, Board Clerk, & Katie Kibler, Minute Taker

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City of Keene

FIRE DEPARTMENT

Office of the Fire Chief

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TOBY D TOUSLEY
PO BOX 626
KEENE, NH 03431-0626

March 23, 2023

RE: 160 Emerald Street Report of Life Safety Inspection

Mr. Tousley,

In an email to City Attorney Thomas Mullins dated February 6, 2023 from your legal counsel, Joseph S. Hoppock, Esquire, both parties agreed to allow the voluntary inspection of the real property located at 160 Emerald Street (PID 2526). The inspection(s) were bounded by the stipulations of; 1) you, Toby Tousley agreed to absent from the inspection provided the I do the same and 2) your representative, Norm Skantze, would be present during the inspections.

Under the stipulated conditions, as stated above, the real property located at 160 Emerald Street (PID 2526), was inspected on 12/8, 2/16, 2/21, 2/24. Prior to the start of each inspection Mr. Tousley and/or one of his representatives signed a PERMISSION TO CONDUCT A FIRE INSPECTION form. The permission form declares that ; 1) the parties have been informed of their constitutional right not to have a Fire & Life Safety Inspection made of the premises and property under their care, custody and control, without an Administrative Inspection Warrant. (RSA 595-B) , 2) the parties acknowledge that they know their lawful rights to refuse to consent to such an inspection and 3) they willingly give permission to conduct a complete inspection of the premises and property.

As agreed upon, your consultant, Mr. Norman Skantze (Fire Risk Management, LLC), was present during the inspections. Our understanding is that Mr. Skantze is IFSAC /PRO Board certified at the Level of Fire Inspector II. Additionally, Mr. Skantze has a background in fire code application and plan review, however, he is not a formally trained or credentialed Fire Protection Engineer (FPE). Also present for the inspections were Captain Steve Dumont and Lt. Meghan Manke from the City of Keene Fire Department.

The voluntary inspections conducted on 2/16, 2/21 and 2/24, have allowed us to gain a greater understanding of the buildings construction, services, fire protection features and existing means of egress.

Observation of the differing occupancies separation(s), consistently showed that separations between distinct occupancies did not meet the requirements for proper fire rated, wall assemblies. Therefore, we have determined the building to be classified as a mixed occupancy – unseparated. The designation of mixed occupancy – unseparated, is in alignment with the building classification noted on the original Notice of Violation and Order to Correct letter of 09/19/2022.

Due to our determination of the building being mixed occupancy (NFPA 1: 3.3.192.20), unseparated (NFPA 1: 6.1.14.2.3), we are requiring that the means of egress facilities, construction, protection, and other safeguards comply with the most restrictive fire safety requirements of the occupancies involved , which would be an assembly occupancy (NFPA 1 1.3.4 Multiple Occupancies) .

In a document submitted to the City of Keene Community Development office received on 1/05/2021 (Titled Tousley Property Management L.L.C. Customer Phone List), you self-describe the building as containing. 36,741 sq. ft. of office space, 38, 865 sq. ft. of storage, 8,500 sq. ft. of assembly space, 6,438 sq. ft. retail, 2780 sq. ft. described as a furniture store and 2,232 sq. ft. industrial, resulting in 95,656 sq. ft. of total building area. Of note, after researching existing records we are unable to validate the original code application strategy used at the time of new building construction These documents would provide a fundamental piece of information that is critical to evaluating the changes and alterations that have clearly occurred within the building.

The lack of formal documentation also extends to a complete absence of documented occupancy classifications within the building. Occupancy classifications are one of the most critical steps in applying NFPA 101, Life Safety Code, and other building and fire codes. Occupancy classification drives the requirements for many different fire and life safety features. These requirements reflect the unique and expected characteristics of the anticipated occupants of that space. Even when one considers the lack of a historical perspective on how the building has changed over time, our inspections provided clear indications that many of the occupancies have undergone modification(s), reconstruction, change of occupancy classifications, and change of use. It appears that almost all of these modifications and changes have occurred without the benefit of proper permitting.

Under NFPA 101, Life Safety Code, once the City of Keene Fire Department, as the Authority Having Jurisdiction (AHJ), has approved a building and a new version of the code is adopted, the building becomes an existing building. Codes that apply to changes to an existing building are established in NFPA 101, Chapter 43. This chapter describes seven (7) distinct work categories. Each work category(s) drive code requirements for the work area(s). Of the seven work categories, described in NFPA 101, our inspections show clear evidence of at least four (4) work categories that have been undertaken, over time, without permit:

- **43.2.2.1.3 Modification:** The reconfiguration of any space; the addition, relocation, or elimination of any door or window; the addition or elimination of load-bearing elements; the reconfiguration or extension of any system; or the installation of any additional equipment.
- **43.2.2.1.4 Reconstruction :** The reconfiguration of a space that affects an exit or a corridor shared by more than one occupant space; or the reconfiguration of a space such that the rehabilitation work area is not permitted to be occupied because existing means of egress and fire protection systems, or their equivalent, are not in place or continuously maintained.
- **43.2.2.1.5 Change of Use:** A change in the purpose or level of activity within a structure that involves a change in application of the requirements of the Code.
- **43.2.2.1.6 Change of Occupancy Classification:** The change in the occupancy classification of a structure or portion of a structure.

When either a change of occupancy or a change of use occurs, a review must take place to determine the fire protection systems or other life safety features that the change of use/occupancy requires. When a change of use/occupancy occurs, codes and standards are in place to ensure that the fire and life safety features of the building also change to appropriately protect the new occupancy. Unregulated changes of use /occupancy, such as those that have clearly occurred within in this building, have historically led to devastating consequences.

As the AHJ, we have concluded, that over many years, unpermitted change(s) of use and occupancies have occurred with complete disregard for the code implications. These actions have greatly diminished the safety-during-building-use goal of prescriptive fire code (as adopted by the State of New Hampshire – RSA 153:14, V; RSA 154:2, II (a)).

In addition to the overall deficient life and safety conditions within the building, we would like to draw your immediate attention to two specific matters: 1) occupancies that meet the criteria of High Hazard Contents (NFPA 101 6.2.2) and 2) lack of occupant notification (NFPA 1 4.4.4).

Classification of Hazard of Contents (NFPA 101 6.2.2)

There are three specific occupancies of great concern. For reference we are using the same document referenced above (Tousley Property Management L.L.C. Customer Phone List) to identify individual occupancies by unit number and occupancy name where available. Through our authority as the AHJ, we are designating, 176E Skattis Flooring Warehouse, 18E Msun Trading Corp and the large rack storage occupancy across from Unit 201 as High Hazard (NFPA 101 6.2.2.4). We consider the hazard of these areas to be greater than that normally found in an assembly occupancy or a business occupancy, meaning those areas

require special protection to ensure that a fire originating in one of those areas is isolated. Our designation of these three (3) areas as High Hazard, considers that such evaluations are both relative and situational. What constitutes a hazardous area in one occupancy may not be considered a hazardous area in another. The hazard of contents (low, ordinary, or high) within a space is based on the potential threat to life presented by the contents, the relative danger of the start and spread of fire and the danger of smoke or gases; all of which endanger the lives and safety of the occupants.

All three of these occupancies appear to have a large fire load and inadequate sprinkler protection. Sprinkler system design (both new construction and any change of use) must consider three variables: 1) commodity classification (classification based on the type of product stored, including container and packaging materials), 2) storage height and storage arrangement (product is stored in racks or piles or on pallets and 3) the type of shelving, (clearance to the ceiling, aisle width, etc.). As an apparent and predictable outcome of unpermitted changes in use /occupancy, the sprinkler system appears to be inadequately designed for the hazard(s) present in all three referenced occupancies.

Importantly, sprinkler systems are designed to control or suppress a fire in its earliest stages with a limited number of sprinklers operating. This limited number of sprinklers is commonly referred to as the sprinkler system design area. It is critical that all sprinkler systems are properly designed and installed for the occupancy they protect and that the adequacy of the sprinkler system is reevaluated prior to any change in building use or occupancy. Clearly, no evaluation was performed at the time of use/occupancy change within these three occupancies to determine and to provide the required sprinkler system coverage.

