

INDIANA FIRE PREVENTION AND BUILDING SAFETY COMMISSION

Monday, June 7, 2021
By Electronic Mail

Stuart Millner
Petitioner
Garvin Business Center
1315 Read Street
Evansville, IN 47710
smillner@thegarvinbusinesscenter.com

James D. Johnson Attorney for
Petitioner Jackson Kelly, PLLC
221 NW 5th Street, PO Box 1507
Evansville, IN 47706
jdjohnson@jacksonkelly.com

Re: Petition for Administrative Review – Evansville Fire Department Fire Watch Order – Garvin Business Center

Dear Mr. Millner and Mr. Johnson:

The Indiana Fire Prevention and Building Safety Commission (Commission) is in receipt of your electronically-filed petition for administrative review of the Evansville Fire Department's May 25, 2021 Fire Watch Order – Garvin Business Center, submitted on Friday, June 4, 2021. Pursuant to the requirements of Indiana Code § 4-21.5-3-7, your petition for administrative review is hereby granted by the Commission.

Your petition will now be forwarded to the Indiana Office on Administrative Law Proceedings (OALP) to be assigned to the Commission's administrative law judge. OALP or the judge will contact you directly to make arrangements for further proceedings. Should you have any questions, you may contact the Indiana Department of Homeland Security's deputy general counsel assigned to this matter, Justin Guedel, at jguedel@dhs.in.gov or (317) 234-9515.

Sincerely,



Douglas J. Boyle, Director
Indiana Fire Prevention and Building Safety Commission
Indiana Department of Homeland Security
Indiana Government Center South, Room E-208
302 W. Washington Street

Indianapolis, IN 46204
dboyle@dhs.in.gov

Enclosure

cc: Greg W. Main, Chief Fire Marshal, Evansville Fire Department – Respondent
(by electronic mail)
Bryston Sprecher, Administrative Assistant of the Indiana Fire Prevention and
Building Safety Commission (by electronic mail)

From: [DHS Legal Mailbox](#)
To: [Guedel, Justin K](#); [Boyle, Douglas J \(DHS\)](#); [Sprecher, Bryston](#)
Subject: FW: Petition for Review
Date: Friday, June 4, 2021 3:31:23 PM
Attachments: [68379161_Garvin Fire Watch Order 5.25.21.pdf](#)
[68380022_Petition for Administrative Review - Garvin.pdf](#)
[68380035_Emergency Petition to Stay EFD Fire Watch Order - Garvin.pdf](#)

From: noreply@formstack.com <noreply@formstack.com>
Sent: Friday, June 4, 2021 7:29:39 PM (UTC+00:00) Monrovia, Reykjavik
To: DHS Legal Mailbox <Legal@dhs.IN.gov>
Subject: Petition for Review

**** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ****



Formstack Submission For: [petition for review](#)

Submitted at 06/04/21 3:29 PM

Individual Name:	Stewart Millner
Business Name :	Garvin Business Center
Phone Number:	(812) 589-2961
Email Address:	smillner@thegarvinbusinesscenter.com
Mailing Address:	1315 Read St Evansville, IN 47710
Are you represented by an attorney?:	Yes
Attorney Name:	James Johnson
Firm:	Jackson Kelly, PLLC

Phone Number:	8124229444
Email Address:	jdjohnson@jacksonkelly.com
Mailing Address:	221 NW 5th St, PO Box 1507 Evansville, IN 47706
Order Number:	
Facility Device Boiler ID:	
Date Order Received:	May 25, 2021
How did you receive the Order? :	Hand Delivery
Entity Issuing Order:	Local Fire Department
Entity Name:	
Upload Order:	View File
Was this order specifically directed to you?:	Yes
Explain:	I am the owner of Garvin Business Center which is the property/business subject to the Order
Explain:	
Have you been aggrieved or adversely affected by the order?:	Yes
Explain:	The Order requires a fire watch which costs Garvin Business Center \$500 per day.
Explain:	

If the order was not specifically directed to you and you have not been aggrieved or adversely affected by the order, are you entitled to review under some other law? :

What law?:

I request review of the entire order described above:

Yes

If you are not requesting review of the entire order, what is the scope of your request?:

I request a stay of effectiveness:

Yes

What is the basis of your challenge? :

The building at issue has operational fire prevention systems at a level which does not support the determination that the building is a threat to public safety and/or the systems are not substantially impaired to the point that a mandatory fire watch is warranted. The EFD did not provide an appropriate factual or legal basis, and the action is therefore arbitrary, capricious, or otherwise an abuse of discretion.

