

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Decision of the State Board of Appeals dated September 30, 2009, Patricia Gearin, and the City of Maplewood, Minnesota.

**ORDER ON  
CROSS MOTIONS FOR  
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Kathleen D. Sheehy on cross motions for summary disposition. The motion record closed on April 27, 2010, upon receipt of correspondence from the parties.

Robin M. Wolpert, Esq., Greene Espel, appeared for the City of Maplewood (City). Jill Clark, Esq., Jill Clark, P.A., appeared for Patricia Gearin, Gearin LLC, and Wipers Recycling LLC (collectively Respondents).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

1. The City of Maplewood's Motion for Summary Disposition is GRANTED;
2. The Respondent's Motion for Summary Disposition is DENIED; and
3. The Decision of the State Board of Appeals dated September 30, 2009, is AFFIRMED.

Dated: May 14, 2010

/s/ Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

**NOTICE**

The Commissioner of Labor and Industry has ordered pursuant to Minn. Stat. § 14.57 (2008) that the Report of the Administrative Law Judge shall constitute the final decision in this case.<sup>1</sup> Accordingly, this Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

This is an appeal from the determination of the State Appeals Board of the Department of Labor and Industry (Department or DOLI) that a change in the occupancy classification of the Respondents' property required the issuance of a new certificate of occupancy. Under the State Building Code (SBC), such a change may trigger the requirement to comply with other code provisions.

The issues presented on the cross motions for summary disposition are (1) whether the Respondents' appeal of the building official's decision is time-barred under Minn. Stat. § 326B.139 and Minn. R. 1300.0230; and (2) whether the Respondents' installation of a grinder on the property changed the use of the building at 1255 Cope Avenue in Maplewood to an "F-1" occupancy classification, which requires a new certificate of occupancy. Summary disposition is the administrative equivalent of summary judgment.<sup>2</sup> Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party is entitled to judgment as a matter of law.<sup>3</sup> The parties have agreed that this issue is amenable to summary disposition. Although the parties were unable to reach agreement on a statement of stipulated facts, no party has argued that genuine issues of material fact require a hearing. Both sides argue that they are entitled to judgment as a matter of law.

There are different kinds of regulations referenced in the Background Facts described below, which are described here in the interests of clarity. The Maplewood zoning code contains land-use planning and development classifications adopted by the City in its ordinances or through the development of a comprehensive plan. The City is responsible for administering its zoning code.

The building code is the State Building Code (SBC), which is applicable to the construction, reconstruction, alteration, and repair of buildings and other structures throughout the state of Minnesota.<sup>4</sup> The SBC includes, among other things, the building code, the mechanical code, the plumbing code, and the

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<sup>1</sup> See Notice and Order for Prehearing Conference at page 2. All citations to Minnesota Statutes are to the 2008 edition; all citations to Minnesota Rules are to the 2009 edition.

<sup>2</sup> *Pietsch v. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500(K).

<sup>3</sup> *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

<sup>4</sup> Minn. Stat. § 326B.101.

electrical code.<sup>5</sup> The Certified Building Official in each municipality is responsible for administration of the SBC, under the direction and supervision of the Commissioner of Labor and Industry.<sup>6</sup>

The fire code is the State Fire Code (SFC). The State Fire Marshal is a division of the Department of Public Safety.<sup>7</sup> The SFC contains its own occupancy classifications and is also applicable throughout the state, except where municipalities have adopted more stringent requirements.<sup>8</sup>

## **Background Facts**

Patricia Gearin is the principal owner of Gearin LLC. In the summer of 2007, Gearin LLC purchased a building located at 1255 Cope Avenue in Maplewood, Minnesota. Gearin is also an owner of Wipers Recycling LLC, a business that operates out of the building at 1255 Cope Avenue. Wipers Recycling LLC is in the business of sorting and selling recyclable materials, including used clothing, shoes, rubber and leather products, and textiles. In addition, the company plans to grind items such as shoes and leather products, by using a grinding or shredding machine, into a product sold as an absorption material for oil spills. This case revolves around the Respondents' installation of the grinding machine and the resulting impact on the occupancy classification of the building.