In such instances, there are generally two options for compliance: protect the hazard through properly designed, automatic extinguishment systems; or isolate the hazard with fire-resistance-rated construction. Our designation of these areas as High Hazard requires both protection measures to be implemented; neither are present.

Lack of Occupant Notification (NFPA 1 4.4.4)

NFPA 1 4.4.4 Occupant Notification, requires that in every building or structure of this size, arrangement, and occupancy, that when a fire itself would not provide adequate warning to the occupants, then a fire alarm system shall be provided to warn occupants of the existence of a fire at any place within the structure. Simply stated, even a cursory evaluation would immediately identify the building as noncompliant with the referenced code.

As a practical example of this issue, on 12/19/2022, the City of Keene Fire Department responded to this building for Master Fire Alarm Box 2138 (Fire Incident # 22-0023863). While attempting to identify the cause of the alarm, Fire Department members personally witnessed that, no evacuation of the building had occurred. Occupants of both first and

second floors were unaware that an alarm had been activated at all. Had this been an actual fire, these individuals would have been at high risk of entrapment, serious injury or death.

We are requiring you to install a fully approved and permitted NFPA 72 complaint fire alarm system within the building.

To restate my requirements of you, you must retain the services of a licensed Fire Protection Engineer (FPE) to perform an existing building investigation and evaluation report. The report shall analyze the occupancy classification, building construction, existing conditions, state fire code requirements and an egress analysis to bring the facility up to current code requirements.

All of the following conditions apply to this requirement:

- 1) The independent reviewer shall provide to the AHJ an evaluation and recommend necessary changes of the proposed design, operation, process, or new technology [NFPA 1 1.15.2].
- 2) The review will be at your expense [NFPA 1 1.15.1].
- 3) The submittal is to bear the stamp of a registered design professional [NFPA 1 1.15.3].
- 4) The AHJ shall make the final determination as to whether the provisions of this Code have been met [NFPA 1.15.4].

For further clarification, the required existing building investigation and evaluation report is intended to assist in applying the appropriate building and life safety codes. This will help to ensure that public and fire safety goals are met. The purpose of the evaluation is to report observations and proposals of corrective action for all deficiencies the building or fire protection system(s) may have. The FPE's report must include, but is not limited to, the following:

ANALYSIS

Code Analysis- Documentation of the title and edition of all applicable State and local Building and Fire codes and standards, and amendments thereto, on which the design is based.

Construction Type – The construction type(s) involved with the project must be identified for each building(s). All building must be identified and compared to the required materials for a given construction type. The building elements that carry a fire resistance rating must be identified in this section. In addition, any documentation regarding the fire endurance of a structural element must be included.

Occupant Load/Egress Calculations – The total occupant load of the building must be calculated (per all building codes and where in conflict the most stringent [highest occupant load] must be used) in consideration of the uses of the spaces within the building.

Any supportive calculations must also be provided. The occupant load of all floor areas of a building is essential in determining the required minimum width (or the capacity) of the means of egress components, as well as the required number of certain egress components.

The square footage of all usable spaces must be shown along with the occupant load factor (person per square foot) for that particular area. This section must also include an egress plan with calculations, verifying adequate egress capacity is provided. The egress plan must include each floor, illustrating routes the occupants may travel to arrive to an exit. Travel distance, dead ends, common paths of travel must be analyzed along with the allowable and actual distances.

Fire Resistant Materials – All materials that carry a fire rating due to any requirement other than construction type must be identified. This section must cover fire separation distance, firewalls, fire separations assemblies, exit enclosures, shaft enclosures, draftstopping, fireblocking, dampers, etc. Opening protectives and penetrations must be included in the analysis of the fire rated assemblies. All design listings for fire rated assemblies must be included such as UL or FM.

Fire Protection Systems – All required fire protection systems of the building must be identified. The FPE must determine the appropriate fire protection system for the intended application of the building. The FPE must ensure that fire protection systems, sprinklers, alarms, smoke control systems, etc., comply with the applicable code requirements.

Emergency Lighting / Emergency Power – The FPE shall determine any area or component required to be provided with emergency lighting and/or emergency power. The capacity of the emergency systems operation shall be evaluated by the FPE for equipment such as means of egress lighting, exit signs, door locks, fire pumps, communication, elevators, and other emergency equipment as required by the applicable code.

Interior Finishes – The FPE must evaluate all interior finishes including, but not limited to, fixed or movable walls and partitions, columns, ceilings, floor finishes and wainscoting, paneling or any other finish applied for acoustical treatment, insulation, fire resistance, decoration, or similar purposes.

Special Use and Occupancy – The FPE must evaluate any special provisions of the use and occupancy of the building in accordance with the applicable building code.

Special Processes, Materials, or Hazards – In some cases, there are other requirements for special processes, materials, or hazards, such as elevators, special locking arrangements, etc. These requirements can be found in the applicable NFPA codes referenced by the applicable Building Code or Life Safety Code and must be evaluated by the FPE.

DEFICIENCIES

If the FPE discovers any code deficiencies during a site visit to an existing building or fire protection system or during the review of the plans for a building or fire protection system(s), the deficiencies must be identified.

The FPE must analyze the building or fire protection system design. Considering all deficiencies, the FPE must make recommendations that would remedy any non-code compliant issues recognized upon analysis of the plans and building or fire protection system. These proposals must also be incorporated into the building or fire protection system design.

STATEMENT OF COMPLIANCE

To ensure that the drawings submitted are of quality, the FPE must attest that the drawings submitted are in compliance with the applicable codes to the best of their knowledge.

CONCLUSION

This Report of Life Safety Inspection is being provided to you in lieu of a formal Notice of Violation, and in the spirit of voluntary cooperation to resolve the serious life and safety issues that exist within the building. The City of Keene Fire Department is ready to work with you and with your FPE to resolve the deficiencies in an expeditious and appropriate manner. However, if this is not possible, then the City reserves the right to request the Board of Appeal to re-open the appeal hearing on the issue of the requirement of your retaining the services of the FPE. Finally, and as noted in the previous violation letter, if conditions at the building deteriorate further and become an immediate and imminent danger to the life or safety of the occupants or other persons, then the building may be ordered to be vacated in accordance with RSA 154:21-a.

Respectfully,

Donald M. Farquhar

Donald M. Farquhar, Chief of Department

cc: Office of the State Fire Marshal
Thomas P. Mullins, Esq

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**CITY OF KEENE
BOARD OF APPEALS**

CASE NUMBER: FBOA 22-01
PROPERTY ADDRESS: 160 Emerald Street
OWNER: Toby D. Tousley
PETITIONER: Toby D. Tousley
DATE: April 7, 2023

**REQUEST TO REOPEN HEARING ON THE FIRE DEPARTMENT'S
UPDATED NOTICE OF VIOLATIONS
(DATED JANUARY 13, 2023) AND TO REOPEN HEARING BEFORE
THE CITY APPEALS BOARD**

Toby D. Tousley (Tousley or Appellant) hereby requests that the Board schedule the above-captioned previously docketed matter for hearing to address the issues previously raised, as amended, and his claims set forth herein. By Order of November 9, 2022, this Board granted Tousley leave to return to the Board if the Fire Chief and Mr. Tousley could not "work together" to address the "16 listed violations" then pending before the Board.

The Appellant states that:

I. Background

1. On April 14, 2022, the City Fire Chief, Donald M. Fraquhar (Chief) inspected the Casino space at the Property located at 160 Emerald Street (the Property). Chief, again, inspected the Property a second time on July 22, 2022.

2. On September 19, 2022, Chief had the Keene Police serve Mr. Tousley with the September 19, 2022 “Notice of Violation and Order to Correct” arising from a second inspection conducted by the Fire Department on July 22, 2022.

3. On September 25, 2022, Mr. Tousley filed his Appeal of the Chief’s Violation Notice and Order with this Board; the case was docketed at FBOA 22-01.

