



State of New Hampshire  
**State Building Code Review Board**

33 Hazen Drive,  
Office of the Commissioner,  
Department of Safety,  
Concord, NH 03305

(603) 223-4315

**Docket No. 23-1**

Appeal of Keene Building and Fire Board of Appeals Decision  
in Keene Fire Department v. Mr. Toby Tousley  
(*Appeal of a Local Building Code Board of Appeals Decision*)

**NOTICE COMMENCING ADJUDICATIVE PROCEEDING**

1. On June 29, the Keene Fire Department filed a petition with this Board to appeal a decision of the Keene Building and Fire Board of Appeals (Local Board of Appeals). The decision of the Local Board stems from a dispute between a building owner, Mr. Toby Tousley, and the Keene Fire Department over the safety of a large commercial building in Keene.

2. In the fall of 2022, the Keene Fire Department issued a Notice of Violation and Order to Correct (Order) to Mr. Tousley concerning the large commercial building. This Order required, in part, that Mr. Tousley retain the services of a Fire Protection Engineer to perform a building investigation and evaluation report. Mr. Tousley subsequently appealed the Keene Fire Department's Order to the Local Board of Appeals.

3. On May 30, 2023, the Local Board of Appeals issued a decision finding the Keene Fire Department inappropriately interpreted the Fire Code. As a result, the Local Board of Appeals did not uphold the Keene Fire Department's directive to retain a fire protection engineer. The Keene Fire Department now seeks reversal of this decision.

4. This Board has jurisdiction over appeals of all final decisions of local building code board of appeals established under RSA Chapter 674. *See, e.g.,* RSA 155-A:10, IV. (e). Within 30 days of a decision of a local building code board of appeals, a party may appeal the decision to this Board. RSA 674:34, II. An appeal must be based on a claim that the true intent of the code or the rules adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an equally good or better form of construction is proposed. RSA 155-A:11-b, II.

Although we have jurisdiction to hear appeals of local building code board of appeals decisions, we have no authority to waive requirements of the state building code or the state fire code. *Id.*

5. Upon review of our authority and the petition, there is a reasonable basis for commencing an adjudicative proceeding to decide this appeal.

6. The specific issues that must be decided are the following:

- A. Whether the decision of the Local Board incorrectly interpreted the true intent of the state fire code or the rules adopted thereunder; and
- B. Whether the decision of the Local Board must be upheld or reversed because provisions of the state fire code do not fully apply.

Based upon the above, it is:

ORDERED that an adjudicative proceeding is commenced for the purpose of resolving the issues above under RSA 155-A:10, IV. (e), RSA 155-A:11-b, RSA 541-A:31 through RSA 541-A:36, RSA 674:34, II., and the Board's administrative rules set forth in CHAPTER Bcr 200<sup>1</sup>; and it is,

FURTHER ORDERED that the parties to this proceeding shall be the Keene Fire Department, represented by Attorney Matthew R. Johnson of Devine Millimet & Brnach P.A., and Mr. Toby Tousley; and it is,

FURTHER ORDERED that all parties shall appear before the Board on July 28, 2023 at 10:00 a.m., at 33 Hazen Drive, Second Floor Conference Room, Office of the Commissioner, Department of Safety, Concord, NH 03305, to participate in this adjudicative proceeding. If a party requires additional time, a party may file a written request for an extension under RSA 155-A:11-b, III.; and it is,

FURTHER ORDERED that any party may elect to be represented by counsel, at their own expense; if represented by counsel, counsel shall file a notice of appearance at the earliest date possible and no later than July 26, 2023; and it is,

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<sup>1</sup> Specifically, New Hampshire Code of Administrative Rules Bcr PART 201, Bcr PART 202, Bcr PART 203, Bcr PART 204, Bcr PART 204, Bcr PART 207, Bcr PART 208, Bcr PART 209, Bcr PART 210, as well as Bcr 206.01 and Bcr 206.03.

FURTHER ORDERED that Mr. Philip R. Sherman, P.E., Board Chair, shall serve as presiding officer for this proceeding unless replaced; and it is,

FURTHER ORDERED that the parties shall comply with the requirements of Bcr 207.07 regarding the mutual exchange of relevant information; and it is,

FURTHER ORDERED that any proposed exhibits, motions, or other documents the parties intend to become part of the record in this proceeding, shall be filed by the proponent with the Board consistent with Bcr 205.01, with an additional copy mailed to any party to the proceeding, and to J.D. Lavalley, acting counsel to the Board, at the N.H. Department of Justice, 33 Capitol Street, Concord, New Hampshire 03301. All responses or objections to such motions or other documents are to be filed in similar fashion within three days of receipt of such motion or other document unless otherwise ordered by the Presiding Officer; and,

IT IS FURTHER ORDERED that a witness list, if any, and any proposed exhibits shall be pre-marked for identification only and filed with the Board no later than three days before the date of the hearing. The Keene Fire Department shall pre-mark proposed exhibits with capital letters (e.g., A., B., C., etc.), and Mr. Tousley shall pre-mark his proposed exhibits with Arabic numerals (e.g., 1, 2, 3, etc.); and,

IT IS FURTHER ORDERED that unless good cause exists, all motions shall be filed at least three days before the date of the hearing, except any motion seeking to postpone a hearing or conference, which shall be filed at least five business days before the hearing or conference in question; and,

IT IS FURTHER ORDERED that the entirety of all oral proceedings be recorded verbatim by the Board; and,

IT IS FURTHER ORDERED that all documents shall be filed with the Board by mailing to Roxie A. Beall, Board Administrator, State Building Code Review Board, Office of the Commissioner, Department of Safety, 33 Hazen Drive, Concord, New Hampshire 03305 or delivering them to Roxie A. Beall, Board Administrator, State Building Code Review Board, NH Division of Fire Safety, 110 Smokey Bear Blvd, Concord, NH 03301; and,

IT IS FURTHER ORDERED that routine procedural inquiries may be made by contacting Roxie A. Beall, Board Administrator, State Building Code Review Board, Office of the Commissioner, Department of Safety, by mail to 33 Hazen Drive., Concord, New Hampshire 03305, or by telephone at (603) 223-4315, but that all other communications with the Board shall be in writing and filed as provided above. *Ex parte* communications are forbidden by statute and the Board's regulations; and,

IT IS FURTHER ORDERED that a copy of this hearing notice shall be served upon the Keene Fire Department via its representative, Attorney Johnson, and Mr. Tobey Tousley by first class U.S. mail at 111 Amherst Street, Manchester, NH 03101 and P.O. Box 626, Keene, N.H. 03431 respectively. A copy shall also be delivered to the City of Keene clerk via first class mail.

BY ORDER OF THE PRESIDING OFFICER, PHILIP R. SHERMAN

Dated: July 13, 2023