Appeal No.: 01-2020

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE *PUBLIC HEALTH ACT*
R.S.A. 2000 c. P-37 AND THE REGULATIONS

AND IN THE MATTER OF THE APPEAL OF THE ORDER OF AN EXECUTIVE OFFICER ISSUED BY ALBERTA HEALTH SERVICES, NORTH ZONE dated DECEMBER 19, 2019

PANEL**:** Denis Lefebvre, Board Chair
Ike Zacharopoulos, Board Member
Barb Rocchio, Board Member

BETWEEN:	)	
	)	
	)	
100 YEAR CONSTRUCTION LTD.	)	Shannon Lively,
and GLENN TAYLOR	)	Taylor & Company,
(Appellants)	)	for the Appellants
	)	
- and -	)	
	)	
ALBERTA HEALTH SERVICES	)	Jennifer Jackson,
	)	Alberta Health Services,
(Respondent)	)	for the Respondent
	)	
	)	
	)	
	)	Stuart Chambers,
	)	McLennan Ross LLP,
	)	Independent Counsel for the Public Health
	)	Appeal Board
	)	
	)	Heard: January 31, 2020

WRITTEN REASONS OF THE BOARD

A notice of appeal was received on January 2, 2020. This matter came before a panel (the "Panel") of the Public Health Appeal Board (the "PHAB" or the "Board") on January 31, 2020, in Edmonton, Alberta via video and telephone conferencing.

The Appeal

[1] This is an appeal (the "Appeal") to reverse an order of an Executive Officer ("EO") dated December 19, 2019 (the "Order"), or in the alternate, to send the matter back to AHS for further consideration and redetermination under s. 5(5) of the *Public Health Act* (the "Act").

Board Decision

[2] The Panel rendered its decision to vary the Order on March 11, 2020 (the "Decision") following the Panel's review of written submissions of the Appellants dated February 10, 2020 and the written submissions of the Respondent dated February 18, 2020.

[3] As stipulated in the Decision, the written reasons were to follow at a later date. The Panel provides the written reasons as follows.

Background

[4] The subject-matter property is two-storey building (the "Building") in Grande Prairie (the "City"). The Building consists of a mixture of offices and rental dwellings.

[5] The rental dwellings that are the subject matter of this Appeal are units 201, 203 and 205 (collectively referred to as "the Premises").

[6] Sometime in October 2019, one of the tenants residing at the Premises made a complaint to the City. Shortly thereafter, a Safety Codes Officer and the Fire Marshal inspected the Premises. Following this inspection, it was determined that the Premises immediately required inter-connected smoke alarms. Further, the Safety Codes Officer and the Fire Marshal advised the Appellants that tenants could not sleep in rooms that did not have windows to the exterior of the Building.

[7] On December 12, 2019, the Safety Codes Officer contacted AHS to request a joint inspection of the Premises.

[8] On December 17, 2019, the Premises was inspected (the "Inspection") with the EO, the Fire Prevention Officer and the Safety Codes Officer in attendance.

[9] Upon the conclusion of the Inspection, the Order was issued verbally on December 17, 2019 followed by the written Order on December 19, 2019.

[10] The Order states (*verbatim)* as follows:

> **WHEREAS** I, and **Executive Office** of **Alberta Health Services** have inspected the above noted premises pursuant to the provisions of the **Public Health Act,** RSA 2000, c. P-37, as amended.
>
> **AND WHEREAS** such an inspection disclosed that the following conditions exist in an about the above noted premises which are or may become injurious or dangerous to the public health or which might hinder in any manner the prevention or suppression of disease, namely:
>
> a. Bedrooms do not have openable windows

b. Common area hallways does not have an operating smoke alarm

AND WHEREAS such inspection disclosed that the following breaches of the Public Health Act and the Housing Regulation, Alberta Regulation 173/99, and the Minimum Housing and Health Standards exist in and about the above noted premises, namely:

a. Bedrooms do not have openable windows which is a contravention of section 3(b)(i) and (ii) of the Minimum Housing and Health Standards which state: for building of 3 storeys or less and except where a bedroom door provides access directly to the exterior of the suite is sprinklered, each bedroom shall have at least one outside window which may be opened from the inside without the use of tools or special knowledge. (ii) Windows referred to in section 3(b)(i) shall provide unobstructed openings with areas not less than .35 M2 (3.8ft2), with no dimension less than 380 mm (15").

b. Common area hallway does not have an operating smoke alarm which is in contravention of section 3(b)(iv) of the Minimum Housing and Health Standards which state: Notwithstanding section 3(b)(i), (ii) and (iii), alternate provisions for emergency egress may be approved by an executive officer where, after consultation with a safety codes officer, the executive officer2 is satisfied that the alternate provisions provide for means of emergency egress.

