

Cause #: 98-16F

Name: Sundance At The Crossing

Administrative Law Judge: William K. Teegarden

Date: April 14, 1999

Commission Action: Affirmed

## **FINDINGS OF FACT**

1. Jurisdiction over this matter by the FPBSC is provided by IC 36-8-17-9 which allows an LFO to issue a violation of the ISFC and IC 36-8-17-11 which allows an appeal of an LFO order to the FPBSC pursuant to IC 4-21.5.
2. IC 4-21.5, IC 36-8, IC 22-12, 675 IAC 13 and 22 and the NFPA apply to this proceeding.
3. On February 5, 1998, the Perry Township LFO issued an order ("Order") To Sundance involving the locations of gas and charcoal grills.
4. At all times relevant to this proceeding, Sundance operated a large apartment complex (452 units) consisting of two and three story buildings in Perry Township, Marion County, Indiana.
5. Sundance responded to the order in writing in sufficient substance to satisfy IC 4-21.5 and IC 36-8-17-11 and provide for administrative review of the order as if it had been issued by a state agency.
6. The FPBSC is the ultimate authority within the meaning of IC 4-21.5 for enforcement disputes involving the ISFC.
7. At all times relevant to this order, the ISFC (675 IAC 22-2.1) adopted the 1988 Uniform Fire Code ("UFC") as the State Fire Code.<sup>1</sup>
8. The original order cited Sections 11.116 and 82.109 of the UFC as the provisions violated.
9. Subsequent discussions have resulted in NFP 58-3-4.9.2 also being involved in the violation.
10. Since this is an enforcement action, the burden of persuasion is on the LFO. See Peabody v. Ralston, (1st Dist 1991), 578 N.E.2d 751.

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<sup>1</sup> Subsequent to the initiation of this proceeding, the FPBSC adopted the 1997 UFC as the ISFC. The new fire code took effect in April of 1998.

11. The factual basis for the issuance of the order is based on the visual observation of the LFO of some portable charcoal and propane gas grills of the type normally used by homeowners on first floor patios and upper floor apartment balconies of the apartment complex.
12. As a result of his observations, the LFO served the office manager (but not the apartment residents) with the Order.
13. Sundance has properly raised the issue of “who should be cited” as a matter to be determined.
14. Section II.116 of the UFC states that “A person shall not construct, erect, install, maintain, or use any incinerator or barbecue pit or so burn any combustible material as to constitute or occasion a fire hazard by the use or burning thereof or as to endanger the life or property of any person thereby.”
15. The grills in question are not incinerators or barbecue pits.
16. The proper use of a standard portable residential grill, whether gas or charcoal, may be the burning of combustible material but does not occasion a fire hazard or endanger life or property.
17. Therefore, the use of a portable grill is not a violation of Section II.116 of the UFC.
18. Section 82.109 of the UFC states that “All weeds, grass, brush, trash, or other combustible material shall be kept a minimum of 10 feet away from all LP-gas tanks or containers.”
19. It appears from the wording of this section that the concern is storage near trash, rubbish, and uncontrolled overgrowth; not use near a manicured and maintained yard area. This section also does not apply to charcoal grills.
20. Further, a cursory reading of Section 82 of the UFC shows it applies to larger storage tanks with permanent locations. It is clearly not intended to set standards for the small LP tank that is attached to a portable grill.
21. 675 IAC 22-1-7 adopts most of NFPA 58 as the ISFC dealing with LP gas storage.
22. NFPA 58-37-3-4.9.2 states “Containers having water capacities greater

than 2 ½ lb. (1 kg.) [nominal 1lb (0.5 kg) LP-gas capacity] shall not be located on balconies above the first floor attached to a multiple family dwelling of three or more living units located one above the other.”

23. Of note is the fact that NFPA 58 does not apply to charcoal grills.
24. On the basis of the code sections cited in the order and NFPA 58, none of the charcoal grills referred to in the order are violations of the ISFC.
25. Further, none of the LP grills located on second floor balconies of 2 story units can be in violation of NFPA 58.
26. The only possible grills which could violate the code sections cited by the LFO would be LP gas grills with water capacities greater than 2 ½ lb. located above the first floor in sections where there are three living units located one above the other.
27. A review of the evidence presented shows that the testimony of the LFO was fairly general and no where did he specifically state there was a gas grill on the 2nd or 3rd story of a 3 story section of the complex which had a tank over the size limit.
28. Since the burden of persuasion is on the enforcement authority,<sup>2</sup> the Order must be vacated for lack of evidence of a violation of the cited sections of the ISFC.<sup>3</sup>
29. As to the issue of whether or not the order should be given to Sundance Management or the tenant, it is clear that the tenant is always a proper party.
30. The order was issued pursuant to IC 36-8-17-9.
31. IC 36-18-17-9 (d) (2) states that the LFO may “Require a person who has control over property that is affected by a violation to take reasonable steps

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<sup>2</sup> Sundance also correctly points out that none of the grills were in use at the time of inspection and thus may only be in violation of codes dealing with storage, not use.

<sup>3</sup> The LFO was concerned about charcoal grills because of the serious fire at Sundance in 1995. The evidence presented at hearing showed the cause of the fire to be the placement of used charcoal in a plastic waste container while still hot. This has nothing to do with the location of the grill.

to . . . (B) correct the violation.”

32. The issue becomes to what degree the landlord has control over the physical area specifically leased by the tenant.
33. The tenant has certain privacy rights in the use of the premises.
34. However, most leases, including the regulations included by Sundance (exhibit 3) retain a limited right of access and control certain activities within the leased premises.
35. Additionally, the grills in question, while within the curtilage of the apartment, were in plain view and easily visible.
36. In cases where the landlord retains some measure of control over the premises and when the factual basis for an order occurs outside the apartment, the landlord can be deemed to have sufficient control to be given an order.<sup>4</sup>
37. However, for the reasons presented previously, the order in question should be vacated.

### **NONFINAL ORDER**

The order of the Perry Township Fire Department dated February 5, 1998, and supplemented on April 20, 1998, issued to Sundance at the Crossings is hereby vacated.

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<sup>4</sup> The issue of whether or not the tenant is a party needed for a full and complete adjudication of the issues pursuant to TR 19 was not raised by any party, but that may be a future issue in similar cases.