Northern Hydraulics was the business located at 1255 Cope Avenue before the Respondents purchased the property. From 1991 to some time in late 2006 or early 2007, Northern Hydraulics operated a retail store at 1255 Cope Avenue. Northern Hydraulics sold snow blowers, lawnmowers, lawn and garden equipment, heavy power equipment, engines, generators, trailers, hydraulic tools, air tools, tractors, and accessories, parts, and supplies for those products. The lower floor of the building was used for the display, sale, and storage of this merchandise. The upper floor was used for storage. Northern Hydraulics did not manufacture any products at the building; its primary business was to sell products made elsewhere. The products sold and stored there were largely made of metal and were noncombustible.<sup>9</sup>

The Respondents do not dispute that Northern Hydraulics sold retail equipment and did not manufacture products on the premises. They assert in their memorandum, however, that in addition to its retail business, Northern Hydraulics also repaired small engines on the premises. This assertion is not supported by reference to any affidavit or other document in the record.<sup>10</sup>

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<sup>5</sup> Minn. R. 1300.0050.

<sup>6</sup> Minn. Stat. § 326B.127, subd. 1.

<sup>7</sup> Minn. Stat. § 299F.01.

<sup>8</sup> Minn. Stat. § 299F.011, subd. 4; Minn. R. 7511.0090 (adopting 2006 International Fire Code).

<sup>9</sup> Affidavit of Butch Gervais (Assistant Chief and Fire Marshal for City of Maplewood) ¶¶ 2-3 (Mar. 26, 2010).

<sup>10</sup> Appellants' Memorandum in Support of Motion for Summary Disposition at 2.

In 1991 the City had issued to Northern Hydraulics a certificate of occupancy, which classified the occupancy of the building at 1255 Cope Avenue as “B-2.”<sup>11</sup> Under the 1988 Uniform Building Code (UBC, which was effective at that time), the B-2 occupancy classification applied, in relevant part, to the following businesses:

Drinking and dining establishments having an occupant load of less than 50, wholesale and *retail stores*, office buildings, printing plants, municipal police and fire stations, *factories and workshops using materials not highly flammable or combustible*, storage and sales rooms for combustible goods, [and] paint stores without bulk handling . . .<sup>12</sup>

The building at 1255 Cope Avenue was vacant for some period of time after the departure of Northern Hydraulics.<sup>13</sup> In April 2007, Respondents inquired of the Maplewood City Administrator about the existing zoning and permitted uses for the building. Respondents had advised the City Administrator of their interest in acquiring the property for a “light manufacturing operation which would require no exterior changes to the existing building.” The Respondents were advised that the zoning for the property was M1 (light manufacturing) and that the zoning code allowed any use permitted in the M1 zone and the business commercial zone.<sup>14</sup> This information was accurate.

In June 2007, the Respondents ordered a \$150,000 ReTech Single Shaft Shredder from Vecoplan, LLC, a company located in North Carolina. According to the order confirmation form, the material to be ground was shoes; the volume of material to be ground was 1,500 lb per hour; and the desired particle size was 3/8 of an inch. The specifications reflect that the machine weighs approximately 12,900 lb and requires 460 V of electricity.<sup>15</sup>

The Respondents did not seek an opinion from David Fisher, the Maplewood Building Official, as to how installation of the grinder might affect the occupancy classification of the building.<sup>16</sup> In July 2007, the Respondents moved into the building. The grinder was shipped on July 25, 2007, and the electrical upgrades necessary to operate it (at a cost of \$17,000) were installed shortly thereafter.<sup>17</sup>

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<sup>11</sup> Affidavit of Jill Clark Ex. B (Mar. 29, 2010).

<sup>12</sup> See Clark Aff. Ex. C (1988 Uniform Building Code) (emphasis added); Affidavit of Robin Wolpert Ex. B (Mar. 29, 2010) (1988 UBC); Minn. R. 1305.0100 (1991) (adopting 1988 UBC).

<sup>13</sup> Affidavit of David Fisher ¶ 2 (Mar. 29, 2010).

<sup>14</sup> Clark Aff. Ex. L.

<sup>15</sup> Clark Aff. Ex. Q.

<sup>16</sup> Fisher Aff. ¶¶ 4-6.

