

City of Keene
New Hampshire

BOARD OF APPEALS
MEETING MINUTES

Tuesday, May 30, 2023

6:00 PM

**Room 22,
Recreation Center**

Members Present:

Malcolm Katz, Chair
Steve Walsh
Donald Flibotte
Doug Brown
Corinne Park

Staff Present:

John Rogers, Building & Health
Official/Zoning Administrator
Corinne Marcou, Board Clerk
Tom Mullins, City Attorney
Amanda Palmeira, Assistant City Attorney
Don Farquhar, Fire Chief

Members Not Present:

All Present

I. Call to Order – Introduction of Board Members

Chair Katz called the meeting to order at 6:03 PM. Roll call ensued.

II. Non-Public Session

A motion by Chair Katz to enter a non-public session per RSA 91-A:3, II(j) was duly seconded by Mr. Flibotte and the motion carried unanimously.

A motion by Mr. Brown to close the non-public session was duly seconded by Mr. Flibotte and the motion was carried unanimously.

At 6:12 PM, the public meeting reconvened.

A motion by Mr. Walsh to seal the minutes of the non-public session was duly seconded by Mr. Brown and the motion carried unanimously.

III. Minutes of the Previous Meeting – November 9, 2022

A motion by Mr. Brown to approve the November 9, 2022, meeting minutes was duly seconded by Mr. Walsh and the motion carried unanimously.

IV. New Business

- A) **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.**

Mr. Walsh recused himself from this hearing.

Mr. Rogers, the Building & Health Official/Zoning Administrator provided some background on the inspections and meetings that had occurred to date:

- April 14, 2022
 - First Fire Department (FD) inspection of the building at 160 Emerald Street.
- July 22, 2022
 - Follow-up inspection.
- September 19, 2022
 - FD Notice of Violation & Order to Correct was served.
- September 25, 2022
 - Toby Tousley, the building owner, appealed the Notice of Violation to the Fire Chief, Don Farquhar; the appeal process is outlined in the Fire Code.
- October 2, 2022
 - The Fire Chief denied Mr. Tousley's appeal.
- October 28, 2022
 - Mr. Tousley appealed the Fire Chief's administrative decision to this Building Board of Appeals (BBOA).
- November 9, 2022
 - First BBOA hearing of this appeal. The Board's decision was for the Fire Chief and Mr. Tousley to work together to resolve the violations.
- November 29, 2022
 - A meeting and brief walk through of 160 Emerald Street.
- December 8, 2022
 - Partial FD inspection.
- January 13, 2023
 - Fire Chief sent updated Notice of Violation to this BBOA, requesting a follow-up hearing on the remaining 2 violations and withdrawing the others.
- February 1, 2023
 - BBOA hearing canceled based on apparent voluntary inspections arranged by the FD and Mr. Tousley.
- February 16, 21, & 24, 2023
 - Voluntary inspections with representatives from the FD and the applicant.
- March 23, 2023

- The Fire Chief sent a letter restating the requirement to hire a fire protection engineer and to have a fire alarm system.
- April 7, 2023
 - A request to re-open the BBOA hearing on the FD's updated Notice of Violations (from January 13, 2023).
- May 2, 2023
 - Mr. Tousley submitted some supplemental materials as a part of the request to re-open the hearing.
- May 22, 2023
 - A response by Keene FD to the appellant's request to re-open the hearing was submitted.

Chair Katz welcomed the City Attorney and Fire Chief Farquhar to speak first, as was agreed upon by both parties' counsels in advance. The City Attorney, Tom Mullins, began by ensuring that all Board members had copies of the materials submitted, including the NH RSA 647:34 that this BOA was operating under and laid out the standards for appeal. The City Attorney said the standard was clear and intentionally narrow from the State of NH and BOA's perspectives. This Statute states that, "*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.*" The City Attorney presented that Statute for the Board's consideration because from the City's perspective, the Fire Chief was acting within his Authority Having Jurisdiction (AHJ). The City Attorney said that Mr. Tousley's representative, Attorney Joe Hoppock, had argued in his submissions to the Board that apparently the Fire Chief did not have the authority to act in the way he had. The City Attorney said the City's perspective was clear under the law.

The City Attorney submitted to the BOA the City of Keene's response to the request to re-open this hearing. He said that response outlined the Fire Chief's legal authority to act in this way and the City Attorney said it was important for the Board to keep that authority in mind. That authority is outlined in the relevant Statutes, including the NH Fire Code under RSA-153. Also, under the National Fire Protection Act (NFPA 1), the Fire Chief has the authority to investigate buildings and determine whether buildings and structures comply with the Fire Code; if not, the Fire Chief has the authority to order certain relief to occur. In this case, the City Attorney said that the fundamental relief the Fire Chief requested was the requirement to retain the services of a fire protection engineer (FPE); this authority was established under NFPA 1, which says, "*The authority having jurisdiction shall be permitted to require a review by an independent third party with expertise in the matter to be reviewed at the submitter's expense.*" The City Attorney said the Chief's authority to require an FPE was also outlined under the rules that implement the NH Fire Code, as demonstrated in his memo to the Board.

The City Attorney continued addressing the second major question raised by Mr. Tousley and Attorney Hoppock, which was whether the current version of the Fire Code applied to a pre-

existing building like this one. The City Attorney said, as outlined in his memo, that the Fire Code very clearly applied to pre-existing buildings based on the NH Statutes, NFPA 1, and the rules of the Department of Safety. To the City Attorney's knowledge, this 95,000 square foot building at 160 Emerald Street was built in 1919; it is a 2-story building with multiple uses in it today. The City Attorney said it would be absurd if the law said that this building could not be subjected to the requirements of the NH Fire Code as it exists now. Fire protection measures that worked in the past were not appropriate today; he used the example of buckets of sand throughout a building that would not be appropriate today. The City Attorney said that part of the City's argument that the Fire Chief would explain in more detail was about what fire protection measures existed in this building. Based upon the FD's inspections and information collected to date, the City Attorney said it was very clear that there was no centralized fire alarm system in this building, which was necessary and required. The City Attorney explained that someone on the second floor of this building (with no direct egress) would likely not know about a fire until it was too late. The City Attorney said that the case law he submitted was also very instructive on so called "grandfathered" uses.

The City Attorney discussed the last issue raised by Mr. Tousley and Attorney Hoppock, which was that the Fire Chief was improperly singling out or harassing Mr. Tousley. The City Attorney said he could not change how Mr. Tousley felt or reacted to any of this. From the City Attorney's perspective, the Fire Chief was taking the necessary steps to ensure that the building was safe. The City Attorney said it was unfortunate that the dispute between the two parties had deteriorated to some extent, which he said the City admitted. Still, he said that did not change the fact that the Chief has responsibilities under the NH Fire Code and the City believed that the Chief was acting appropriately.