AND WHEREAS, by virtue of the foregoing, the above noted premises are hereby declared to be **Closed for Tenant Accommodation Purposes.**

NOW THEREFORE, I hereby **ORDER** and **DIRECT**:

1. That the occupants vacate the above noted premises on or before February 18, 2020.
2. That the Owner immediately undertake and diligently pursue the completion of the following work in and about the above noted premises, namely:
    a. Install openable windows or sprinkler system as per requirements under the Alberta Building Code.
    b. Install and interconnected smoke alarm in the common area hallway as per requirements of City Safety Codes Officer.
3. That until such time as the work referred to is completed to the satisfaction of an Executive Officer of Alberta Health Services, the above noted premises shall remain closed for tenant accommodation purposes.

The above conditions were noted at the time of inspection and may not necessarily reflect all deficiencies. You are advised that further work may be required to ensure full compliance with the Public Health Act and Regulations, or to prevent a public health nuisance.

DATED at Grande Prairie, Alberta, December 19, 2019
Confirmation of a verbal order issued to Glenn Taylor on December 17, 2019.

Adrea Simmons B.Sc, B.EH, CPHI(C)
Executive Officer
Alberta Health Services

[11] AHS consented to staying execution of the Order pending this Appeal, as the Appellants agreed to install interconnected smoke alarms in the common hallway as temporary egress measures and the tenants also agreed not to sleep in bedrooms where there were no windows.

Timing of Appeal

[12] Section 5(3) of the *Public Health Act*[1] requires the Appellant to serve a notice of an appeal in the prescribed form within 10 days after receiving notice of the EO's decision complained of by leaving the notice of appeal at the office of the PHAB Secretariat or AHS.

[13] The PHAB Secretariat received a notice of the Appeal dated January 2, 2020 (the "Notice of Appeal") on that same date. While the Order is dated December 19, 2019, neither party confirmed whether the Appellants received the Order on December 19, 2020. As such, the Panel will assume receipt of the Order on that date. While the period is greater than 10 days, the Panel notes the Secretariat's advice that the government's offices were closed for the holiday season when the Notice of Appeal would otherwise have been due. Ten days from the date of the Order is Sunday, December 29, 2019. The PHAB's offices were closed the following three weekdays, reopening on Thursday, January 2, 2020.

[14] Pursuant to section 22(2) of the Alberta *Interpretation Act*[2], the time for service of the Notice of Appeal was extended to the following day on which the office of the PHAB was open:

> (2) If in an enactment the time limited for resignation of filing of an instrument, of the doing of anything, expires or falls on a day on which the office or place in which the instrument or thing is required to be registered, filed or done is not open during it regular hours of business, the instrument or thing may be registered, filed or done on the day next following on which the office or place is open.

[15] Accordingly, the deadline for service of the Notice of Appeal was January 2, 2020 and was therefore submitted on time.

Grounds of the Appeal

[16] The Appellants advance the following grounds of the Appeal:

(a) The EO committed an abuse of process and/or breach of natural justice in ordering the Appellants to close and vacate unit 205 of the Premises, as she did not actually inspect the unit before issuing the Order. On this basis, the executive officer acted in excess of her jurisdiction under the Act.

(b) In breaching the *Minimum Housing and Health Standards* (the "MHHS"), the Appellants committed an officially induced error of law. As this is recognized defence to regulatory offences, the Appellants should be entitled to a stay of the Order.

(c) The MHHS permits alternative means of emergency egress in tenant accommodation that is three-storeys or less. In light of a variety of factors in this in this case, including the existence of a one–hour fire barrier between the first and second floors of the building and the number of exits from the second floor of

[1] RSA 2000 c p-37.
[2] RSA 2000, c. I-8

the building, the means of egress currently provided by the Appellants should be considered sufficient.

