

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

CASE NO.: CVA1 08-10

**STEVEN J. WOLK 2/3 INT &
STEVEN J. WOLK TR 1/6 INT &
HELEN WOLK TR 1/6 INT,**

Appellants,

v.

ORANGE COUNTY, FLORIDA,

Appellee.

Appeal from a decision of the
Special Magistrate for the
Orange County Code Enforcement Board.

Steven J. Wolk, Esquire,
for Appellants.

Edward M. Chew, Assistant County Attorney,
for Appellee.

BEFORE POWELL, STRICKLAND, SHEA, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART

Appellants timely appeal from a second amended order of the Orange County Code Enforcement Board Special Magistrate (CEB), dated March 7, 2008, finding Appellants in violation of certain codes applicable in Orange County, Florida.¹ Specifically, Appellants' 22-

¹ There were three orders entered by the Special Magistrate for the CEB: (1) Findings of Fact, Conclusion of Law, and Order, dated January 14, 2008; (2) Amended Findings of Fact, Conclusion of Law, and Order, dated January 29, 2008; and (3) Second Amended Findings of Fact, Conclusion of Law, and Order, dated March 7, 2008. Appellants' Notice of Appeal addressed the first two orders. We deem the Notice of Appeal to also include the Second Amended Order as well.

unit apartment building was found to be in violation of 1-NFPA 101, 31.3.4.5.1 and 1-NFPA, 101, 31.3.4.1.1, regarding the installation of smoke alarms and fire alarms.² Appellants were advised that failure to timely correct the violations would result in a fine of \$250.00 per violation per occurrence for each day the violation(s) occurred after the stated compliance date. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Appellants contend that the building is exempt from the requirements of the ordinance by virtue of the exception found in 1-NFPA 101, 31.3.4.1.2., and that the fire code provisions may not be applied retroactively since the building was constructed before the subject ordinances were enacted.³ We affirm in part and remand with directions.

The Exception

² The provisions of the Life Safety Code, Pamphlet 101, published by the National Fire Protection Association (NFPA) have been adopted and incorporated by reference into the Florida Fire Prevention Code pursuant to section 633.0215(2), Florida Statutes. Orange County adopted and incorporated by reference the Florida Fire Prevention Code, including such provisions of the NFPA Pamphlet 101, as its fire code pursuant to section 18-32, Orange County Code of Ordinances.

Section 1 NFPA 101, 31.3.4.5.1 states as follows:

In buildings other than those equipped throughout with an existing, complete automatic smoke detection system, approved single-station smoke alarms shall be installed in accordance with 9.6.2.10, as modified by 31.3.4.5.2, outside every sleeping area in the immediate vicinity of the bedrooms and on all levels of the dwelling unit, including basements.

Section 1 NFPA 101, 31.3.4.1.1 states as follows:

Apartment buildings with more than three stories or with more than 11 dwelling units, other than those meeting 31.3.4.1.2, shall be provided with a fire alarm system in accordance with Section 9.6, except as modified by 31.3.4.2 through 31.3.4.5.2.

³ Section 1 NFPA 101, 31.3.4.1.2 states as follows:

A fire alarm system shall not be required where each dwelling unit is separated from other contiguous dwelling units by fire barriers (*see Section 8.3*) having a fire resistance rating of not less than ½ hour, and where each dwelling unit has either its own independent exit or its own independent stairway or ramp discharging at grade.

We find and conclude that there is not sufficient competent evidence to show that the building comes within the exception provided in 1-NFPA 101, 31.3.4.1.2. There is no evidence that Appellants' building meets the first required condition, which is that each dwelling unit be separated from the other contiguous dwelling units by fire barriers having a fire resistance rating of not less than ½ hour. Further, the evidence shows that the second condition is not met. There are ten second floor units which share a common area leading to a single stairway to the finished ground level. To meet the second condition, each of the ten units would have to have an independent stairway or ramp discharging at the finished ground level.

Retroactive Application of Fire Code

After examining the authorities cited by the parties and conducting further research, the Court concludes that for the subject Fire Prevention Code provisions to be applied retroactively, competent substantial evidence must show that there is an immediate and direct threat to lifesafety or property, and that requiring installation as specified would not be arbitrary or unduly burdensome. § 633.025(6), Fla. Stat. (2008); see Blich v. City of Ocala, 195 So. 406 (Fla. 1940); Dublin v. Finkes, 615 N.E.2d 690 (Ohio Ct. App. 1992).

The Hard-Wired Smoke Detector System

The Court finds that there is sufficient competent evidence to support the CEB's finding that the lack of a hard-wired smoke detector system in the remaining ten units "present(s) a threat to the public safety."⁴ The evidence shows that Appellants' installed individual battery smoke detectors in each unit at the time of construction even though there was no county ordinance requiring any kind of fire protection system. This shows that Appellants' deemed such protection necessary. The evidence also shows that battery detectors are not reliable because

⁴ Twelve units damaged by hurricanes in 2005 have already had a compliant hard-wired smoke detector system installed.

unit occupants or maintenance personnel cannot always be relied upon to replace batteries or repair non-functioning detectors. There does not appear to be a complaint by Appellants that installation of new systems in the remaining units would be burdensome.

Consequently, we **AFFIRM** the first paragraph of Part II of the Second Amended Order, dated March 7, 2008. The timeframes for compliance provided in the first paragraph of Part III of the Second Amended Order shall begin to run as of the date of the mandate: (1) within 30 days, Appellants shall secure a proper contract and furnish a copy to the Orange County Fire Marshal; (2) within 60 days, Appellants shall apply for and obtain permits; and (3) within 180 days, Appellants shall complete installation and notify the Fire Department for final inspection and approval.

The Fire Alarm System

We agree with Appellants that there is not sufficient competent evidence to show that there is an immediate and direct threat to lifesafety and property if a code-compliant overall fire alarm system is not installed. The only evidence was the fire inspector's conclusory statement that "[t]his fire code violation is a threat to life and property." It was not shown that the fire inspector was qualified as an expert or lay witness to give such an opinion and she did not state any ultimate facts upon which it was based. See, e.g., Braddock v. School Bd. of Nassau County, 455 So. 2d 394 (Fla. 1st DCA 1984); RCI Services Div./Aetna Cas. & Sur. v. Sisson, 527 So. 2d 824 (Fla. 1st DCA 1988).

Rather than reverse this portion of the CEB's order, this Court relinquishes jurisdiction and **REMANDS** this issue to the CEB. Appellants are directed to file an appeal as to this issue with the Orange County Fire and Life Safety Code Board of Adjustments and Appeals not later than fifteen days following the issuance of the mandate. Evidence may be presented to the board

at a noticed public hearing and a full record may be made on the issues of immediate direct threat and whether the full fire alarm system is burdensome or whether it can be modified to the extent practical to assure a reasonable degree of safety to life and property or a reasonable alternative fashioned as section 633.025(b), Florida Statutes, provides. If Appellants are aggrieved by the board's decision, they still have the right to appeal to this Court.

AFFIRMED IN PART and REMANDED with DIRECTIONS.

DONE and ORDERED at Orlando, Florida this 31 day December ,
2009.

 /s/
ROM W. POWELL
Senior Judge

 /s/
STAN STRICKLAND
Circuit Judge

 /s/
TIM SHEA
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 2 day of Jan , 2010, to the following: **Edward M. Chew, Senior Assistant County Attorney**, Orange County Attorney's Office, Post Office Box 1393, Orlando, Florida 32802-1393 and **Steven J. Wolk, Esquire**, 857 Dover Road, Maitland, Florida 32751-3121.

 /s/
Judicial Assistant