The City Attorney explained that the City's principal request was for the BOA to affirm the Fire Chief's decision based on all the investigations and inspections. The City Attorney said he wanted to be clear that the parties could argue back and forth on the various issues (e.g., appropriate plug use or need for an exit sign), but from the City's perspective, the fundamental issues were how this building was constructed, how it is separated now, and what uses existed. From the City's perspective, there were multiple high hazard uses in the building that require specific fire suppression systems; a use with a heavy fire load would require a heavier duty sprinkler system, for example. The City Attorney said the only real way to know what exists in the building today was to have an FPE perform an engineering study of all the uses and separations. The City Attorney said he was the first to admit that no one in the meeting room was a licensed FPE, including Mr. Tousley's consultant, Norman Skantze. While Chief Farquhar and Mr. Skantze could look at a building and notice violations, that did not mean that they had the expertise to determine the structural needs to correct a violation, whether that be the centralized fire alarm system or an enhanced sprinkler system. The City Attorney repeated his perspective that the Chief had the authority to require the FPE.

The City Attorney explained that there were proposed uses in this building that the Fire Chief could not permit because one was on the second floor with no direct egress or centralized fire

system to warn people there. He said this had nothing to do with people trying to run their businesses on that second floor and that the City would like to work with Mr. Tousley to resolve those issues, which would require the FPE. The City Attorney said that the third party FPE would be advantageous and appropriate because, admittedly, the Fire Chief and Mr. Tousley had been disagreeing. The City Attorney said that Mr. Skantze was not an FPE but was involved with the walkthroughs.

The City Attorney also wanted to discuss the supplemental request that was submitted and had a lot to do with the casino on the property. He said that a Notice of Violation was issued in January 2023 on the casino property. It was the City Attorney's understanding that most of those issues had been resolved with a few still outstanding; there was a temporary Certificate of Occupancy issued and the FD had issued a permit to operate a place of assembly. From the City's perspective, the issues with the casino were moot. The City Attorney said he agreed with Attorney Hoppock's submission that when these notices of violation arise, Mr. Tousley has a right to be notified as the property owner. He said the proposed tenant was provided the notices of violation in January 2023, but Mr. Tousley was not provided with that information at that time, which was an oversight the City was working to correct.

The City Attorney concluded by ensuring that the Board had the report the Fire Chief submitted on March 23, 2023, the notice of violation on the casino, and the first notice of violation from February 2023, but he said most of those issues were taken off the table at the last hearing by reserving any rights. Fundamentally, the City Attorney said there were only a few issues still outstanding related to the sprinkler system, the centralized fire alarm system, and a few other matters based on the current inspection.

The Fire Chief spoke next. He said there were 3 things that Board could rule on:

- 1) Whether the rules adopted under the Fire Code had been interpreted incorrectly.
 - a. The Fire Chief was confident the Code was interpreted correctly for this existing building based on the NH laws.
- 2) The provisions of the Fire Code do not fully apply.
 - a. The Fire Chief said there are rarely any exceptions to this, and he did not believe any existed in this case, leaving the FD with the authority and right to assess and cite the building (per NFPA 1 and NH law).
- 3) An equally good or better form of construction is proposed.
 - a. The Fire Chief explained that for the 2 years before he came to Keene he worked for a private industry, bringing some of the most complex buildings that exist in the U.S. from very far out of Code into full compliance. So, he said he had a framework for understanding these things. The Fire Chief found that this building at 160 Emerald Street had been renovated over time with a lack of permitting; walls had moved, occupancies had changed, the demands of the fire sprinkler system had changed, all of which he spoke about at the November 9, 2022, meeting.

Ultimately, the Fire Chief said that he thought any credible fire search professional would consider this building as dangerous and said it needed to progress toward Code compliance. He said that the strict application of the Code was almost impossible to achieve in a building of this complexity that is so far out of compliance. The Fire Chief was glad that Mr. Tousley contracted with another fire code professional, Mr. Skantze (owner of the consultant business Fire Risk Management), to help because there are alternate pathways to compliance that are much less expensive, much more expedient, and satiate the City's need for that building to be a safe space and Mr. Tousley's need to run a profitable business. To this point, the Fire Chief said his Department's relationship with Mr. Tousley had remained oppositional, fractured, and unhealthy.

The Fire Chief explained that after the last BOA meeting on November 9, 2022, he thought it was important to maintain a relationship with Mr. Tousley and those who represent him. The Fire Chief said there had been a lot of acrimony and that he could speak at length about some extremely offensive behaviors and posters Mr. Tousley hung in his building that the Fire Chief said were frightening, intimidating, and uncomfortable. The Fire Chief hoped these things would not continue after this meeting. He said those issues slowed down a process that must happen.

The Fire Chief said the crux of all of this was his requirement for Mr. Tousley to hire an FPE. The Chief thought they were close to an agreement on that, in theory. The Fire Chief cited page 37 of this meeting's agenda packet, under "Appellant's Grievances," Section A, "*The 160 Emerald Street building is an existing structure,*" which the Chief agreed with. He continued quoting, "*The Chief incorrectly applied Code requirements for an existing structure by demanding that an FPE and plan completely new alarm systems and sprinkler systems,*" which the Fire Chief said he disagreed with. He said that even in the appellant's own writing, they stated that a "*consultant and qualified specialists he retains (a qualified specialist will likely involve the participation of an FPE).*" The Chief discussed the value of a design professional or FPE; he said anything that is cited needs corrective action, and any corrective action would need to be permitted. Any permit for construction design would require a stamp of approval by a design professional, which would get the appellant one step closer. The Fire Chief said that Mr. Skantze is a knowledgeable person who the Chief respects professionally. Still, the Chief said that the end product in getting this building from dangerous to acceptable and somewhat Code compliant in the future, is through that design professional.

The Fire Chief said that fire codes are fundamentally based on occupancy (e.g., assembly, storage, etc.). As the Fire Chief, he said he could declare occupancy of this building; he thought that Mr. Tousley might disagree, but the Chief thought he was relatively close. The Chief said this building at 160 Emerald Street was near the top of the list of the most complex buildings he had seen throughout his career. He said the building had changed so much over time that it was difficult to determine the occupancy. The Chief referred to his response in the agenda packet, which described this building as "high hazard," which is more dangerous than one would expect. He said that within this building there is a carpet store with rugs displayed on a vertical plane. He said that those carpets would burn with such intensity that an FPE or even a sprinkler designer would need to calculate the fire load of those materials and whether a sprinkler system could

handle them. He said the same was true for a high rack storage area in the building that was not permitted; the Chief said that storage should not be permitted because the racks are small and do not come close to meeting what the Chief would consider proper Building Code. He added that the commodity classification of those storage racks had not been evaluated for a sprinkler system. He reiterated that this building changed over time. The Fire Chief said that every time an occupancy changes or the commodities in the occupancy change, the fire protective features need to change as well; a change in occupancy could result in a change of fire load. He said this building was so far from compliance that it was difficult to define.