<sup>17</sup> Wolpert Aff. Ex. D. Exhibit D is an Affidavit of Robin Wolpert dated September 15, 2009, which itself has attached Exhibits A through N, some of which (confusingly) have their own lettered

Soon after the Respondents moved in, David Fisher observed that the building was occupied, and he went there to speak to Ms. Gearin. He observed that large quantities of used clothing, shoes, rubber and leather products, and textiles were being stored in the building. He formed the impression that Gearin intended to sell some of these items at retail. There was so much material, however, that doors and exits were blocked, and was difficult to move through the building because the aisles were not cleared. During this visit, Ms. Gearin told Fisher that she intended to install an industrial grinding or shredding machine to grind items such as shoes into an absorption material to be resold. Shoes contain plastic and rubber, which are combustible items. When these items are ground, they create combustible dust.<sup>18</sup>

Fisher informed Gearin that she would need a new certificate of occupancy to conduct manufacturing activities in the building, because this was a change in use. He told her to apply for a new certificate of occupancy, and she reluctantly did so. On August 1, 2007, the City issued a temporary occupancy permit. The temporary permit provided that approval by the fire marshal and building official were required before manufacturing activities could begin.<sup>19</sup>

On August 3, 2007, Fisher and Fire Marshal Butch Gervais inspected the building and subsequently provided Gearin with a list of items she had to address in order to operate the grinder. In the report, Fisher identified the proposed use as a change “from Mercantile to Factory,” and he identified the proposed occupancy classification as “F-1.” The highest priority item on the list was to provide certification of the fire sprinkler system by a Minnesota licensed sprinkler contractor and to verify that the sprinkler system was monitored. This is a requirement of the SFC and is applicable to Gearin regardless of the occupancy classification of the building.<sup>20</sup>

To obtain a new certificate of occupancy, Fisher advised Respondents they would have to meet code accessibility requirements, including handicap-accessible parking, entrance, door hardware, restrooms, and handrails.<sup>21</sup> Over the next several months, however, additional issues arose pertaining to the Respondents’ compliance with the conditional use permit and with the SFC, after a licensed sprinkler contractor reported that the Respondents would either have to reduce the amount of material stored on the premises or upgrade the existing sprinkler system.<sup>22</sup> The Respondents’ attorney (not current counsel) did not dispute the need for a new certificate of occupancy and proposed a schedule for making the required accessibility changes by the summer of 2008. Instead of

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attached exhibits. The documents the ALJ intends to reference here are the invoices from Vecoplan and White Bear Electric, which are Exs. E & F to the 9/15/09 Affidavit.

<sup>18</sup> Fisher Aff. ¶¶ 7-8.

<sup>19</sup> Clark Aff. Ex. K-I & K-ii.

<sup>20</sup> Clark Aff. Ex. E.

<sup>21</sup> *Id.*

<sup>22</sup> Clark Aff. Ex. H; (10/11/07 letter); Ex. I (11/6/07 letter); Ex. J (12/17/07 letter).

upgrading the sprinkler system, the Respondents indicated they would reduce the amount of material stored in the building.<sup>23</sup>

On January 8, 2008, Vecoplan technicians arrived in Minnesota “to test or otherwise work on the grinder.”<sup>24</sup> On January 10, 2008, the grinder caught on fire and caused significant smoke damage to the building.<sup>25</sup> The Maplewood Fire Department responded to the fire. The Respondents blame the manufacturer’s technicians for causing the fire.<sup>26</sup> The Respondents had not requested or obtained a mechanical permit for installation of the duct work or dust collector for the grinder. When city officials inspected it after the fire, they concluded the ventilation ducts were improperly installed and were not sealed, in violation of the mechanical code.<sup>27</sup>

After the fire, the building official posted one or more “stop work” notices on the building.<sup>28</sup> On January 16, 2008, the building official again wrote to Gearin, asking her to verify in writing the details of her business plan. It was his understanding at that time that the business recycled boots, shoes, and clothing, and that it also sold used boots and shoes. Some of the clothing was packaged or bundled and sent overseas. If boots, shoes, and other leather goods were not reusable, the plan was to grind them up and sell the resulting pellets as absorbent material. He also summarized the steps necessary to amend the conditional use permit, bring the building into compliance with the fire code and building code, and call for inspections upon completion of the work.<sup>29</sup> On January 18, 2008, the city issued a building permit to a contractor to do fire damage cleaning on the premises.<sup>30</sup>

When Gearin later refused to allow the building official to inspect the property to ensure its safety after the fire, the building official applied for and obtained an administrative search warrant from the Ramsey County district court, and criminal charges were filed against Gearin for obstructing legal process and failing to obtain a new occupancy permit.<sup>31</sup> The status of those charges is not

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<sup>23</sup> Wolpert Aff. Ex. D. The document the ALJ intends to reference here is the letter dated Dec. 3, 2007, from Allan Barnard to David Fisher, which is Ex. C to the Affidavit of David Fisher dated Dec. 15, 2008.

