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By Douglas J. Boyle at 12:28 pm, Dec 11, 2018

**STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND
BUILDING SAFETY COMMISSION**

IN RE:) CAUSE NO.
)
RYAN FIRE PROTECTION,) DHS-1811-FPBSC-010
INC.)
)
)

NOTICE OF NON-FINAL ORDER

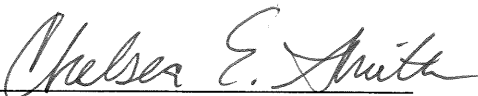
You are hereby notified that the attached document entitled **Findings of Fact, Conclusions of Law, and Non-Final Order** has been entered by the Administrative Law Judge in accordance with Ind. Code § 4-21.5-3-27.

The ultimate authority in this matter is the Fire Prevention and Building Safety Commission. Ind. Code § 4-21.5-3-29(d) requires any party seeking to preserve an objection to this order for judicial review to file a written objection that:

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with the Board within fifteen (15) days (or any longer period set by statute) after this order is served.

This order will be considered by the Commission at its next meeting on January 3, 2019 at 9:00 a.m. (EST) at the Indiana Government Center South, Conference Center Room B, 302 W. Washington Street, Indianapolis, IN 46204. In the absence of an objection from a party or notice from the Commission of its intent to review any issue related to this order, the Commission shall affirm this order in accordance with Ind. Code § 4-21.5-3-29(c).

Date: December 11, 2018


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Noblesville, IN

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 RYAN FIRE PROTECTION,) **DHS-1811-FPBSC-010**
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

The Petitioner in this matter, Ryan Fire Protection, Inc., appealed an order issued by the Respondent, the Noblesville Fire Department, citing Petitioner for violating Section 903.3.1.2.1 of the 2014 Indiana Fire Code (IFC).¹ Based on the evidence presented and for the reasons set forth below, the Administrative Law Judge (ALJ) concludes that the Petitioner did not violate the code is therefore not required to comply with Respondent's order.

PROCEDURAL BACKGROUND

On July 17, 2018, Mark Riffey filed a Petition for Review on behalf of Ryan Fire Protection, Inc. seeking administrative review of an Inspection Report that was issued by the Noblesville Fire Department on July 5, 2018. The Commission granted the Petition for Review as timely on July 20, 2018. The undersigned ALJ was appointed to adjudicate this appeal.

An initial prehearing conference was held in this matter on August 22, 2018. Mark Riffey, Keith Colgan, Justin Fetters, Steve Schipp, and Jake McKanna appeared on behalf of the Petitioner. Darrell Cross and Daniel Sheposh appeared on behalf of the Respondent. After some discussion, the parties advised that they did not believe informal resolution was likely and requested that the evidence and arguments in this case be submitted through written briefs and

¹ The 2014 Indiana Fire Code (2014 IFC), Section 903.3.1.2.1, and the 2014 Indiana Building Code (2014 IBC), Section 903.3.1.2.1 are identical. For the purposes of this opinion, the ALJ will base its analysis on the 2014 IBC because that is how the Respondent started its analysis in its brief. Throughout this opinion, the 2014 IFC and 2014 IBC may collectively be referred to as "the code."

documentary evidence. The ALJ approved of the requested form of proceeding and then issued a briefing schedule on the same day. The briefing schedule stated that Respondent's brief was due on September 21, 2018 and Petitioner's brief was due within 30 days of the submission of Respondent's brief. Respondent timely filed its brief on September 21, 2018 and Petitioner timely filed its brief on October 18, 2018.

BURDEN AND STANDARDS OF PROOF

Ind. Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, “the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense.” That burden rests upon the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). In this appeal, the Respondent issued an inspection report to the Petitioner, which cited Petitioner for violating Section 903.3.1.2.1 of the 2014 IFC. Therefore, the burdens of proof and production rest upon the Respondent, as it issued the violation order to Petitioner. Id.; see also Ind. Code § 4-21.5-3-14(c).

Proceedings held before an ALJ are *de novo*, per Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency's initial determination. Ind. Dep't of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder, the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d). At a minimum, the ALJ's findings “must be based upon the kind of evidence that is substantial and reliable.” Ind. Code § 4-21.5-3-27(d). “[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision.” St. Charles Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is “something more than a scintilla, but something less than a preponderance of the evidence.” State ex rel. Dep't of Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted). Therefore, in order to succeed in this appeal, the Respondent must demonstrate through substantial and reliable evidence that Petitioner violated the code and the penalty/corrective action is seeks to impose is appropriate under the circumstances.