The Fire Chief recalled that he was asked not to be present at the final, more in-depth inspections. The FD has some excellent and highly trained inspectors who conducted the work, kept the Chief informed, and took a lot of photos. He said the results of the inspections showed that the building was as far from compliance as the Fire Chief expected. He said the building was mixed use by definition with multiple occupancies. The Chief added that the building was unseparated. He explained why “separation” is incredibly important. The Chief said that if a building is properly separated using 1-hour, 2-hour, or 3-hour walls, it can be considered a separate building. He said that if proper separations were in a high hazard area, it would act as and be treated as a completely different building than the main building. The Fire Chief said that there was no way that the building at 160 Emerald Street could be considered a separated building. He said that when a building is unseparated, the rule is that building must be designed to protect people from the highest hazard classification in the building.

The Fire Chief reiterated that this building had changed dramatically over time. He said the parties could argue about the occupancies, but the Fire Chief said there were at least 3 occupancies in that building that he would classify as high hazard. He said that all boiled down to NFPA 1, which says that the building owner is responsible for following the Fire Code and ensuring the building is safe. The Chief said that everyone should have the reasonable expectation that when they go into a building, they should be able to get out of that building alive. He added that there is also an expectation that his firefighters should be able to exit a burning building alive. As a Fire Chief who is also in charge of fire suppression, he believed that if there was smoke coming from the building at 160 Emerald Street, that his firefighters would not make it out alive. He called it a dangerous, complex, maze of a building. He said there are electrical cords everywhere, innumerable materials that would burn rapidly, hazardous materials, and an unending list of things that could cause a fire.

Next, the Fire Chief discussed the fire alarm system in this building. He said that a section of the NFPA 1 says that if an individual cannot see a fire in a building, they should be warned that there is a fire in the building. In his professional opinion, the Fire Chief thought that what made the building at 160 Emerald Street most dangerous was the lack of a fire alarm system. He cited occupancies that could cause a fire such as an apparent Amazon shipping warehouse and one where an oil truck is parked with bare wires hanging around it. He said that outside of a developing nation, it was unacceptable for improper occupancies on a first floor to kill people on a second floor because of no centralized fire alarm system to warn them.

The Fire Chief said he understood that it would be a lengthy and expensive endeavor to bring this building to Code. He said it was a balancing act for him between safety and allowing people to run their businesses. The Chief said he had to make a lot of hard decisions regarding this building. Still, he said that he took an oath to protect the citizens of Keene, which was what he was trying to do. The Chief said he could not overstate how important that was to him. He said it was not lost on him what his decisions meant for the building owner and the people trying to run businesses in that building. However, the Fire Chief said he had a good understanding of and a lot of experience and training to gauge right from wrong. He said this building was just wrong. The Chief thought the building could be in compliance fairly quickly. Still, he said that could not happen until the FD had a good understanding of what the building is. The Chief said the only way to gain that understanding about the building was for an FPE to determine things like separations, the heating system, duct work, and electricity; he said that perhaps Mr. Skantzé could initiate that process.

The Fire Chief discussed the push back, stating that there had been many unfair things said about him and his statement about unpermitted work in that building. The Chief said Mr. Tousley and his representatives were aware of an email the Chief sent the night before this meeting (May 29, 2023); the Chief said that upon the earliest inspection cycle in December 2022, he walked into what used to be a gym that was actively under renovation and was recently (in 2023) permitted as a restaurant. He said that those renovations occurred for months before the FD saw the permit. The Fire Chief said it was a fact that while Mr. Tousley was impugning him and challenging The Chief's personal and professional character (e.g., stating that he made things up and fabricated photos), there was ongoing and unpermitted construction of an assembly space occurring in the building at 160 Emerald Street. He said that was what had occurred in the building over time.

The Fire Chief concluded by stating that the building was dangerous and had a long way to go to be in compliance, and that to get there, he would need cooperation that he had not received yet. The Chief was completely amenable to working something out at this meeting to move forward with a timeline. He said that he was asked to sign an agreement before this meeting that said the building was separated, but he said it was not true and it would have been immoral for him to sign. The Fire Chief said this must begin with getting a fire alarm system in the building, at minimum, so that all people and firefighters could get out; if the building burns down, the Fire Chief said that would be between Mr. Tousley and his insurance company. The Chief said it was as simple as the fact that not everyone in the building would be alerted to get out of the building during a fire.

The City Attorney had some procedural comments. He noted that Attorney Hoppock had provided the Board with a book of materials. The City Attorney said that the rules of evidence did not strictly apply in this context. The City Attorney did not have any objections to the materials Attorney Hoppock submitted for the Board to consider, but the City Attorney did want the Board to understand that he had no time to review those materials. He said that a cursory glance showed materials on permitting issues and other things the building owner had gone through. The City Attorney wanted to be clear that the City was not saying that individual

occupancies in the building had not gone through permitting processes before; some tenants did what they needed to with the Building Code enforcement department. However, the City Attorney was saying that over a period of time (especially given the age of the building), there had been activities in the building that were not permitted; the Chief had pointed out the restaurant example, but the City Attorney thought that occupant was moving forward trying to do the right thing. In particular, the City Attorney said there was a document in Attorney Hoppock's materials—tab 17—that was apparently a preliminary analysis and report from Mr. Skantze that the City Attorney had not reviewed. Still, the City Attorney had not seen anything that changed his perspective about the Fire Chief's authority on these matters. The City Attorney added that he had received a copy of the permit to operate the casino as a place of assembly.

Chair Katz appreciated and commended both sides for working from the 17 original issues to the three issues that remained. He thought everyone on the Board understood that there were nuances because this is a mixed-use structure.

Chair Katz welcomed comments from Attorney Hoppock, Mr. Tousley, and Mr. Skantze. Mr. Hoppock reviewed what was included in the 18-tab packet of materials he shared with the Board to make his case:

1. Five-year sprinkler system inspection report dated July 22, 2022
2. Annual fire alarm and sprinkler report. Attorney Hoppock said the Chief was given copies of these months ago.
3. Fire extinguisher safety report, which Attorney Hoppock said was largely good.
4. Notice of Violation from September 19, 2022, which Attorney Hoppock said was derived from inspections on April 14, 2022, and July 22, 2022. He quoted, "*The buildings were inspected for compliance with the minimum standard for existing buildings as required by the State Fire Code and the State Building Code. The building was inspected for fire and life safety concerns. This notice reflects the violations that were observed at the time of the inspection.*" Attorney Hoppock said those were important caveats to keep in mind. He said the next page of his materials referenced the NFPA 101-12.2.5.1.3, which states that dead end corridors should not exceed 20 feet. Attorney Hoppock asked what the violation was and where, which he said the Notice of Violation did not indicate. He said the Board could go through every item listed by the NFPA and ask the same two questions: what and where? He said the Board's answer would be, "We don't know." He called the Notice of Violation a "cut and paste job" that Mr. Tousley was supposed to understand and correct—without knowing what or where—within the 60 days allowed according to the Notice. Attorney Hoppock said that was the kind of unprofessionalism Mr. Tousley was dealing with. Attorney Hoppock did not want to belabor this Notice because ultimately those issues were all resolved.

