



BROWARD COUNTY

Board of Rules & Appeals

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BOARD OF RULES AND APPEALS

JANUARY 11, 2018

MEETING MINUTES

Call to order:

Vice Chair Kenneth Wynn called a published meeting of the Broward County Board of Rules and Appeals to order at 7:02 p.m. The roll was called and the following members were present:

Present:

Kenneth Wynn, Vice Chair
Ron Burr
Gregg D'Attile
Shalanda Giles-Nelson
Robert A. Kamm, P.E.
Daniel Lavrich, P.E.
John Sims
Abbas H. Zackria
Daniel Rourke
Dennis A. Ulmer
Stephen E. Bailey, P.E.
Jeff Falkanger

After the roll call, the presence of a quorum was announced.

Approval of Minutes

MR. LAVRICH MADE A MOTION AND MS. GILES-NELSON SECONDED THE MOTION TO APPROVE THE NOVEMBER 9, 2017 MEETING MINUTES AS SUBMITTED. THE MOTION CARRIED BY UNANIMOUS VOTE OF 12-0.

CONSENT AGENDA

1. Certifications – Staff Recommended

MR. LAVRICH MADE A MOTION AND MR. FALKANGER SECONDED THE MOTION TO APPROVE ALL SUBMITTED CERTIFICATIONS. THE MOTION PASSED BY UNANIMOUS VOTE OF 12-0.

2. **Motion of John Madden, Respondent, for dismissal of the matter of Broward County Board of Rules and Appeals vs. John Madden .**

Mr. James DiPietro, Administrative Director, introduced the Hearing Officer for this matter, Mr. John Hearn. He asked that those Board members who served on the Probable Cause Committee to step down from the dais and sit in the audience.

a. Motion to Dismiss for Misconduct

Mr. Hearn explained that a Hearing Officer is necessary because the motion involves the Board's counsel and as a result there is a conflict. He highlighted his professional experience. The Board has no policies for this type of matter. The Board needs to decide whether to move forward to a probable cause hearing or grant a motion to dismiss. He went on to outline the reasons for the motion to dismiss: 1) delay in having a hearing has denied due process to the Respondent; and 2) that there was ex-parte communications that denied due process to the Respondent. After the oral argument, he will make a finding and ask the Board to adopt a motion, approving the finding.

b. Response to Motion to Dismiss w/memorandum of law

Ms. Denise Bleau, attorney for the Respondent, indicated that they requested a hearing be set in April of 2017, but did not receive a response until November. She believed their delay in preparing for this evening has nothing to do with refusing to schedule a hearing. She referred to the investigation that took place prior to taking the matter to the Probable Cause Committee and indicated that the Board Attorney has claimed that he did not direct, oversee or participate in the investigation process. As a result of public records requests and emails, she indicated that Mr. Kramer drafted questions to be used for the sworn statement of Chris Augustin in the investigation that occurred prior to the Probable Cause Committee. Also, Mr. Kramer raised the question in emails about Mr. Madden and pointed the finger at Mr. Madden. He was the first one to suggest that charges be brought against Mr. Madden and to suggest to staff that perhaps Mr. Madden should be held responsible because he was the chief. She went on to claim that Mr. Kramer participated in the probable cause hearing. Mr. Kramer was the author of the letter sent to Mr. Madden on behalf of the Probable Cause Committee. She referred to information concerning the Office of Inspector General finding Mr. Madden culpable and directed that the Board bring this proceeding against Mr. Madden and she claimed that is not true. Concerning ex-parte communications, she referred to discussions wherein Mr. Kramer said the case could not be dismissed. Actually Mr. Madden is willing to have a mutual walk-away and waive any current claims. This is what he would like to do.