<sup>24</sup> Clark Aff. Ex. S at pages 7-8, ¶¶ 6-9.

<sup>25</sup> Wolpert Aff. Ex. D (application for administrative search warrant ¶ 13).

<sup>26</sup> Clark Aff. Ex. S at pages 7-8, ¶¶ 6-9.

<sup>27</sup> Wolpert Aff. Ex. C. The mechanical code regulates the “design, installation, maintenance, alteration, and inspection of mechanical systems that are permanently installed and utilized to provide control of environmental conditions and related processes within buildings,” in addition to systems specifically addressed in the International Mechanical Code and the IFGC. See Minn. R. 1346.0101.

<sup>28</sup> Wolpert Aff. Ex. D (Exhibits E, F & G to the Affidavit of David Fisher dated 12/15/08).

<sup>29</sup> Clark Aff. Ex. H; Wolpert Aff. Ex. D (Ex. F to application for administrative search warrant).

<sup>30</sup> Clark Aff. Ex. M-i & M-ii.

<sup>31</sup> Wolpert Aff. Ex. D (Ex. J to the application for administrative search warrant); Clark Aff. Ex. Nii (criminal citations dated 2/15/08).

clear from the record.<sup>32</sup> In April 2008, after completion of the fire damage clean-up work, the building official conducted a final inspection of that work and issued a certificate of occupancy to the Respondents for the M (Mercantile) occupancy classification so that Respondents could use the property for retail purposes.<sup>33</sup>

In November 2008, the Respondents sent a Request for Reconsideration and a Request for Hearing to the City of Maplewood.<sup>34</sup> On December 8, 2008, the building official responded, advising Respondents that because Maplewood did not have a local board of appeals, the appropriate way to appeal the building official's decision was to apply for review by the State Board of Appeals.<sup>35</sup> Respondents did not seek review by the State Board of Appeals until some time in September 2009.

The State Appeals Board met on September 21, 2009. The Board unanimously determined that the installation of the grinder changed the occupancy classification to F-1 (Moderate Hazard), and that a new certificate of occupancy was required. On September 30, 2009, the Board confirmed its decision in writing. The Respondents appealed this determination by requesting a contested case hearing pursuant to Minn. Stat. § 326B.139. On December 16, 2009, the Commissioner issued the Notice and Order for Prehearing Conference and Statement of Charges in this matter.

## **Analysis**

A municipality is not required to administer and enforce the SBC, but it “may choose to administer and enforce the State Building Code within its jurisdiction by adopting the code by ordinance.”<sup>36</sup> When a municipality designates a building official, the Department must review and certify that specified qualifications are met. Once designated, the building officials shall “in the municipality for which they are designated, be responsible for all aspects of code administration for which they are certified, including the issuance of all building permits....”<sup>37</sup> The building official receives permit applications, reviews construction documents, inspects the premises, and interprets and enforces

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<sup>32</sup> It appears the district court dismissed some charges and suppressed evidence of the code violations found during the search, on the basis that the building official had failed to disclose the 1991 certificate of occupancy in the warrant application. See Clark Aff. Ex. G.

<sup>33</sup> Clark. Aff. Ex. R. The Certificate of Occupancy provides that it was issued “pursuant to the requirements of Section 109 of the 2006 IBC.” Respondents have correctly maintained that Minnesota did not adopt Chapter 1 of the IBC, which governs administration of the building code. It does not follow, however, that the building official lacked authority to issue this certificate of occupancy. Minnesota adopted chapter 1300 of Minnesota Rules to replace the administration sections of the IBC. See Minn. R. 1305.0011, subp. 3 A. Pursuant to Chapter 1300, the building official has authority to issue permits and certificates of occupancy when the official is satisfied that a project meets code requirements. See Minn. R. 1300.0110, subp. 3; 1300.0220, subp. 1.