5. Mr. Tousley's reply to the Notice of Violation, which Attorney Hoppock called quite thorough. He said Mr. Tousley described the Code issues accurately.
6. An October 12, 2022, letter from the Fire Chief to Mr. Tousley. Attorney Hoppock said this was important and quoted Chief Farquhar as writing that he "*could respond at great length to the other violation appeal responses*" that Mr. Tousley made, but the Chief wrote "*that would only serve to distract from the central point of the Notice of Violation and Order to Correct and that is completing an existing building investigation and evaluation report by a fire protection engineer.*" Attorney Hoppock said that the Fire Chief went on to suggest an interim step, writing, "*I believe it would be mutually beneficial if a more thorough evaluation of the building were allowed. To perform such an evaluation, I would need the support 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.*" Attorney Hoppock reported that in February and March 2023, the FD Staff had almost 16 hours in that building with the State Fire Marshall's representatives. He said the Fire Chief concluded his letter by stating that he would not reverse his requirement until Mr. Tousley retained the services of an FPE, which Attorney Hoppock called "overkill" in this situation.
7. The BOA's November 9, 2022, decision.
8. Attorney Hoppock skipped tab 8.
9. Notice of Violation for the casino on January 11, 2023, following an inspection on January 6, 2023. Attorney Hoppock said Mr. Tousley was not served this notice but found out about it from tenants well after the fact. Attorney Hoppock said there were the same questions about what standards were used to inspect the building. He said this Violation required Mr. Tousley to provide an updated fire alarm test report. Attorney Hoppock said the Fire Chief already had those reports (shown in tabs 1–3). He said that wanting these copies did not warrant Violation. He added that the alarm system and the occupant notification system had been a "bugaboo" for a long time.
10. An updated Notice of Violation & Order to Correct, with some more details that Attorney Hoppock said were missing earlier. He added that this was not an effort to work together after the BOA's November 9, 2022, order. He said this was the notice in which "all those serious violations" were resolved or withdrawn and the only ones remaining were #2 and #13. He said that most were withdrawn because the Fire Chief could not determine whether there was a violation; Attorney Hoppock said the Fire Chief was using the excuse of lacking an FPE. It struck him as odd that those were violations on September 19, 2022, but they were not violations any longer.
11. Summary of Mr. Skantze's meeting with the Fire Chief on January 30, 2023. Attorney Hoppock quoted the summary as stating that "*through direct observation, the Fire Chief*

wanted to rule out any issue or combination of issues that constituted clear and imminent danger to the life or safety of the occupants or other persons anytime and (#2) be allowed to complete a full assessment of the building in its entirety. Despite our good faith efforts, we have been unable to achieve either of these goals. The Fire Chief wants to work with Mr. Skantze to discuss creating a structured plan, with timelines, to achieve these goals and to establish a formal, agreed upon remediation strategy.” Attorney Hoppock said this was what the Fire Chief was saying in January 2023, but that it went nowhere, which was the impetus for this appeal.

12. Life Safety Report. Attorney Hoppock said that a lot of what was listed was the same as before, such as the inadequate sprinkler system, alarm system, and a claim of unpermitted work. He said that if he understood correctly, over the years as different people owned the building and different tenants occupied it, that various people did things within the building without permits; Attorney Hoppock thought that was to be expected over a 90-year period.
13. Another Notice of Violation for the casino space dated May 22, 2023. Attorney Hoppock pointed out that this hearing was noticed on May 3, 2023. He challenged the Board to compare the violations listed in the May 22, 2023, notice to the January 11, 2023 notice; he said they were almost verbatim the same (e.g., testing, extension cords, no exit). He referred to the issues with occupant notification and sprinkler testing, stating that those (5) items were in the January 2023 report. Attorney Hoppock said it was fair to ask why the Fire Chief was doing this again, a week before this hearing and almost 3 weeks after this hearing was noticed.
14. Permit to Operate a Place of Assembly for the casino dated May 23, 2023, which was only one day after the Notice of Violation for the casino (May 22, 2023; tab 13). Attorney Hoppock quoted the permit: *“It appears that the necessary safeguards for the safety of life are provided within the described premises in accordance with provisions of RSA 155. This is to certify that Peninsula Pacific Entertainment, owner and operator of the Place of Assembly at 160 Emerald Street is permitted to operate in accordance with the provisions of the law for one year.”* Attorney Hoppock recalled that one day before this permit was issued, there were five violations, so he asked how that happened so fast. Attorney Hoppock stated that it happened so fast because *“the Chief is harassing Mr. Tousley.”*
15. A collection of emails that Attorney Hoppock encouraged the Board to read. He said the emails demonstrated Mr. Tousley’s efforts to get the FD to come to the building to address the 16 alleged violations, which the Board ordered both parties to work together to address at the November 9, 2022, BBOA meeting. He noted other emails from tenants trying to get their establishments permitted.

16. Code citations dealing with “design professionals and responsible charge” provided by Mr. Skantze, who would address this tab. Attorney Hoppock said this was not only dealing with the NFPA, but also the existing International Building Code (IBC) and some others that he said mingle together.
17. Mr. Skantze would address this tab.
18. Copies of various inspections that the City had performed in the building, some from the Code Department and some in the FD, many of which were approved as final. Attorney Hoppock referred to the restaurant that was unpermitted and operating for an unknown time period. However, he said that since April 22, 2022, Fire Inspectors had been in and out of the building and they never said a word about the restaurant; if there was concern, he said the inspectors should have said something.

Attorney Hoppock said that he was asking the BOA to rule and find that the Fire Chief, as the AHJ, did not have lawful authority to require a property owner to retain an FPE for the reasons stated by the Chief. Attorney Hoppock quoted the Fire Chief as stating “*to perform a comprehensive inspection of the building and analysis of same, and report same to Fire Chief.*” In effect, Attorney Hoppock stated that the Fire Chief was “*collecting a salary of \$100,000 a year and having someone else do his job for him at [Mr. Tousley’s] expense.*” Attorney Hoppock called that “*obscene.*”

Attorney Hoppock referred to [NFPA 1.151] that the City Attorney discussed, and he said it should be read carefully. Attorney Hoppock said this fell within one of the three things presented [that the Board was deciding]: 1) the true intent of the Code, 2) the wrong interpretation of the Code, or 3) a better interpretation of the Code. Attorney Hoppock thought that Mr. Tousley’s interpretation of the Code was better and that the Fire Chief’s interpretation did not meet the true intent of the Code. Attorney Hoppock read: “*The AHJ shall be permitted to require a review by an approved independent third party with expertise in the matter to be reviewed at the submitters expense.*” Attorney Hoppock pointed out that this quote did not say anything about an FPE. He said that Mr. Skantze had the necessary expertise and there was no reason that he could not fill that role. Attorney Hoppock said the Fire Chief originally requested 6–8 hours in the building but took approximately 16 hours, from which he said the Chief brought forward four major issues with: the alarm system, the sprinkler system, unseparated walls, and high hazard materials. Attorney Hoppock said an FPE was not needed to deal with those things; he said a company could be hired to prescribe what to do and that eventually, once the plans are finalized, an engineer could review and stamp them (which would be a part of the cost of the company doing the work). He said an independent engineer (at \$250/hour or more) was not needed to do this study that Attorney Hoppock believed was overkill, and he did not think the Fire Chief had the authority to demand it. Thus, Attorney Hoppock believed that Mr. Tousley’s interpretation of the Code made more sense.

