

VIRGINIA:

BEFORE THE  
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Glenn Yates, Jr., AIA  
Appeal No. 11-13

Hearing Date: November 18, 2011

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 (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

A historic building, known as the Pythian Castle, located at 612 Court Street, in Portsmouth is the subject of the appeal. The building is a three story masonry building built in the late 1890's. The first floor was historically used as retail space and the second and third floors for meetings of the Knights of Pythias.

In the mid to late 1900's the second and third floors may have not been occupied or used for extended periods. In the 1990's the third floor was leased and used as office space with desks, but no reconstruction or modifications to the construction of the building occurred.

In 1997, the second floor was approved by the City of Portsmouth Department of Planning as a "drinking establishment," and the second floor was used, and is still currently used, as a bar or tavern type use with pool tables.

In 2008, Joe Haskell, the current owner of the building, operating as Pythian Castle, LLC, submitted an application to the City of Portsmouth Department of Planning to use the third floor as an entertainment establishment. In February of 2009, the City of Portsmouth City Council approved a use permit for the use of the building as an entertainment establishment.

In 2010, a building permit was obtained from the City of Portsmouth Department of Permits and Inspections for alterations to the third floor.

During the renovations of the third floor, Pythian Castle, LLC engaged Glenn Yates ("Yates"), an architect, and in March of 2011, the City USBC department's building official corresponded with Yates informing him that the anticipated use of the third floor constituted a change of occupancy under the USBC and a plan for compliance with the USBC's change of occupancy provisions would need to be submitted for review and approval prior to the project proceeding.

Yates filed an appeal of the building official's decision that a change of occupancy was occurring to the City of Portsmouth Building Code Board of Appeals ("City USBC board"), which conducted two hearings and eventually ruled to uphold the building official's decision. Yates then further appealed to the Review Board.

Review Board staff, in processing the appeal to the Review Board, conducted an informal fact-finding conference, attended by all the parties. The conference resulted in an agreement among the parties that the correspondence between the parties concerning what needed to be done if there was a change in occupancy was not properly part of the appeal as the decision of whether there is a change of occupancy in the use of the third

floor of the Pythian Castle had to be decided first. There was a caveat that since the argument had been made by Yates that the historic building provisions in the USBC did not require compliance with the change of occupancy requirements, that the Review Board was asked to determine whether an appeal of the application of the historic building provisions in the USBC to the situation could be heard.

### III. FINDINGS OF THE REVIEW BOARD

With respect to whether a change of occupancy is occurring for the use of the third floor of the Pythian Castle as planned by the owner, the Review Board finds as follows:

Part I of the USBC, the Virginia Construction Code ("VCC"), in Chapter 2, provides a definition of change of occupancy, which is used to determine whether a change of occupancy has occurred. The definition is below.

Change of occupancy. A change in the use or occupancy of any building or structure which would place the building or structure in a different division of the same group of occupancies or in a different group of occupancies; or a change in the purpose or level of activity within a building or structure that involves a change in application of the requirements of this code.

In applying this definition to the situation in question, while there is documentation that the use of the third floor of the Pythian Castle was as a business use (Group B under the

current USBC) for a period of time, since no certificate of occupancy was issued under the USBC for that use and no alterations were made to the building for that use, the accepted long term use of the third floor of the Pythian Castle as a meeting room for the Knights of Pythias is the established use in the determination of whether the planned use of the third floor is a change of occupancy rather than the Group B classification.

The planned use of the third floor is as an entertainment establishment. The application for the entertainment establishment to the City of Portsmouth Department of Planning stated the floor would be used for parties and banquets. A bar and a bandstand will be present.

Based on the definition of the term "change of occupancy," a comparison of the existing established used of the third floor to the planned use of the third floor in relation to the occupancy classifications in the VCC is necessary to determine whether a change of occupancy has occurred.

The occupancy classifications of relevance in the VCC are Groups A-2 and A-3, and the classification characters from the VCC are set out below.

A-2 Assembly uses intended for food and/or drink consumption including, but not limited to:

Banquet halls  
Night clubs

Restaurants  
Taverns and bars

A-3 Assembly uses intended for worship, recreation or amusement and other assembly uses not classified elsewhere in Group A including, but not limited to:

Amusement arcades  
Art galleries  
Bowling alleys  
Community halls  
Courtrooms  
Dance halls (not including food or drink consumption)  
Exhibition halls  
Funeral parlors  
Gymnasiums (without spectator seating)  
Indoor swimming pools (without spectator seating)  
Indoor tennis courts (without spectator seating)  
Lecture halls  
Libraries  
Museums  
Places of religious worship  
Pool and billiard parlors  
Waiting areas in transportation terminals

Based on the above classification characteristics, the existing established use of the third floor of the Pythian Castle falls under Group A-3 since it was used as a meeting hall. The planned use of the third floor falls under Group A-2 since it is to be used for banquets and entertainment with food and/or drink consumption. As the definition of the term "change of occupancy" states that a change of occupancy does occur if a new use would place the building in a different division of the same group of occupancies; and, as the planned use of the third floor does fall in a different division (Group A-2 as opposed to Group A-3) of the Group A occupancies; therefore, it is, by

definition, a change of occupancy to use of the third floor of the Pythian Castle as an entertainment establishment as planned by the owner.

With respect to whether an appeal of the application of the historic building provisions in the VCC to the situation in question is properly before the Review Board, the Review Board finds that that issue was not specifically ruled upon by the City USBC board; therefore, as the Review Board may only hear appeals after a final determination by a local appeals board, the issue is not properly before the Review Board.

#### IV. FINAL ORDER

The appeal having been given due regard, and for the reasons set out herein, the Review Board orders the decision of the City of Portsmouth building official; that the planned use of the third floor of the Pythian Castle constitutes a change of occupancy, to be, and hereby is, upheld. The Review Board further orders the appeal of the application of the historic provisions of the VCC to the situation to be, and hereby is, dismissed as not properly before the Review Board.

/s/\*

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Chairman, State Technical Review Board

March 16, 2012  
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.