FINDINGS OF FACT

Present in the record of proceedings are the orders and notices issued by the ALJ in this matter. The Respondent submitted the following documents as exhibits: (1) Petitioner's variance application; (2) letter from the Commission denying Petitioner's variance application; (3) minutes from the August 7, 2018 Commission meeting; and (4) an email opinion from Jeffrey Shapiro.² The Petitioner submitted the following documents as exhibits: (1) Noblesville Fire Department plan review requirements for sprinkler and fire alarm systems and Ordinance #50-10-09; (2) email with supplemental information for "Variance 18653 32 Union"; (3) construction design release (CDR) for project "32 Union"; (4) email with Petitioner's fire suppression drawings and calculations for the "32 Union" project; (5) inspection report issued by Respondent on July 5, 2018, the Petition for Review, and the Commission's letter granting review; (6) email with code opinion from Keith Enstrom; (7) email with code opinion from Bob Upson; (8) excerpt from the NFPA 13R handbook; (9) proposed revision to the 2009 International Building Code; (10) email from Kevin Kelley; (11) TYCO Residential Balcony Testing with Horizontal Sidewall Sprinklers; and (12) table A-1-2 from NFPA 13R-16.³ Pursuant to a request for supplemental evidence from the ALJ, Petitioner also submitted a copy of the CDR application for the sprinkler system on November 16, 2018, and Respondent stipulated to the admission of this exhibit into the record.⁴ Based solely on that evidentiary record and any additional items specifically noted below, the ALJ hereby issues the following findings of fact:

1. Petitioner is a licensed fire sprinkler contractor that was hired to design and install a fire suppression system for a new apartment building located at State Road 32 and Union Chapel Road in Noblesville, IN (32 Union). (Pet. Br. at 2.)
2. 32 Union is a three (3) story apartment building. (Resp. Br. at 1.)
3. On August 7, 2017, Justin Fetters, Design Engineer for Petitioner, submitted the fire suppression drawings and calculations for 32 Union to Matt Mitchell, Assistant Fire Chief for the Noblesville Fire Department, and those plans were forwarded to Noblesville Fire Marshal, Darrell Cross. (Pet. Ex. 4.)
4. On August 21, 2017, Petitioner obtained a construction design release (CDR) from the Indiana Department of Homeland Security for its fire sprinkler plans. The construction

² These exhibits are marked and admitted as Respondent's Exhibits 1, 2, 3, and 4, respectively.

³ These exhibits are marked and admitted as Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively.

⁴ This exhibit is marked and admitted as Stipulated Exhibit 1.

design release did not list any conditions regarding adding sprinklers to the balconies or projections above the balconies. (Pet. Ex. 3.)

5. Petitioner's application for the CDR stated under the section titled "TYPES OF SUPPRESSION SYSTEM," that the NFPA standard it was utilizing was "13R." (Stip. Ex. 1.)
6. On July 5, 2018, the Noblesville Fire Department generated an inspection report which stated, "3rd floor balconies with a roof above do not have sprinkler protection. Please provide sprinkler protection for 3rd floor balconies with a roof above." (Pet. Br. at 4, Pet. Ex. 5.)
7. On July 17, 2018, Petitioner filed an appeal of the above-referenced inspection report to the Commission and the Commission granted the appeal as timely on July 20, 2018. (Pet. Br. at 4, Pet. Ex. 5.)
8. In an effort to informally resolve this appeal, Petitioner also filed a variance application with the Commission. (Pet. Br. at 4, Resp. Ex. 1.)
9. The Commission did not approve Petitioner's variance application. (Pet. Br. at 5, Resp. Ex. 2 and 3.)
10. The first and second floor balconies at 32 Union have balconies (second and third floor) directly above and those balconies are protected by automatic sprinklers. (Pet. Ex. 6.)
11. The third floor balconies in question extend 5 ft. from the exterior wall and are partially covered by a 2 ft. 6 in. projections from the roof deck above. (Resp. Br. at 2.)
12. The third floor balconies in question are not intended to be used for grilling, as the units share an outdoor common grilling area. (Resp. Ex. 3.)