4. On October 12, 2022, Mr. Tousley met with the Chief in an effort to resolve what the Chief claims are code violations. Instead of discussing the Chief’s alleged concerns over the claimed violations, the Chief brought up new information that went in an entirely different direction from his claimed violations. The Chief disingenuously claimed that the “central point” of the Notice of Violation was the “completion of an existing building inspection and evaluation by a Fire Protective Engineer” (FPE). Chief had no intention of cooperating with Tousley to address any violations he claims he found in the building. Chief already determined an FPE was required.

5. On November 9, 2022, this Board held a hearing on Mr. Tousley’s Appeal. The Board ordered the parties to “work together” to address “the 16 listed violations.” (See, below ¶33).

6. The property owner denies there are any violations and that the Chief grossly misconstrues or ignores applicable code provisions.

7. However, following this Board’s Order of November 9, 2022, Mr. Tousley continued to work with the Fire Chief to resolve the issues Chief raised.

8. On November 10, 2022, Meghan Manke, on behalf of the Fire Department, demanded “access to the entire building (i.e., all tenant spaces/businesses, common areas, mechanic/electrical rooms, storage closets, etc.). We will be documenting the inspection with written notes and photographs where necessary.” Her attitude and approach was not conducive to “work{ing} together.”

9. Mr. Tousley immediately objected to the dictatorial and authoritarian invasion demanded by the Chief, especially given the tone of his operative. Mr. Tousley noted that he believed the Board of Appeals required the parties to “work together” to resolve the 16 alleged code violations. He wrote “The Board was pretty specific to work on the 16 alleged code violations and then come back with the results.”

10. Previously, on November 9, 2022, the Chief acknowledged that both he and his staff “lacked the technical expertise required to do a comprehensive review.” Ms. Tousley, properly and lawfully, denied the Chief’s demands for an invasion of his property rights and for a *carte blanche* inspection of the premises that had absolutely nothing to do with the 16 alleged code violations Chief brought up in September 2022.

11. Mr. Tousley received no response to his November 10, 2022 email to Ms. Manke. Consequently, he contacted her again on November 28, 2022 to follow up on the walk through ordered by the Board. He suggested that “We should start [with the alleged locked doors] as I suggested 2 weeks ago.”

12. An inspection appointment was set for November 29, 2022 at 1:00 PM (this would be the THIRD inspection demanded by the Chief and granted by Tousley). On that date, the Chief's operatives inspected all common areas but refused to address or discuss any of the 16 alleged violations purportedly outstanding since September or April 2022. On November 29, 2022, those operatives asserted that they could not make "any determinations" on any of the 16 code violations *previously found*. Instead, they insisted on demanding to see other spaces occupied by retail tenants that are not part of, and had nothing to do with, the 16 alleged violations identified in September 2022. Nevertheless, Mr. Tousley agreed to let them in other spaces with the understanding they would then work with him on the 16 alleged violations.

13. Instead of "work{ing} together" on the 16 alleged violations, on November 29, 2022, the Fire Department issued an "Updated Notice of Violation and Notice to Correct." In the November 29, 2022 "updated" Violations Notice, as it pertains to the Buildings Sprinkler System, "replacement {of} sprinkler heads" were deemed "pending" actions, noting that "sprinklers in the building in service for 50 years have been replaced."¹

14. On December 8, 2022, Mr. Tousley asked about the status of the resolution of the 16 alleged Code Violations. The Fire Department demanded another inspection

¹ This previous "updated" Order that refers, in part, related to the sprinkler system is noted here because by March 23, 2023, the Chief's direction took a drastic turn from replacing sprinkler system components to demanding an entirely new sprinkler system.

of the property on December 8, 2022. (This would be their FOURTH inspection of the property).

15. On December 8, 2022, Fire Prevention provided Mr. Tousley with a copy of the November 29, 2022 "Updated" Code Violation Notice, all while maintaining it could not make a determination on the 16 initial violations. They, again, demanded more access to spaces within the building.

16. On December 8, 2022, Fire Prevention inspected five retail spaces and the Casino space. During this fourth inspection of the Property, the Fire Prevention team refused to address the original 16 alleged code violations, claiming they "could not make a determination on them," at that time, notwithstanding the fact that the Chief claimed those violations in September 2022.

17. On December 8, 2022, Mr. Tousley personally escorted the Fire Prevention team to each and every area of the 16 claimed violations. Said team maintained that they "could not make a determination" on the violations previously claimed found by this Chief.

18. On December 9, 2022, Mr. Tousley informed the Fire Chief he would not be extended any further access to the property solely based on the Chief's refusal to address the 16 alleged code violations previously determined (Chief still claimed, incredulously, that he was not capable of determining them at the time).

19. On January 18, 2023, the Chief submitted his Second "Updated" :Notice of Violation and Order to Correct," directly to this Board (without providing Mr. Tousley the courtesy of a copy). In his Second "Updated" Order, the Chief withdrew "without prejudice," every violation found in September 2022, except two, namely, numbers 2 and 13; others, such as numbers 9, 10, 11 and 12 were marked "resolved conditioned upon the monthly inspection tags being completed" or "resolved with respect to the areas inspected," etc.

20. On January 30, 2023, the Chief set forth Fire's "two basic goals," namely:

- (a) "through direct observation, rule out any issue or combination of issues that constitute a clear and imminent danger to the life or safety of the occupants or other person at any time;² and
- (b) be allowed to complete a full assessment of the building in its entirety. Despite our continue {sic} good faith efforts, we have been unable to achieve either of these goals."³

21. On January 30, 2023, the Chief discussed with Tousley's consultant "creating a structured plan, with time limits, to achieve these goals and to establish a formal, agreed upon remediation plan..."

² One would think that after four inspections of the building, the Chief would have had sufficient "direct observation" to make any such decision, which, in fact, he had already made.

³ His last statement is either nonsense or reflects his complete incompetence.

22. In the spirit of the Board's November 9th Order, Fire and Tousley agreed, through counsel, that a full inspection of the building would occur. This would now be the FIFTH inspection consent granted by Tousley. At the City Attorney's suggestion, the Chief would not attend the inspection if Mr. Tousley agreed not to be present when it occurred. Tousley so agreed. Instead, the parties agreed Tousley's expert consultant would be permitted to observe. Tousley requested that the city officials make "as much progress [during the inspections] any given day by the [inspection] team." February 16, 2022 at 10:00 AM was agreed upon for the fifth inspection..

23. Deputy Chief Steve Dumont and Lieutenant Meghan Manke were the designated inspectors from the City and Norman W. Skantze, was Tousley's designated expert consultant, who observed the inspection. Notwithstanding Tousley's request that the city officials make as much progress on the inspection as possible while they were in the building and had devoted the entire day to the task, they stopped at 2:00 PM (with three hours left in the workday) leaving two occupied spaces (Butch Esty's CIA space and Evan's law space) uninspected. Notwithstanding this complete lack of diligence, Tousley agreed to a second date, February 21, 2023 at 10:00 AM, to conclude the inspection.

24. The inspections demanded by the Chief were completed on February 21, 2023 and the Chief authored a report dated March 23, 2023. Tousley takes substantial objection to the March 23rd Report.

25. The Chief is playing games. Either there are code violations at the Property or there are not. Chief said there were in September 2022 (he issued numerous violations and then “updated” them twice). Thereafter, despite this Board telling him to work with the owner to resolve them, he could “not make any determination.” He still can’t after six months and over eight total hours of inspection time. Instead of addressing the previous violations Chief claims he found, and despite his “two basic goals,” and lip service to an agreed upon “timeline” for making corrections, he concludes that Tousley is required to retain a Fire Protection Engineer (FPE) in order to plan, design and implement *new building-wide sprinkler and alarm systems*.

