

CAUSE NO. 05-27F

NAME: EAST WAYNE STREET

ADMINISTRATIVE LAW JUDGE: WILLIAM TEEGUARDEN

DATE: DECEMBER 12, 2005

COMMISSION ACTION: MODIFIED

FINDINGS OF FACT

1. The Office of the State Fire Marshal and the Division of Fire and Building Safety of the Department of Homeland Security are agencies within the meaning of IC 4-21.5.
2. IC 4-21.5, IC 22-14 and the 1989 Indiana Building Code (“IBC”) apply to this proceeding.
3. The Commission is the ultimate authority within the meaning of IC 4-21.5 over Orders issued by the SFM.
4. At all times relevant to this proceeding, the Center operated a “head start” program in Fort Wayne, Indiana.
5. Since a head start program deals with pre-school age children it is considered the same occupancy classification as a daycare by the IBC.
6. As a result of an inspection by the SFM in April of 2005, violation 5 of the Order of the SFM dated April 19, 2005 was issued.
7. The violation cited IBC Section 3303(a) as the code section violated.
8. Section 3303(a) of the IBC, (which is also Section 3303(a) of the 1988 Uniform Building Code) requires that every “. . . Usable portion . . . shall have at least one exit, not less than two exits where required by Table No. 33-A and additional exits as required by this subsection.”
9. Table No. 33-A requires two exits whenever the calculated maximum occupancy of a room which is used as a classroom or assembly area is at least 50 persons.
10. The SFM contends the Center’s all purpose room has a calculated occupancy of more than 50 people and thus requires two exits.
11. There is one very large exit in the front of the room which exits almost immediately to the outside through a code compliant corridor.
12. There is a second exit on the left side facing into the room but it is not code compliant as it exits through a kitchen area and thus does not count as a code compliant exit. See 1989 IBC Section 3303(c).
13. The Center contends the room in question does not have a calculated occupant load of 50 or more.
14. The Center also expressed concern about changed standards of inspection since the building was released in 1991, finished and occupied as a head start program in 1992, and has been inspected annually as a preschool/daycare since that time.
15. The parties agree that the project was designed and released for a “day-care educational” occupancy in 1991 and therefore the 1989 IBC applies.
16. The room in question is almost square and contains just under 700 square feet of floor space.

17. The current use of the room is to provide a play area for the head start students when the weather is bad.
18. In good weather, the room is generally not used.
19. Only one class at a time uses the play area so actual usage is rarely over 15-20 persons.
20. There are no fixed seats or tables in the area.
21. At the time of the hearing, there were some shelves and children's toys in the area but basically the room was open space.
22. The architect who did the original design (and testimony indicates there have been no changes to this area since design and construction) was unavailable, but the firm sent another associate to the hearing.
23. The architect testified the room was designed to be a "less concentrated" use and this occupancy factor is 15 square feet per person.
24. Under this theory of the case, the occupancy of the room would be approximately 46 or 47 and thus the IBC Table 33 A would only require one exit.
25. An inspector for the Fort Wayne Fire Department who has inspected this building before also concurred with the less concentrated use contention and felt that the room only needed the one compliant exit.
26. The only other actual use of the room is for staff meetings which never involves more than 15 persons.
27. The witnesses for the SFM considered the room, because of the lack of any fixed seating, tables, or any other such objects, as a concentrated use assembly area and thus the occupant load factor is 7 square feet per person.
28. Under this theory, the calculated occupant load of the room is 99 or 100 and thus 2 compliant exits are required.
29. The administrative law judge certainly believes the testimony of the Center's Director, architect, and local fire official as to the current actual use of the room which never results in an actual occupant load near 50.
30. However, the SFM makes a valid point in that the future managers of the Center may well decide to use this nice empty room for a concentrated use.
31. From the site view, it would be very east to put 8 rows of 10 folding chairs in this room and still leave room for a small Christmas performance or similar activity.
32. Table 33-A recognizes 2 types of assembly occupancies.
33. Less concentrated uses include gymnasiums, dining rooms, and lounges.
34. Concentrated uses include auditoriums, churches and chapels, and dance floors.
35. Neither seems to directly apply to the all purpose room and the arguments on both sides have merit.
36. There is, however, another problem with this violation.
37. The Center raised the issue of having passed annual (or at least periodic) inspections by both state and local fire officials for almost 13 years prior to this violation.
38. There is no question that the room has not undergone any significant structural or dimensional change since it was first occupied in 1992.
39. The Indiana State Legislature has provided a statutory scheme to act as a bar to "stale" claims. It is called the "Statute of Limitations".