Mr. Charles Kramer, Board Attorney, referred to Ms. Bleau's allegation that he directed, oversaw and participated in the investigation process and indicated that he did not direct or oversee the investigation. He indicated that he took one deposition. He had no involvement until after the Probable Cause Committee came to their decision. He took one deposition of Chris Augustin. He had no influence on the Committee. His job as general counsel to the Board of Rules and Appeals (BORA) is to assist the administrative staff in whatever investigation they conducted. He did not see anything to substantiate the allegation in Ms. Bleau's motion that that the Board was misled to encourage the Office of Attorney General was encouraged to proceed against Mr. Madden. She seems

to be abandoning her complaint as far as her motion to dismiss for misconduct. He indicated that there was no delay of the hearing by BORA counsel. The investigation began in about May of 2016. There were about four months of personal time that Ms. Bleau needed. He thought the matter was to go forward in August, instead Ms. Bleau scheduled six months of depositions. On May 1, 2017, BORA sent a proposed agreement between BORA and John Madden foregoing prosecution if Mr. Madden did not seek any position as either a building official or chief inspector. There was no communication from Ms. Bleau for five months. In fact, he contacted her assistant on at least two occasions to ask about the status. In October, BORA sent another proposal setting forth a unilateral determination to not go forward with discipline subject to certain conditions. Mr. Bleau advised him that Mr. Madden would not accept the proposal, even though it was a unilateral termination and nothing for Mr. Madden to accept unless he wanted to become a chief inspector or building official. In November, he responded to Ms. Bleau, expressing his desire to take a deposition of Mr. Madden. Mr. Bleau responded that would not be permitted because the administrative staff had already taken a statement from him. The motion to dismiss for misconduct was then filed. He discussed legal specifics and case law concerning undue delay. There was no allegation of prejudice for undue delay and no information as to harm. He concluded that the pleading fails on its face. As to ex-parte communications, he indicated that the minutes clearly show that he only discussed case status with the Board of Rules and Appeals. Moreover, Ms. Bleau failed to state how Mr. Madden was harmed. He concluded by citing a case law and stated that the case was never discussed.

Mr. D'Attila raised the two proposals offered to Mr. Madden by BORA. Ms. Bleau explained that the case would not actually go away. With a dismissal, Mr. Madden could be a chief or building official if he chooses. It is not the same as the proposals. Also, she could not follow Mr. Kramer as to the decision to stay the case and that Mr. Madden could not do anything about it but on the other hand he was asking to depose Mr. Madden.

Mr. Hearn believed the delay is longer than anyone probably wants. While there has been delay, it has not solely been on the plaintiff's side. If there were more letters demanding a hearing aggressively and they were ignored, he thought it might get to a level of dismissal. His finding as far as the delay is that it does not reach the level of prejudice or dismissing based on due process rights. There are two ex-parte issues here. One is about Mr. Kramer bringing up the settlement documents. Mr. Kramer did not go to a judge; he is the Board Attorney and the meetings have to be held in the Sunshine. He did not see that it violates due process rights. There are minutes of it. It was done as a status report and some Board members asked questions. It did not get into the substance or evidence of it, but often at a public meeting it is not as clean as one would want because people start asking questions in a public forum. Based on a motion to dismiss standard, he did not find that it would prejudice Mr. Madden as the matter moves forward because the Board would be told to only take the evidence presented at that probable cause evidentiary hearing. His finding is therefore that it could move forward to a hearing although it does not prevent any settlement being considered before then. However, the case has been unsettled too long. He wanted a date to be set or at least a time limit for a hearing to be held.

Ms. Bleau advised that Mr. Madden was not provided notice of all of the discussions. Mr. Hearn indicated that he was assuming that was the case.

c. Board Action

A MOTION WAS MADE BY MR. FALKANGER AND SECONDED BY MR. GILES-NELSON TO ACCEPT THE RECOMMENDATIONS OF HEARING OFFICER JOHN HEARN AS NOTED ABOVE. THE MOTION PASSED BY UNANIMOUS VOTE OF 9-0. MR. BURR, MR. LAVRICH AND MR. ZACKRIA WERE NOT PRESENT.

As to a hearing date, Mr. DiPietro advised that a room would have to be reserved. Also, one of the witnesses will be traveling from Tennessee. There was consensus to reserve a full day. Ms. Bleau suggested the week of April 16. Mr. Kramer indicated he would have to check his calendar, but that week is acceptable at present. A starting time of 9 a.m. was noted. Mr. Kamm asked that Friday not be chosen.

3. Amending Board Policy 15-01 Pre-qualification program fee for employment for companies seeking to provide Plans Examiner and/or Inspectors, who are not sponsored by city or county building departments.

a. Recommendation of the Certification Review Committee - Building

Mr. Otto Vinas, Chief Plumbing Code Compliance Officer, noted that since this program went into effect on January 20, 2015, there have not been any applications from companies providing private building department services to local jurisdictions. Staff is recommending the policy be amended to remove the fee.

b. Board Action

A MOTION WAS MADE BY MR. D'ATTILE AND SECONDED BY MR. ZACKRIS TO ACCEPT THE STAFF RECOMMENDATION REMOVING THE PRE-QUALIFICATION PROGRAM FEE AS NOTED ABOVE. THE MOTION PASSED BY UNANIMOUS VOTE OF 12-0.

