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## State of Wisconsin DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of Orders Against Premium Properties Limited Partnership, N331 Brandenburg Avenue, Merrill, WI 54452

FINAL DECISION AND ORDER ORDER U007026

#### Division of Legal Services and Compliance Case No. 17 COM 236

The State of Wisconsin, Department of Safety and Professional Services, having considered the above-captioned matter and having reviewed the record, the Proposed Decision of the Administrative Law Judge, and the Objections to the Proposed Decision filed by Premium Properties LP, makes the following:

#### ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Department of Safety and Professional Services.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth in the attached Notice of Appeal Information.

Dated at Madison, Wisconsin on the 9th day of October, 2020

Aloysius Rohmeyer

Chief Legal Counsel

Department of Safety and Professional Services



# State of Wisconsin DIVISION OF HEARINGS AND APPEALS

In the Matter of Orders Against Premium Properties Limited Partnership, N331 Brandenburg Avenue, Merrill, WI 54452

DHA Case No. SPS-19-0017 DLSC Case No. 17 COM 236

#### PROPOSED DECISION AND ORDER

The PARTIES to this proceeding are:

Premium Properties Limited Partnership, by

Attorney T. Gregory Amann Amann & Associates P.O. Box 70 Ellsworth, WI 54011-0070

Department of Safety and Professional Services, Division of Legal Services and Compliance, by

Attorney Matthew McCasland
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P.O. Box 7190
Madison, WI 53707-7190

#### **PRELIMINARY RECITALS**

These proceedings were initiated on October 1, 2018, when the Department of Safety and Professional Services (Department) filed a notice of violations and orders against Scott DeGross and Victory Fireworks concerning the property located at N331 Brandenburg Avenue in Merrill, Wisconsin 54452. The notice of violations and orders stated that the Department found the property in violation of Wis. Admin. Code § SPS 361.03 and that installation of an automatic sprinkler system and submittal of building plans and fire suppression plans were needed for the property to be brought into compliance with the Wisconsin Commercial Building Code.

On October 29, 2018, Attorney T. Gregory Amann, on behalf of Victory Fireworks, Inc. and Premium Properties LLC, requested a hearing on the reasonableness of the notice of violations and orders.

On March 4, 2019, the Department's Division of Legal Services and Compliance (Division) issued a notice of hearing and referred the matter to the Division of Hearings and Appeals (DHA) for adjudication. Administrative Law Judge (ALJ) Jennifer Nashold was appointed to preside over the matter.

On March 18, 2019, ALJ Nashold held a prehearing telephone conference with the parties, and a contested case hearing was scheduled for September 5, 2019. On April 11, 2019, DHA transferred the matter to ALJ Sally Pederson for adjudication.

At the hearing commenced on September 5, 2019, counsel for Respondent argued that Scott DeGross and Victory Fireworks were not proper parties to the action and made a motion to dismiss. The Department objected to the motion as untimely. Noting that the motion was indeed untimely, the ALJ nevertheless ordered that the hearing be adjourned in the interests of due process and judicial economy, rescheduled the hearing to November 21, 2019, and issued a scheduling order for the filing of written motions and responses.

On September 18, 2019, counsel for Respondent filed a motion for summary judgment and dismissal. On September 27, 2019, the Division filed a response to the Respondent's motion, a motion to amend the case caption, and an amended notice of violations and orders. On October 4, 2019, Respondent filed a reply brief.

A prehearing telephone conference was held on October 15, 2019 to address the motions filed by the parties. During the telephone conference, the parties' motions were discussed and resolved by stipulations of the parties that were memorialized in a prehearing conference report dated October 15, 2019. Most notably, the parties stipulated that Scott DeGross is not a party in the matter, and instead, as the owner of the real estate located at N331 Brandenburg Avenue in Merrill, Wisconsin, Premium Properties Limited Partnership (Premium Properties) is the appropriate party named in the amended notice of violations and orders, the case caption for this matter, and in the amended petition for hearing filed on October 28, 2019.

