

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

CASE BCA-02-2016

Hearing Date of May 25, 2016

**OBJECTION TO BUILDING BOARD JURISDICTION TO HEAR THIS
APPEAL AND TO GRANT THE RELIEF REQUESTED**

The Municipality, through Assistant Municipal Attorney Samuel Severin, objects to the Building Board hearing this appeal. Refund requests are not the type of dispute this board is designed to hear and 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.

AMC 23.10.103.4.1 states:

The Building Board of Regulation Examiners and Appeals (Building Board) has the power and duty: 1) to hear and decide appeals from the decisions of administrative officials relating to building and fire regulations under Anchorage Municipal Code Title 23, including mechanical and plumbing regulations; 2) to grant modifications from strict application of the Building Code on appeal from a decision of the building official; 3) to determine the suitability of alternate materials and methods of construction when hearing and deciding an appeal; 4) to conduct hearings on matters brought before it pursuant to the Abatement of Dangerous Buildings under chapter 23.70; and 5) in its discretion, to offer comment or recommendation concerning amendments to building code and regulations in Anchorage Municipal Code Title 23.

Of those various powers, the only one that arguably applies to Mr. Thompson's refund request is subsection 1. The denial of the refund request by Ms. Walsh in the letter of April 27, 2016 is a decision of building official. However, it is clear from the remainder of that sentence, and from considering the overall subject matter of the other

four subsections, that the board is to hear decisions regarding the substantive building codes. It is not to act as a court and referee past disputes about money that do not even pertain to actual current projects.

The board is made up of a pool of “members qualified by experience and training to pass upon appeal matters pertaining to building construction and building service equipment.” AMC 23.10.103.4.1. It is meant to be a group of people with experience in building design and construction, not adjudicating claims for money. Otherwise, the board would have attorneys and accountants.

AMC 23.10.103.4.2 - Limitations of authority, states:

An application for appeal shall be based on a claim that the true intent of this code, or the rules legally adopted thereunder, have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of this code. Modifications must meet the standards within the Building Board's jurisdiction.

This appeal is not about the intent of the building code. While it is true that the fees are based in Title 23, this appeal really is a factual dispute about the amount of time that inspectors were at various sites. That type of factual adjudication with the intent to order a monetary award is clearly not within the limitations of authority under AMC 23.10.103.4.2. If the board were to award a refund, the Municipality would almost certainly have to challenge that decision in court. The board simply does not have the express authority to grant refunds or damages. Further, the potential for future appellants to try to follow such a precedent by requesting refunds is problematic.

It may seem confusing that the Municipality accepted this appeal and convened a hearing if it does not believe the board has jurisdiction to hear the appeal or the power to order the Municipality to write a check. This is not the first time the Municipality, or this department, has accepted an appeal that it feels is not appropriate for the building board.

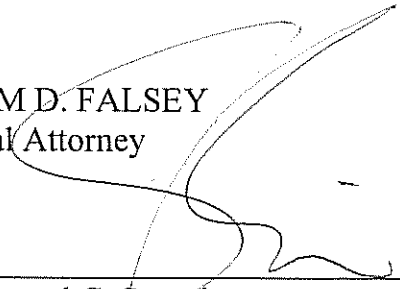
When an appeal is filed where there is a question about appealability or jurisdiction, it arguably creates a conflict of interest. The same office or administration who made the decision is then the same group of people who are tasked with determining whether the decision can be appealed at all. In some situations it is very clear. If

someone wanted to appeal a zoning decision to the building board, the appeal should not even be accepted at all. There is another board for that. However, where the subject matter is in the general realm of Title 23 and the types of things the building department regularly does, undersigned counsel has frequently advised the building department to accept the appeal, start the process, and then later ask the board or to determine that the appeal is not appropriate. That avoids the appearance of the fox guarding the henhouse and ensures due process by allowing a neutral board to decide whether it even has the authority or obligation to hear a particular case.

The board should decline to hear this case.

Respectfully submitted this 18th day of May, 2016.

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