26. The Property is an existing building constructed over 100 years ago, probably slightly before 1920.

II. Appellants’ Grievances

27. Appellant raises four (4) issues (a-d below) arising from the Chief’s March 23, 2023 Report:

- a. The 160 Emerald Street building is an exiting structure. Chief incorrectly applied code requirements to an existing structure by demanding that an FPE design and plan completely new alarm systems and sprinkler systems, which Appellant contends requires only upgrades and can be coordinated and planned by Appellant’s consultant and qualified specialists he retains (a qualified specialist will likely involve the participation of an FPE).
- b. Chief claims unpermitted work has occurred at the Property. He makes a blanket claim without proof. A survey of the City’s Community Development department files on the Property contain a wide range of documentation on the propety, including permits,

plans, correspondence and occupancy permits going back to the 1970s, well before Tousley owned the property. For the Chief to allege that “our inspections provided clear indications that many of the occupancies have undergone modification(s) reconstruction and change of occupancy classifications, and change of use. It appears that almost all of these modifications and changes⁴ have occurred without the benefit of proper permitting.” March 23, 2023 Report, p. 2. The Chief’s remarks reflect *reckless professional indifference or incompetence*. His assertions are false. The Community Development records indicate that the Property and the Property owner are compliant and obtain permits and schedule inspections at the Property, when required.

If there are outstanding requirements for repair, alteration, change of occupancy additions to and relocation of existing buildings, then a permit would be required and a Community Development official, NOT the Fire Chief, would be the designated Authority Having Jurisdiction (AHJ).

- c. The Chief is abusing his power and bullying Mr. Tousley. This Board’s November 9th Order required the Chief and Mr. Tousley to “work together.” Chief’s email of January 30, 2023, speaks to “creating a structured plan, with time limits” and “establishing formal, agreed upon remediation strategy.” However, two months later, this conciliatory approach was abandoned, for in the March 23, 2023 Report, Chief “restated” his “**requirements**” as follows:

- 1) “you *must* retain the services of a licensed Fire Protection Engineer (FPE) to perform an existing building inspection and evaluation report;” Chief imposed four conditions on this “requirement.”
- 2) “**We are requiring you to install a fully approved and permitted NFPA 72 compliant fire alarm system within the building.**” (emphasis in original).⁵

⁴ Notably, Chief offers not one example.

⁵ This is in direct contradiction of Chief’s “updated” November 29, 2022 Notice of Violation and further evidences his abuse of his power.

Under the Chief's regime, there will be no "agreed upon remediation plan." It will be his way or the highway. That is abuse, and a blatant breach of the commitments he made on January 30, 2023.

In this existing building, Appellant contends that code requirements do not mandate the degree of work ordered by the Chief (without any input from the City's Building Inspector).

28. The Chief breached his earlier commitment to work with the Property owner and he violated this Board's Order to "work together" with him, as plainly evidenced by the direct threat that concluded the Chief's March 23, 2023 Report. Chief concludes his Report as follows: "Finally, and as noted in the previous violation letter⁶ if conditions in the building deteriorate further⁷ and become an immediate and imminent danger to life and safety of the occupants or other persons, then the building may be ordered to be vacated in accordance with RSA 154:21-a." Chief's demands, "requirements," and his dictatorially imposed "four conditions," are a direct violation of this Board's November 9th Order and a direct breach of his promises and agreements made to Mr. Skantze on January 30, 2023 (as Chief explained in his email of that date), as described below. This statement reflects unprofessionalism and abuse of power, and ignores the oversight of this Board. Other City officials need to be involved in this matter to curb the Chief's abuses and to act as checks and balance.

⁶ Thus far, he has issued three.

⁷ Evidently, the Chief does not believe the building is an imminent danger to health and safety, for his comment is conditioned on *if* conditions deteriorate...., etc.

29. The Property clearly does not rise to the level of a “clear and imminent danger,” which is the standard set forth in RSA 154:21-a (based on “reasonable belief” a fire chief may order a building vacated if the condition of the premises constitutes a clear and imminent danger to life or safety of occupants or other persons).

30. The Chief’s attitude is especially troubling given the fact that on January 30, 2023, the Chief agreed to work with Mr. Skantze:

- i. To coordinate inspections and develop an action plan on his behalf.⁸
- ii. Coordinate inspections of the property with his staff for the purpose of ruling out any issues that constitute a clear and imminent danger to life or safety of occupants or others.
- iii. Work with Mr. Skantze to create a structured plan, with timelines, to achieve formal goals and establish a formal plan for a remediation strategy.

31. By virtue of his Report of March 23rd, Chief Farquhar breached everyone of his promises (and his own acknowledged “basic goals”) he made in the meeting with Mr. Skantze and in his email of January 30, 2023.

- d. The process for the remediations of the Property is complicated and should involve the Community Development Department, which Chief appears to intend to exclude.

32. With the above four specific issues in mind, Mr. Tousley reiterates his intent to “work with” the appropriate City officials to:

⁸ Based on the Chief’s email of January 30, 2023, it appears he agreed.

- A. Improve (update) the existing fire alarm system (per the “updated” violation Notice of November 29, 2022);
- B. Improve (update) the existing automatic sprinkler system;
- C. Develop and improve existing exit paths and exits;
- D. Address door hardware, locks, handles and closers;
- E. Modify and maintain existing fire separations.

III. Code Provisions Implicated

33. In an effort to clarify Tousley’s objections and to support his position, the following cited sections of both the building and fire codes are referenced:

- a. **The International Existing Building Code 2018 [a]101.4.** Buildings previously occupied. The legal occupancy of any building existing on the date of adoption of this code shall be permitted to continue without change, except as is specifically covered in this code, the International Fire Code, or the International Property Maintenance Code, or as is deemed necessary by the code official for the general safety and welfare of the occupants and the public.
- b. **The NFPA 101 Life Safety Code 2018 A.1.2** The Code endeavors to avoid requirements that might involve *unreasonable hardships* or *unnecessary inconvenience* or interference with the normal use and occupancy of a building but provides for fire safety consistent with the public interest. Protection of occupants is achieved by the combination of prevention, protection, egress, and other features, with due regard to the capabilities and reliability of the features involved. The level of life safety from fire is defined through requirements directed at the following:
 - (1) Prevention of ignition
 - (2) Detection of fire
 - (3) Control of fire development
 - (4) Confinement of the effects of fire
 - (5) Extinguishment of fire
 - (6) Provision of refuge or evacuation of facilities
 - (7) Provision of fire safety information to occupants.

- c. **NFPA 101 Life Safety Code 2018 1.3 Application: 1.3.1 New and Existing Buildings and Structures.** The code shall apply to both new construction and existing buildings and existing structures
- d. **NFPA 101 Life Safety Code 2018 4.6.5 Modification of requirements for existing buildings:** Where it is evident that a reasonable degree of safety is provided, as is the case here, the requirements for existing buildings shall be permitted to be modified if their application would be impractical in the judgement of the authority having jurisdiction.
- e. **NFPA 101 Life Safety Code 2018 A 4.6.5** In existing buildings, it is not always practical to strictly apply the provisions of this code. Physical limitations can cause the need for disproportionate effort and expense with little increase in life safety. In such cases the authority having jurisdiction needs to be satisfied that reasonable life safety is ensured. In existing buildings, it is intended that any condition that represents a serious threat to life be mitigated by the application of appropriate safeguards. *It is not intended to require modification for conditions that do not represent a Significant threat to life, even though such conditions are not literally in compliance with this code.*
- f. **NFPA 101 Life Safety Code 2018 4.7.7 Building Rehabilitation 4.6.7.1** Rehabilitation work on existing buildings shall be classified as one of the following work categories in accordance with 43.2.2.1:
 - (1) Repair
 - (2) Renovation
 - (3) Modification
 - (4) Reconstruction
 - (5) Change of use or occupancy classification
 - (6) Addition
- g. **NFPA 101 Life Safety Code 2018 4.7.7 Building Rehabilitation 4.6.7.2** Rehabilitation work on existing buildings shall comply with chapter 43.
- h. **NFPA 101 Life Safety Code 2018 4.7.7 Building Rehabilitation 4.6.9 Conditions for Occupancy 4.6.9.1** No new construction or existing building shall be occupied in whole or in part in violation of the provisions of this code unless the following conditions exist:

- (1) A plan of correction has been approved
- (2) The occupancy classification remains the same
- (3) No serious life safety hazards exist as judged by the authority having jurisdiction

The section commentary states the following: Because the code applies retroactively, 4.6.9.1 prohibits the use of existing, nonconforming facilities. However 4.6.9.1 does permit the building to continue in use, provided that the occupancy classification remains the same and there is no serious life safety hazards, as judged by the authority having jurisdiction, that would constitute an imminent threat.⁹ Such permission does not exempt the building from compliance with the code. *A limited but reasonable time for bringing the building into compliance with the Code to the extent deemed necessary by the AHJ under 4.6.5 must be established and fulfilled.*

The Authority Having Jurisdiction has not adequately identified violations or provided reasonable guidance as to what he believes is a significant threat to life or a condition which constitutes a serious life safety hazard. The process has not proven such conditions exist. Instead, the Fire Chief has placed the responsibility on the property owner to identify potential hazards and conditions which constitute a serious life safety hazard. This appears to be contrary to the provisions of section 4.6.9 condition for occupancy in which the Life Safety Code identifies in subsection (3) that it is the authority having jurisdiction who judges the seriousness of life safety hazards therefore placing the burden of proof on the AHJ.

