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Date: August 21, 2019

Name of Appellant: Nicholas Mango

Service Address: Nicholas Mango
P.O. Box 336
Swampscott, MA. 01907

In reference to: 7 B Skinner's Path
Glover Landing Bldg. #21
Marblehead, MA. 01945

Docket Number: 17-0007

Property Address: 7 B Skinner's Path
Glover Landing Bldg. #21
Marblehead, MA. 01945

Date of Hearing: June 6, 2019

Enclosed please find a copy of the decision on the matter aforementioned.

Sincerely:

BUILDING CODE APPEALS BOARD

Patricia Barry, Clerk

cc: Building Code Appeals Board, Building Official



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BUILDING CODE APPEALS BOARD
DOCKET NO. APP-BCAB 17-0007

Nicholas K. Mango and
Elizabeth Garthe,
Appellants

v.

Town of Marblehead,
Appellee

DECISION

Introduction

This matter is before the Building Code Appeals Board ("BCAB") as a result of a remand from the Superior Court. Appellants Nicholas K. Mango and Elizabeth Garthe (the owners of Unit 7B of the Grover Landing Condominium) appealed to the Superior Court the BCAB's decision dated February 27, 2017 in Docket No. BCAB17-0007. The Superior Court held hearings and issued an order, dated October 24, 2017, which stated, "After determination by the Building Inspector of the compliance of the to-be-finalized fire inspection [sic] system, this case is remanded to the Building Code Appeals Board for evaluation and determination of the issues raised in this case as well as all the issues raised by the parties before the Board concerning the current fire escape system, once final inspection has occurred." ("Order") (Superior Court Civil Action No: 2017CV00406 B, October 24, 2017). *See G. L. c. 143, § 100; 780 CMR 113.1.*

On February 20, 2019, Appellants submitted hundreds of pages of documents for the BCAB to consider. The BCAB identified, as listed below, some of those documents, and excluded "irrelevant or unduly repetitious" documentation. *801 CMR 1.02(10)(f)*. In addition, the BCAB considered a photograph of the subject building from the Town of Marblehead's Assessor's records.

Notices of the remand hearing were issued and the hearing was held on June 6, 2019. All interested parties were provided with an opportunity to testify and present evidence and argument to the BCAB. The following individuals appeared: (for Appellants: Nicholas K. Mango and Elizabeth Garthe; Attorney Carl Goodman; Cory R. Brett, P.E. (for Appellee: Richard Baldacci; Attorney Adam Costa, for the Town of Marblehead).

The following BCAB members were present: Richard P. Crowley; H. Jacob Nunnemacher; Steven Frederickson). Patricia Barry, the BCAB's clerk, and Charles Kilb, BCAB counsel were also present. At the conclusion of the hearing session, the BCAB continued to deliberate. The BCAB now issues its decision.

Exhibits

The following documents were entered in evidence. Most of these also have Bates numbering as supplied by Appellants:

1. 2/25/2019 photograph from Town Assessor's records for Unit 7B, which shows the landward side of part of Building 21 (containing Unit 7B);
2. "Memorandum of Decision and Order," by the Superior Court (Civil Action No. 2017CV00406 B), dated October 24, 2017 (2 pages, R-003161 - 3162) ("Order");
3. BCAB Decision, Docket No. APP-BCAB17-0007 (dated February 27, 2017) (4 pages);
 - 3-A. BCAB Decision, Docket No. APP-BCAB16-0016/17/18/19 (9 pages);
4. February 19, 2019 cover letter to BCAB from Nicholas Mango and State Building Code Appeals Board application forms marked "REMAND" (7 pages, R-004001 – 4007);
 - 4-A. "OVERVIEW OF ISSUES" by Appellants (18 pages, R-004016-4033) (some parts highlighted in orange by the BCAB);
5. Overhead photograph, "Part of Glover Landing Complex," with label: "Bldg 21, prior to installation of catwalk" (R-002649);
6. Photograph, "BUILDING #21 – GLOVER LANDING, September 2017, Colored Outlines show [locations] of the four Units in the Building, #6, #7A, #7B and #8," (R-002651);
7. Photograph, "BUILDING #21 – GLOVER LANDING, September 2017, UNIT 7B EGRESS PROCESS, Keyed to written description," (R-002655);
8. Photograph, plus attached written comments by Appellants, "BUILDING #21 – GLOVER LANDING, September 2017, FIRE ESCAPE RELATED CODE & SAFETY ISSUES, Boxed Numbers are Keyed to Issues in associated materials," (6 pages, R-002662 – 2667);
9. Appellants' "ATTACHMENT 1" description with three photographs (taken in March 2018) showing waves washing over catwalk. (4 pages, R-004101 – 4014);