Legal Issues

[17] Based on the aforementioned grounds, the legal issues for consideration by the Panel are as follows:

(a) Whether the Premises' bedrooms comply with the MHHS with respect to emergency egress.

(b) Whether the Appellants can rely on the doctrine of officially induced error of law, and if so, whether the test for officially induced error of law has been made out in the present case.

(c) Whether the EO erred in finding a violation under the Act and the Regulations with respect to unit 205, as she did not actually inspect the unit.

(d) Whether a standard of review is applicable to PHAB hearings. If so, what is the standard of review?

[18] While the fourth issue (at (d) above) was not originally contemplated in the PHAB's Decision, the Appellants have raised the issue of standard of review in its written submissions. The Panel will briefly address that issue first.

Jurisdiction

[19] There are no objections to the Panel's jurisdiction to hear the Appeal.

Documents/Exhibits

[20] Prior to the commencement of the hearing, the following documents were entered as exhibits by agreement of the parties:

(a) Exhibit 1 – Document production of the Appellants divided into 18 tabs;

(b) Exhibit 2 – Copy of Alberta Labour (Work and Safety Division) Director's Interpretation of sentence 3.2.5.13(4) dated September 1992;

(c) Exhibit 3 – Article entitled "NFPA 13 Versus 13R" prepared by the mechanical contractor, fire protection services and pipe fabrication company in Wisconsin, USA, F. Ahern Co, found at: https://www.jfahern.com/blog/2018/01/26/nfpa-13-versus-13r; and

(d) Exhibit 4 – Document production of the Respondent divided into 9 tabs.

Submissions of the Appellants

Standard of Review

[21] The Appellants first make submissions on the standard of review. They submit that since PHAB hearings are *de novo*, the Panel is entitled to make its own findings of fact and the panel is not required to show deference to an EO's order that is being appealed.

[22] Section 5(10) of the Act permits the Panel to exercise the powers and privileges of a commissioner appointed under the *Public Inquiries Act*.[3] This legislation grants commissioners "the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner… consider to be required for the full investigation of the matters[.]"[4]

[23] When faced with similar legislative provisions, the Alberta Court of Appeal confirmed that an appellate administrative tribunal is empowered to conduct *de novo* hearings.[5]

[24] Even though the Panel will conduct a hearing *de novo*, these proceedings are not entirely fresh. In addition to being a trier of fact, the Board also plays the role of an appellate body and must consider the fairness of the proceedings below.[6]

[25] The Appellants take issue with the fairness of the process employed by the EO and argue that she exceeded her jurisdiction under the Act by issuing an Order with respect to unit 205. As such, the Appellants submit that the Order should be reviewable on the standard of correctness.[7]

Submissions of the Appellants

[26] On September 8, 2014, the Appellants obtained a development permit for tenant improvements. Sometime after the permit was issued, an inspector with the City stated that because of the residential apartments on the second floor of the Premises, a one-hour fire barrier would be required between the first floor and the second floor. After the said improvements were completed, a representative of the Fire Department (the "FD") inspected the Premises to ensure compliance with the Fire Code. The Appellants were told that fire extinguishers would need to be installed at each end of the second floor hallway in addition to emergency lighting. The Appellants confirmed that the necessary fire equipment, including emergency lighting, was in fact installed.

[27] The City required other safety measures. Mr. Taylor testified that he was directed to consult with other third party experts as required in order to ensure that the Premises were built in accordance with the Building Code. For example, the Appellants installed subflooring above the crawl space and the mechanical room in the basement. To that end, the Appellants were advised that they would need to obtain engineered drawings, which was done.

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[3] RSA 2000, c P-39

[4] Ibid., s. 4

[5] *Stewart v Lac Ste. Anne (County) Subdivision & Development Appeal Board*, 2006 ABCA 264, paras 9-11

[6] Ibid. at paras 17 and 27

[7] *Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65, paras. 19-20

[28] The Appellants submit that during the renovations, the contractors did extra work to bring the Premises up-to-date with the Building Code, this included, *inter alia*, upgrading the electrical panel for the Premises.