The IEBC defines dangerous as : Any building, structure or portion thereof that meets any of the conditions described below:

1. The building or structure has collapsed, has partially collapsed, has moved off its foundation or lacks the necessary support of the ground.
2. There exist a significant risk of collapse, detachment or dislodgement of any portion, member appurtenance or ornamentation of the building or structure under permanent, routine or frequent loads,; under acute loads in effect; or under snow, wind, flood earthquake or other environmental loads when such loads are imminent.

Unsafe is defined by IBC as. Buildings or structures or equipment that are unsanitary, or that are deficient due to inadequate means of egress facilities, inadequate light and

⁹ As noted above, Chief agrees there are no life safety threats at the Property.

ventilating, or that constitute a fire hazard, or in which the structure or individual structural members meet the definition of dangerous, or that are otherwise dangerous to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance shall be deemed unsafe. A vacant structure that is not secured against entry shall be deemed unsafe.

NFPA defines imminent threat to life: An act or condition that is judged to present a danger to persons or property that is so urgent and severe that it requires immediate corrective or preventive action.

- i. **IBC [a] 105.1 Required.** Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code or to cause any such work to be performed, shall first make application to the building official and obtain the required permit. Exemptions 105.2.

- j. **[A] 107.1 General.** Submittal documents consisting of construction documents, statement of special inspections, geotechnical report or other data shall be submitted in two or more sets with each permit application. The construction documents shall be prepared by a registered design professional where required by the statutes of the jurisdiction in which the project is to be constructed. Where special conditions exist, the building official is authorized to require additional construction documents to be prepared by a registered design professional.

Exception: The building official is authorized to waive the submission of construction documents and other data not required to be prepared by a registered design professional if it is found that the nature of the work applied for is such that review of construction documents is not necessary to obtain compliance with this code.

- k. **IBC 2021 [A] [A]107.1 General.** Submittal documents consisting of *construction documents*, statement of *special inspections*, geotechnical report and other data shall be submitted in two or more sets with each *permit* application. The *construction documents* shall be prepared by a *registered design professional* where required by the statutes of the jurisdiction in which the project is to be constructed. Where special

conditions exist, the *building official* is authorized to require additional *construction documents* to be prepared by a *registered design professional*.

Exception: The *building official* is authorized to waive the submission of *construction documents* and other data not required to be prepared by a *registered design professional* if it is found that the nature of the work applied for is such that review of *construction documents* is not necessary to obtain compliance with this code.

Reference: NH RSA 310-A:52 Architects Exemptions:

Nothing in this subdivision shall be construed to prevent or affect

- I. The Preparation of drawings and specifications for and the supervision of the construction of alteration of a single family or two family residence or of any building used for that purpose or for any building used for farm purposes.
- II. **The alteration of an existing building not involving structural changes**
- III. The practice of architecture by officers and employees of the United States while engaged within the state in the practice of architecture for the federal government.
- IV. The preparation of drawings and specifications for and the supervision and alteration of any structure which does not have as its principal structural members reinforced concrete or structural steel and is 2.5 stories or less, and 4,000 square feet or less, and not a building of assembly, which includes schools, churches, auditoriums, theatres, hospitals and any building for the elderly.

The Fire Chief is the AHJ with respect to the life safety code and the Building Inspector is the AHJ with respect to the International Building Code. The intent of the codes is to recognize action in any of the following areas: Repair, Renovation, Modification, Reconstruction, Change of use or occupancy classification, Addition which would require a permit and invoke certain requirements. The code addresses maintenance and the State of New Hampshire amended the building code to exempt the ICC Maintenance Code. The codes also indicate that the level of design acceptable is based on judgement of the AHJ with respect to existing buildings. This fact is strengthened by section II of RSA 310-A:52 which exempts existing buildings from the requirements of the statute.

IV. Conclusion

34. The Chief is abusing his authority with his heavy handed, threatening approach to issues that Mr. Tousley agrees require attention. The Chief refuses to involve other appropriate City officials having jurisdiction over the Property who all should be part of the process the Chief himself agreed to on January 30, 2023. Tousley disputes that an FPE is required (except for project specific remediation work) and disagrees that code provisions require a completely new sprinkler or alarm systems.

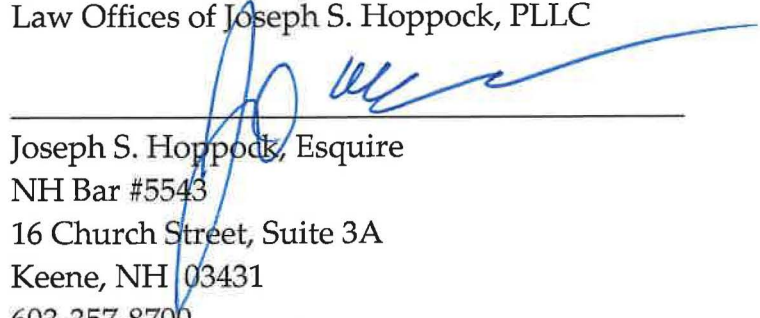
35. The true intent of the Code Provisions, which the Chief has failed to identify, but which Tousley has summarized above, demonstrate that his first priority (See, ¶32, A-E above) is the appropriate checklist for making the Property safer. There is no support in the Code for the Chief's heavy handed demands.

36. Mr. Tousley requests his appeal be reopened and he requests a hearing before this Board to address the issues raised herein.

Respectfully submitted,
TOBY TOUSLEY
By and Through His Attorneys,
Law Offices of Joseph S. Hoppock, PLLC

April 7, 2023

BY: _____


Joseph S. Hoppock, Esquire
NH Bar #5543
16 Church Street, Suite 3A
Keene, NH 03431
603-357-8700
jhoppock@hoppocklaw.com

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**CITY OF KEENE
BOARD OF APPEALS**

CASE NUMBER: FBOA 22-01
PROPERTY ADDRESS: 160 Emerald Street
OWNER: Toby D. Tousley
PETITIONER: Toby D. Tousley
DATE: May 2, 2023

**TOBY TOUSLEY'S REQUEST TO SUPPLEMENT ITS REQUEST TO RE-OPEN
HEARING ON FIRE DEPARTMENT'S VIOLATION NOTICES, ETC.**

On April 7, 2023, Toby Tousley, through counsel, asked this Board to re-open proceedings before it arising out of alleged fire code violations cited by the Fire Chief (Chief). Since that date, new information has come to Mr. Tousley's attention that bears directly on the Chief's treatment of Mr. Tousley, and indeed, his fitness for duty¹

1. On January 11, 2023, Chief, through Lieutenant Meghan Manke, issued a Notice of Violation against Mr. Tousley regarding the space occupied by Wonder Casino, at 160 Emerald Street. The Notice lists Mr. Tousley as the property owner.

2. In the immediate past, Chief employed the services of the Keene Police Department to serve his Violation Notices upon Mr. Tousley. In fact, Chief used the Keene Police Department to serve his September 19, 2022 Notice of Violation on Mr. Tousley. Unbeknownst to Mr. Tousley, the January 11, 2022 Notice of Violation was

¹ If a high ranking public official cannot respect a citizen's constitutional rights and purposefully ignores same, said official is not fit for duty as a public servant.

sent, by means unknown, directly to the local casino operators who, upon information and belief, passed it up their corporate chain.

