

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Tidewater Fibre Corporation
Appeal No. 06-2

Decided: July 21, 2006

DECISION OF THE REVIEW BOARD

I. PROCEDURAL BACKGROUND

The State Building Code Technical Review Board ("Review Board") is a Governor-appointed board established to rule on disputes arising from application of the Virginia Uniform Statewide Building Code (the "USBC") and other regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. Enforcement of the USBC in other than state-owned buildings is by local city, county or town building departments. See § 36-105 of the Code of Virginia. An appeal under the USBC is first heard by a local board of building code appeals and then may be further appealed to the Review Board. See § 36-105 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act. See § 36-114 of the Code of Virginia.

II. CASE HISTORY

Tidewater Fibre Corporation ("TFC"), a recycling company with operations in Chesapeake, Virginia, appeals the conditional approval of a modification request under the USBC by the City of Chesapeake's Code Compliance Manager (the "building official").

TFC's Chesapeake operations are located at 1958 Diamond Hill Road. The plant operations are to receive recyclable materials including plastic, paper, bottles, aluminum cans and glass; separate and sort the materials using conveyors, screens and sorting equipment, and to bale the separated materials for shipping.

In October of 2005, in conjunction with proposing improvements to all of its buildings resulting from a determination of the City of Chesapeake Fire Marshal's Office (the "fire official") after a fire at the facility,¹ TFC contacted the building official about a proposed addition to Building #4 in order to increase its sorting capabilities.

Based on its understanding of how the fire official and building official believed the USBC and the SPFC applied to its operations, TFC submitted a modification request to the building official proposing a number of fire protection enhancements to

¹The determination of the fire official led to TFC submitting a modification request to the fire official under the Virginia Statewide Fire Prevention Code (the "SFPC"), which is the subject of Appeal No. 06-1, heard and ruled on by the Review Board at the same meeting in which this appeal was considered.

permit the addition to Building #4 to comply with the Group F-1 (factory industrial, moderate-hazard) occupancy requirements of the USBC rather than the Group H-3 (high-hazard) occupancy requirements.

The building official responded to the modification request by asking that it be resubmitted with additional information and by providing a preliminary determination that while the original building was approved as a Group F-1 occupancy under the USBC in effect in 1997, the addition would be considered as a Group H-3 occupancy since Group H-3 included occupancies handling combustible fibers which included wastepaper such as the paper processed by TFC.

TFC resubmitted the modification request in November of 2005. The building official responded by letter dated November 18, 2005 approving the modification contingent upon a number of conditions. One of the conditions was that TFC must comply with stipulations set out in a letter from the fire official to TFC dated November 8, 2005.

TFC filed an appeal with the City of Chesapeake Local Building Code Board of Appeals (the "City appeals board") by letter dated December 7, 2005 disagreeing with the building official's determination that the addition to Building #4 would be classified as Group H-3 because wastepaper is a combustible fiber and seeking relief from the operational restrictions imposed by

the building official in requiring compliance with the fire official's stipulations contained in the November 8, 2005 letter.

TFC's appeal was heard by the City appeals board in January of 2006. The City appeals board ruled to deny TFC's appeal finding that wastepaper within a recycling facility was considered to be combustible fiber.

TFC then further appealed to the Review Board in February of 2006.

In March of 2006, in processing the appeal to the Review Board, Review Board staff conducted an informal fact-finding conference attended by representatives of TFC, the building official and their respective legal counsel. Subsequent to the conference, Review Board staff drafted a document outlining the appeal and the parties were given an opportunity to respond to the staff document and to submit additional documents and written arguments to the Review Board in preparation for a hearing.

The Review Board heard the appeal in July of 2006 and the hearing was attended by all parties and their legal counsel.

III. FINDINGS OF THE REVIEW BOARD

The building official argues that TFC's appeal should be dismissed since (i) the modification request was approved by the building official rather than denied, (ii) TFC did not appeal the building official's response to the modification request, but

instead only appealed the determination by the building official that wastepaper is a combustible fiber, (iii) the building official's determination that wastepaper is a combustible fiber is not, in and of itself, an application of the USBC and therefore not something that may be appealed, and (iv) the City appeals board never heard the merits of the building official's response to the modification request.