10. Thirteen (13) photographs, taken September 5, 2018, of various parts of fire escape system (with Appellants' comments) (R-004106, 4114, 4148, 4125, 4126, 4128, 4132, 4133, 4136, 4137, 4139 (two of the photographs do not have Bates numbers on them));
11. Photograph of individuals on catwalk (R-002689);
12. August 29, 2017 Superior Court Order and September 5, 2017 letter to Justice Fahey from Richard Baldacci (in response to August 29, 2017 Court Order) (3 pages, R-002430, R-002428 – 2429);
13. September 12, 2017 letter to Judge Fahey, Superior Court from Richard Baldacci, re: Inspection of Fire Escape at 7 Skinner's Path, Building 21 (2 pages, R-004254 – 4255, with red arrow markings by Appellants);
14. September 21, 2017 letter to Judge Fahey, Superior Court, from Richard Baldacci, re: Report related to permits and inspection (3 pages, R-004256 – 4258);
15. September 20, 2017 letter to Commissioner Baldacci from Town Fire Inspector Lieutenant Thomas Rice (Marblehead Fire Department) (R-002698);
16. September 20, 2017 letter to Glover Landing Trust (c/o Sue Teichmann) from Richard Baldacci, re: Open building permits numbers 24110 (2 pages, R-002702- 2703);
17. April 17, 2018 letter to Glover Landing Trust (c/o Sue Teichmann) from Richard Baldacci, re: Single egress dwellings (R-004296);
18. May 16, 2018 letter to Rich Baldacci from Glover Landing Board of Governors, re: Single Egress Dwellings (2 pages, R-004299-4300);
19. July 11, 2018 letter to Glover Landing Unit Owners from Sue Teichmann (R-004301);
20. "ATTACHMENT 3", January 8, 2019 reports by Simpson, Gumpertz & Heger, re: Fire Escape Catwalk Code Review, Building 21, Unit 7B, Skinners Path, Marblehead, MA (R-004156 – 4181).
21. "Fire Escape Engineers Confidence Test," certified by Mark S. Landsberg (Registered Architect, Massachusetts, No. 5158) re: 6, 7A, 7B, 8 Skinners Path, Building 21.
22. Deposition excerpts: August 16, 2018 of Richard Baldacci (pre-identified as "Attachment 15" by Appellants); March 19, 2018 of Barbara Kostick-Smith (pre-identified as "Attachment 21" by Appellants); and March 12, 2018 of Sue Teichmann (pre-identified as "Attachment 22" by Appellants).

Findings and Discussion¹

Findings

The issuance of Building Permit # 24110 (in September 2016, pursuant to the 8th Edition of 780 CMR) led to the construction of the Catwalk (described in the BCAB's February 27, 2017 decision and by several other documents in evidence, e.g. Exhibits 4-A (R-004020), 6 (R-002651), 11 (R-002689), 13 (R-004254) 16 (R-002702), 20 (R-004156)). As the testimony and documentation evidence make abundantly clear, the Catwalk is part of an exterior system of platforms and ladders that provides a means for individuals to reach the West exterior of Building 21, at approximately the grade level for Unit 8 ("System"). (See e.g. Exhibits 7, 8 (R-002663, R-002662)). The System joins an exterior door Appellants' Unit 7B.