[29] The Appellants argue that during all stages of the renovations up to and including their completion, both the City and the FD inspected the Premises. The FD issued its inspection report in January 2017. The only deficiency per the said report was that fire separation was required underneath the stairwell on the main floor of the Building. Approximately one year later, the Safety Codes Officer issued his inspection report. Except for two relatively minor deficiencies, essentially all of the renovations were approved by the City. The Appellants submit that, since the City and the FD communicated to them that all of the safety requirements were satisfied, the Appellants believed that they had complied with all legal safety requirements.

[30] Sometime in October 2019, shortly after one of the tenants made a complaint to the City regarding the Premises, the Appellants explained that the same Safety Codes Officer who approved the Premises on January 8, 2018, attended the Premises with the City Fire Marshal to conduct an inspection. Following that inspection, the Appellants were advised that the Premises did not comply with the minimal requirements for egress. As a temporary measure to be put in place immediately (as to allow the tenants to continue living in their units), the Appellants were required to install inter-connected smoke alarms in units 201, 203 and 205. Further, the Appellants were advised that the tenants could not sleep in rooms without windows. Mr. Taylor testified that the interconnected smoke alarms were installed in units 201, 203 and 205 in addition to installing the same on the main floor of the Building out of an abundance of caution. Since there were no windows in unit 203, the tenant was required to move out of the Premises. The tenants in units 201 and 205 remained. The Appellants submit that this was the first time they were told by the Safety Codes Officer and the Fire Marshal that the Premises did not meet legal egress requirements.

[31] Shortly thereafter, the Appellants started to review egress requirements for the Premises and had discussions with the Safety Codes Officer and the Fire Marshal. It was the Appellants' understanding at that time that there were only three options: operable windows in each bedroom, a door in each bedroom leading directly to the exterior of the building, or the installation of a sprinkler system. The installation of a sprinkler was, in the Appellants estimation, too costly to make that option viable. The Appellants argue that had they been told that a sprinkler system was required when the Appellants made the application for the renovation permit, they would have installed same during the renovations, as the relative costs at that time would have been manageable. Moreover, they submit that it is fundamentally unfair for AHS to impose the requirements for egress on the Appellants at this time when it would have been much easier and much less costly during the renovations.

[32] Mr. Taylor also testified that it would costs between $5,000 and $10,000 to replace the bedroom windows in units 201 and 205 to meet MHHS egress requirements. It was further explained by Mr. Taylor that he would likely have to replace all the windows of the Premises to ensure that the outside appearance is consistent and aesthetically pleasing. With respect to the windowless bedrooms in units 203 and 205, installing egress windows is impossible due to the fact that those bedrooms share a wall with the adjacent building.

[33] The Appellants submit that, during the December 17, 2019 Inspection, the Safety Codes Officer, the City Fire Prevention Officer and the EO were unable to inspect unit 205. The EO nonetheless included unit 205 in the Order. The Appellants therefore argue that the EO erred in ordering that unit 205 be closed for tenant accommodation.

[34] With respect to alternate egress under s. 3(b)(iv) of the MHHS, the Appellants argue that the EO never properly evaluated the Appellants' proposal for alternate egress. Specifically, the Appellants submit that the installation of the interconnected smoke alarms required to allow the tenants to stay in the units pending this Appeal should be acceptable as alternate egress measures, as the Safety Codes Officer, the City Fire Prevention Officer were the ones who imposed this requirement on the Appellants. The Appellants also argue that the EO cannot determine the requirements for alternate egress under the MHHS, as determining permissible alternate egress is the joint responsibility of AHS and the City.

[35] The Appellants also argue that the EO never adequately explained alternate egress options. The Order, it is argued, left the Appellants with the belief that there were really only two (2) options: (a) sprinklers or (b) operable windows of the proper minimal dimensions for each bedroom.

[36] In their submissions, the Appellants ask that the Panel make findings of fact based on their evidence presented during the hearing. Those facts are summarized at Appendix "A" of the Appellants written submissions and are reproduced here. They are as follows:

(a) The City required the Appellants to install the 1-hour fire barriers in the Building due to the apartments on the second floor.

(b) The City was aware that there were apartments on the second floor of the Building when the development permit application was submitted in September 2014.

(c) The second floor of the Building was inspected by a government entity either before the renovations began or during the renovation process.