Attorney Hoppock referred back to Mr. Skantze’s recommendations listed in tab 16, which not only dealt with the NFPA, but also the existing IBC, and some others that he said mingle

together. Mr. Skantze wrote: *“Chief Farquhar is using his authority to require a licensed fire protection engineer to act as the design professional in responsible charge. The Life Safety Code criteria for this role does not necessarily require an engineer for this purpose. Rather, it states that it must be someone with expertise in the matter. When the matter of designing elements of a building and the submittal of certain design work would require the stamp of a licensed engineer, then the engineer would review it and stamp it,”* which Attorney Hoppock said would cost far less money.

Attorney Hoppock asked Mr. Skantze to talk about the existing alarm and sprinkler systems in the building, as well as his qualifications. Mr. Skantze said he got involved with this case in January 2023, when Mr. Tousley contacted him because of this standstill. Mr. Skantze said his credentials were similar to the Fire Chief’s. Mr. Skantze had a 40-year fire service career, working as a firefighter, fire inspector, and a fire chief in several NH communities; he was certified by the NFPA as a Fire Inspector 1 & 2 (the same as the Fire Marshall and the FD Staff). He said that the NFPA gives out fire inspector certifications and a fire protection specialist rating, both of which he said the NFPA would not offer if it was not possible to work outside the scope of engineering. Mr. Skantze explained that when he got involved, he did what he always does, which is to meet with the local Fire Chief. Mr. Skantze said he respected what the FD was trying to do in the City to get buildings into compliance and enforce the NH Fire Code. He said he knew that work was not easy due to his many years as the AHJ in several communities and on similar buildings, so he understood the Fire Chief’s burden as the AHJ to ensure residents, the property owner, and firefighters are safe. Still, Mr. Skantze said he must also represent his client’s best interests and look on this as a third party. When he met with Chief Farquhar, Mr. Skantze asked if they could work together to resolve this for Mr. Tousley, with Mr. Skantze as the intermediary. He said the Fire Chief agreed and was very enthusiastic about it. At that time, he said there was discussion of closing the building under the dangerous building statute, getting administrative search warrants to go into the building, and the various violations found. Mr. Skantze said he offered to get the FD access to the building and to walk through with them. He said that due to the contention, the Fire Chief offered not to be present for that inspection if Mr. Tousley was also not present.

Mr. Skantze toured the building with FD Staff and one member of the NH Fire Marshall’s office for four hours, after which he said [they] did not come back or write a report. He said that he asked the Fire Chief if they could forgo the previous reports, which Mr. Skantze said were confusing, complex, and some things had been corrected. He wanted to walk through the building and come up with the list of things needing work, and if engineering was required—which he said would be needed for major changes (e.g., new fire alarm, constructing anything structural) — then they would bring in the appropriate professionals. However, he said an FPE would not be specifically needed; there could be structural and electrical engineers, etc., depending on the need. For this building, Mr. Skantze felt his role was to coordinate the inspections and any other professionals needed to do this work.

Mr. Skantze continued, explaining that there was a fire alarm in the building at 160 Emerald Street, although the Fire Chief was reporting that there was not a fire alarm. Mr. Skantze said he

had seen the fire alarm, adding that there was a remote panel in the casino. He said that sprinkler heads were allowed as detection per NFPA 13. He said there were other requirements for smoke detection in certain locations. Still, he said there was detection throughout the building in addition to a fully functioning sprinkler system, which he said was inspected and approved by a qualified sprinkler company; Mr. Skantze said the Fire Chief stated his confidence in that company and worked with them closely. Mr. Skantze agreed that the company was competent and added that he also brought in his third-party sprinkler consultant to look at things forensically. Mr. Skantze said the sprinkler consultant reported that it was an old mill, some sprinkler heads needed updating, the diameter of some branches could be improved, and there were some missing connections to the risers—there are three different risers and no way to supply pressurized water to the outside of the building, so he said this should be a priority. He said he spent a lot of time talking to Mr. Tousley about these things, including the fire alarm. He noted that Mr. Tousley spent a lot of money to add a fire alarm panel for the casino. Mr. Skantze said the FD claimed there were no “pull stations” but he said there were some, just not at all the exits, which could be improved. He asked if that was maintenance or if a new panel would be required, noting that the current panel was only two years old. Mr. Skantze believed it was possible to resolve the issues in the building. He hoped to be able to sit with FD Staff so they could explain the sprinkler violations they saw, so the owner could address those issues with the relevant vendors (whether for maintenance or a new system). Of course, he said that if a new system were needed, an engineer would be required, which he said Mr. Tousley understood. Mr. Tousley had an architect on retainer for his business.

Mr. Skantze discussed the inspections that he was present for with FD Captain Steven Dumont and FD Lieutenant Meghan Manke, and a representative (Jessica) from the NH Fire Marshall’s office. He said they all toured the building 3–4 times and reviewed every space diligently. Mr. Skantze said he had a sidebar discussion with Captain Dumont, in which they agreed to sit down together, discuss the various violations, and develop a timeline for compliance because work on a 90,000 square foot building could not be completed overnight. Mr. Skantze said one year had passed and Mr. Tousley could have had things underway if they were not stuck in this process. Mr. Skantze said that Captain Dumont was willing to work with him at that time, but said that nothing happened, and Mr. Skantze had been waiting to see a report identifying the violations and to meet with the Captain. Mr. Skantze thought it was a communication breakdown while all parties were trying to do the right things. He said that if the FD clearly explained that they wanted the fire alarm system improved, then Mr. Tousley could start addressing those things, but he said they were stuck on this FPE issue. Mr. Skantze agreed that he is not an FPE, and while he said he was not qualified to design anything, he could coordinate all the right parties. He reiterated that he was a third party and had no animosity toward anyone, but said that after meeting with FD Staff, he never heard anything more about working together toward a resolution.

Mr. Skantze hoped that whatever decision came from this meeting, that the FD would focus clearly on what the inspection results were, which indicated issues with the sprinkler system, fire alarm, and fire separation. He said that Mr. Tousley disputed some of the fire separation issues because the building’s sprinkler system meant that some walls could be one hour less than what

the NFPA requires. While he was not an engineer, Mr. Skantze believed that the walls between the Quonset Huts in the building were 3-hour separations with parapets. He said those were substantial fire walls but there was a weak point at the door, which he said would be an easy fix.

Mr. Skantze continued by discussing his report, in which he referenced Codes, and showed that the NFPA and IBC allow a person that the Fire Chief determines to be qualified. At his first meeting with the Fire Chief, Mr. Skantze said the Fire Chief agreed to work with him. He did not understand why the Chief would not work with him now, and then Mr. Skantze could arrange the relevant engineers needed. He agreed with the Fire Chief about sprinkler clearance and the need for 18 inches from a sprinkler head. Mr. Skantze mentioned the carpet store in the building, part of which includes tall, rolled carpets, and Mr. Tousley told them they had to keep those clear of the sprinklers. Mr. Skantze said it was an ongoing issue with tenants to ensure they maintain those clearances. He said there were other parts of the building that could benefit from added sprinkler heads, like an area under a stairway that leads to an office.