A class 2 hearing was held at the Hill Farms State Office Building in Madison, Wisconsin, on November 21, 2019, ALJ Sally Pederson presiding. Attorney Matthew McCasland appeared on behalf of the Department, and Attorney T. Gregory Amann appeared on behalf of Premium Properties.

The Department filed a closing brief on January 7, 2020. Premium Properties filed a post-hearing memorandum on February 4, 2020. The Department filed a reply brief on February 14, 2020, and the record closed on that date.

#### **ISSUE**

Was the Department's notice of violations and orders reasonable under Wis. Stat. § 101.02(6)(e)?

#### **FINDINGS OF FACT**

- 1. Premium Properties Limited Partnership is the owner of the real estate parcel and building located at N331 Brandenburg Avenue, Merrill, Wisconsin 54452. Victory Fireworks is a tenant of Premium Properties at that site and, since it was built, the building has always been used for the retail sales and storage of fireworks. (Testimony of Scott DeGross, Tr. pp. 80-82, 96)
- 2. At the time of construction, architect Bradley Kortbein, on behalf of Premium Properties, prepared building plans for the building, which were submitted to the Department for conditional approval. (Testimony of DeGross, Tr. p. 88)
- 3. Upon submission of a building plan, the Department assigns the plan to a reviewer who reviews the plan, along with associated calculations and information provided by the architect or design professional, to verify its compliance with various requirements of the Wisconsin Commercial Building Code. (Testimony of Randall Dahmen, Tr. pp. 31-33)
- 4. Randall Dahmen has a master's degree in engineering from the University of Wisconsin-Madison and has been employed by the Department<sup>1</sup> for 25 years as an engineering consultant for building systems. His job duties include performing building plan reviews, acting as a technical liaison for Wisconsin's Commercial Building Code Committee, and providing training to commercial building inspectors, design professionals, contractors, and building owners. He has provided training to over 25,000 people and has reviewed well over 4,600 commercial building plans during his career with the Department. (Testimony of Dahmen, Tr. pp. 15-17, 24)

<sup>&</sup>lt;sup>1</sup> Mr. Dahmen began his public service employment with the Department of Commerce, Division of Safety and Buildings, which was then responsible for enforcing the sections of the Wisconsin administrative code commonly referred to as the Commercial Building Code, which were codified at Wis. Admin. Code ch. Comm 50 through 64, with Appendices A and B, until June 30, 2002, when they were repealed and ch. Comm 61 to 65, with Appendix A and B, were created. In 2011, enforcement responsibility was transferred to the Department of Safety and Professional Services, Division of Industry Services, and the Commercial Building Code was renumbered as ch. SPS 361 through 365.

- 5. On June 26, 2002, Mr. Dahmen issued a conditional approval letter regarding Premium Properties' building plans for the site located at N331<sup>2</sup> Brandenburg Avenue in Merrill, Wisconsin. He conditionally approved the site using the methodology described in Finding of Fact #3 above and did not personally inspect the site. (Ex. 3; Testimony of Dahmen, pp. 30-33)
- 6. The conditional approval letter indicated that the description of the building in the plans was "Ch. 54 New-Office/Warehouse," with a projected size of 9,600 square feet, and occupancy as listed as "Business, Storage." (Ex. 3) The business was not identified as selling and storing fireworks. (Testimony of Randall Dahmen, Tr. pp. 34-35)
- 7. After conditional approval has been granted, and a building has been constructed, with all building systems installed, a Department inspector then inspects the building site to ensure the building has been constructed consistent with the approved plans. The inspector may issue a final inspection report before a building's non-structural elements, such as pallets, cabinets, and movable items, are installed or placed in the building. (Testimony of Dahmen, Tr. pp. 67-68)
- 8. The Department's longstanding interpretation of the Commercial Building Code has been that a building used for retail sales and storage of fireworks is classified as high hazard and requires installation of an automatic sprinkler system. (Testimony of Dahmen, Tr. pp. 37-38, 55-56, 76-77; Exs. 5, 101)
- 9. In the past 25 years, the Department has granted a few exceptions to its high hazard classification for fireworks sales and storage buildings, thereby allowing those owners, including Premium Properties, to not install sprinkler systems in the buildings, provided they met certain specified conditions. (Exs. 100, 102, 103)
- 10. In December 2017, a Department fire coordinator filed a complaint with the Division alleging that the building plans for Premium Properties' building at N331 Brandenburg Avenue had described the building as office/warehouse when, in actuality, the building was used for retail sales and storage of fireworks. (Department's closing brief, p. 1; Dahmen testimony, p. 70)
- 11. The Department conducted an investigation on May 29, 2018 and determined that the building's use was different or changed than that for which it had received conditional approval in June 2002. As a result, on October 1, 2018, the Department issued a notice of violations and orders, which stated that the following codes had been violated: Wis. Admin. Code § SPS 361.03(11) Change of occupancy or use; Wis. Admin. Code § SPS