<sup>34</sup> Clark Aff. Ex. V.

<sup>35</sup> Clark Aff. Ex. W.

<sup>36</sup> Minn. Stat. § 326B.121, subd. 2 (b).

<sup>37</sup> Minn. Stat. § 326B.133, subd. 4 (emphasis added).

compliance with the Building Code.<sup>38</sup> The City of Maplewood has designated David Fisher as its Certified Building Official.

Municipalities are authorized to create a local board of appeals to hear and decide appeals of orders, decisions, or determinations made by the building official relative to the application and interpretation of the SBC. Appeals must be heard within ten working days from the date the municipality receives a properly completed application for appeal. If a municipality has no local board of appeals, an appeal may be made to the State Appeals Board assembled by the Department of Labor and Industry's Construction Codes and Licensing Division.<sup>39</sup> A person aggrieved by the final decision of any municipality as to the application of the code may appeal to the commissioner within 180 days of the decision. An appeal must be heard as a contested case under chapter 14. The party not prevailing shall pay the costs of the contested case hearing, including fees charged by the Office of Administrative Hearings.<sup>40</sup>

### **Is the Appeal of the Building Official's Decision Time-Barred?**

The City argues that the State Appeals Board should not have heard the Respondents' appeal because Respondents waited too long to challenge the building official's decision. The City asserts that, despite the absence of any express deadline in Minn. R. 1300.0230 for appealing an order, decision, or determination made by a building official, the deadline can be no longer than the 180 days specified in Minn. Stat. § 326B.139 for the appeal of a final decision to the Commissioner. Otherwise, the City contends, a decision would never be final unless it is appealed. In addition, the City argues that the definition of a "final" decision in Minn. Stat. § 326B.082, subd. 5, provides support for the proposition that a "final" order limits the time for appeal, because the statute defines a final decision as one that has not been appealed in the time frame permitted.

The Respondents argue that there is no limitations period for seeking review of a building official's decision by an appeals board. In addition, the Respondents point out that the DOLI representative at the State Appeals Board hearing advised the Board that DOLI has always interpreted the statute to provide no limitations period for appeals to the Board of Appeals. In the Department's view, the 180-day deadline applied only to appeals to the Commission from the final decision of the Board of Appeals.

As noted above, Minn. R. 1300.0230, subp. 1, contains no express limitation on the time for bringing an appeal to a local appeals board. In addition, the 180-day limitation period contained in Minn. Stat. § 326B.139 expressly applies to an appeal to the commissioner from a municipality's final decision. Moreover, Minn. Stat. § 326B.082, subd. 5, does not purport to define the final decision of a building official; rather, that statute is applicable to administrative

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<sup>38</sup> Minn. R. 1300.0110.

<sup>39</sup> Minn. R. 1300.0230, subp. 1.

<sup>40</sup> Minn. Stat. § 326B.139.

enforcement orders issued by the Commissioner for licensing or other violations. It does not apply to building officials.

The permitting process is not, and should not be, comparable to litigation. Building construction is a fluid process; building plans are often changed multiple times in the course of a project, in response to conditions not originally anticipated, cost considerations, or other factors. Until a certificate of occupancy is issued, the process is not complete.<sup>41</sup> A building official's decisions accordingly are not stamped with the "finality" language of a court or administrative order. The Administrative Law Judge concludes there is no legal or policy basis for reading a separate 180-day deadline into the rule. In this case, the State Appeals Board served in place of a local appeals board and made the municipality's final decision on September 30, 2009. The Respondents appealed to the Commissioner within the requisite 180-day timeframe. The City's motion for summary disposition on the basis that the appeal is time-barred is denied.