Please see attached additional documents for a more detailed basis and general background

What is your desired outcome? :

(1) The May 25, 2021 Order is stayed pending a hearing before an ALJ; and (2) That the EFD's May 25, 2021 Order, which requires Garvin Business Center to maintain a fire watch during public business hours, be removed.

Additional information in support of my request:

Please see attached additional documents for a more detailed request and general background.

Additional Attachments:

[View File](#)

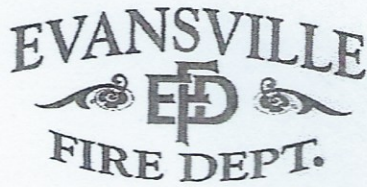
Additional Attachments:

[View File](#)

Additional Attachments:

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Formstack, 11671 Lantern Road, Suite 300, Fishers, IN 46038



LLOYD WINNECKE
MAYOR

MIKE CONNELLY
FIRE CHIEF

550 S.E. Eighth St. • Evansville, IN 47713-1786
(812) 435-6235 • FAX: (812) 435-6248 • TDD/Hearing Impaired: (812) 436-4925

FIRE WATCH AGREEMENT

This Fire Watch Agreement ("**Agreement**") is made and entered this 25 day of MAY, 2021, by and between the City of Evansville, Indiana Fire Department ("**Fire Department**") and Garvin Business Center, the owner, agent or lessee of a Class 1 structure or any other place that people congregate (hereinafter, "**Obligor**") located at 1315 Grand Street, Evansville, Indiana (the "**Property**"). The Fire Department and Obligor shall collectively be known as the "**Parties**."

RECITALS

WHEREAS, a fire watch is a temporary measure intended to ensure continuous and systematic surveillance of a building or portion thereof by one or more qualified individuals for the purposes of identifying and controlling fire hazards, detecting early signs of unwanted fire, raising an alarm of fire and notifying the Fire Department (hereinafter, "**Fire Watch**");

WHEREAS, Indiana Administrative Code 675 IAC 22-2.5-5 states that whenever it is essential for public safety, the fire chief for the Fire Department (the "**Fire Chief**") may require Obligor to employ one (1) or more qualified persons to be on duty to serve as a Fire Watch for the Property;

WHEREAS, the Fire Chief has deemed it essential for public safety that Obligor employ a Fire Watch for the Property; and

WHEREAS, Obligor agrees to employ a Fire Watch per the terms and conditions of this Agreement.

NOW, THEREFORE, the Parties agree as follows:

1. **Fire Watch Contractor.** Obligor shall contact and employ a qualified fire watch contractor to commence the Fire Watch on the Property. A qualified fire watch contractor shall be a certified firefighter who has completed the minimum mandatory training under Indiana law. The fire watch contractor must be approved by the Fire Chief, with such approval to be made in the Fire Chief's sole discretion.
2. **Fire Watch Duties.** Obligor agrees that it shall require its fire watch contractor as employed in Section 1 to follow the Fire Watch Protocol that is attached hereto as **Exhibit A**.
3. **Fire Department Acting as Fire Watch Contractor.** During the period between the Fire Chief determining that a Fire Watch is necessary and Obligor employing a qualified fire watch contractor

to commence the Fire Watch, if the Fire Department must utilize its own firefighters to commence the Fire Watch, then Obligor shall reimburse the Fire Department for any wages, overtime or other fees incurred by the Fire Department in performing such duties. The Fire Department shall invoice such wages, overtime or other fees to Obligor. Obligor shall then make payment to the Fire Department within ten (10) days of receiving such invoice. In the event of non-payment, Obligor agrees to pay all of Fire Department's reasonable attorneys fees, collection costs, court costs and expenses associated with the collection of any amounts owed under this section.

4. **Termination of Fire Watch.** A Fire Watch commenced under this Agreement may only be terminated upon the sole discretion of the Fire Chief or the Fire Chief's designee.