CONCLUSIONS OF LAW

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

1. **The code permitted Petitioner to utilize NFPA 13 or NFPA 13R for the design and installation of the sprinkler system at 32 Union.**

The 32 Union Apartments are considered a "group R-2 occupancy," which are residential occupancies containing sleeping units or more than two dwelling units where the occupants are primarily permanent in nature, and specifically includes "apartment houses." 2014 IBC, Section 310.4. Group R occupancies are required to be equipped throughout with an automatic sprinkler system in accordance with the 2014 IBC, Section 903.2.8. 2014 IBC, Section 420.4.

Section 903.2.8 provides that an automatic sprinkler system installed in accordance with Section 903.3 shall be provided throughout all buildings with a Group R fire area. Section 903.3.1 further states:

Sprinkler systems shall be designed and installed in accordance with Section 903.3.1.1 unless otherwise permitted by Sections 903.3.1.2 and 903.3.1.3 and other chapters of this code, as applicable.

2014 IBC, Section 903.3.1. And Section 903.3.1.1 states:

Where the provisions of this code require that a building or portion thereof be equipped throughout with an automatic sprinkler system in accordance with Section 903.3.1.1, sprinklers shall be installed throughout in accordance with NFPA 13 (675 IAC 28-1-5) except as provided in Section 903.3.1.1.1.

2014 IBC, Section 903.3.1.1. Section 903.3.1.1.1 discusses some specific locations where an approved fire detection system may be used in lieu of automatic sprinklers. Balconies are not listed in Section 903.3.1.1.1.

Sections 903.3.1.2 and 903.3.1.3 both list situations where it is permissible to apply standards other than NFPA 13. Section 903.3.1.2 permits installation of automatic sprinklers in accordance with NFPA 13R in Group R occupancies up to and including four stories in height. This is the standard Petitioner utilized for the design and installation of the automatic sprinkler system at 32 Union.

2. Respondent did not demonstrate by substantial and reliable evidence that Petitioner violated the code.

In support of its position that the code requires Petitioner to install automatic sprinklers over the third floor balconies at 32 Union, Respondent made the following arguments: (1) Section 903.3.1.2.1 of the 2014 IBC requires Petitioner to install automatic sprinklers because there is a “roof or deck above” the third floor balconies; (2) NFPA 13 requires sprinkler protection where a balcony is covered by a projection that is over 2 ft. wide; and (3) the Commission denied Petitioner’s variance application for the omission of the sprinklers on the third floor balconies at 32 Union.

a. Applying Respondent’s interpretation of Section 903.3.1.2.1 of the 2014 IBC would result in requiring NFPA 13R sprinkler protection on every balcony with an eave or soffit above it, which does not meet the intent of the code.

The 2014 IBC states that, where an NFPA 13R sprinkler system is installed throughout an R occupancy in accordance with 2014 IBC, Section 903.3.1.2, “sprinkler protection shall be provided for exterior balconies, decks and ground floor patios of a dwelling where the building is of type V construction, *provided there is a roof or deck above.*” 2014 IBC, Section 903.3.1.2.1 (emphasis added).

In this case, the third floor balconies are covered by a 2 ft. 6 in. projection, which Respondent argues is part of the roof, and Petitioner argues is an eave. No definition of “roof” or “deck” is provided in the 2014 IBC, 2014 IFC, or in the 2010 NFPA standards. However, the code defines “roof deck” and “roof assembly,” respectively, as follows:

The flat or sloped surface constructed on top of the exterior walls of a building or other supports for the purpose of enclosing the story below, or sheltering an area, to protect it from the elements, not including its supporting members or vertical supports.

A system designed to provide weather protection and resistance to design loads. The system consists of a roof covering and roof deck or a single component serving as both the roof covering and the roof deck. A roof assembly includes the roof deck, vapor retarder, substrate or thermal barrier, insulation, vapor retarder and roof covering.

2014 IBC, Section 202. “Eave” is also not defined by the code; however, 675 IAC 12-4-3 states that where the rules of the Commission do not provide a definition, the words have the “ordinary accepted meanings within the context in which they are used.” Merriam-Webster’s Dictionary defines an eave as the lower border of a roof that overhangs the wall. Based on this definition, the projections in question are eaves, which are part of the roof deck, and therefore also part of the roof assembly.