### **Did Installation of the Grinder Change the Occupancy Classification?**

The second issue is whether the installation of the grinder changed the occupancy classification of the building and required a new certificate of occupancy. The City argues that installation of the grinder changed the use of the building from B-2 or M to F-1, requiring a new certificate of occupancy. The Respondents argue that the 1991 B-2 occupancy classification included their proposed use of the property, that B-2 is equivalent to F-2, and that no new certificate of occupancy was required.<sup>42</sup>

Under the SBC, the owner of property is responsible for ensuring that a proposed use of the property, or a proposed modification to property, is permitted. In the normal course of events, an owner who intends to alter or change the occupancy of a building or structure, or who intends to install any mechanical system or other equipment, applies for a building permit before any work is done. The permit application requires the owner to identify the work to be done by the permit; indicate the use and occupancy for which the proposed work is intended; and provide other information as required by the code. The application triggers review by the building official, who typically specifies what, if anything, must be done to ensure that the proposal conforms to the requirements of the code and other applicable laws and ordinances.<sup>43</sup>

In addition, the SBC provides that no building or structure shall be used or occupied, and no change in the existing occupancy classification of a building,

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<sup>41</sup> See generally Minn. R. 1300.0220.

<sup>42</sup> Appellants' Memorandum in Support of Motion for Summary Disposition at page 1 ("This issue is very simple. B-2 = F-2."). The Respondents have also argued, inconsistently, that a B-2 occupancy is now equal to an F-1 occupancy. See Appellants' Responsive Memorandum at page 2.

<sup>43</sup> See Minn. R. 1300.0120, subs. 1, 7, & 8.

structure, or portion of a building or structure shall be made until the building official has issued a certificate of occupancy for the building or structure.<sup>44</sup> The legal occupancy of any structure existing on the date of adoption of the code, however, shall be permitted to continue without change, except as specifically required in Chapter 1311 (Guidelines for the Rehabilitation of Existing Buildings).<sup>45</sup> Similarly, changes in the character or use of an existing structure shall not be made except as specified in Chapter 1311.<sup>46</sup>

Chapter 1311 of Minnesota Rules adopts by reference chapters 1 through 6 of the 2000 Guidelines for the Rehabilitation of Existing Buildings (GREB), as promulgated by the International Conference of Building Officials.<sup>47</sup> Section 501.1 of the GREB addresses changes to existing buildings as follows:

The character or the occupancy of existing buildings and structures may be changed, provided the building or structure meets the requirements of this chapter and provided the requirements of Chapter 4 are applied throughout the area of the building where the new use occurs. Where no specific requirements are included herein, the building or structure shall comply with the Building Code.

*Every change of occupancy to one classified in a different group or a different division of the same group shall require a new certificate of occupancy regardless of whether any alterations to the building are required by these guidelines.*<sup>48</sup>

In 2007, Minnesota adopted the 2006 International Building Code (IBC) as the State Building Code. This is the code that is currently in effect. Under the current building code, there is no occupancy classification that is comparable to the B-2 classification under the UBC. The retail portion of the B-2 classification would be considered Mercantile (M) occupancy; the factory portion of the B-2 classification would be considered either F-1 (Moderate Hazard) or F-2 (Low Hazard) factory occupancy.<sup>49</sup>

The Respondents maintain that their proposed use is within the scope of the B-2 or F-2 occupancy classification and that they are not required to obtain a new certificate of occupancy or make any other changes to comply with the SBC. They argue, somewhat cavalierly, that even if installation of the grinder turned the premises into a “factory,” there was no change in character or use of the

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<sup>44</sup> Minn. R. 1300.0220, subp. 1.

<sup>45</sup> Minn. R. 1300.0220, subp. 2.

<sup>46</sup> Minn. R. 1300.0220, subp. 3.

<sup>47</sup> Minn. R. 1311.0010.

<sup>48</sup> Wolpert Aff. Ex. E (2006 International Building Code § 501.1) (emphasis added); see also Minn. R. 1311.0301 (change in use or change in occupancy means a change in the character or use of an existing building or portion of a building that would place it in a different division of the same group of occupancy or a different group of occupancies).