5. **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the state of Indiana. In the event of any litigation between the parties hereto concerning this Agreement or any matters related thereto, such action shall be brought in state court in Vanderburgh County, Indiana.

6. **Entire Agreement.** This Agreement contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements and understandings between the parties hereto respecting such matters.

FIRE DEPARTMENT:

City of Evansville, Indiana, by and through its
Evansville Fire Department

By:

Kevin M. ...

Its:

Chief Fire Marshal

OBLIGOR:

Roger L. ...
Owner, Agent or Lessee of Property

Roger L. ...
Printed Name

This form was approved by the Safety Board at its meeting on September 12, 2018.

Note: This facility is placed under a mandatory fire watch, during business hours. This order shall be in place until Garvin Business Center has provided a plan that has been approved by the AHJ on upgrading the current automatic sprinkler system or installing a new automatic sprinkler system. Fire Watch detail shall consist of 1 person conducting roving patrols of the facility.

OWNER Intends, on Appealing this order on June 2 @ State Board of Fire Prevention and Building Safety.

BEFORE THE STATE OF INDIANA
FIRE PREVENTION AND BUILDING SAEFTY COMMISSION

Garvin Business Center,)	
Petitioner,)	
)	
v.)	Case No. _____
)	
Evansville Fire Department,)	
Respondent.)	

PETITION FOR ADMINISTRATIVE REVIEW

Garvin Business Center (“Garvin”) brings this petition for review under IC 4-21.5-3-7 and Ind. Code §36-8-17-11 against the Evansville Fire Department (“EFD”). Garvin seeks review of the decision of EFD expressed in the Fire Watch Agreement (“Order”) between Garvin and EFD, dated May 25, 2021. Attached hereto as Exhibit A. In support of its petition, Garvin states as follows.

BACKGROUND

1. Garvin purchased a lot at 1315 Read St., Evansville, IN 477110 (the “Property”), which is an older industrial park, in 1995. Situated on the Property is an industrial complex that Garvin converted into a business center. Garvin currently leases space in the complex to nineteen (19) tenants. Sixteen (16) tenants operate under the B, S2, or F2 classifications, and three (3) operate under the S1 classification.

2. In 2016, Garvin sought a variance from the Fire Prevention and Building Safety Commission (the “Commission”), Variance 16-03-61, which was granted on March 1, 2016. The Variance required Garvin’s fire prevention systems to meet several conditions, one of which was to comply with certain NFPA standards. On February 1, 2021, members of the EFD’s Fire Marshal Division conducted a fire inspection and determined that Garvin was not in compliance with the 2016 Variance.

3. Water had been allowed into the Property's dry sprinkler system, causing a flow switch trouble signal to trip on the alarm panel for riser system number 1. Garvin attempted to reset the system, but the attempt was unsuccessful due to problems with the alarm module. Garvin corrected the issue; however, two (2) additional alarm modules indicated similar trouble signals. The EFD indicated that they would require a fire watch until the additional alarm modules were repaired or the issues sufficiently corrected. Garvin corrected the additional alarm module issues the following day and all notification devices were and continue to be in service.

4. Around the same time, EFD and Garvin's representatives also discussed an internal inspection report from 2018 that indicated internal debris was present in the systems and recommended the systems be flushed. EFD's position was that the internal debris issue had not been satisfactorily addressed. In response, Garvin agreed to have a general inspection completed by July 23, 2021 to determine the system's condition and service capabilities. Garvin is concerned with continuing to "bandage" an 80-year-old system and would move to install a new system to be ready for installation by October 1, 2021.

5. On Monday May 24, 2021, the EFD and Garvin met to discuss Garvin's intent to begin putting a financing plan in motion and plans drawn to submit for CDR plan review. Without notice, the EFD returned the following day, Tuesday May 25, 2021, to verify the systems were active and monitored. During this unannounced visit, EFD presented Garvin the Order and declared that if Garvin refused to sign the Order, then the EFD would issue a separate order requiring the premises to be vacated. The Order took effect immediately.

6. The Property's sprinkler system is operational and continues to be adequately monitored, just as it has been for the last several years. This new requirement that Garvin pay for a \$500+ daily fire watch financially prevents Garvin from obtaining the necessary financing to

upgrade the system (estimated to be around \$300,000). Again, the system is fully functional throughout the occupied and vacant main floor and is capable and ready to send an alarm to a monitoring station in the event such an alarm becomes necessary. EFD is aware of this fact. Thus, there is no imminent danger to the Property's occupants.