3. On April 14, 2023, Daniel Katsekas, the New England Operational Manager for New Hampshire Group, LLC, the owner of Wonder Casino, provided Mr. Tousley with a copy of the Chief's January 11, 2023 Notice of Violation. Tousley contends Chief's failure to have Mr. Tousley properly notified (by serving him with a copy as he did with a similar Notice in September of 2022) is a serious and deliberate breach and a violation of Mr. Tousley's due process rights, which entitle him to Notice, fairly calculated for him to receive it, coupled with a Reasonable Opportunity To Be Heard on the alleged violations. To cure what Mr. Tousley contends is a deliberate violation of his due process rights, Ms. Tousley DEMANDS this Board hear his Appeal of the alleged violations listed in the January 11, 2023, Notice of Violation.

4. Mr. Tousley cites the following in Appeal of the alleged January 11, 2023 violations promulgated by the Chief against him:

4.1. Extension cords (NFPA 1:11.1.5.6)

Extension cords are clearly allowed in and permitted by the terms of the NFP1 11.1.4.3. Relocatable power strips are allowed, but may not extend through walls, ceilings or floor coverings or be subject to environmental or physical damage. 11.1.5.5. There is no violation here. For instance:

11.1.4 Relocatable Power Taps - This reference (power strips) is an issue which has been raised by the fire department repeatedly and I wanted to include these requirements to demonstrate that the application of the code has specifics and is not handled with

blanket statements. The impression we were left with is that power strips or relocatable power taps are allowed with conditions as stated:

11.1.4.1 Relocatable power taps shall be listed to UL 1363, standard for Relocatable Power Taps, or UL 1363, Outline of Investigation for special purpose relocatable power taps, where applicable

11.1.4.2 The relocatable power taps shall be directly connected to a permanently installed receptacle.

11.1.4.3 Relocatable power tap cords shall not extend through walls, ceilings, or floors; under doors or floor coverings; or be subject to environmental or physical damage.

11.1.5 Extension Cords

11.1.5.1 Extension cords shall be plugged directly into an approved receptacle, power tap, or multiplug adapter and shall, except for approved multiplug extension cords, serve only one portable appliance.

11.1.5.2 The ampacity of the extension cords shall not be less than the rated capacity of the portable appliance supplied by the cord.

11.1.5.3 The extension cords shall be maintained in good condition without splices, deterioration, or damage.

11.1.5.4 Extension cords shall be grounded when servicing grounded portable appliances.

11.1.5.5 Extension cords and flexible cords shall not be affixed to structures; extend through walls, ceilings, or floors or under doors or floor coverings; or be subject to environmental or physical damage.

11.1.5.6 Extension cords shall not be used as a substitute for permanent wiring.

4.1.2. "Kitchen Window – powering temp. lights outside..."

The provisions of 11.1.6 apply to temporary electric power and lighting installations. Temporary electric power and lighting installations shall be permitted for a period not to exceed 90 days for holiday, decorative lighting and similar purposes. 70.590.3© NFPA 1:11.6.3.2 (90 days).

In addition, with respect to minimum fire resistance ratings, the fire resistance rating is permitted to be reduced by 1 hour, but in no case less than one hour where the building is protected throughout by an approved automatic sprinkler system in accordance with 9.7.1.1(1). Another significant fact is the City of Keene approved the creation of a Casino with conditions as evidenced by the submission and approval of plans and the issuance of building permit to construct the casino, inspections conducted and approved, and certificate of occupancy issued. If there is an issue with separation it lies with the approval process which allowed the current and now existing separations. Even if separations were retroactive, only a one hour separation is required due to the presence of an automatic sprinkler system.

Regarding the separation of the kitchen and the casino, there are 'Special Provisions for food service and the casino is a new occupancy and not an existing one. It was not previously a place of assembly and there was a change of use and is controlled by Chapter 12 of the NFPA Life Safety Code [2018]; namely:

12.7.2.3 Food preparation facilities shall be protected in accordance with 9.2.3 and shall not be required to have openings protected between food preparation areas and dining areas.

9.2.3 Commercial Cooking Operations: Where required by another section of this Code, commercial cooking operations shall be protected in accordance with NFPA 96 Standard for Ventilating Control and Fire Protection of Commercial Cooking Operations, unless such installations are approved existing installations, which shall be permitted to be continued in service.

Last, on the kitchen separation; if the original plans call for separation of the kitchen and the permit was issued based on that as a requirement and there was a subsequent understanding reached during inspections that the kitchen would be separated, the agreements should be honored. If it is not addressed specifically in the plans, then it is not required.

The IBC Section 509 Incidental Uses 509.1 General Incidental uses, located within single occupancy or mixed use occupancy buildings shall comply with the provisions of this section. Incidental uses are ancillary functions associated with a given occupancy that generally pose a greater level of risk to that occupancy and are limited by those listed in Table 509.

509.3 Incidental uses shall not occupy more than 10 percent of the building area of the story in which they are located.

509.4 Separation and Protection The incidental uses listed in Table 509 shall be separated from the remainder of the building or equipped with an automatic sprinkler system, or both, in accordance with the provisions of that table.

Both Restaurants and Casino's fall under the same use category which is Assembly A-2.

4.2 "Sprinkler Testing"

Chief cites no violation here; he wants a copy of "most recent sprinkler test report," however, Tousley has provided Chief with copies of sprinkler test reports dated August 2, 2022 (by Matt Duncan). Chief writes that "Mechanical water flow alarm devices including, but not limited to, water meter gauges, shall be tested quarterly." This is informational and not a cited code violation.

A professionally written violation would be expected to a) identify the exact violation; b) cite the appropriate code section and edition year; c) be prepared to explain the merits of the violation; and d) provide a clear instruction on the corrective action ordered. Most of this Report fails in regard to clarity on each of these points.

4.3. "No Exit" (7.10.8.3.1)

Again Chief cites NO VIOLATION but asks that the operator change the exit sign above the breakroom door with a "not an exit" sign, as it has been determined that this "exit is not required for exit." While the door is an exit, it is not *required* for exit. This was the same area Chief wrote up on his earlier Notice of Violations, *See*, September 19, 2022.

4.5. Occupant Notification: NFPA 101 Life Safety Code [2018 Edition]

The requirement for fire alarm in a multiple use occupancy, protected by an automatic sprinkler system will require more consideration and cannot be adequately covered in this response and without the participation of the local fire department and the property owner.

The sprinkler system can act as the detection component of the fire alarm. Sprinkler systems are required to be monitored as this one is, by a master box which is a direct connection to the dispatch and communications center at Mutual Aid. There is a radio controlled backup to the master box as well.

A fire alarm system is also required to be provided with pull stations at each major exit and egress pathway so that occupants can activate the fire alarm if they become aware of a fire which has not activated the sprinkler system. If a fire alarm is present or if a fire alarm is required by virtue of the sprinkler system requirement then audible horn, strobe devices are also required so that occupants in all areas of the building can be notified of an activation of the pull stations or sprinkler system.

Components of a fire alarm system are currently in place. The sprinkler system heads act as detection and the activation is monitored at Mutual Aid. There is also a fire alarm panel, the master box and a few pull stations. What is missing are pull stations at all exits and warning devices that are audible in all areas of the building. This is a correction to be achieved, not a basis for Chief's continuing harassment.

The design of the system will require the services of a design professional. Chief demands a system designed by a fire protection engineer. That is not required. Other design professionals, such as: NICET Certified, National Institute for Certification in Engineering Technologies design professionals are qualified to perform the actual design under the supervision of an engineer. In many jurisdictions the fire alarm vendor designs the system and then has the plan reviewed by a staff or contracted engineer, which is what the owner proposes here.

The property owner has been open to having discussions about upgrading his **EXISTING** fire alarm system and his **EXISTING** Sprinkler system. He has invested significant funds so far to provide the upgrade for the casino including a new fire alarm panel. The best approach going forward: acknowledge that improvements are a good idea, but recognize the method employed by Chief to achieve this goal (threats) is antithetical to a good working relationship between the owner and the city. The city needs to allow the property owner and the code enforcement team (exclusive of the Chief) to mutually agree on a timetable of compliance. An order to correct non-specific violations is not practical and will only delay the desired results.

