

VIRGINIA:

BEFORE THE
STATE BUILDING CODE TECHNICAL REVIEW BOARD

IN RE: Appeal of Kristie Sours Atwood
Appeal No. 19-05
Appeal of Kristie Sours Atwood
Appeal No. 19-06
Appeal of Buracker Construction
Appeal No. 19-07

DECISION OF THE REVIEW BOARD
(For Preliminary Hearing as to Jurisdiction and Timeliness)
(For Hearing on the Merits of the Cases)

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 regulations of the Department of Housing and Community Development. See §§ 36-108 and 36-114 of the Code of Virginia. The Review Board's proceedings are governed by the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

II. Case History

The three referenced cases presented to the Review Board for consideration at the January 24, 2020 meeting for Kristie L. Sours Atwood (Atwood) and Buracker Construction (Buracker) have not been merged and remain independent of each other; however, the three cases originate from the same nexus of facts. Accordingly, all three of the cases were brought before the Review Board at the same time for the sake of efficiency.

A. The Inspection of the Dwelling

In July of 2016, the County of Warren Department of Building Inspections (County building official), the agency responsible for the enforcement of Part 1 of the 2009 Virginia

Uniform Statewide Building Code (Virginia Construction Code or VCC), issued a final inspection and a subsequent Certificate of Occupancy to Buracker, a licensed Class A contractor, for a single-family dwelling located at 1255 Pilgrims Way owned by Atwood.

Atwood believed there were multiple issues with her new home; therefore, in September of 2017, Atwood hired David Rushton of ABLE Building Inspection, Inc. (ABLE) to perform a home inspection. ABLE issued a new construction defect inspection report in December of 2017 identifying 126 defective items of which sixty eight (68) were identified as potential code violations. In March of 2018, at the request of Atwood, the County building official performed a re-inspection of the property subsequently issuing a Notice of Violation (NOV) to Buracker citing five (5) violations.

B. The First Local Appeals Hearings

In May of 2018, Atwood filed an appeal to the local appeals board asking the local board to review the remaining sixty three (63) potential code violations, listed in the ABLE report, not cited in the March 30, 2018 NOV. The local appeals board heard Atwood's appeal and identified 12 additional violations from the ABLE report. Atwood further appealed to the Review Board the remaining fifty one (51) potential violations listed in the ABLE report that were not cited by the county building official.

Subsequent to the June 7, 2018 decision of the local appeals board, the County building official issued a second NOV that was dated June 13, 2018 citing the 12 violations identified in the local appeals board decision. On June 28, 2018, Buracker filed an appeal to the local appeals board of the 12 violations cited in the June 13, 2018 NOV.¹ The local appeals board has six (6) total members. Of those six (6) members, at least two (2) members worked as contractors on

¹ This was the second of the two hearings before the local appeals board.

Atwood's dwelling that is the subject of this appeal. One of the members, Buracker, recused himself from the hearings. The other member, who also was a contractor on the Atwood dwelling, participated in the hearings and was the chair of the local appeals board during one of the hearings.

The local appeals board heard the appeal on July 26, 2018 whereby the local appeals board overturned six of the violations and upheld the other six violations. On August 10, 2018, Atwood further appealed the six cited violations overturned by the local appeals board to the Review Board. On August 17, 2018, Buracker further appealed to the Review Board the six cited violations upheld by the local appeals board.²

Review Board staff conducted an informal fact-finding conference (IFFC) in August of 2018 attended by all parties. Subsequent to the August 2018 informal fact-finding conference, Review Board staff processed the Atwood Appeals (Appeal Nos. 18-08 and 18-12) and the Buracker Construction Appeal (Appeal No. 18-13).

C. The First Review Board Hearing

All three (3) appeals, Atwood Nos. 18-08 and 18-12, and Buracker Construction No. 18-13, were presented to the Review Board for consideration at the January 11, 2019 Review Board meeting. The Review Board remanded all three appeals back to the local appeals board and ordered that the potential conflict of interest issue be addressed. The Review Board ordered that all local appeals board members that participated in the hearings for these cases to seek written opinion from the Warren County Commonwealth's Attorney, or a formal opinion from the Virginia Conflict of Interest and Ethics Advisory Council (COIA Council), whether their participation in the proceedings to that point constituted a violation of State and Local Government Conflict of Interest Act (COIA). The Review Board further ordered that for any of the three cases

² At the August 17, 2018, local appeals board hearing Atwood asserted that a conflict of interest existed and objected to the members involved participating in the hearing.

(Nos. 18-08, 18-12, and 18-13) where local appeals board members are advised by either the Commonwealth's Attorney or the COIA Council that they have a conflict of interest or might have already committed a COIA violation, the local appeals board is to re-hear the case on its merits after members with conflicts recuse themselves in accordance with the Uniform Statewide Building Code (USBC) and COIA.