7. The system is 80+ years old and in need of upgrades or removal as outlined in Variance 16-03-61. Since this event has occurred, Garvin is seriously contemplating changing course, particularly given that the variance would permit Garvin to abandon all the sprinkler systems and replace same with a smoke detection and auto fire alarm system in areas which store combustibles. Garvin has already abandoned two sprinkler heads on the vacant 2nd story of the Property in compliance with the variance, but they did not remove any other sprinkler heads because they did not abandon any other systems. All the aforementioned action was contemplated and permitted by the variance.

8. Ultimately, the building on the Property should not require sprinklers or fire alarms in approximately 75% of its space. Thus, Garvin's goal was to leave its systems active until the smoke detection and fire alarm systems were installed in the other 25% of space. At that point, Garvin would remove the sprinkler heads as well as the piping. After that initial removal of sprinkler heads and piping, the final step would be to leave systems active until all the sprinkler heads and piping were removed from the remaining space.

9. Garvin believes it has the finances in place for the above and it can all be accomplished in six (6) months.

10. If forced to spend \$500 per day, \$15,000 per month, Garvin will likely be forced to declare bankruptcy, leaving the Property in a worse condition and guaranteeing the fire prevention system remains in the inadequate state alleged by the EFD.

11. Garvin requests the EFD's May 25, 2021 Order, which requires Garvin to maintain a fire watch during public business hours, be removed while the above is being accomplished. Garvin will provide EFD monthly updates on the progress of the above.

**COUNT I –
ARBITRARY AND CAPRICIOUS AGENCY ACTION**

12. Garvin incorporates and realleges by reference each of the allegations made in paragraph 1-11 set forth above.

13. Pursuant to Ind. Code Section 36-8-17-11, EFD is subject to the Administrative Orders and Procedures Act, §4-21.5 et seq., and thus governed by its provisions.

14. As the owner of the Property, Garvin is a person who is aggrieved or otherwise adversely affected by the EFD Order of May 25, 2021. Garvin is entitled to review EFD's Order and hereby seeks review and to stay the effectiveness of the agency's decision pursuant to Indiana Code §4-21.5.

15. In its Order of May 25, 2021 requiring Garvin to employ a Fire Watch indefinitely, EFD asserts that the Property's fire prevention system is inadequate to the point of implicating essential public safety. Because the Property's sprinkler system and/or fire prevention systems are currently operational, the conclusion reached by EFD as expressed in the Order is arbitrary, capricious and otherwise an abuse of agency discretion.

16. In its Order of May 25, 2021 requiring Garvin to employ a Fire Watch indefinitely, EFD asserts that the Fire Chief "deemed it essential for public safety that [Garvin] employ a Fire Watch." This threadbare conclusion contradicts certain NFPA standards - #1, 25, 72, and/or 101 - that set out fire watch criteria, all of which require that a certain level of system impairment must exist to justify forcing the implementation of a Fire Watch. For example, NFPA 101 requires "significant" impairment.

17. The AOPA requires EFD to state factually and legally supported reasons for the conclusions it reaches. Its decision as expressed in its Order of May 25, 2021 fails to provide the requisite reasons and conclusions and is therefore arbitrary, capricious and otherwise an abuse of agency discretion.

18. EFD's issuance of the Order without previous comment, question or request for information is also arbitrary, capricious and an abuse of agency discretion.

**COUNT II –
DUE PROCESS VIOLATION**

19. Garvin incorporates and realleges by reference each of the allegations made in paragraph 1-18 set forth above.

20. In its Order of May 25, 2021 requiring Garvin to employ a Fire Watch indefinitely, EFD asserts that the action is necessary because the Fire Chief determined it “essential for public safety,” and the Order was to take effect immediately.

21. 675 Ind. Admin. Code 22-2.5-5 empowers the Fire Chief to make this determination but makes no provision for due notice to the owner and for a formal hearing prior to the decision.