WHEREFORE, Toby Tousley, prays this Board, for all the reasons stated above, will enter the following Orders:

- a. Remand the matter to another **qualified member of the Fire Department** (e.g., City Fire Marshall Steve Dumont) who is authorized to act as the Authority Having Jurisdiction to issue specific violations, cite code sections, and meet professionally with Mr. Tousley's consultant and Mr. Tousley so that an agreement can be reached;

- b. Allow the parties to set a specific amount of time to come to an agreement. The timetable for actual compliance has to be based on prioritizing alleged violations and assigning achievable deadlines agreeable to Mr. Tousley to reach these goals. Financial impact on Mr. Tousley must be taken into consideration.

NFPA Life Safety Code 101 [2018] A.1.2 The code endeavors to avoid requirements that might involve unreasonable hardships or unnecessary inconvenience or interference with the normal use and occupancy of a building but provides for fire safety consistent with the public interest.

Of course, many of these issues are easily corrected, but Tousley and his team see that Chief is acting in the tyrannical capacity of AHJ and issuing violations arbitrarily and capriciously and in violation of Mr. Tousley's constitutional rights. Correction efforts need to be consolidated with notification mechanisms. Notification failed abysmally (and quite intentionally) with the January 11, 2023, Notice of Violation. Mr. Tousley contends he is entitled to:

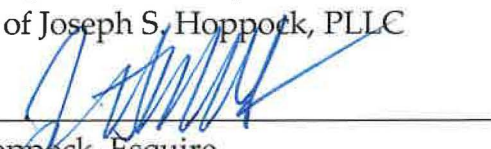
- A. An opportunity to timely review alleged violations;
- B. To ask questions about them to qualified personnel; and
- C. Be provided an opportunity to negotiate by submitting alternative Code citations *to the person who is actually responsible for enforcement*, AND authorized to negotiate resolution.

Wherefore, Mr. Tousley, asks that the Board take up his Appeal of the January 11, 2023, Notice of Violation along with his Appeal submitted on March 23, 2023 and for any other relief as is just.

Respectfully submitted,
TOBY TOUSLEY
By and Through His Attorneys,
Law Offices of Joseph S. Hoppock, PLLC

May 2, 2023

BY: _____


Joseph S. Hoppock, Esquire
NH Bar #5543
16 Church Street, Suite 3A
Keene, NH 03431
603-357-8700
jhoppock@hoppocklaw.com



City of Keene

FIRE DEPARTMENT
Office of the Fire Marshal



Office: 31 Vernon Street, Keene, NH 03431
Telephone: (603) 357-9861 • Fax: (603) 283-5668
KFDlifesafety@keeneh.gov

NOTICE OF VIOLATION AND ORDER TO CORRECT RELATIVE TO THE CASINO

Date of Inspection: January 06, 2023

Date of Notice: January 11, 2023

Occupancy: Casino
160 Emerald Street
Keene, NH 03431

Owner: TOUSLEY, TOBY D.
PO BOX 626
KEENE, NH 03431

This Notice details the findings of the inspection conducted on January 06, 2023. Present at this inspection was Captain Steven Dumont and Lieutenant Meghan Manke. The building was inspected for compliance with the minimum standard for existing buildings as required by the State Fire Code and State Building Code. The building was inspected for fire and life safety concerns. Other problems with the building may need to be addressed that are outside the scope of this inspection. This Notice reflects the violations that were observed at the time of the inspection. Other violations may exist that were not observed at the time of the inspection. In summary, the building is classified as an Assembly Occupancy. Below is a breakdown of the observed Fire Code Violations. Pursuant to RSA 154:2, II(a), RSA 47:17, XVI, and City Code Section 42-1, you are hereby ordered to correct the below violations within [45] days of receipt of this Notice.

VIOLATIONS OF STATE FIRE CODE

NFPA 1: 13.1.5. Testing. Detailed records documenting all systems and equipment testing and maintenance shall be kept by the property owner and shall be made available upon request for review by the AHJ.

1. *Provide copy of updated fire alarm test report*

NFPA 1: 11.1.5.6. Extension Cords. Extension cords shall not be used as a substitute for permanent wiring.

Remove extension cords from the following areas:

2. *Kitchen window – powering temp. lights outside. These must have their own dedicated outlet, rated for exterior use*
3. *Cord running along wall/ceiling in staff/break room*

NFPA 101: 8.3.3.1 General Every opening in a fire barrier shall be protected to limit the spread of fire from one side of the fire barrier to the other.

8.3.3.2.1 Minimum Fire Protection Rating. Fire protection ratings for products required to comply with 8.3.3 shall be as determined and reported by a nationally recognized testing agency in accordance with NFPA 252, NFPA 257, ANSI/UL 10B, *Standard for Fire Tests of Door Assemblies*, ANSI/UL 10C, *Standard for Positive Pressure Fire Tests of Door Assemblies*, or ANSI/UL 9, *Standard for Fire Tests of Window Assemblies*.

4. *Kitchen needs a fire door*

NFPA 25: 5.3.3.1. Sprinkler Testing. Mechanical waterflow alarm devices including, but not limited to, water motor gongs, shall be tested quarterly.

5. *Provide copy of most recent sprinkler test report*

7.10.8.3.1 * No Exit. Any door, passage, or stairway that is neither an exit nor a way of exit access and that is located or arranged so that it is likely to be mistaken for an exit shall be identified by a sign that reads as follows: NO EXIT

6. *Change exit sign above break room with "not an exit" sign, as it has been determined that this exit is not required for egress*

NFPA 101: 13.3.4.1.1 Assembly occupancies with occupant loads of more than 300 and all theaters with more than one audience-viewing room shall be provided with an approved fire alarm system in accordance with 9.6.1 and 13.3.4, unless otherwise permitted by 13.3.4.1.2, 13.3.4.1.3, or 13.3.4.1.4.

NFPA 101: 9.6.3.9.2 Occupant Notification. Where permitted by Chapters 11 through 43, automatically transmitted or live voice announcements shall be permitted to be made via a voice communication or public address system that complies with all of the following:

- (1) Occupant notification, either live or recorded, shall be initiated at a constantly attended receiving station by personnel trained to respond to an emergency.
- (2) An approved secondary power supply shall be provided for other than existing, previously approved systems.
- (3) The system shall be audible above the expected ambient noise level.
- (4) Emergency announcements shall take precedence over any other use.

7. *Due to occupant load exceeding 300 people, alarm system must be equipped with voice evacuation, as described above*

CORRECTION OF VIOLATIONS OF STATE CODES

Due to the severity of these violations, you are hereby ordered to correct these violations within [45] days of receipt of this Notice; a reinspection will be conducted on [45] days from this Notice. City Code Sec. 42-1(a).

If a violation is unable to be corrected within the timeframe provided, within [45] days of receipt of this Notice, you must provide an action plan to correct those violations. A corrective action plan may be sent to: KFDlifesafety@keenenh.gov.

APPEALS

If you disagree with Notice, you may appeal to the Keene Fire Chief, or his designee, **within 10 days of the date of your receipt of this Notice**. City Code Sec. 42-32; RSA 31:39-c, I. Your appeal must be sent to: KFDlifesafety@keenenh.gov.

If, following the Keene Fire Chief's or his designee's review, you disagree with the decision of the Keene Fire Chief or his designee, you may appeal the Keene Fire Chief's decision to the City of Keene's Board of Appeals **within 15 days of your receipt of the Fire Chief's decision**. RSA 674:34, I; City Code Sec. 2-741 – 2-743.

A request for a variance from or exception to the State Fire Code may be made to the State Fire Marshal. RSA 153:4-a, I; N.H. Admin. R. Saf-C 6005.04. Such a request may be made via: <https://www.nh.gov/safety/divisions/firesafety/documents/variance-request-form.pdf>. A copy of any request for a variance or exception made to the State Fire Marshal shall be mailed to the City of Keene Fire Department, 31 Vernon Street, Keene, NH 03431.

FURTHER INFORMATION

If you have any additional questions or concerns, do not hesitate to contact me at the contact information below.