40. This Commission has faced a case where reference was made to the Statute of Limitations in In Re AMERICAN LEGION POST 470 (August 15, 2005, Cause Number 03-66).
41. In this case, the Commission upheld an order of the SFM for a violation that had existed for 9 years.
42. The Commission thus affirmed find #28 which stated:
“28. The Legion did not cite, nor did the trier of fact find a statute of limitations in IC 34 which arguably applies and which would limit the commencement of an action for enforcement to less than 9 years.”
43. In this particular case, the result is different.
44. IC 34-11-1-2 states:
 - (a) A cause of action that;
 - (1) arises on or after September 1, 1982, and
 - (2) is not limited by any other statute;
must be brought within ten (10) years.
45. IC 34-11-2 contains a number of specific statutes of limitation none of which appear to be relevant. The only one that exceeds 10 years is execution on a court judgment or decree which has been entered.
46. Black’s Law Dictionary, 6th edition, gives as one definition for “cause of action” the following: “Failure to perform a legal obligation . . . to do . . . some act.”
47. The Order issued by the SFM began a proceeding for failing to provide a second exit and therefore the proceeding must be considered a cause of action.
48. The Center was first occupied as a head start facility in 1992 and the order starting this proceeding was issued in April of 2005.
49. Since more than 10 years passed before the SFM issued the Order, enforcement is barred by the Statute of Limitations specified in IC 34-11-1-2.

NONFINAL ORDER

Violation 5 of the Order of the State Fire Marshal issued April 19, 2005 to the Fort Wayne Center Head Start program is hereby declared unenforceable because of the Statute of Limitations.

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

IN THE MATTER OF) **ADMINISTRATIVE CAUSE NO. 05-27**
)
EAST WAYNE STREET CENTER, INC.) **(Order of SFM)**

**FINAL ORDER OF THE FIRE PREVENTION AND
BUILDING SAFETY COMMISSION**

At the regularly scheduled meeting of the Fire Prevention and Building Safety Commission on March 7, 2006, the Commission modified the Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge as follows:

- (a) Finding 36 is modified to read: There are, however, other issues concerning this alleged violation.
- (b) Findings 40 through 49 dealing with the Statute of Limitations were deleted and replaced by the following:
 - 40.5 However, the statute of limitations of ten years found in IC 34-11-1-2 does not apply to administrative proceedings.
 - 41.5 The Order must be decided on its merits
- (c) Findings 42.5 and 43.5 are added as follows:
 - 42.5 The testimony of the local fire official and the design professional establish that the room in question was designed and used as a “less concentrated use” room and therefore the proper occupant load factor is 15 square feet per person and not 7 square feet per person.
 - 43.5 Thus the calculated occupant load is 47 and being under 50, a second code compliant exit is not required under building code applicable to this building.

(d) The Nonfinal Order is modified to read as follows:

Since the occupant load is less than 50, no second exit is mandated by code hence that portion of the violation of the Order of the State Fire Marshal dated April 19, 2005 issued to the East Wayne Head Start dealing with a second exit is hereby vacated.

The remainder of the Report, Findings of Fact, and Nonfinal Order of the Administrative Law Judge was not changed by the Commission and remains in effect.

The Commission is the ultimate authority, and this action is its final determination. A person who wishes to seek judicial review of this final determination must file a petition for review in an appropriate court within 30 days of this notice and must otherwise comply with IC 4-21.5-5.

Date: March _____, 2006

DAVID L. HANNUM
Chairman
Fire Prevention and Building
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