22. EFD's issuance of the Order indicates that the EFD and/or the Fire Chief has been conferred arbitrary power without providing for the intervention or assistance of a court or jury and results in an unwarranted delegation of legislative and judicial authority or deprives the owner of his property without due process of law.

REQUEST FOR RELIEF

Therefore, Garvin requests that:

1. A hearing on the merits of this petition be granted to challenge the conclusions that the Property is unsafe and constitutes a public safety hazard that requires the EFD Fire Chief to require a Fire Watch;

2. A hearing on the merits of this petition be granted to challenge the conclusions that the Property's sprinkler system or other fire prevention system is inoperable and/or diminished and/or inadequate;

3. A hearing on the merits of this petition be granted to challenge the violations of due process inherent in the EFD's Order; and

4. All other relief which the Administrative Law Judge appointed by the Fire Prevention and Building Safety Commission deems appropriate.

Dated: June 4, 2021

Respectfully submitted,

/s/ James D. Johnson

James D. Johnson, #11984-49

Mark T. Abell, #36641-82

Jackson Kelly PLLC

P.O. Box 1507

Evansville, IN 47706

Telephone: (812) 422-9444

Facsimile: 812-421-7459

E-mail: jdjohnson@jacksonkelly.com;

mark.abell@jacksonkelly.com

Counsel for Garvin Business Center

BEFORE THE STATE OF INDIANA
FIRE PREVENTION AND BUILDING SAEFTY COMMISSION

Garvin Business Center,)	
Petitioner,)	
)	
v.)	Case No. _____
)	
Evansville Fire Department,)	
Respondent.)	

EMERGENCY PETITION TO STAY AGENCY ACTION

Garvin Business Center (“Garvin”) brings this emergency petition to stay under IC 4-21.5-3-6(e), IC 4-21.5-3-7, and Ind. Code §36-8-17-11 against the Evansville Fire Department (“EFD”). Garvin seeks a stay of the decision of EFD expressed in the Fire Watch Agreement (“Order”) between Garvin and EFD, dated May 25, 2021, while the Order is pending review by an ALJ. The Order is attached hereto as Exhibit A. In support of its emergency petition, Garvin states as follows.

BACKGROUND

1. Garvin purchased a lot at 1315 Read St., Evansville, IN 477110 (the “Property”), which is an older industrial park, in 1995. Situated on the Property is an industrial complex that Garvin converted into a business center. Garvin currently leases space in the complex to nineteen (19) tenants. Sixteen (16) tenants operate under the B, S2, or F2 classifications, and three (3) operate under the S1 classification.

2. In 2016, Garvin sought a variance from the Fire Prevention and Building Safety Commission (the “Commission”), Variance 16-03-61, which was granted on March 1, 2016. The Variance required Garvin’s fire prevention systems to meet several conditions, one of which was to comply with certain NFPA standards. On February 1, 2021, members of the EFD’s Fire Marshal

Division conducted a fire inspection and determined that Garvin was not in compliance with the 2016 Variance.

3. Water had been allowed into the Property's dry sprinkler system, causing a flow switch trouble signal to trip on the alarm panel for riser system number 1. Garvin attempted to reset the system, but the attempt was unsuccessful due to problems with the alarm module. Garvin corrected the issue; however, two (2) additional alarm modules indicated similar trouble signals. The EFD indicated that they would require a fire watch until the additional alarm modules were repaired or the issues sufficiently corrected. Garvin corrected the additional alarm module issues the following day and all notification devices were and continue to be in service.

4. Around the same time, EFD and Garvin's representatives also discussed an internal inspection report from 2018 that indicated internal debris was present in the systems and recommended the systems be flushed. EFD's position was that the internal debris issue had not been satisfactorily addressed. In response, Garvin agreed to have a general inspection completed by July 23, 2021 to determine the system's condition and service capabilities. Garvin is concerned with continuing to "bandage" an 80-year-old system and would move to install a new system to be ready for installation by October 1, 2021.

5. On Monday May 24, 2021, the EFD and Garvin met to discuss Garvin's intent to begin putting a financing plan in motion and plans drawn to submit for CDR plan review. Without notice, the EFD returned the following day, Tuesday May 25, 2021, to verify the systems were active and monitored. During this unannounced visit, EFD presented Garvin the Order and declared that if Garvin refused to sign the Order, then the EFD would issue a separate order requiring the premises to be vacated. The Order took effect immediately.