<sup>49</sup> Wolpert Aff. Ex. A (2006 International Building Code § 309.1; § 306.3).

building because B-2 occupancy included “factory use.” The B-2 occupancy, however, did not include all possible factory use. It included factories and workshops “*using materials not highly flammable or combustible.*” Under the 1988 UBC, occupancies with combustible dusts, either in suspension or capable of being put into suspension in the atmosphere of the room or area, were classified as H-2 (moderate explosion hazard); other occupancies with combustible fibers or dusts were classified as H-3 (high fire or physical hazard).<sup>50</sup>

Under the current code, the occupancy classification corresponding to B-2 factory use is F-2, which is specifically defined as factory industrial uses that involve the fabrication or manufacturing of noncombustible materials, which during finishing, packing or processing do not involve a significant fire hazard. This category expressly includes, for example, the fabrication and assembly of metal products.<sup>51</sup> In contrast, the F-1 (Moderate Hazard) occupancy classification under the current code includes all factory industrial uses that are not classified as F-2 Low Hazard. The F-1 occupancy classification includes, but not limited to, the fabrication or processing of clothing, leather products, shoes, and textiles.<sup>52</sup>

The Respondents have not disputed that the processing of leather products and shoes into absorbent pellets generates combustible dust, which is a significant fire hazard. The Maplewood building official and the State Appeals Board concluded that installation of the grinder to process this product fits within the F-1 (Moderate Hazard) occupancy classification. The Administrative Law Judge agrees. Whether this situation is viewed as a change from M to F-1, or from B-2 to F-1, or from F-2 to F-1, this is a change in occupancy to a different group or a different division of the same group. It requires a new certificate of occupancy.

Moreover, the SBC requires that when a change of occupancy of a building places the building in a different division of the same occupancy group or in a different occupancy group, the building shall have all the following accessible features: (1) at least one accessible building entrance; (2) at least one accessible interior route from an accessible building entrance to primary function areas; (3) accessible parking, where parking is provided; (4) at least one exterior accessible route from accessible parking to an accessible building entrance; and (5) at least one accessible unisex or male and female toilet room.<sup>53</sup> These are

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<sup>50</sup> Second Affidavit of Robin Wolpert dated 4/5/2010 Ex. B. Lumberyards using only power saws were exempted from H-2 classification, as were small woodworking shops using no more than two dust-producing machines, provided the machines were equipped with approved dust collectors. The building official, however, retained the authority to revoke these exemptions for good cause. *See id.*

<sup>51</sup> Wolpert Aff. Ex. A (2006 International Building Code § 306.3).

<sup>52</sup> Wolpert Aff. Ex. A (2006 International Building Code § 306.2).

<sup>53</sup> Minn. R. 1311.0501, subp. 2. If a change in occupancy of a *portion* of a building occurs, all of the above requirements except for an accessible unisex toilet room remain applicable. *Id.* It appears that after receiving additional information about the planned operation, the Maplewood

the same requirements the Maplewood building official has communicated to the Respondents on multiple occasions. And even without a change in occupancy, existing buildings are required to comply with certain basic safety requirements.<sup>54</sup>

There is debate between the parties about whether the building official's knowledge of how Northern Hydraulics operated is relevant to the question whether a change of occupancy has occurred. What the building official knew about the previous operation of Northern Hydraulics may have informed his judgment that there was a change in the use of the property and the corresponding occupancy classification, but it is not dispositive. The greater weight of the evidence suggests that Northern Hydraulics was operating in compliance with its certificate of occupancy by using the building for retail sales; if Northern Hydraulics were using the property for small engine repair, it may have been operating outside the limitations of its certificate of occupancy. Whether Northern Hydraulics was in or out of compliance with its occupancy certificate, however, is not particularly relevant to this case.

What matters is whether there is a change in the use of the property that moves it to a different occupancy group or a different division within the same occupancy group. The record demonstrates unequivocally that installation of the grinder changed the occupancy classification of the property from a low hazard factory use (under either the 1988 UBC or the 2006 IBC) to a moderate hazard factory use and that this change requires a new certificate of occupancy under the SBC. Regardless of the thought process used to reach this conclusion, the Maplewood building official correctly concluded, from the very first contact that he had with the Respondents, that installation of the grinder changed the occupancy of the building to F-1 and that a new certificate of occupancy was required.

The Respondents have relied in part on the Affidavit of Adam S. Richardson, who apparently telephoned a Mr. Fallon at the Department of Labor and Industry and had the following exchange about this case:

Gearin LLC purchased the building which used to house Northern Hydraulics in Maplewood, in 2007, and the Northern Hydraulics COO specified the use classification as B-2 (under the old UBC designation) which stood for factor use. Northern Hydraulics sold equipment retail, and also had an engine/equipment repair shop. Wipers' use category also fits within this old B-2 designation due to Wipers' processing of leather goods. When the old designation B-2 under the now superseded UBC is matched up with the current designation under the IBC, it is now called F for factory. Mr. Fallon

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building official removed the requirement of an accessible unisex toilet by letter dated January 30, 2009. See Clark Aff. Ex. X.