Mr. Skantze referred to the classifications of the occupancies and fire separations, noting that it was the AHJ's role to determine occupancies under the Code. On use and designation, Mr. Skantze quoted (document unknown): *"The occupancy is typically established by a design professional during the Code analysis phase. Most of the time, the designer's determination is consistent with that of the building department. However, where there is a disagreement as to the proper classification of the various uses within the building, it is the building official's responsibility to make the final decision (IBC 302.1)."* After meeting with the Fire Chief, Mr. Skantze also met with the Building Inspector and Community Development Director; Mr. Skantze reviewed the file on this building and took photos of everything in the file. He said that innumerable building permits had been issued, as well as Certificates of Occupancy, and building plans that showed fire wall locations. He asked the Community Development Director what this building's designation and use group was, and he offered to work with the Director to get those in the file, so the use groups are clearer in the future.

Mr. Skantze said there were fire walls in the building as well as separations and floor-ceiling assemblies separating the 2 floors. He is not an engineer and could not determine whether a wall was a 1 or 2-hour separation. Still, Mr. Skantze said it was a heavy mill construction, with good separations, tongue-and-groove floors, and sheet rock below that he thought was likely at least a 1-hour fire separation. He said that during the inspection with FD Staff, they discovered a storage room with no sheet rock on the inside wall of the egress, which all parties agreed needed 5/8-inch sheet rock to be in compliance.

Mr. Skantze referred back to occupancies. He said that mixed occupancy means that occupancies are intermingled but said the occupancies in this building were separated. So, he said it was a multiple occupancy building, which could get confusing, but means it is, *"A building or structure in which 2 or more classes of occupancy exist and they are separated."* Mr. Skantze said that Mr. Tousley believed that the building was separated based on the existing nature of the building. He said that if the FD pointed out areas of separation that could be improved, Mr. Tousley could consider that. Mr. Skantze mentioned means of egress, noting that there are four stairways from the 2nd floor to the building exterior, which he thought was adequate egress. He said the building

corridors are long and were previously divided; Mr. Skantze thought it could be valuable to add fire doors back in those locations. He said the existing egresses could be enhanced with improved doors, closers, separations. Still, he did not see those as major issues because two of the exits are to the exterior of the building; the main egress from the 2nd floor in the “160 division” is to the exterior of the building, but it had no sprinkler head. Mr. Skantze said no one denied that improvements were needed.

Mr. Skantze continued by discussing existing buildings and said the NFPA (1.2) “*avoids requirements that might involve unreasonable hardship or unnecessary inconvenience or interference with the normal use and occupancy of the building but provide for fire safety consistent with public interest.*” He said this building has a sprinkler system that was tested and certified to work and would go a long way toward suppressing any fire in the building. Mr. Skantze stated that he did not think the Fire Chief was wrong for wanting an improved fire alarm system but said the two parties still could not seem to get there. Mr. Skantze quoted again: “*It is not always practical to strictly apply the provisions of this Code. Physical limitations ... the building can cause the need for disproportionate effort or 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 modifications for conditions that do not represent a significant threat to life, even though such conditions are not in compliance with the Code.*” Mr. Skantze said that both the IBC and Life Safety Code indicate that existing buildings would not be in compliance. He said the NH Code changes every three years and is adopted by the NH Board of Fire Control and the NH Legislature; the State was operating with the 2018 codes and was getting ready to move up to the next level, 2021, in the next year.

Mr. Tousley asked Mr. Skantze whether he agreed with the Fire Chief and believed the building was unseparated and mixed occupancy. Mr. Skantze replied that he believed the building was multiple use and separated based on the age of the building. The City Attorney objected to Mr. Tousley leading Mr. Skantze. Chair Katz recalled that the rules of court did not apply to this Board, but he appreciated the City Attorney’s concern; the Chair allowed Mr. Skantze to reply to Mr. Tousley. Mr. Skantze said that the collective parties needed to work together to look closely at this building. He said the building had multiple occupancies and was intended to be separated; he said there were fire separations between occupancies and between use groups. He thought more investigation was needed to determine whether the separations were up to current standards. He knew the FD looked during the inspection, but he said they did not discuss the issues, which would have made it more reasonable to make needed improvements.

Mr. Tousley stated that “*the Fire Chief has categorically said the entire building is unseparated,*” yet the Chief did not provide any proof or specify locations of the issues. Chair Katz asked Mr. Tousley whether there was any plan in existence that showed the fire separations. Mr. Tousley said he thought there was and said that Mr. Skantze testified to reviewing those plans at City Hall. In response to the Chair, Mr. Skantze said he saw plans with fire wall designations. The Chair asked if those plans showed the entire building and Mr. Skantze replied

in the affirmative. The City Attorney thought the question was whether the plans Mr. Skantze saw showed the current separations. Mr. Skantze said he did not know whether they were the current separations; he said, “*There is no ‘as built’ in the file showing the current separations.*” Without “as built,” Chair Katz said it was difficult to determine where the fire zones and separations were. The Chair asked Mr. Skantze whether it was possible to determine the occupancy load of and length of egress allowed out of a room with an undetermined size. Mr. Skantze stated that he did not know whether any of that information was available. Mr. Tousley said it was important to note that this was an existing building, and that the FD thoroughly inspected every single space in the building and saw the floor-to-ceiling sheet rock on both sides of the walls. Mr. Tousley stated that the building was completely separated, and that the FD knew that; they took photos of the parapet walls with brick above the roof. He said the doors were also solid with closers (not hydraulic), that the whole space was separated, and had been that way for decades. Mr. Tousley said the Codes (e.g., fire walls) were very similar to today when the building was constructed in the 1980s. Mr. Skantze quoted the IBC, “*Buildings previously occupied – legal occupancy of any building existing on the date of adoption of the Code shall be permitted to continue without change, except as explicitly covered in this Code, the International Fire Code [which is not applicable in NH], or the International Property Maintenance Code [which the Building Review Board exempts].*” While there were a lot of Codes protecting existing buildings, Mr. Skantze said that did not mean improvements could not be made. Mr. Tousley said that if the FD pointed out the specific violations, he would make the improvements, but he said the FD just told him everything was unseparated.

Attorney Hoppock provided the Board with a proposed order that they could use as an outline of what he hoped the Board would do. He quoted paragraph 5, “*The parties shall work together to agree upon a remediation plan for the sprinkler and alarm systems for the building.*” He said the Board could add to that regarding fire protection walls or other issues. Attorney Hoppock said the problem was that Mr. Tousley did not have a partner to work with from the FD and that the Fire Chief was not interested in working with them. Attorney Hoppock stated that the way the Fire Chief behaved toward Mr. Tousley and the timing of some of these violations demonstrated that. Attorney Hoppock said the Fire Chief was working with Mr. Skantze on January 30, 2023, and then something happened, and they did not hear from the Chief anymore other than receiving Notices of Violations. Attorney Hoppock asked the Board to consider these things and rule, accordingly, keeping in mind the extraordinary cost of some of these things and that Mr. Tousley was willing to develop a remediation plan with Mr. Skantze’s help. Attorney Hoppock said he included a provision: “*The parties shall have 60 days to develop and file with this Board an agreed upon remediation plan with specific timelines for completion.*” He said he included that provision in part because on November 9, 2022, the BOA asked the parties to work together without any guidance and that did not turn out well, so he hoped the Board would keep control of this situation. Chair Katz said things did work out to a degree in that what started as 17 violations was now only three. Mr. Tousley said that was because most of the 17 violations were misinterpreted to begin with. Attorney Hoppock said most of those 17 were not really violations, so he said he the Board should not have too much hope in that.