<sup>&</sup>lt;sup>2</sup> The conditional approval was for the building that Premium Properties constructed at N331 Brandenburg Avenue but erroneously referred to N250 Brandenburg Avenue because the county had initially provided Premium Properties with the incorrect street number for the property at the time of purchase. (Testimony of DeGross, Tr. pp. 88-91)

361.03(1) (sic) - Plan review and approval; and 2009 IBC 903.2.5.1 - An automatic sprinkler system shall be installed in Group H occupancies. At the hearing, the Department acknowledged a typographical error in the second cited violation; the correct section is Wis. Admin. Code Wis. Admin. Code § SPS 361.30(1). The notice of violations and orders directed Premium Properties to submit building change of use plans and fire suppression plans to the Department for review and approval. (Department's Notice of Violations and Orders and Amended Notice of Violations and Orders)

12. On October 31, 2018, Premium Properties, as owner, and Victory Fireworks, Inc., as occupant, filed a petition for hearing with the Department, which stated:

There has been no change in occupancy nor use, and no change or alteration in the business operation or building during the life of the facility. Occupancy has been determined by the department to be moderate hazard. The structure was built prior to the 2002 Enrolled Building Code. The department has not applied such Code retroactively on any other similarly situated structures in the State of Wisconsin. (Petition for Hearing)

- 13. On September 27, 2019, the Department filed a motion to amend case caption and an amended notice of violations and orders. As a result, with the stipulation of the parties, the case caption was amended from In the Matter of Orders Against Scott DeGross and Victory Fireworks to the current case caption set forth on the first page of this proposed decision, and Scott DeGross, an employee of both Premium Properties and Victory Fireworks, was not named as a party to the action. (Department's Motion to Amend Caption)
- 14. On October 25, 2019, in response to the amended notice, Premium Properties filed another petition for hearing that set forth the same issues and reasons that it objected to the Department's orders as those contained in its October 31, 2018 petition. (Petition for Hearing Amended Notice of Violations and Orders)

#### APPLICABLE LAW

Wis. Stat. § 101.02 Powers, duties and jurisdiction of department.

(6)(a) All orders of the department in conformity with law shall be in force, and shall be prima facie lawful; and all such orders shall be valid and in force, and prima facie reasonable and lawful until found otherwise upon judicial review pursuant to ch. 227 or until altered or revoked by the department.

- (6)(f) All petitions for hearing shall set out specifically and in full detail the order upon which a hearing is desired and every reason why such order is alleged to be unreasonable, and every issue to be considered by the department by the hearing. The petitioner shall be deemed to have finally waived all objections to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition.
- (15)(a) The department has such supervision of every employment, place of employment and public building in this state as is necessary adequately to enforce and administer all laws and all lawful orders requiring such employment, place of employment or public building to be safe, and requiring the protection of the life, health, safety and welfare of every employee in such employment or place of employment and every frequenter of such place of employment and the safety of the public or tenants in any such public building.
- (15)(e) The department may enter such orders against a site if it learns that the site is not safe in accordance with department statutes and rules.
- (15)(j) The department shall ascertain, fix and order such reasonable standards or rules for constructing, altering, adding to, repairing, and maintaining public buildings and places of employment in order to render them safe.