<sup>54</sup> See generally GREB §§ 401.1 & 403.1 (life safety requirements).

opined that Wipers' occupancy/use had not changed from that of Northern Hydraulics.<sup>55</sup>

This telephone conversation is not persuasive evidence of anything. First, Mr. Richardson asserted, incorrectly, that the Respondents' use of the building fit within the B-2 designation, without providing the critical information that Respondents had installed a grinder to turn shoes and leather products into absorbent pellets. Moreover, his information about how the B-2 classification corresponds to the factory occupancy classifications under the IBC is imprecise, because there are two possible classifications: one that is low hazard, and one that is moderate hazard. The conversation as related in the affidavit would not be admissible evidence at a hearing, and it does not create any genuine issue of material fact.

The Respondents also contend that the district court's determination in the criminal case that "no new COO was necessary" is persuasive here. The issue the district court decided was whether the administrative warrant application was incomplete because it failed to reference the 1991 certificate of occupancy. The district court did not decide that a new certificate of occupancy was unnecessary.

Finally, there apparently is a dispute as to whether the Respondents complied with the terms of a conditional use permit issued to Northern Hydraulics, which contains restrictions related to the hours of operation, outside storage, and fencing.<sup>56</sup> These are matters of zoning law that are unrelated to occupancy issues under the SBC. The building official, however, has the responsibility to determine whether proposed work meets the requirements of the SBC as well as other applicable laws and ordinances.<sup>57</sup> This appeal does not present the issue whether Fisher was right or wrong on the merits of the advice he gave to Respondents about the steps necessary to comply with or change the terms of the conditional use permit. By raising these issues with Respondents, however, Fisher did not exceed his authority as a building official.

The Administrative Law Judge concludes there is no genuine issue of material fact, and the City has proved as a matter of law that a new certificate of occupancy is required before the Respondents may operate the grinder on the premises. The City's motion for summary disposition on the merits is granted, and the Respondents' motion for summary disposition is denied. The decision of the State Appeals Board is AFFIRMED.

The Respondents in this case have been persistently confused about the complexity of the regulations governing their proposed business.<sup>58</sup> Moreover,

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<sup>55</sup> Affidavit of Adam S. Richardson.

<sup>56</sup> See Clark Aff. Exs. A & X.

<sup>57</sup> See Minn. R. 1300.0120, subp. 8.

<sup>58</sup> See, e.g., Wolpert Aff. Ex. D (Gearin Declaration in Support of Motion for a Temporary Restraining Order at ¶15) ("I have no idea what an 'occupancy permit' is. I have never heard of

when Fisher gave the Respondents a certificate of occupancy for retail sales after the fire clean-up work had been inspected, they viewed this as “crazy,” even though it was done to facilitate their use of the property for retail purposes, while they continued to work on the updates required by installation of the grinder.<sup>59</sup> The Respondents did not seek advance approval of the planned use of the property from the building official. If they had, their path to operating the business as planned may have been straighter, and much of the delay that they complain about now may have been avoided. The fact that they did not seek approval in advance, however, does not mean that the building official lacked authority to require a new occupancy certificate or compliance with the code when he discovered the plan to operate the grinder.

Minn. Stat. § 326B.139 provides that the party not prevailing on an appeal to the Commissioner shall pay the costs of the contested case hearing, including fees charged by the Office of Administrative Hearings.<sup>60</sup> The parties have not addressed this provision, and it is possible that the Department of Labor and Industry intends to absorb those costs without charging them back to the parties. If those costs are charged back, however, the Administrative Law Judge believes they should be shared equally, because each party prevailed on one of the issues presented.

**K. D. S.**

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such a thing, and I don't believe that it is a real document. I believe that Maplewood made it up to try to harass me into bringing the Building up to code”).

<sup>59</sup> *Id.* ¶ 43 (“I never requested this. I don't even know how or why it happened.”).

<sup>60</sup> Minn. Stat. § 326B.139.