Attorney Hoppock continued discussing some of the costs associated with these violations. He questioned whether a new sprinkler system was needed or just a renovation of the current one; Attorney Hoppock stated that it was the latter. If Mr. Skantze could work with responsible FD officials, then Attorney Hoppock thought the work could get done. He reiterated that an FPE was not needed at \$250–\$300/hour. He asked the Board to be reasonable. He said the reason that problems were not being fixed was because they could not make headway with the FD, which was why he suggested the 60-day time limit. Mr. Tousley pointed out that this Board requested that he specifically work with the new FD personnel—Captain Dumont and Lieutenant Manke—who Mr. Tousley said he reached out to immediately and they discussed some items together. Still, he said the FD refused to make any determinations. He believed that the Fire Chief was micromanaging and not allowing progress, which Mr. Tousley believed was a part of the problem. He said he received no communication from the Fire Chief and Mr. Tousley’s requests to work with the FD had fallen on deaf ears. He said the Fire Chief refused to let his employees do their jobs. Mr. Tousley said that the Fire Chief also kept adding new items, like the separation issues.

Chair Katz recalled that the first issue was about the FPE, but he said Mr. Skantze seemed like a qualified fire code official. Chair Katz said the second issue the Board needed to determine was whether the Fire Chief interpreted the Code correctly. The Chair gave each party a final chance for rebuttal.

Attorney Hoppock thought Mr. Tousley/Mr. Skantze should work with the FD to try to agree on the classifications of occupancies. Attorney Hoppock thought he had otherwise covered the other issues the Board needed to consider: the FPE, the sprinkler system, the alarm system, and the fire separations.

The City Attorney referred to the sprinkler system and the reports in the file, stating that the City did not dispute that the sprinkler system was inspected by [this] entity. However, the City Attorney said that if looking at those reports closely, they only state that the sprinkler system works (e.g., sprinkler flow, all valves are working, etc.), but do not indicate if it works for the purposes intended (e.g., obstructions, fire load, etc.). The City Attorney said it was important to keep in mind that those reports did not indicate what was necessary; he said an FPE was really important to make those determinations. The City Attorney said the point was that despite Mr. Skantze’s certifications, he is not an FPE. Regarding the withdrawal of Notices of Violations, the City Attorney reminded the Board that those were withdrawn without prejudice, which was not the City saying those were resolved or no longer existed. The City Attorney said those violations were withdrawn without prejudice because an FPE was needed to determine if each violation existed. The City Attorney said that both the Fire Chief and Mr. Skantze admitted that they are not design professionals.

The City Attorney continued, stating that it was important to read NFPA 1.15 in its entirety, because each subparagraph indicates that, *“The AHJ is allowed to require review by an approved, independent third party. The independent reviewer shall provide an evaluation of the proposed design ... The AHJ shall be authorized to require that individual or entity to bear the stamp of a registered design professional.”* The City Attorney said that was talking about a

registered engineer, not a structural engineer or an electrical engineer, but one with expertise in fire protection. Regarding the fire separations, the City Attorney said it struck him that Mr. Tousley seemed to be implying that because there were walls in the building, that it was separated. The City Attorney said that was not the point and as Chair Katz pointed out, there was no adequate information about the fire ratings, and the appellant could not tell the Board they knew the fire ratings. He said that even someone with expertise in fire inspection would not know what is within or on the other side of a wall to make that determination. The City Attorney reiterated that the Fire Chief did not say the entire building was unseparated. Some aspects of the building were separated, which was why the Public Occupancy Permit for the casino was granted, for example. The City Attorney referred to the proposed salon location on the 2nd floor that the FD did not believe was fire separated. As the Fire Chief pointed out, the City Attorney said it was important to remember that each use stands alone in its own building, unless or until it could be shown that there is no separation between the high hazard uses and the other uses. That was the issue the FD was unable to determine. The City Attorney agreed with Mr. Skantze that it would be good to work together to sort these things out. The City Attorney provided an objection to Attorney Hoppock's proposed order, which he said a court might be able to issue, but that was not the Board's jurisdiction. The Board's jurisdiction was narrow under the statute for how to review this appeal and whether the Code was interpreted correctly.

Attorney Hoppock agreed that the Code should be read as a whole. Still, he said the Code did not preclude an expert, Mr. Skantze, from retaining a firm with an engineer on staff. Attorney Hoppock did not believe the Fire Chief was interpreting the Code properly and the Attorney thought his interpretation was better and more cost effective for Mr. Tousley. Attorney Hoppock reiterated that this was a multi-occupant, separated building. He thought the Board could order the parties to work together and develop a remediation plan as the Board did in November 2022, which nobody objected to. He thought a remediation plan was reasonable and that there should be a time limit to accomplish that. Attorney Hoppock and Mr. Tousley had no objection to recessing for a few weeks, so the Board had ample time to review materials. Chair Katz thought the Board was trying to avoid that.

The Assistant City Attorney, Amanda Palmeira, advised the Board that this was their time to ask any questions based on the scope of their review under RSA 674-34. There were no questions from the Board.

A motion by Mr. Brown to close the public hearing was duly seconded by Mr. Flibotte and the motion was carried unanimously. The Board began deliberating.

Chair Katz reviewed the issues the Board was considering: 1) whether the Fire Chief had authority to request the FPE, and 2) whether the Codes had been applied correctly. Chair Katz asked if that was correct, and the Assistant City Attorney referred the Board to the testimony they heard and reminded the Board that RSA 674-34 was the scope of their review.

Mr. Brown said that after hearing both sides, he did not want to get hung-up on the FPE issue. He said there could be a need for one down the line, but he thought that was the issue preventing a resolution. His inclination was to not require an FPE and to see where the rest of the process

leads; if they need that professional help down the line, they could seek that, but he did not think it needed to be step one. He said the importance of the FPE seemed to be oversized compared to its real worth moving forward.

Mr. Flibotte agreed with Mr. Brown. Mr. Flibotte thought that spending \$20,000–\$40,000 on an engineer, who would not provide anything additional, when Mr. Tousley and Mr. Skantze had already decided to work together to get this done now. Mr. Flibotte said that both the Fire Chief and Mr. Tousley/Mr. Skantze had some good ideas. Still, Mr. Flibotte said that both sides needed to work together. He recalled hearing this case in November 2022 and said the Board expected this to be done by now. Mr. Flibotte told both parties to work together.