Wis. Stat. § 101.12 Approval and inspection of public buildings and places of employment and components.

(2) Plans of said buildings, structures and components shall be examined for compliance with the rules of the department and a statement of the examination returned to the designer and owner before construction is started. Nothing in this section shall relieve the designer of the responsibility for designing a safe building, structure or component.

#### Wis. Admin. Code § SPS 361.01 Purpose of Code.

[T]he purpose of chs. SPS 361 to 366 is to protect the health, welfare, safety, and welfare of the public and employees by establishing minimum standards for the design, construction, maintenance, and inspection of public buildings, including multifamily dwellings and places of employment.

Wis. Admin. Code § SPS 361.03 Application.

- (11) CHANGE OF OCCUPANCY OR USE. Except as provided in sub. (12), no change may be made in the use or occupancy of any building or structure, or any space within a building or structure, that would place the building, structure or space either in a different division of the same group of occupancies or in a different group of occupancies, unless the building, structure or space complies with the requirements of chs. SPS 361 to 366 for the new division or group of occupancies, as these requirements exist on one of the following dates:
  - (a) Pursuant to s. SPS 361.30, the date when plans for the change in occupancy or use are approved by the department or authorized representative.

#### Wis. Admin. Code § SPS 361.30 Plan review and approval.

(1) TYPES OF BUILDINGS. Except as provided in par. (b), Table 361,30-1, and sub. (4), the construction of, the alteration of, or the addition to a public building or place of employment may not commence unless plans for the project have been submitted to and approved by the department or its authorized representative in accordance with s. SPS 361.31.

#### 2009 IBC 903.2.5.1.

An automatic sprinkler system shall be installed in Group H occupancies.

#### Wis. Admin. Code § Comm 52.013(7) [in effect in June 2002]

Except as provided in par. (b), an automatic sprinkler system shall be installed in all high hazard occupancies exceeding 3000 sq. ft. in floor area.

#### DISCUSSION

As an agency that issued an order to a recipient who requested a hearing on the matter, the Department bears the burden of proof, which is a preponderance of the evidence. See Wis. Admin. Code § HA 1.12(3)(a) and 1.17(2).

Any commercial building built in Wisconsin must meet or exceed the requirements of the Wisconsin Commercial Building Code at the time of construction. The Department has the authority and responsibility to supervise, enforce, and administer the Commercial Building Code.

Wis. Stat. § 101.02(15)(a). Prior to construction of a public building or place of employment, building plans must be submitted to the Department for review to ensure that the building will comply with the Department's rules. However, a building's designer remains responsible for designing a safe building. Wis. Stat. § 101.12(2).

If the Department receives a complaint, conducts an investigation, and determines that a building is not in compliance with the Commercial Building Code, the Department is legally obligated to send the building's owner notice of the violations and issue orders regarding actions that the owner must take to bring the building into compliance. See Wis. Stat. § 101.02(15)(e) and (j). If a building has a change in use or occupancy that requires plan approval from the Department, the building must comply with the Commercial Building Code that is in effect on the date when plans for the change in occupancy or use are approved by the Department. Wis. Admin. Code § SPS 361.03(11)(a).

