

THREE MEMBER PANEL OF THE
BOARD OF BUILDING REGULATION EXAMINERS AND APPEALS

CASE BCA-4-2016

**OBJECTION TO BUILDING BOARD JURISDICTION TO GRANT THE
REFUNDS REQUESTED**

The Municipality, through Assistant Municipal Attorney Samuel Severin, objects to the Building Board's jurisdiction to grant the relief requested in this appeal – a refund. Refund requests are not the type of dispute this Board is designed to decide. It does not appear anywhere in Title 23 that this Board has the authority to issue an order that the Municipality pay money damages or grant refunds.

While it is somewhat of a fine point, there was some confusion at the last hearing where a similar issue came up. The Municipality is not suggesting the Board cannot hear the issue of fees charged for finished basements and Policy R.01. If the Board wishes to entertain the appeal in the interest of public process, it is free to do so. The Board does not, however, have the ability to order the Municipality to write a check in the event it decides in Appellant's favor.

AMC 23.10.103.4.1 states: **General.** In order to hear and decide appeals of orders, decisions or determinations made by the building or fire code official relative to the application and interpretation of this code, there shall be and is hereby created a board of building regulation examiners and appeals (hereafter "building board"). The building board may, in its discretion, offer comment or recommendation concerning amendments to this code. The building board shall be appointed by the governing body and shall hold office at its pleasure. The building board shall follow rules of procedure approved by the Assembly for conducting business. All decisions and findings in an appeal shall be rendered in writing to the appellant, with a duplicate copy to the building official.

This language was adopted from the International Building Code. Neither the International Building Code, nor AMC 23.10.103.4.1, grants any authority to the Board to adjudicate past claims for an award of money damages. Neither code gives the Building Board authority to issue an order to the Municipality to pay money. Such a power would be highly unusual for a municipal board. What the Board could do is "offer

comment or recommendation concerning amendments to the code,” pursuant to AMC 23.10.103.4.1.

The Alaska Supreme Court has long held that boards are limited to the powers expressly granted in the code or statute that creates them and defines their authority. For example, in *Fields v. Kodiak City Council*, 628 P.2d 927 (Alaska 1981) the court found that a zoning board did not have the power to use equitable doctrines like estoppel or “clean hands.” A zoning board is only allowed the authority contained in the zoning ordinance. See also footnote 31, *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 635 (Alaska, 1979)

For example, AMC 23.10.103.4.7 allows the \$500 filing fee for a full board hearing to be refunded to the appellant if the full board overturns the decision rendered by a three-member hearing panel. A zealous attorney, accustomed to litigating in court, may also ask for attorney’s fees or a refund of some of appellant’s costs. Surely the Board would not grant that request. The Board would say it lacks the authority and that it is not a court.

By contrast, the Worker’s Compensation Appeals Commission, a state entity, is granted the express authority by statute (A.S. 23.30.008 (d)) to grant reasonable costs and attorney’s fees. The legislature has specifically chosen in that unique circumstance to grant such an authority. Our Assembly, by contrast, has only granted the Building Board one limited way to financially reward a successful appellant – return of the \$500 full board filing fee.

The Anchorage Equal Rights Commission is an example of the assembly granting broader powers, including authority to grant equitable and/or monetary relief.

AMC 5.70.130D:

The commission may order the following types of relief:

1. In cases involving employment practices, the commission may order any equitable relief, including but not limited to the hiring, reinstatement or upgrading of an employee or group of employees with or without back pay, restoration to membership in a labor organization, or admission to or participation in an apprenticeship

- training program, on-the-job training program or other retraining program, and any other appropriate relief.
2. In cases involving the sale or rental of real property, the commission may order any equitable relief, including but not limited to the sale, lease or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease or rental of the next vacancy in like accommodations owned by the person against whom the complaint was filed, and any other appropriate relief.
 3. In cases involving public accommodations, the commission may order any equitable relief, including but not limited to restoration to membership in a place of public accommodation, or admission to or service in a place of public accommodation, and any other appropriate relief.
 4. In cases involving financial institutions, the commission may order any equitable relief, including but not limited to the issuance of a credit card to a person, the approval of a loan to a person or the issuance of insurance to a person, and any other appropriate relief.
 5. In cases involving educational institutions, the commission may order any equitable relief including, but not limited to admission to the institution or admission to the programs of the institution, and any other appropriate relief.

All that is to say that the assembly knows how to give a board or commission the ability to make orders for payments of money. There is no such express authority granted to the Building Board. The assembly must surely be aware that permit fees are a topic that invites debate. Yet the assembly did not grant the Building Board the ability to grant refunds or make monetary awards. If there is a permitting fee issue that needs clarity, the Board can “offer comment or recommendation concerning amendments to the code,” pursuant to AMC 23.10.103.4.1.

Though it is not before us today, it may be that prior to incurring a fee, an appellant could ask that the decision to impose a certain fee be reviewed. Such a decision would not require the Board to issue an order for the payment of money. The Board could use its expertise in the industry and in understanding the building code to determine if a prospective fee really does apply.

However, looking backward and asking for refunds causes a whole new set of problems. The Municipality would object on the basis of the statute of limitations, arguing that any refunds request must be brought within two years pursuant to A.S. 09.10.070, the state statute of limitations. An appellant might request pre-judgment interest, a remedy allowed by courts to compensate for the loss of use of money during the time it takes to reach conclusion in the court system.

The code is wholly inadequate to address these issues. Because it does not authorize the Board to order the Municipality to pay money to appellants, it did not create rules governing such refunds. Nor should the board members be expected to decide such arguments, especially without guidance in the code. The Board is made up of engineers, architects, and contractors who are “qualified by experience or training to pass on matters pertaining to building construction.” AMC 23.10.103.4.4. The Board is not made up of attorneys or accountants who are qualified by training and experience to decide issues pertaining to awards of money.

The Board may hear this case if it feels so inclined. It cannot, however, order the Municipality to pay money to the appellant. It could render some kind of advisory opinion. This Board, like all others, is limited to the express authority it has been granted by the assembly. The Board has not been given the express authority by the assembly to order the Municipality to grant refunds.

Respectfully submitted this 12th day of July, 2016.

WILLIAM D. FALSEY
Municipal Attorney

By: _____

Samuel C. Severin
Assistant Municipal Attorney
Alaska Bar No. 0606035