Chair Katz said he generally agreed. He said that [Mr. Tousley] should use his professional engineer to determine square footage, occupancy loads, and the egress requirements. Once they have all those details, the Chair said they should ensure the building works. Chair Katz recalled that it was an existing building and over time, there had been understandable changes, but someone should put all of that together in a legible plan. He said part of the problem was the building was not well understood. Ms. Park agreed that an existing building survey would be helpful. Chair Katz said that when looking at a wall, he would have no idea how thick it is, what is inside it, or how it was assembled. The Chair said that the documentation existed somewhere in City Hall (“because Mr. Bradshaw would probably do it correctly too”) and needed to be coordinated. The Chair said it was fine, in his opinion, if Mr. Skantze did that coordinating. Chair Katz agreed with Mr. Flibotte that an FPE was not needed at this time, despite their utility. However, Chair Katz said he was convinced that the sprinkler system needs to work; the purpose of a sprinkler system is to not necessarily save the building, but to get all the people out. The Chair agreed that the [fire alarm system] should alert people on the second floor to what is happening on the first floor. He said that if he was renting a space to an individual, it was his responsibility to make sure they could get their people out safely. Thus, the Chair had no issue with the process to improve the sprinkler and alarm systems.

Chair Katz led the Board in considering the issues within their scope. The Chair said that as an architect, he did believe that the Fire Department had authority, but he also thought that Codes change, and things need periodic updates. He called it a toss-up. He thought Mr. Tousley’s architect could provide the sizes of spaces in the building and more. Mr. Brown thought the Board should not require the FPE and he encouraged the Board to rule on that matter and move on to the others. Ms. Park questioned what [they] meant by “hire,” noting that the appellant seemed amiable to having someone review what [they] come up with, which she thought was different than hiring someone to do all the work. Mr. Brown thought the City was proposing the latter, which he did not think needed to be a first step. Ms. Park thought it was important to have a stamp on the final plan and the Chair agreed; Ms. Park thought that was different than requiring an engineer to do all of the work. Mr. Brown added that he was unclear about what work they would be requiring an FPE to do. Chair Katz said that someone stamping their seal on a plan was important. Mr. Brown said there were sprinkler, separation, and fire alarm issues, which could be reviewed by architects or fire protection professionals. Mr. Brown did not care who the professionals were, but when he is presented with a fire alarm design or sprinkler survey and

possible design, he said there were various professionals available in those fields, but all might not be FPEs. Mr. Brown thought that Mr. Tousley should have that flexibility as he works on improvements. Chair Katz said these plans would be submitted to the City, which Mr. Brown thought could be when this issue is fleshed out. Chair Katz noted that when he had submitted plans to the City they always had to be reviewed by the FD, so he said the cross information was available, which he thought was missing in this case. Mr. Flibotte agreed with Mr. Brown about spending \$30,000 on one engineer when several professionals could be hired for that cost. Mr. Brown also did not think this ruling precluded hiring an FPE at some point in the process.

Chair Katz asked the Board if they thought the true intent of the Code was properly interpreted. The Chair thought it was. Mr. Brown was not sure it was properly interpreted after hearing the testimony. Mr. Flibotte said an engineer would need to look at the sprinkler system and advise, and the same would be true for fire protection; they would submit the plans to the City and get them approved. The Board agreed that the approved independent third party did not need to be an FPE. Mr. Brown thought there would be professionals of multiple disciplines involved throughout the process. He also thought there should be a timeline to develop the plan and report back to the Board.

The Assistant City Attorney advised that the Board was tasked with upholding or reversing the Fire Chief's decisions; asking the building owner to report back to the Board would require a continuance of this hearing. The Board agreed that they needed to rule on each of the two violations based on the intent of the Code. The Chair said it boiled down to the parties working together on these two violations, and he called it a convoluted issue. Mr. Brown questioned whether an FPE would look at sprinkler heads and things like that, noting that he had worked with some bad engineers. The Board members agreed that an FPE should do all of that, but Mr. Brown questioned if they would do it all, and the Chair mentioned that an architect or regular engineer could do a lot of that. The Chair said a design professional would work with all parties involved to develop a decent program. He said it was up to Mr. Tousley as the building owner to determine who he wants to hire to consult. Mr. Brown said that Mr. Tousley would have to hire someone, no matter what, and Ms. Park agreed. However, Mr. Brown said that hiring one engineer to do one thing was a waste of money. Mr. Brown said Mr. Tousley needed a plan to fix the sprinkler and fire alarm systems that is stamped by a professional.

Chair Katz noted that the Board did not have authority to waive requirements from the NH Building or Fire Codes. The Board agreed about not requiring an FPE. Still, Chair Katz thought that the Board should include, "*someone who is willing to work to hire one if necessary for parts of the building that require them.*" Mr. Brown rephrased the intent for the building owner to hire an engineer could do it all or multiple engineers capable of doing their portion of the work. The Board reiterated the three issues: sprinklers, fire alarms, separations. Chair Katz said that the professional working on the fire separations would also be responsible for room classifications, occupancy, distance of egress (i.e., could people on the 2nd floor get out within 250 feet?), and whether the fire egress goes to the outside (he said it was clear for one but not the other). Chair Katz said the egresses were an important issue. He suggested hiring an engineer or multiple professionals for different projects who would provide plans to be approved by the City. Mr.

Brown agreed with the FD that all of this was for the safety of those in the building; however, he also thought [the FD] could overdo it. He wanted a prioritized plan, with a timeline. Discussion ensued about how to word the motions. The Assistant City Attorney reiterated that the Board cannot stipulate what the building owner must do and return with. The Board could only rule on what the FD brought forward; if the FD did not provide a plan, the Board could not create one. The Board needed to proceed just based on what was presented to them. Ms. Park suggested upholding the need for modifications to the sprinkler system, alarm system, and separations, while disagreeing with the need for that all to be performed by an FPE; the work could be by other competent professionals licensed in NH. Chair Katz thought that was appropriate.

Mr. Brown made the following motion, which was duly seconded by Mr. Flibotte. On a vote of 4–0, the Building Board of Appeals found an inappropriate interpretation of the Fire Code and did not uphold the Fire Chief's requirement for a fire protection engineer (FPE).

The Board deliberated on the remaining issues. Mr. Rogers quoted the City Attorney's materials that stated, "*The requirement to clear obstructions located at or below sprinkler heads within the building.*" It was Chair Katz's impression that whoever does the building review for the client would figure that out, and he thought the requirement was an appropriate interpretation of the Code. Mr. Brown and Chair Katz agreed that Mr. Tousley was amenable to changing what was necessary and knew what needed to be done now.

Mr. Flibotte made the following motion, which was duly seconded by Mr. Brown. On a vote of 4-0, the Building Board of Appeals found an appropriate interpretation of the Fire Code and upheld the Fire Chief's requirements to clear obstructions.

V. Adjournment

Hearing no further business, Chair Katz adjourned the meeting at 8:20 PM.

Respectfully submitted by,
Katrinya Kibler, Minute Taker
June 2, 2023

Reviewed and edited by,
Corinne Marcou, Board Clerk