Storm and wave action on or about March 2, 2018, removed nearly all of decking for the Catwalk. (See e.g. Exhibit 9 (R-004102-4103)). Photographs taken September 5, 2018 suggest that at least some of the decking for the Catwalk was replaced or reinstalled after the storm/wave action damage. (See Exhibits 10 (R-004132, 4133, 4136, 4137)). The horizontal part of the Catwalk, located between sets of stairs on either end, is at an elevation approximately four feet below Base Flood Elevation for the applicable Flood Zone. (Exhibit 20).

The conditions of other parts of the System are indicated by the photographs in Exhibit 10 (R-004106, 4114, 4148, 4125, 4136, 412_, 4128). These other parts show signs of lack of maintenance, likely dating back years. To use the System from Unit 7B, one starts at an exterior platform that runs between Unit 7B and 7A. (See Exhibits 7, 8) ("Upper Platform"). Next, a hatch must be lifted that exposes a painted metal (possibly aluminum) step ladder that runs from the Upper Platform down to an exterior platform that runs between Unit 8 and Unit 6 ("Lower Platform"). The step ladder between the Upper and Lower Platforms has no hand rails. (See Exhibit 10 photographs).

From the Lower Platform, one must open a hatch that exposes a pull-down/fold-out ladder mechanism, that, when deployed, leads to a concrete base and alcove. (See Exhibits 7, 8). This ladder mechanism, (as depicted in Exhibits 6, 7, and 8) runs at a diagonal such that its base is nearly against a wall in the alcove. From this level, one would walk along the Catwalk, which runs the width of the foundation beneath Units 8 and 7B, to a set of stairs that leads up to the grade-level for Unit 8.

Discussion and Conclusions

Introduction and Summary

The BCAB's February 27, 2017 decision (Exhibit 3) acknowledged eight (8) demands by Appellants. That decision, however, focused on only the scope of work pursuant to Building

¹ Findings and conclusions were reached in accordance with G. L. c. 30A and 801 CMR 1.02.

Permit # 24110, which was for the installation of the Catwalk (intended to provide a means to get to dry land). As of the date of that decision, the Catwalk had not been completed and the BCAB's decision concluded only to order the Building Commissioner to determine whether the work taking place exceeded the scope of the Building Permit. If it were determined that the work exceeded the scope of the Permit, then the decision directed the Building Commissioner to issue a stop work order. The Building Commissioner determined, the next day after the hearing session (and well before the BCAB decision was issued), that the work was not exceeding the scope of the Building Permit. He concluded that no stop work order was needed.

As noted above, Appellants appealed the BCAB's February 27, 2017 decision to Superior Court, which resulted in the Memorandum of Decision and Order the Court issued, dated October 24, 2017. The Court's Memorandum focused on the "fire escape system at the residential building at 7 Skinner's Lane." (Exhibit 3, p. 1). The Memorandum did not discuss the other demands Appellants initially made before the BCAB. The Court's Order is quoted above. In addition, the Court's Memorandum of Decision and Order emphasized Appellants' "fire escape system," the work not yet completed, and anticipated inspections not yet performed. The Court did not describe any of the other issues or provide any direction to the BCAB about those issues except "evaluation and determination of the issues raised in this case as well as all issues raised by the parties before the Board concerning the current fire escape system, once final inspection has occurred." (Exhibit 2, p. 2 (R-003162)).

Thus the Court (notwithstanding its two hearings and, no doubt, its consideration of Appellants' extensive offers of evidence, as indicated by what Appellants have submitted to the BCAB), has not directed the BCAB to do more than evaluate and determine the various demands Appellants initially made. The BCAB's "evaluation and determination," however, is governed by the following:

The [BCAB] may grant a variance from any provision of [780 CMR] in any particular case, may determine the suitability of alternate materials and methods of construction, and may provide reasonable interpretations of the provisions of [780 CMR]; provided, however, that [BCAB] decisions shall not conflict with the general objectives set forth in G. L. c. 143, § 95.² In

² "The powers and duties of the board set forth in section ninety-four [the BBRS] shall be exercised to effect the following general objectives:

(a) Uniform standards and requirements for construction and construction materials, compatible with accepted standards of engineering and fire prevention practices, energy conservation and public safety.