Although the projections above the third floor balconies are part of the roof, it was not the intent of the code to require automatic sprinklers on balconies with eaves above.⁵

Petitioner received an informal code interpretation from Bob Upson with the National Fire Sprinkler Association. (Pet. Ex. 7.) In his opinion, Mr. Upson states that “by strict definition, a partially overhanging eave is neither a roof nor a deck.” He further states that the intent of this section is for sprinkler protection to be provided “where a roof has been expressly provided to shelter the balcony; not for an incidental overhang created by another construction feature.”

Respondent also submitted an opinion from Jeffrey Shapiro, a co-author of F93-02, which was the initial proposal for what would eventually become 2014 IBC, Section 903.3.1.2.1. (Resp. Ex. 4.) His opinion discusses the reasoning for introducing Section

⁵ Unless the eave above the balcony exceeds 2 ft. in width and the balcony is used to store combustibles. 2010 NFPA 13, Section 8.15.7.5, as amended by 675 IAC 28-1-5. Combustible materials (i.e. dust, fibers, and liquids) are defined in Section 202 of the code and storage is discussed in Section 311 of the 2014 IBC. Section 311 implies that some of the items that may be placed on a balcony, such as furniture, shoes, clothing, cardboard boxes, baskets, etc. may be considered “combustible,” as these items would belong in the moderate-hazard storage category (Group S-1). However, the important distinction is between storage and useful space. Furniture that is placed inside an apartment to be used by the occupants is not considered stored furniture; likewise, furniture or similar items placed on a balcony for use by the occupant of the apartment is not considered stored. By definition, something that is being stored is put away for future use, not left out for current use.

903.3.1.2.1 to the 2002 International Building Code (F93-02), which was to mitigate catastrophic property damage caused by balcony fires in multi-family housing. (Resp. Ex. 4.) Petitioner included the public hearing committee information for this proposed change with its brief as Exhibit 9. The proposal was to add the following text to the IBC: "Sprinkler protection shall be provided for exterior balconies of dwelling units." This proposal was ultimately approved, but the language was modified to state:

Sprinkler protection shall be provided for exterior balconies and ground floor patios of dwelling units where the building is of Type V construction. Sidewall sprinklers that are used to protect such areas shall be permitted to be located such that their deflectors are within 1" to 6" below the structural members, and a maximum distance of 14" below the deck of the exterior balconies that are constructed of open wood joist construction.

2002 International Building Code, Section 903.3.1.2.1. Mr. Shapiro states that it was his intent that this section would require the installation of a sprinkler system under a soffit/eave, as well as under a roof or deck. (Resp. Ex. 4.)

In its brief Petitioner points out that in 2006, Section 903.3.1.2.1 was revised to add "provided there is a roof or deck above" after "Type V construction." (Pet. Ex. 8.) The purpose of the revision was to clarify that exterior sprinklers are to be installed only where there is a roof or deck above because the sprinkler will not operate properly unless there is a roof or deck to collect the heat and fuse the sprinkler open. Although Mr. Shapiro states that it was the drafter's intent when Section 903.3.1.2.1 was originally added to the code to include sprinkler protection under eaves/soffits, the change in 2006 was intended to clarify that, if there isn't an actual roof or deck above the balcony to collect heat, the sprinkler will not operate properly.

- b. Under NFPA 13, no sprinkler protection would be required over the third floor balconies at 32 Union because the balconies will not be used for combustible storage and the eaves above are less than 4 ft. wide.**

Respondent pointed to NFPA 13 to provide additional guidance regarding the projections at issue. Although Respondent acknowledges that it is not controlling in this case because Petitioner installed an NFPA 13R sprinkler system, Respondent points out that NFPA 13 requires sprinklers over balconies with a projection above that is more than 2 ft. wide. Respondent cites NFPA 13, Section 8.15.7.5, which states:

Sprinklers shall be installed under roofs, canopies, porte-cocheres, balconies, decks, or similar projections greater than 2 ft (0.6 m) wide *over areas where combustibles are stored.*

2010 NFPA 13, Section 8.15.7.5, as amended by 675 IAC 28-1-5 (emphasis added). While the roof projections in question are greater in width than 2 ft. (at 2 ft. 6 in.), no evidence has been presented indicating that combustibles will be stored on the balconies at 32 Union. Based on the common uses of a balcony, it does not seem likely

that the balconies will be used to store combustibles (or anything else). Therefore, this section does not apply. Fortunately, NFPA 13 also addresses the need for automatic sprinklers where balconies are not being used to store combustibles, stating:

Unless the requirements of 8.15.7.2, 8.15.7.3, or 8.15.7.4 are met, sprinklers shall be installed under roofs, canopies, porte-cocheres, balconies, decks, or similar projections exceeding 4 ft (1.2 m) in width.