6. The Property's sprinkler system is operational and continues to be adequately monitored, just as it has been for the last several years. This new requirement that Garvin pay for a \$500+ daily fire watch financially prevents Garvin from obtaining the necessary financing to upgrade the system (estimated to be around \$300,000). Again, the system is fully functional throughout the occupied and vacant main floor and is capable and ready to send an alarm to a monitoring station in the event such an alarm becomes necessary. EFD is aware of this fact. Thus, there is **no imminent danger** to the Property's occupants.

7. The system is 80+ years old and in need of upgrades or removal as outlined in Variance 16-03-61. Since this event has occurred, Garvin is seriously contemplating changing course, particularly given that the variance would permit Garvin to abandon all the sprinkler systems and replace same with a smoke detection and auto fire alarm system in areas which store combustibles. Garvin has already abandoned two sprinkler heads on the vacant 2nd story of the Property in compliance with the variance, but they did not remove any other sprinkler heads because they did not abandon any other systems. All the aforementioned action was contemplated and permitted by the variance.

8. Ultimately, the building on the Property should not require sprinklers or fire alarms in approximately 75% of its space. Thus, Garvin's goal was to leave its systems active until the smoke detection and fire alarm systems were installed in the other 25% of space. At that point, Garvin would remove the sprinkler heads as well as the piping. After that initial removal of sprinkler heads and piping, the final step would be to leave systems active until all the sprinkler heads and piping were removed from the remaining space.

9. Garvin believes it has the finances in place for the above and it can all be accomplished in six (6) months.

10. Garvin will provide EFD monthly updates on the progress of the above.
11. The Order saddles Garvin with an impossible financial burden, and if forced to spend \$500 per day, \$15,000 per month, Garvin will likely be forced to declare bankruptcy, leaving the Property in a worse condition, and guaranteeing the fire prevention system remains in the inadequate state alleged by the EFD.
12. Pursuant to Ind. Code Section 36-8-17-11, EFD is subject to the Administrative Orders and Procedures Act, §4-21.5 et seq., and thus governed by its provisions.
13. As the owner of the Property, Garvin is a person who is aggrieved or otherwise adversely affected by the EFD Order of May 25, 2021. Garvin is entitled to review and request a stay of the EFD's Order and hereby seeks to stay the effectiveness of the agency's decision pursuant to Indiana Code §4-21.5.
14. Garvin is simultaneously filing a Petition for Administrative Review that requests the EFD's May 25, 2021 Order, which requires Garvin to maintain a fire watch during public business hours, be removed while the above is being accomplished.
15. Pursuant to Ind. Code §4-21.5-3-6(e) an aggrieved party who timely files a petition for review under Ind. Code §4-21.5-3-7 may also file a petition for stay of effectiveness of an order, and the assigned ALJ shall conduct a preliminary hearing on the stay "as soon as practicable."
16. The EFD Order of May 25, 2021 took immediate effect on May 25, 2021, and by its terms will not expire until the EFD Fire Chief or his designee decides the Order should be terminated.
17. Because Garvin has timely filed their Petition for Administrative Review, and has timely filed this petition to stay the effectiveness of EFD's Order, it is entitled to an order staying

the effect of EFD's Order until a hearing on the merits and a final decision of the Fire Prevention and Building Safety Commission is entered.

REQUEST FOR RELIEF

Therefore, Garvin requests that:

1. The legal effect imposed by the May 25, 2021 Fire Watch Agreement forcing Garvin to employ a Fire Watch during all public hours of operation be stayed until a hearing on the claims presented by Garvin's Petition for Administrative Review is conducted and a final adjudication entered; and

2. All other relief which the Administrative Law Judge appointed by the Fire Prevention and Building Safety Commission deems appropriate.

Dated: June 4, 2021

Respectfully submitted,

/s/ James D. Johnson

James D. Johnson, #11984-49

Mark T. Abell, #36641-82

Jackson Kelly PLLC

P.O. Box 1507

Evansville, IN 47706

Telephone: (812) 422-9444

Facsimile: 812-421-7459

E-mail: jdjohnson@jacksonkelly.com;

mark.abell@jacksonkelly.com

Counsel for Garvin Business Center