In the formulation of such standards and requirements, performance for the use intended shall be the test of acceptability, in accordance with accredited testing standards.

(b) Adoption of modern technical methods, devices and improvements which may reduce the cost of construction and maintenance over the life of the building without affecting the health, safety and security of the occupants or users of buildings.

(c) Elimination of restrictive, obsolete, conflicting and unnecessary building regulations and requirements which may increase the cost of construction and maintenance over the life of the building or retard unnecessarily the use of new materials, or which may provide unwarranted preferential treatment of types or classes of materials,

exercising its powers under this section, the [BCAB] may impose limitations both as to time and use, and a continuation of any use permitted may be conditioned upon compliance with regulations made and amended from time to time thereafter.” *G. L. c. 143, § 100.*

With all this in mind, the BCAB concludes, for the reasons discussed below, that the System does **not** provide an adequate means of egress from Appellants’ Unit. As a result, alternatives to the System must be considered. Alternatives must be planned by a Massachusetts Registered Design Professional. If those plans are properly created, they should be able address all eight of Appellants’ demands (see discussion below) which the BCAB acknowledged in its February 27, 2017 decision.

Egress

Regardless of the history of the Condominium complex and, specifically, Building 21 in which Appellants’ Unit 7B is located, Appellants and the Building Commissioner agree that the System was initially (as installed in the 1960’s) intended to provide a required second means of egress for their Unit. The Code also expressly provides a presumption that an existing building met applicable codes in effect when the building was constructed or altered and can continue “to be occupied pursuant to its use and occupancy.” *780 CMR 102.6.1 (9th and 8th Editions of 780 CMR).* But this presumption and allowance has a condition: “provided that the building or structure **shall be maintained by the owner in accordance with this code.** *Id.* (emphasis added). Lest the maintenance requirement be ignored, the Code emphasizes compliance in other sections. *See e.g. 780 CMR 102.8, 102.8.1 (8th and 9th Editions); see also 780 CMR 114.1, 114.4 (8th and 9th Editions).*

A building official also plays a role with respect to existing buildings. “The legal occupancy of any structure existing on the date of adoption of this code shall be permitted to continue without change, except as is specifically covered in this code **or as deemed necessary by the building official for the general safety and welfare of the public.**” *780 CMR 102.6 (8th and 9th Editions)* (emphasis added).

In addition, with respect to existing conditions, 780 CMR provides:

102.6.4 Existing Means of Egress, Lighting and Ventilation. The building official may cite the following condition in writing as a violation and order the abatement within a timeframe deemed necessary by the building official to make the building environment safe, healthy or otherwise comply with this code.

a. Inadequate number of means of egress.

products or methods of construction without affecting the health, safety, and security of the occupants or users of buildings.” *G. L. c. 143, § 95.*

b. Egress components with insufficient width or so arranged to be inadequate, including signage and lighting.

c. Inadequate lighting and ventilation.

Where full compliance for means of egress, lighting and ventilation are not practical, the building official may accept compliance alternatives, engineering, or other evaluations that adequately address the deficiency. 780 CMR 102.6.2 (8th and 9th Editions).

The facts that came into evidence before the BCAB and subsequent to the BCAB's February 27, 2017 decision obviously show that the System was "so arranged [as to] be inadequate" (780 CMR 102.6.2) because, among other things, the Catwalk did not withstand storm and wave action. Moreover, even if the Catwalk consistently withstood the elements, ocean wave action would make the Catwalk impassable.