(d) The City did not instruct Mr. Taylor to consult with any other government entity before or during the renovations of the Premises regarding requirements that the building needed to satisfy.

(e) The Appellants were first advised that the apartments in the Premises did not meet the legal egress requirements when the Premises were inspected in October 2019.

(f) During the inspection in October 2019, Mr. Taylor had only been told to install interconnected smoke alarms in the affected apartments and had not been told to install an interconnected smoke alarm in the common hallway.

(g) Mr. Taylor was told that there were only three potential means of egress that complied with the Minimum Housing and Health Standards – either the installation of a door in each bedroom leading directly to the exterior of the building, egressible windows that satisfy the Minimum Standards, or the installation of a sprinkler system throughout the entire building.

(h) Alternate means of egress may be approved under section 3(b)(iv) of the Minimum Housing and Health Standards, but AHS's preference is for the affected property owner to propose the alternate means of egress.

(i) An executive officer cannot determine the requirements for alternate egress under the Minimum Housing and Health Standards and determining permissible alternate egress is the responsibility of both AHS and municipalities, including the City.

(j) The Minimum Housing and Health Standards and the Alberta Building Code are inextricably intertwined by virtue of s. 3(b)(iv) of the Minimum Standards, such that City officials are necessary to properly interpret this provision.

(k) Ms. Simmons and Mr. Olsen did not consider whether the doors in the window-less bedrooms that exited directly to the common hallway on the second floor of the Premises could impact the type of alternate egress that could be permitted under s. 3(b)(iv) of the Minimum Standards.

(l) Ms. Simmons and Mr. Olsen did not consider what alternative steps the Appellants could take under s. 3(b)(iv) of the Minimum Housing and Health Standards to satisfy the legal egress requirements before the Order was issued.

(m) Ms. Simmons did not inform Mr. Taylor that an alternate plan for egress could be submitted until after she told him that she would be issuing an Order to close and vacate the apartment units.

(n) With the evidence before the panel, it is unknown what steps the Appellants could take to provide adequate alternate egress under s. 3(b)(iv) of the Minimum Housing and Health Standards.

(o) Mr. Taylor has not yet had an adequate opportunity to discuss alternate egress with AHS and the City.

[37] In summary, the Appellants submit that the Premises were renovated with the approval of both the City and the FD and followed all of the requirements imposed by those two government entities. As such, the Appellants verily believed that the Premises complied with all applicable legal standards, including safety standards. The Appellants submit that since the City and the FD misrepresented to them that all safety standards were met, any error of law made by the Appellants was officially induced. They further submit that all of the elements of the doctrine of official induced error of law are made out and that the Panel should, on that basis, stay the Order.

[38] In the alternative, the Appellants submit that the Premises' second floor safety measures currently in place and approved by the EO are a suitable alternative for emergency egress pursuant to part III, section 3(b)(iv) of the MHHS.

[39] In the further alternative, the Appellants ask that the PHAB send the matter back to AHS for further consideration and redetermination under s. 5(5) of the Act on the basis that AHS did not made a reasonable effort to resolve the dispute with the Appellants before the Order was issued, or after the Notice of Appeal was filed.

Submissions of the Respondent

Preliminary matter – concessions of AHS

[40] Prior to making their submissions, the Respondent addressed three concessions AHS was prepared to make with respect to the Order:

(a) The Order includes unit 205 despite the admitted fact that the EO did not inspect that unit.

(b) The Order states that the common area hallway does not have an operating smoke alarm, which is in contravention of section 3(b)(iv) MHHS. This is an error. There is no requirement in the MHHS for hallway smoke alarms.

(c) During the hearing of this Appeal, AHS consented to an extension of the stay until 30 days after the last of the written submissions were delivered.

[41] The Respondent submits that the first concession was addressed at the hearing on January 31, 2020. It was explained to the Panel that the error existed and it was proposed that the Panel hear evidence with respect to unit 205 nonetheless as the Respondent argues that it was also in contravention of the MHHS.

[42] With respect to the section concession at (b) above, the Respondent asks the Panel to exercise its authority under the Act to reverse only that portion of the Order that addresses hallway smoke alarms. This error on the part of the EO was explained during the hearing. The purpose of it was to ensure that there were temporary measures in place pending the hearing. The error was made in good faith and it should not have the effect of nullifying the entirety of the Order.