D. The Local Appeals Re-Hearings

On July 18, 2019, the local appeals board re-heard LBBCA Appeal No. 1-2018, filed by Atwood. Mr. George Cline did not sit on the panel hearing the appeal due to a conflict of interest. The attorney for Buracker Construction filed a "Memorandum in Opposition of Appeal Number 1-2018", where he pointed out three potential jurisdictional issues related to timeliness, jurisdiction, and authority of the local appeals board. The local appeals board identified six (6) code violations. The new local appeals board decision vacated the June 7, 2019 local appeals board decision, and subsequently, the June 13, 2018 NOV and LBBCA Appeal 2-2018 by Buracker Construction as it was an appeal of the June 13, 2018 NOV. In the new decision for Appeal No. 1-2018, the local appeals board erroneously referenced the vacated June 13, 2018 NOV. Atwood further appealed to the Review Board the remaining sixty three (63) potential violations listed in the ABLE report that were not cited by the local appeals board.

Buracker filed a new appeal to the local appeals board. The local appeals board heard LBBCA Appeal No. 1-2019, on September 10, 2019, and upheld five (5) identified violations and overturned one (1) identified violation of its new decision of Appeal No. 1-2018. In the decision for Appeal No. 1-2019, the local appeals board erroneously referenced vacated Appeal 2-2018. On July 29, 2019, Atwood further appealed to the Review Board the one (1) identified violation

overturned by the local appeals board. On October 7, 2019, Buracker further appealed to the Review Board the five (5) identified violations upheld by the local appeals board.

Review Board staff conducted an informal fact-finding conference (IFFC) on November 7, 2019 attended by all parties. Subsequent to the November 7, 2019 informal fact-finding conference, Review Board staff processed the Atwood Appeals (Appeal No. 19-05 and 19-06) and the Buracker Construction Appeal (Appeal No. 19-07).

III. Findings of the Review Board

A. Whether the appeal was timely for the Atwood Appeals (Appeal Nos. 19-05 and 19-06).

Buracker, through legal counsel, argued that Atwood did not file the appeal within the required thirty (30) day timeframe provided in the VCC. Buracker further argued that the County building official, after re-inspection, only cited the five (5) violations present and that no other violations existed.

The County building official argued that Atwood did not file the appeal within the required thirty (30) day timeframe provided in the VCC.

Atwood argued that the County building official's decision not to cite additional violations was an action of the County building official; thus was appealable. Atwood further argued that she received the decision of the County building official via United States Postal Service on April 12, 2018 and filed her appeal on May 3, 2018, which was within the timeframe provided in the VCC.

The Review Board finds the appeal to be untimely because the lack of citing additional violations during the March 2018 inspection, identified as potential violations in the ABLE report, did not constitute a new decision, rather was an affirmation of the application of the code when the Certificate of Occupancy was issued in July 2016.

B. Whether the appeal is properly before the Board for the Buracker Construction Appeal (Appeal No. 19-07).

Buracker, through legal counsel, argued that with the decision of the Review Board to dismiss the Atwood appeals (Appeal Nos. 19-05 and 19-06), Buracker Construction appeal (Appeal No. 19-07) no longer had any issues to appeal. Buracker further argued that all of the violations in the Buracker Construction appeal (Appeal No. 19-07) had been dismissed with the dismissal of the Atwood appeals (Appeal Nos. 19-05 and 19-06); thus, Buracker Construction appeal (Appeal No. 19-07) was no longer properly before the Board.³ The County building official made no argument. Atwood made no argument.

The Review Board finds the appeal to be properly before the Board because the County building official applied the code by issuing a NOV on June 13, 2018; therefore, the merits of the case are to be heard.

C. Merits of the Buracker Construction Appeal (Appeal No. 19-07).

1) Whether item #11 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R502.2.2.2.

Buracker, through legal counsel, argued that all construction on the porch post and beam was done in compliance with the 2009 VCC. Buracker clarified that the construction work performed was to move the porch post, at the owner's request, and was done after the issuance of the Certificate of Occupancy.

The County building official argued that the construction on the porch post and beam was a violation. The County building official confirmed that the construction work performed was done after the issuance of the Certificate of Occupancy. Atwood argued that the construction on the porch post and beam was a violation.

³ Buracker, through legal counsel, chose not to withdraw the appeal, but rather to argue that the appeal was no longer ripe.

The Review Board agrees with the County and the local appeals board and finds that violations of VCC Section R502.2.2.2 exist.

2) Whether item #12 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R502.6.

Buracker, through legal counsel, argued that all construction on the post and beam was done in compliance with the 2009 VCC. Buracker clarified that the construction work performed was to move the porch post, at the owner's request, and was done after the issuance of the Certificate of Occupancy.

The County building official argued that the construction on the porch post and beam was a violation. The County building official confirmed that the construction work performed was done after the issuance of the Certificate of Occupancy. Atwood argued that the construction on the porch post and beam was a violation.

The Review Board agrees with the County and the local appeals board and finds that violations of VCC Section R502.6 exist.