Thus, notwithstanding what the Building Commissioner may have reasonably believed while the Catwalk was under construction pursuant the Building Permit, the evidence now shows that the discretionary suggestion of the phrase "may cite the following" in 780 CMR 102.6.2 was no longer reasonable in these circumstances. Regardless, the System provided an unreasonable means of escape for Appellants; the System such as it is, is a means of egress that does not comply with 780 CMR and all of which could not have been maintained in compliance with 780 CMR given its proximity to the ocean.

Even if the System without the addition of the Catwalk had been adequately maintained, an occupant using it would end up on the beach or in the water. Although ending up on the beach or in the water might be preferable to being trapped in a fire, a building occupant can expect that the means of egress must be an "accessible means of egress," which means "a continuous and unobstructed way of egress travel from any accessible point in a building or facility to a public way." 780 CMR 202. See also 780 CMR Chapter 10. The BCAB does not find this sea shore, which can be under water at certain times, meets the definition of "public way" (780 CMR 202) and does not meet the intent of a public way for purposes of 780 CMR. (The evidence shows that all those involved in designing and permitting the Catwalk agreed, because it was intended to lead one to a public way.) As a result, Appellants must consider alternatives to the System.

Alternatives

The BCAB's discussion below about alternatives to the System will address Appellants' other demands. The BCAB's February 27, 2017 decision identified the following demands:

- 1) revoke building permit number 24110; (2) direct that an order be issued to repair the entire fire escape "to Code" not only add an egress; (3) overturn entirely the determinations in the Building Commissioner's September 20, 2016 [letter] to Appellants (Exhibit 1A); (4) direct that an order be issued requiring that the fire escape originally approved for Building 21 in 1965,

which fire escape design consisted of two, 3-story spiral stairs on the East and West side of the building be constructed and installed per Code to provide secondary fire egress for Building #21, Units 7A and 7B; (5) direct that an order be issued to the Town of Marblehead Electric Company to relocate its three-phase, high voltage, oil cooled transformer; such that the transformer location is compliant with Code related to its proximity to Building #21 and also the modified fire escape egress; (6) direct that an order be issued that the current fire escape be removed in its entirety and the doors that access it be removed and shingled over; (7) direct that an order be issued that two additional grade-level doors be added to Building #21 on the East and West grade levels' faces to provide secondary egress for Units #6 and #8; and (8) direct the Building Commissioner, or his authorized assistant, to immediately carry out Section 110 (of 780 CMR) safety inspection of the complex.

The BCAB addresses each of these in order. (1) Revocation or otherwise closing out the Building Permit is called for because the evidence shows the Catwalk cannot be made Code-compliant. *See e.g. 780 CMR 105.4, 105.5, 105.6 (8th and 9th Editions).* (2) It is premature to determine whether the entire fire escape must be repaired. For example, alternatives for a second means of egress might also allow the System to be completely eliminated or modified so the Platforms might remain as exterior decks.

(3) The September 20, 2016 letter the Building Commissioner issued (which is Exhibit 1A to the BCAB's February 27, 2017 decision) discusses the issuance of the Building Permit for the Catwalk. The letter also states: "Only if the railing is replaced will there be a requirement to bring the lawfully, pre-existing non-conforming railing to the requirements of the 8th Edition of the Building Code. The hatch covers are part of an existing component of the fire escape system" The issuance of the Building Permit has now been addressed. Again, it is premature and may be partly moot to specify what must happen with the hatches, beyond noting the obvious that they might no longer be used and could be eliminated. The future of those exterior elements might be changed.

(4) The suggestion to install a spiral staircase or some other exterior egress systems to serve the East and West sides of Building 21 (thus serve Units 7A and 7B) may be one of the alternatives a Registered Design Professional might consider. Again, it is premature to specify this suggestion as the only way to achieve Code compliance. (5) Relocation of the electrical transformer is also premature because we do not know whether/where an exterior egress system would relate with the transformer. It is reasonable to assume, however, that a Registered Design Professional should be capable of addressing how those elements can relate with one another in accordance with 780 CMR and other applicable codes to the satisfaction of the Town's various code officials.