#### Submit building change of use plans

Here, the Department received a complaint about Premium Properties' building at N331 Brandenburg Avenue in Merrill, Wisconsin, and subsequently initiated an investigation of the property. The Department determined that the building was being used for a purpose different from what had been conditionally approved in 2002. The building plans identified the use and occupancy as office/warehouse and business/storage. (Ex. 3) However, the building was and is being used for retail sales and storage of fireworks, which Mr. Dahmen was not aware of at the time he conditionally approved the building plans and was not later informed of by a building inspector. (Tr. pp. 34-35)

During his testimony, Mr. DeGross conceded that the use and occupancy description in the building plans had likely been cut and pasted from the plans of a previous Premium Properties building, and he opined that the appropriate description for the building would have been Ch. 54-Mercantile. (Tr. p. 92) Both mercantile and office/warehouse fall under ch. 54. However, the review of building plans for retail sales and storage of fireworks involves checking compliance with different code provisions than the review of building plans for more general uses such as mercantile/storage or office/warehouse. See Ex. 116, p. 11.

In its petition for hearing and post-hearing memorandum, Premium Properties argues that there has been no change in occupancy or use of the building and no change or alteration to the business operation or building since it was built; and therefore, it cannot be found in violation for not having submitted change of occupancy or use plans. The problem with that reasoning is that designers or owners could submit building plans with untruthful use and/or occupancy descriptions, receive conditional approval based upon the untruthful information, and then use the building for a completely different purpose that may not have received the Department's approval if the actual use does not comply with the Commercial Building Code.

The Department's position is that, if misrepresentations or misinformation was provided in building plans that resulted in the inappropriate issuance of conditional approval that would

not have been granted if the true use and occupancy had been known by the Department, the Department must issue orders requiring the owners to take action and make modifications, as needed, to bring the building into compliance with the Code. The Department's position is consistent with the statutory mandate that it supervise public buildings and places of employment in the state to enforce and administer all laws, to ensure that such places are safe, and to protect the life, health, safety and welfare of every employee and frequenter of such places of employment and the safety of the public or tenants in public buildings.

In the instant case, Mr. Dahmen granted conditional approval of the building without knowing that it would be used for the retail sales and storage of fireworks. He testified that, because the Department has now discovered that the building's use is fireworks sales and storage, it is considered a change of use from what was conditionally approved and that it is reasonable for the Department to order the owner to submit new building plans to reflect this use. (Tr. 47-48) Mr. Dahmen has 25 years of experience working with the Commercial Building Code. His testimony was extremely credible and logical. I find that the Department reasonably determined that Premium Properties violated Wis. Admin. Code §§ SPS 361.03(11) and 361.30 by not submitting a change of use plan. Further, it was reasonable for the Department's notice of violations and orders to include, as a suggested action, that Premium Properties submit building change of use plans.

#### Install sprinkler system and submit fire suppression plans

The Department also determined that Premium Properties violated 2009 IBC 903.2.5.1 by not having an automatic sprinkler system installed in the building and suggested that Premium Properties submit fire suppression plans. This relates to the fact that the Department considers buildings used for retail sales and storage of fireworks to be high hazard, requiring installation of automatic sprinkler systems. Mr. Dahmen's credible testimony, and the record as a whole, established that, with a few exceptions over the years, it has been the Department's interpretation of the Commercial Building Code, under the law in effect in June 2002 and currently, that firework sales and storage buildings are classified as high hazard.

It is noteworthy that, in the cases where the Department made exceptions to the high hazard classification, such as it did with two Premium Properties' warehouses in Ellsworth, Wisconsin, the Department accepted a moderate hazard classification based on specific conditions being met. See Exs. 100, 102, and 103. Moreover, in the approval letters for the two Premium Properties' warehouses, the Department stated that "[t]his approval is specific to this building and does not extend to any other structure, buildings or applications." (Exs. 102 and 103) While Premium Properties would undoubtedly like the Department to make an exception for the current building, as it did for the warehouses in Ellsworth, the Department is under no legal obligation to do so.

Premium Properties argues in its petition for hearing that the Department determined that occupancy of the building was moderate hazard. This argument is meritless in that the

Department's conditional approval and any previous moderate hazard classification was made without its knowledge that the building would be used for retail sales and storage of fireworks.