[43] With respect to the third concession at (c) above, the Respondent submits that this stay was an agreement based on and undertaking by the Appellants to install hallway smoke detectors on the second floor of the Premises. The Appellants confirmed the hallway smoke detectors were installed on February 4, 2020. It was agreed by both parties that the Appellants would provide their final response submissions on February 24, 2020. The stay is therefore extended by agreement to March 25, 2020.

Submissions of the Respondent AHS

[44] Given the aforementioned concessions, the Respondent argues that the Panel need only to consider whether the Appellants meet the test for officially induced error of law and whether the current means of egress for all three rental units of the Premises meet the requirements under the MHHS.

[45] The Respondent submits the following are the relevant and material facts currently before the PHAB:

(a) No representative of AHS attended the Premises on or before December of 2019, which was confirmed by Mr. Taylor.

(b) No representative of AHS ever made representations to the Appellants about the compliance/non-compliance of the second floor rental units with the Act as confirmed by Mr. Taylor.

(c) The authority of the municipality does not encompass enforcement of the Act or its corresponding regulations, as confirmed by the EO.

(d) Mr. Taylor testified that no representative of the City ever made overt representations to the Appellants to confirm that it was safe to use the second floor of the Premises as rental units. It is clear from the documentary evidence presented by the Appellants that they only ever requested permits to renovate the first floor of the Premises. Any dealings with respect to the second floor rental units were done based on a number of assumptions. The evidence presented at the hearing was simply that the Appellant, Mr. Taylor, assumed that it was acceptable to rent the units out based on the fact that no one ever told him it was not safe to do so until late 2019 and no one ever came to specifically inspect the Premises to his recollection. Mr. Taylor claimed the representatives of the municipality ought to have known it was not safe and that they ought to have involved AHS sooner.

(e) At no time during the Appellants' case did they place blame on AHS's representatives. The focus was on the municipality and the neglect by those individuals to ensure the second floor was up to Code for rental units. Mr. Taylor confirmed this.

(f) The City and AHS are each responsible for ensuring compliance with their own respective legislation.

(g) Evidence presented by Ms. Simmons is that AHS does not examine each and every rental unit in Grande Prairie without the issuance of a complaint. Once a complaint is lodged or the municipality reaches out, AHS will attend at a premises to ensure it complies with the Act and its Regulations. In this case, that happened in December of 2019. As soon as AHS became aware of the potential for an egress issue, it attended the Premises.

(h) Mr. Taylor acknowledges there is non-compliance with the Act and its Regulations with respect to egress from the rental units on the Premises.

(i) Ms. Simmons presented evidence that the rental units on the Premises currently do not meet the requirements for egress in the MHHS.

(j) An alternate solution for egress was discussed by Mr. Taylor and Ms. Simmons on December 17, 2019; Mr. Olsen's (the City's Safety Codes Officer) suggestion to have an engineer develop an engineered plan.

(k) The Appellants were given 30 days (the length of the Order) to bring forward any alternative solutions for egress. AHS was never contacted, as confirmed by the EO.

[46] The Respondent submits that the Appellants have not met their burden of establishing the defence of officially induced error of law.

[47] In *Lévis (City) v Tétreault*[8], the test for proving the defence of officially induced mistake requires:

(a) that an error of law or of mixed law and fact was made;

(b) that the person who committed the act considered the legal consequences of his or her actions;

(c) that the advice obtained came from an appropriate official;

(d) that the advice was reasonable;

(e) that the advice was erroneous; and

(f) that the person relied on the advice in committing the act.

[48] Moreover, the Court in *R v Jorgensen*[9] stated that this defence will only be successful in the clearest of cases.

[49] The Respondent submit that the Appellants' alleged mistake in this matter was not an erroneous belief that they had satisfied the provincial standards under the Act. Rather, their mistake was a failure to recognize and adhere to standards under the Act. The Appellants did not receive advice from any officials on their compliance with the requirements under the Act and its Regulations. As stated in their brief, they were completely unaware of their obligations under the Act. Furthermore, it appears that the Appellants made no attempt to find out what additional requirements they may have to meet. Passive ignorance is not a valid defence.