4. Consideration of providing each city and the county with one complimentary copy of the 2014 National Electric Code Book handbook.

a. Staff Recommendation

Mr. James DiPietro, Administrative Director, advised that this is a one-time proposal considering the level of funding availability. He noted the cost is \$5,267.79.

b. Board Action

A MOTION WAS MADE BY MR. LAVRICH AND SECONDED BY MR. BURR TO APPROVE THE STAFF RECOMMENDATION AS NOTED ABOVE. THE MOTION PASSED BY UNANIMOUS VOTE OF 12-0.

5. Election of Officers.

Board Nominations and Election of Chair and Vice-Chair Passing the Gavel

Mr. James DiPietro, Administrative Director, highlighted pertinent information concerning the process and practice traditionally. He noted that while alternate members present vote, they cannot be a candidate.

Mr. Lavrich noted the attendance record provided in the agenda backup to the Board is incorrect. It shows that he was absent from the June meeting but he was in attendance at that meeting. Mr. Kamm noted it shows him absent from the November meeting but he was in attendance at that meeting.

a. Board Action

MR. FALKANGER NOMINATED MR. LAVRICH FOR CHAIR AND MS. GILES-NELSON SECONDED THE MOTION. THERE WERE NO OTHER NOMINATIONS. THE MOTION PASSED UNANIMOUSLY BY A VOTE OF 12-0.

Mr. Zackria nominated Ms. Giles-Nelson for Vice Chair however she declined.

MR. BURR NOMINATED MR. WYNN FOR VICE CHAIR AND MR. FALKANGER SECONDED THE MOTION. THE MOTION PASSED UNANIMOUSLY BY A VOTE OF 12-0.

6. **Director's Report** - none

7. **Attorney's Report** - none

8. **Committee Report** - none

9. **General Board Members Discussion**

Water Intrusion - Mr. Lavrich indicated that he has witnessed water intrusion in buildings, particularly highrises, that was not as a result of recent Hurricane Irma and even when there are high impact windows. The damages are significant, amounting to millions of dollars. Insurance companies do not cover damage from wind driven rain unless there was some kind of a breach. The building code requires the building envelopes to be designed to resist the full force of the wind based upon wind velocities and resulting pressure from those wind velocities. They are tested to 150 percent of those values, but for water intrusion, the testing is only to 15 percent. He felt changes to the code are in order, or at least talk about this. He proposed they discuss this issue with Miami-Dade County and perhaps with this board's structural committee. He also thought it would be helpful to get other organizations involved i.e. American Architectural Manufacturers Association (primary trade organization for the manufacture of windows and doors) and some of the major manufacturers of windows and doors in Florida. He suggested a committee be organized to study his matter. As a consumer advocate, Mr. Ulmer felt it is absolutely something the board should be doing. Mr. Lavrich felt a code change will be needed and it will ultimately result in more cost. A general discussion followed where other members noted similar observations.

Mr. Bill Tracy, Building Official for City of Parkland, advised that he has investigated about forty cases of water intrusion where all new homes in Parkland have large and small missile impact rated windows. He described the installation but Mr. Lavrich noted the water is actually coming through the window assembly. Mr. Tracy went on to discuss other intrusion issues including those with doors. Mr. Lavrich pointed out that vehicle windows are designed to withstand intrusion.

Mr. Burr complimented staff in their work to promote the Board to cities.

Inspections that are outside of Board's purview - Mr. Burr noted there are inspectors from engineering, zoning and landscaping departments not certified by this board or the State. He found it problematic. If they are going to inspect and approve plans, they should be categorized the same as other inspectors certified by the Board of Rules and Appeals.

10. **Public Comment (3 minute limit per person) and written communication** - none

11. **Adjournment**

Having no further business to go before the Board, the meeting adjourned at 8:13 p.m.

A handwritten signature in black ink, appearing to read 'K. Wynn', is written over a horizontal line.

Kenneth B. Wynn – Vice Chair