The current code requires fireworks retail sales and storage facilities to have sprinkler systems installed due to high hazard classification. See 2009 IBC 903.2.5.1. Premium Properties argues in its hearing petition that the building was built prior to the 2002 Enrolled Building Code and that the Department has not applied the code retroactively on any other similarly situated structure in Wisconsin. This argument is misleading in that the Department is not seeking to retroactively apply the new code to the original building plans. Because the Department's notice and order suggests that Premium Properties submit building change of use plans to accurately describe the building's use, under Wis. Admin. Code § SPS 361.03(11)(a), the Commercial Building Code that is in effect on the date that the Department approves the change of use plans will apply. As such, the new code is not "retroactively" applied.

Premium Properties also vehemently argues that buildings used for retail sales and storage of fireworks, of the type and quantity at its N331 Brandenburg Avenue location, should be classified as moderate hazard, not high hazard, and do not require sprinkler systems. In support of this argument, Premium Properties set forth in its post-hearing memorandum a considerable amount of scientific data and information from Rick Thornberry and other industry professionals, none of whom testified at the hearing, as well as an analysis of various other administrative code provisions related to pyrotechnics, explosives, and fireworks.

Premium Properties did not specifically raise this in its petition for hearing, as required by Wis. Stat. § 101.02(6)(f). Nevertheless, even if considered, the hearsay evidence presented by Premium Properties in support of its argument is not sufficiently reliable or persuasive for this hearing officer to find that the Department's interpretation of the Commercial Building Code is unreasonable. Further, the issue at hand relates to the Department's exercise of its authority under Wis. Stat. § 101.02, which does not require an analysis of the various code provisions cited by Premium Properties in its argument about the classification of fireworks stores and storage.

Finally, Premium Properties argues that the Department has exceeded its rule-making authority by considering buildings used for retail sales and storage of fireworks to be high hazard. Premium Properties did not raise this issue or objection in its petition for hearing. Therefore, pursuant to Wis. Stat. § 101.02(6)(f), Premium Properties is deemed to have waived this objection, and it will not be considered herein.

For the reasons stated above, I find that the Department reasonably determined that Premium Properties violated the code by not having an automatic sprinkler system installed in a building with high hazard use and reasonably exercised its statutory authority by issuing a notice of violations and orders that included, as a suggested action, that Premium Properties submit fire suppression plans.

#### PROPOSED CONCLUSIONS OF LAW

- 1. The Department Safety and Professional Services has jurisdiction over this matter pursuant to Wis. Stat. § 101.02(10) and Wis. Stat. ch. 227.
- 2. The Division of Hearings and Appeals has jurisdiction in this matter and authority to issue this proposed decision and order pursuant to Wis. Stat. §§ 227.46(1) and (2).
- 3. The Department bore the burden of proof and met its burden of proving by a preponderance of the evidence that Premium Properties engaged in the violations set forth in the notice of violations and that the Department's notice of violations and orders was reasonable. Wis. Admin. Code § HA 1.12(3)(a)
- 4. Premium Properties' building at N331 Brandenburg Avenue in Merrill, Wisconsin has been used for retail sales and storage of fireworks, which is not the use that was identified and received conditional approval in 2002, and therefore, it constitutes a change of use without submission of a building change of use plan to the Department, in violation of Wis. Admin. Code §§ SPS 361.03(11) and 361.30(1).
- 5. Premium Properties violated 2009 IBC 903.2.5.1 by not having an automatic sprinkler system installed in a building with high hazard use.
- 6. To enforce the Commercial Building Code and ensure public safety, the Department of Safety and Professional Services reasonably exercised its authority under Wis. Stat. § 101.02(6)(e) in issuing the notice of violations and orders and amended notice of violations and orders to Premium Properties.

#### PROPOSED ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the Department's notice of violations and orders and amended notice of violations and orders be affirmed.

Dated at Madison, Wisconsin on May 29, 2020.

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