[50] The Respondent points out that, as noted by the Appellants, the City Bylaw explicitly states that an applicant is responsible for ascertaining and complying with the requirements of any Federal, Provincial, or other municipal legislation. This Bylaw alerts applicants to the fact that they are responsible for additional standards beyond the ones administered by the City. Per *R v Goebel*,[10] the fact that the City allegedly did not bring this particular provision to the Appellants' attention does not excuse their non-compliance. Furthermore, rather than being misled by erroneous advice, the Appellants were actually pointed in the right direction by the Bylaw.

[51] The Respondent argues that Appellants are now attempting to apply the advice they received from the City and the FD to a different legislative standard, applied by a different entity, at a different level of government. As the Appellants did not receive any advice on the issue of whether the Act, its Regulations and the MHHS had been met, they could not have reasonably

[8] 2006 SCC 12 at paras. 22-26
[9] [1995] 4 SCR 55 at para. 37
[10] 2003 ABQB 422 at paras 22, 25 ("*Goebel*")

relied on any such advice. The Respondent submits that, per *Jorgensen*, where no erroneous advice has been given, the excuse of officially induced mistake cannot be relied upon.

[52] The Respondent further argues that even if the City had provided advice to the Appellants on the Act and its Regulations, which is not admitted but denied, this would not have been advice from an appropriate official. The appropriate government officials with regards to the Act are EOs of AHS. That is, the administration of the Act rests with AHS, not the City. The Safety Codes Officer for the City is not an EO pursuant to the Act and is not in any legal position to enforce the provisions of the Act, its Regulations or the MHHS. Any advice on the Act provided to the Appellants by the City's official, it is argued, would have been outside his/her jurisdiction and would merely have been advice and not enforceable statements. In support of their position, the Respondent relies on *Leung v Alberta Health Services,*[11] confirming that the PHAB has no jurisdiction over the findings of a Fire Marshal or the guidelines used by the Fire Marshal. The PHAB refused to consider whether the letter from a fire marshal satisfied the requirements of the Act.

[53] The Appellants rely on *BPCL Holdings Inc v Alberta*,[12] for the proposition that there is a confusing overlap between the MHHS and the Alberta Building Code. However, that Court also confirmed the essential difference between the two regulatory schemes. In *Goebel*, the court stated as follows:

> It is true that there is some conflict between the two Codes, in the sense that the windows comply with one but not the other. It is not the sort of conflict where compliance with one code would be a breach of the other, as it is possible to comply with both. Where a building is subject to several legal minimum standards the owner must comply with all of them. Since they serve different purposes, it is no answer to say that one has been complied with.[13]

[54] Furthermore, the Court confirmed that there is nothing unlawful about a party being asked to modify facilities under the Act even though they may have been compliant with the legal standard in place at the time of construction under the applicable Building Code.[14] The two schemes are distinct and the Appellants are obliged to comply with both.

[55] The Respondent argues that even if past City officials had referred to the Act, the Regulation or the MHHS, the Appellants are not excused from their continuing obligation to comply with the present requirements of the Act. Section 3(1) of the MHHS places a positive duty on the Appellants to comply with the MHHS. That duty exists even if an inspection of the Premises never occurs. Just because an inspection is done does not lower the standards required of an owner, nor does it shift some of the responsibility for repairs to the inspectors. Referring to *Goebel*, the Respondent argues that even if a defect is not noted on an inspection that does not relieve the owner of the responsibility to correct it. The obligation to maintain the building is always on the owner and if the building falls below the standard the obligation to fix it is also on the Owners.

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[11] PHAB Appeal 16-2018 at para 37

[12] *BPCL Holdings Inc v Alberta*, 2006 ABQB 757 at paras 33-34, aff'd 2008 ABCA 153 ("*BPCL*")

[13] *Goebel*, Supra 2, at para. 41

[14] BPCL at para 36

[56] The Respondent argues that, even if the Appellants had met their burden and established a defence of officially induced error, the appropriate remedy would not be a reversal of the Order and a finding that a contravention of the Act did not occur. Typically in criminal cases where the defence is made out, the accused is entitled to a stay of proceedings rather than an acquittal.[15] In those instances, the blame for the error is, in a sense, shared with the state official who gave the erroneous advice. Here, the Respondent argues, if the defence were made out, an appropriate remedy may be a stay of offence proceedings or relief from a penalty imposed under section 73 of the Act. However, the fact would remain that the Premises are not compliant with the Act. The defence of officially induced error may excuse or reduce liability, but it does not make the conditions safe. The Respondent argues that this defence should not be permitted to trump the legislated safeguards enacted to protect renters' lives during a fire. Even if the defence were established, the Order to vacate the Premises should be upheld.