With respect to issue (i) above, the Review Board finds that the building official's response to the modification request was tantamount to a refusal to grant a modification since in order for the request to be approved, TFC was required by the building official to comply with twenty-three stipulations outlined in the fire official's November 8, 2005 letter to TFC. Such stipulations were above and beyond what TFC offered in the modification request.

With respect to issues (ii) and (iii) above, the Review Board finds that while TFC did state that its appeal was of the building official's determination that wastepaper is a combustible fiber, it also stated in its appeal letter to the City appeals board that it sought relief from the operational restrictions imposed by the building official in response to the modification request.

The building official relies on a staff opinion from the International Code Council ("ICC"), the organization which develops the International Building Code (the "IBC"), the nationally recognized model code incorporated as part of the USBC, as the basis for the denial of the modification. The staff opinion essentially states that because the word "wastepaper" is included in the definition of the term "combustible fibers" in the IBC, any operation involving wastepaper must meet the requirements in the IBC applicable to combustible fibers.

The definition in question from the 2003 edition of the IBC, which is used in the current edition of the USBC, is set out below:

"Combustible fibers. Readily ignitable and free-burning fibers, such as coca fiber, cloth, cotton, excelsior, hay, hemp, henequen, istle, jute, kapok, oakum, rags, sisal, Spanish moss, straw, tow, wastepaper, certain synthetic fibers or other like materials."

The modification provisions from the USBC are also set out in pertinent part below:

"106.3 Issuance of modifications. Upon written request by an owner or an owner's agent, the building official may approve a modification of any provision of the USBC provided the spirit and functional intent of the code are observed and the public health, welfare and safety are assured. The decision of the building official concerning such modification shall be retained in the permanent records of the local building department.

Note: The USBC references nationally recognized model codes and standards. Future amendments to such codes and standards are not automatically included in the USBC; however the building official should give them due

consideration in deciding whether to approve a modification."

TFC argues that the wording of the definition of combustible fibers includes only those products listed if they are in fibrous form rather than in whole form. In support of this argument, TFC notes that the definition was amended in the 2006 edition of the IBC. The 2006 IBC definition is set out below:

"Combustible fibers. Readily ignitable and free-burning materials in a fibrous or shredded form, such as coca fiber, cloth, cotton, excelsior, hay, hemp, henequen, istle, jute, kapok, oakum, rags, sisal, Spanish moss, straw, tow, wastepaper, certain synthetic fibers or other like materials. This definition does not include densely packed baled cotton." (Emphasis added.)

Since the modification provisions of the USBC specifically note that a building official should consider newer amendments to the model codes in deciding whether to grant a modification and in this case the newer definition clarifies that the materials listed in the definition must be in fibrous or shredded form to be combustible fibers, the building official's denial of the modification request is unreasonable.

In addition, even using the definition of combustible fibers in the current USBC, the classification of the addition to Building #4 is subject to the application of Chapter 3 of the USBC which contains a provision acknowledging that the group classifications in the code have overlapping characteristics. In such cases, the building official is to classify a building in the

use category it most nearly resembles. See Section 302.1 of the IBC. The F-1 group classification under the USBC contains a list of typical materials or products involved in processing operations and includes essentially all of the products processed in TFC's operations, e.g., metals, paper products, plastic products, etc. See Section 306.2 of the IBC. Therefore, the correct classification of the addition to Building #4 under the USBC is in the F-1 group, not in the H-3 group.

This is further evidenced by the fact that the building official classified Building #4 as Group F-1 when it was originally constructed in 1997 and the USBC in effect at that time contained the exact same definition of combustible fibers and the same list of typical products under the F-1 group classification and the types of materials sorted by TFC in its operations were the same then as they are now.

Therefore, given all of the above, as the modification request submitted by TFC meets or exceeds the applicable requirements of the USBC, there is no basis for its denial.

IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the building official's denial of TFC's modification request to be, and hereby is, overturned.

The appeal is granted.

/s/*

Chairman, State Technical Review Board

Oct. 20, 2006

Date Entered

As provided by Rule 2A:2 of the Supreme Court of Virginia, you have thirty (30) days from the date of service (the date you actually received this decision or the date it was mailed to you, whichever occurred first) within which to appeal this decision by filing a Notice of Appeal with Vernon W. Hodge, Secretary of the Review Board. In the event that this decision is served on you by mail, three (3) days are added to that period.

***Note: The original signed final order is available from Review Board staff.**