2010 NFPA 13, Section 8.15.7.1, as amended by 675 IAC 28-1-5. The evidence submitted in this case indicates that Section 8.15.7.1 would apply here, rather than Section 8.15.7.5. Per the 2014 IBC, Section 903.3.1.1 and NFPA 13, an automatic sprinkler system would not be required over the third floor balconies at 32 Union because the projections above the balconies are less than 4 ft. wide and the balconies are not intended to be used for combustible storage.

NFPA 13 is persuasive for determining at what length a projection should be considered a roof when applying NFPA 13R and Section 903.3.1.2.1 of the 2014 IBC. It provides clear guidance that, where a projection over a balcony is less than 4 ft. and the balcony isn't being used to store combustibles, no sprinklers are required. Another persuasive source for determining the intent of Section 903.3.1.2.1 is the commentary to the 2012 International Building Code. The commentary explains that the intent of Section 903.3.1.2.1 is to address hazards, such as grilling, to mitigate catastrophic property damage that could be caused by a balcony fire. (Pet. Ex. 8.) Grilling is not permitted on the balconies at 32 Union; there is a common grilling area that all residents may use instead. So, the likelihood of a fire originating on a balcony at 32 Union is low.

After reviewing the evolution of the code, code commentary, and various professional opinions, Section 903.3.1.2.1 of the 2014 IBC is intended to require sprinkler protection where an actual roof is provided above the balcony for weather protection or there is a deck above, such as from another balcony, not where the balcony is only partially covered by an eave, as is the case here.

c. Petitioner's variance application is a separate matter and is not relevant to this proceeding.

After filing this appeal, Petitioner submitted a variance application with the Commission in an effort to informally resolve this case. (Resp. Br. at 2.) The Commission did not approve Petitioner's application. (Resp. Ex. 2.) The reasoning cited in the Commission meeting minutes, which Respondent quotes in its brief, is as follows: "Denied based on Commission believing the eave is operating as a roof due to being over 2 feet hangover." (Resp. Ex. 3.) The relevant code sections in this matter have been discussed above at length and, therefore, do not need to be re-examined. However, it is noteworthy that the "2 feet hangover" rule appears to be from NFPA 13, and is not applicable here. Furthermore, if NFPA 13 were controlling, no sprinklers would be required because the projections (eaves) are less than 4 ft. wide and the balconies are not intended to be used for combustible storage.

It is common practice for petitioners to file for a variance as an attempt to informally resolve disputes related to code violations and that method has been successfully used to resolve cases in the past. However, such requests are separate and distinct from the appeal process. If the ALJ were to give weight to the outcome of the variance application in this appeal, it would likely discourage others from pursuing informal resolution in such a way for fear that it would prejudice their pending appeal. Furthermore, it would also require petitioners trying to informally resolve through the variance process to initiate a new appeal and start the appeal process over, or worse, pursue two concurrent appeals with essentially the same core issue. This would unnecessarily complicate the appeals process and place an undue burden on those seeking administrative review from the Commission. Therefore, Petitioner's variance application is not relevant to this appeal.

Based on the evidence and arguments presented in this case, and for the reasons discussed above, Respondent did not prove by substantial and reliable evidence that Petitioner violated Section 903.3.1.2.1 of the code.

DECISION AND NON-FINAL ORDER

The code does not require installation of automatic sprinklers over the third floor balconies at 32 Union; therefore, the Petitioner is not required to comply with Respondent's order.

The Fire Prevention and Building Safety Commission is the ultimate authority in this matter. It will consider this Non-Final Order in accordance with the provisions of Indiana Code §§ 4-21.5-3-7 thru -29 and the Notice of Non-Final Order also issued today.

Date: December 11, 2018



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A copy of the foregoing was served by email and U.S. Postal Service upon the following parties and attorneys of record:

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