(6) The removal of the entire System and closure of doors is premature. This might be part of the alternatives a Registered Design Professional would consider. But, as mentioned

above, there may be reasons to retain and repair the existing deck systems even if they no longer serve as a means of egress.

(7) Although the BCAB appreciates that possible alternatives for Units #6 and #8 could involve grade-level egresses on the East and West sides of Building 21, this demand, like Appellants' demands about the rest of the System, implicates other owners who did not participate in this matter. Thus, the potential alternatives for the System will necessarily involve the owners of Units 7A, 6, 8, and the Condominium. (8) The evidence shows that the Building Commissioner has been inspecting other parts of the Condominium. Regardless, it has not been made clear how his inspections of the Condominium complex, pursuant to 780 CMR 110, apart from Building 21 relate to Appellants' interest in Unit 7B.

In addition to those demands, Appellants also argued that the BCAB must consider two other issues: (1) whether any "grandfathering protection" applies for pre-existing structures; and (2) if pre-existing structures were "grandfathered," whether the "grandfathering" was lost over a number of years because of subsequent work that was not permitted in accordance with 780 CMR. Appellant argued that, to determine whether the System complies with 780 CMR, the BCAB must also determine whether parts of the system complied with whatever applicable codes were in existence when those parts were constructed.

As noted above, and as both the evidence and numerous documents Appellants have submitted indicate, the Condominium complex has a long history that begins well before the promulgation of 780 CMR. With respect to Appellants' Unit and the System that has been providing a second means of egress, whatever may have been fully compliant with applicable codes at given times is now largely moot. Even if the BCAB were to continue this hearing and expand the scope to determine all the issues Appellants have been attempting to air, the end results would not change with respect to the second-egress issues to be resolved for Appellants and Building 21.

In sum, The BCAB finds that the System with or without the Catwalk conflicts with the general objectives of G. L. c. 143, § 95 with respect to this particular building. As a result, alternatives must be considered and chosen. To that end, a Massachusetts Registered Design Professional must consider alternatives and apply the Existing Building Code to create a plan acceptable to the Building Commissioner.

As Appellants' testimony and their counsel's representations indicate, however, there may be challenges to getting the issues resolved in agreement with all interested parties. Appellants obviously do not have complete control over effecting necessary changes. At least the three other Units/their owners in Building 21 will have an obvious interest in what happens to the System, what alternatives might be created, and where changes in or to Building 21 might be needed to achieve Code compliance. The Condominium association also likely will have an interest because work that may take place may implicate more than the four unit owners in Building 21 (e.g. who does/pays for what). None of those other potentially interested and possibly aggrieved parties have been directly involved in this proceeding.

Conclusion and Order

Accordingly, based on the evidence before the BCAB, the BCAB **CONCLUDES** that the System does not and cannot be made compliant with 780 CMR to provide a required means of egress from Appellants' Unit 7B in accordance with 780 CMR 102.6.4. The BCAB **ORDERS** that a Massachusetts Registered Design Professional consider alternatives to the System that will comply with 780 CMR, determine alternatives, and her/his written analysis of those alternatives is presented to the Building Commissioner as part of the building permit processes required by 780 CMR.

**SO ORDERED,
BUILDING CODE APPEALS BOARD**

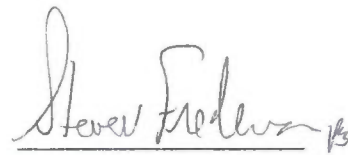
By:



H. Jacob Nunnemacher



Richard P. Crowley, Chair



Steven Frederickson

DATED: August 21, 2019

Any person aggrieved by a decision of the State Building Code Appeals Board may appeal to Superior Court of the Commonwealth of Massachusetts in accordance with M.G.L. c. 30A, § 14 within 30 days of receipt of this decision.