Lt. Meghan Manke
Fire Prevention Officer
mmanke@keenenh.gov
(603) 357-9861

CERTIFICATION OF DELIVERY

I, Meghan Manke, certify that I delivered this Notice to the Owner listed above on January 11, 2022 via:

- Certified Mail
- In-Hand Delivery
- Email

Signature: _____

ATTACHMENTS

This Notice includes the following attachments:

N/A

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**CITY OF KEENE
BOARD OF APPEAL**

CASE NUMBER: FBOA 22-01
PROPERTY ADDRESS: 160 EMERALD STREET
OWNER/APPEALANT: TOUBY D. TOUSLEY
DATE: MAY 22, 2023

RESPONSE OF THE CITY OF KEENE FIRE DEPARTMENT TO APPELLANT’S REQUEST TO
REOPEN HEARING ON NOTICES OF VIOLATION RELATED TO 160 EMERALD STREET.

INTRODUCTION

Before the Board of Appeal (“Board”) is the request by the Appellant dated April 7, 2023, to re-open the Hearing previously held on November 9, 2022 (“Hearing”), related to Notices of Violation served on Appellant by the City of Keene Fire Department (“KFD”) arising from inspections at the real property located at 160 Emerald Street (“Building”). Also before the Board is a supplemental request to re-open the Hearing filed by the Appellant on May 2, 2023, and related to the inspection of space within the Building intended to be used as a Casino (“Supplemental Request”).

Subsequent to the Hearing, on January 13, 2023, after partial inspections of the Building on November 29, 2022, and December 8, 2022, KFD notified the Board that it was withdrawing without prejudice all but two of the uncorrected Violations pending a further and complete inspection of the entire building. The two Violations not withdrawn without prejudice were the requirement to retain the services of a licensed Fire Protection Engineer to perform a complete investigation and evaluation report on the Building, and the requirement to clear obstructions located at or below sprinkler heads within the Building.

Thereafter, on February 16, 21, and 24, additional inspections were performed on the entire Building by the KFD with assistance from the Office of the State Fire Marshal. A representative of the Appellant was also present during these inspections. On March 23, KFD provided a Report of the results of the inspections to the Appellant, a copy of which is provided to the Board with this Response (“Report”). The Report cites specific matters that must be corrected within the Building, including but not limited to, means of egress, correct classifications and fire protection of occupancies, automatic fire suppression and fire rated

separation both generally and specifically for high hazard occupancies, and an approved and permitted fire alarm system. The primary requirement of the Report is for the Appellant to retain the services of a Fire Protection Engineer (“FPE”) to do a comprehensive inspection and analysis of the Building, including but not limited to the Analysis stated in the Report. The Appellant now objects to the Report and to the requirements contained within it.

ARGUMENT

A. The State Fire Code Applies to Pre-Existing Structures.

The review by the Board of an appeal from the decision of the KFD applying the State Fire Code (RSA 153:1, et seq; NFPA 1 (2018); NFPA 101 (2018)) is narrow and limited: “An application for appeal shall be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of the state building code or the state fire code.” RSA 674:34, I. Appeals of the decision of the Board “shall be made within 30 days of the board’s decision to the state building code review board as outlined under RSA 155-A:10, IV (c), RSA 674:34, II.

In Section II, paragraph 27, beginning on page 8 of the April 7 Request to Re-Open, Appellant asserts “4 issues” arising from the March 23 Report as his “grievances.” However, KFD can only discern 3 issues stated in the Request, only two of which are substantive.

The first assertion (apparently repeated twice) is that “160 Emerald Street is an existing structure” and that the Fire Chief “incorrectly applied code requirements to an existing structure by demanding that an FPE design and plan completely new alarm systems and sprinkler systems, which Appellant contends requires only upgrades...” Appellant’s argument that the provisions of the fire code noticed as violations by KFD do not apply to the pre-existing Building is easily dismissed. RSA 155-A:2, provides: “All buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code.” In the event of any conflict between the building code and the fire code, “...the code creating the greater degree of life safety shall take precedence...” RSA 155-A:2, II. In performing his or her duties, the Fire Chief “shall use” the state fire code, including any rules that are adopted pursuant to it. RSA 153:5, V. The Rules of the Department of Safety

implementing the State Fire Code, specifically state as follows: “All persons constructing, reconstructing, maintaining or operating any structure and all owners or occupants of existing structures or premises shall comply with the requirements of NFPA 1, ‘Fire Code’...” Finally, the New Hampshire Supreme Court has also held that retrospective application of the state fire code to a pre-existing use is not prohibited, and that an owner has no vested rights to continue a use or a building classification for purposes of the application of the state fire code. Fischer 1993 v. NH State Building Code Review Board, 154 N.H. 585 (2006). Accordingly, Appellant’s argument to the contrary has no merit, and it should be dismissed by the Board. If the Board were to conclude otherwise, then any building constructed prior to the enactment of any life safety code, which would include Appellant’s Building constructed in 1919, would be exempt from modern fire protection requirements. Such a result is nonsensical on its face.

B. The Fire Chief is the Authority Having Jurisdiction For Interpreting the Requirements of the State Fire Code.

Appellant’s second substantive argument, that the KFD, and specifically the Fire Chief, lacks authority to require the alterations contained in the Report, is also quickly dismissed. In making this argument, Appellant conflates the requirements of the State Building Code into the State Fire Code, and asserts that construction, alteration, changes of use, etc., fall only under the purview of the City’s Building Code Department, and that all required permits from that department with respect to the Building were obtained. The KFD disputes the assertion that all construction, improvements, or changes in use of the Building have been properly obtained over the years. And while it is true that both the State Building Code, and the State Fire Code, apply to the Building, that does not prohibit or prevent KFD from inspecting the Building under the requirements of the State Fire Code specifically, and any other applicable state law related to fire safety, including RSA 155: 39-a, et seq. regulating places of public accommodation. As stated previously, in the event of any conflict between the State Building Code, and the State Fire Code, the “...the code creating the greater degree of life safety shall take precedence...” RSA 155-A:2, II. In the matter before the Board, where the identified violations include fire suppression systems, fire alarm systems, fire separation requirements, fire load issues, etc., all of which arise under the State Fire Code, the Fire Chief is clearly the Authority Having

Jurisdiction (“AHJ”) under applicable state law. Accordingly, whether or not the Appellant has any permit issues with the City’s building code officials is irrelevant to the determination to be made by the Board. And that determination by the Board should be that the Fire Chief, and his designees, are the AHJ with respect to the violations identified in the Report, and the Board should conclude the Report respects the intent of the State Fire Code, that the provisions of the code as determined by the Fire Chief apply, and that the Appellant has not presented an equally good or better form of construction to rectify the identified violations.

C. Appellant’s Argument that he is being Harassed is Baseless and without Merit.

Appellant’s final argument requires little rebuttal. That argument is based on the assertion that the Fire Chief is essentially abusing his authority and harassing the Appellant for no reason other than because he can. Unfortunately, Appellant’s very actions and statements, both before the Board, and in his prior interactions with KFD, belie his assertion that it is the Fire Chief who is acting unreasonably in this process. Appellant has refused from the beginning to work with the KFD to resolve what any reasonable person would immediately see as very serious life safety fire issues. He has instead refused to properly recognize the potential peril that his tenants and the general public face in the event of a fire emergency at the Building, and has instead accused the Fire Chief and KFP of incompetence. Appellant is the owner of a 95,000+ square foot, two story building, with multiple uses, some of them high hazard, without an operating centralized fire alarm system, adequate fire separations, and a deficient fire suppression system, and he accuses others of incompetence. Based on these facts, the Board should dismiss the baseless assertion that the Fire Chief or fire personnel are doing anything other than the job that they are required to do, whether or not the Appellant likes it.

[REMAINDER OF PAGE BLANK]

CONCLUSION

For the reasons stated herein, the Board should conclude that the Appellant has not met his statutory burden to show that the intent of the State Fire Code has not been correctly interpreted by the Fire Chief, that the provisions of the code have not been shown to fully apply, and that the Appellant has not presented and equally good or better construction for the Board's consideration, and accordingly, the Appeal of the Fire Chief's Report and Notices of Violation should be dismissed.

Respectfully submitted,
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