3) Whether item #23 of the ABLE Building Inspection, Inc. report is a violation of VCC Table R301.5.

Buracker, through legal counsel, argued that the guard system was constructed in compliance with the 2009 VCC. Buracker also argued that the deck was less than 30" from grade; thus, the guards were not required. Buracker further argued that the guards were tested, by the County building official, and passed.

The County building official argued that a violation existed because the guard system did not meet the required 200lb live load and certified design professional testing was required.

Atwood argued that the fasteners used to attach the porch posts to the deck floor were not code compliant. Atwood also argued that the top rails of the porch were secured with finish nails and loose. Atwood further argued that the post columns were loose and not properly secured.

The Review Board agrees with the County and the local appeals board and finds that violations of VCC Section Table R301.5 exist.

- 4) Whether item #92 of the ABLE Building Inspection, Inc. report is a violation of VCC Sections R1005.1, R1005.2, R1005.3, R1005.4, and/or R1005.5.

Buracker, through legal counsel, argued that the fireplace and chimney systems match per the manufacturers installation instructions. Buracker further clarified that the proper chimney was installed on the fireplace that was installed.

The County building official argued that he could not testify, with certainty, that the chimney pipe at the bottom, near the fireplace, met the Underwriters Laborites (UL) requirements due to his inability to see the chimney pipe within the wall at this time; therefore, evidence that the chimney piping met the requirements was required.

Atwood argued that Buracker did not install the fireplace unit that was ordered and that a different fireplace was installed.

The Review Board agrees with Buracker Construction and finds that violations of VCC Sections R1005.1, R1005.2, R1005.3, R1005.4, and/or R1005.5 do not exist.

- 5) Whether item #101 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R302.12.

Buracker argued that neither VCC Section R302.12 nor any other code applied to any condition within the cited area. Buracker further argued that fire separation and draftstopping was not required between the garage and attic above; thus, the installation of the attic access was not a code violation. Buracker also argued that the wall between the garage and house was properly

separated with drywall and the proper access panel was installed. Buracker, through legal counsel, argued that the ABLE report was completed more than a year after the issuance of the Certificate of Occupancy and further that Buracker had no way of knowing what had changed inside the house since the issuance of the Certificate of Occupancy.

The County building official argued that the panel cover needed to be installed to be code compliant.

Atwood argued that Buracker installed the attic access in the garage after the issuance of the Certificate of Occupancy. Atwood also argued that access cover was plastic and was a code violation.

The Review Board agrees with Buracker Construction and finds that violations of VCC Section R302.12 do not exist.

IV. Final Order

A. Whether the appeal was timely for the Atwood Appeals (Appeal Nos. 19-05 and 19-06).

The appeals for Atwood (Appeal Nos. 19-05 and 19-06) having been given due regard, and for the reasons set out herein, the Review Board orders the appeal to be dismissed.

B. Whether the appeal is properly before the Board for the Buracker Construction Appeal (Appeal No. 19-07).

The appeal for Buracker Construction (Appeal No. 19-07) having been given due regard, and for the reasons set out herein, the Review Board order the appeal to be properly before the Board and that the merits of the appeal be heard.

C. Merits of the Buracker Construction Appeal (Appeal No. 19-07).

The appeal having been given due regard, after considering the arguments of the parties and the evidence in the record, and for the reasons set out herein, the Review Board orders as follows:

- 1) Whether item #11 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R502.2.2.2.

The decision of County building official and the local appeals board that a violation of VCC Section R502.2.2.2 exists is upheld.

- 2) Whether item #12 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R502.6.

The decision of County building official and the local appeals board that a violation of VCC Section R502.6 exists is upheld.

- 3) Whether item #23 of the ABLE Building Inspection, Inc. report is a violation of VCC Table R301.5.

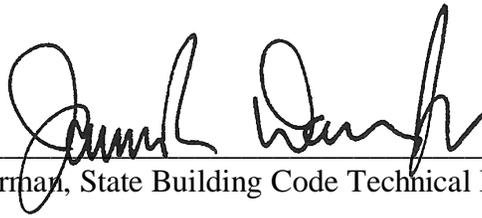
The decision of County building official and the local appeals board that a violation of VCC Table R301.5 exists is upheld.

- 4) Whether item #92 of the ABLE Building Inspection, Inc. report is a violation of VCC Sections R1005.1, R1005.2, R1005.3, R1005.4, and/or R1005.5.

The decision of County building official and the local appeals board that a violation of VCC Section R1005.1, R1005.2, R1005.3, R1005.4, and/or R1005.5 exists is overturned.

- 5) Whether item #101 of the ABLE Building Inspection, Inc. report is a violation of VCC Section R302.12.

The decision of County building official and the local appeals board that a violation of VCC Section R302.12 exists is overturned.



Chairman, State Building Code Technical Review Board

Date entered _____September 18, 2020_____

Certification

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 W. Travis Luter, Sr., 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.