[57] The Respondent states that the facts in this case are that: (1) Mr. Taylor became aware of non-compliance with the Act and the Regulations, (2) the Order was issued, (3) the Order allowed for 30 days for Mr. Taylor to address non-compliance, and (4) Mr. Taylor did not reach out for any further meetings with the EO. The Respondent submits that it is not AHS' duty to come up with a plan pursuant to section 3(b)(iv) of the MHHS. AHS has identified significant issues with egress and Mr. Taylor has acknowledged these deficiencies and then placed blame on the City as to why he has not complied with the Act and its corresponding Regulations and the MHHS. Mr. Taylor has been given every opportunity for consultation with AHS.

[58] In summary, the Respondent submits that the Appellants had not made out the defence of officially induced error of law, and the current means of egress do not comply with the MHHS.

[59] Given the foregoing concessions and submissions, the Respondent proposes to vary the Order as follows:

> **WHEREAS** I, and **Executive Office** of **Alberta Health Services** have inspected the above noted premises pursuant to the provisions of the **Public Health Act,** RSA 2000, c. P-37, as amended.
>
> **AND WHEREAS** such an inspection disclosed that the following conditions exist in an about the above noted premises which are or may become injurious or dangerous to the public health or which might hinder in any manner the prevention or suppression of disease, namely:
>
> a. Unit 201 and 203 each have one bedroom with no window and no other acceptable means of emergency egress[16].
> b. Unit 201 has a second bedroom with a non-openable fixed window and does not provide other acceptable means of emergency egress.
>
> **AND WHEREAS** such inspection disclosed that the following breaches of the Public Health Act and the Housing Regulation, Alberta Regulation 173/99, and the Minimum Housing and Health Standards exist in and about the above noted premises, namely:
>
> a. Unit 201 and 203 each have one bedroom with no window and no other acceptable means of emergency egress which is a contravention of section 3(b)(i) and (ii) of the

[15] *Lévis* at para 25

[16] Note: variances to the Order are underlined.

Minimum Housing and Health Standards which state: for buildings of 3 storeys or less and except where a bedroom door provides access directly to the exterior or the suite is sprinklered, each bedroom shall have at least one outside window which may be opened from the inside without the use of tools or special knowledge. (ii) Windows referred to in section 3(b)(i) shall provide unobstructed openings with areas not less than 0.35 m2 (3.8ft2), with no dimension less than 380 mm (15").

b. Unit 201 has a second bedroom with a non-openable fixed window and does not provide other acceptable means of emergency egress which is a contravention of section 3(b)(i) and (ii) of the Minimum Housing and Health Standards which state: for buildings of 3 stories or less and except where a bedroom door provides access directly to the exterior or the suite is sprinklered, each bedroom shall have at least one outside window which may be opened from the inside without the use of tools or special knowledge. (ii) Windows referred to in section 3(b)(i) shall provide unobstructed openings with areas not less than 0.35 m2 (3.8ft2), with no dimension less than 380 mm (15").

AND WHEREAS, by virtue of the foregoing, the above noted premises are hereby declared to be **Closed for Tenant Accommodation Purposes.**

NOW THEREFORE, I hereby **ORDER** and **DIRECT**:

1. That the occupants vacate the above noted premises on or before March 31, 2020.

2. That the owners immediately undertake and diligently pursue the completion of the following work in and about the above noted premises, namely: Install one openable window in each bedroom, **OR** install a sprinkler system, **OR** other approved means of egress as outlined in the Minimum Housing and Health Standards section 3(b).

3. Pursuant to evidence presented at the hearing of this matter before the Public Health Appeal Board Held January 31, 2020, ensure that unit 205 also complies with requirements for egress as stated above.

4. That until such time as the work referred to above is completed to the satisfaction of an Executive Officer of Alberta Health Services; the above noted premises shall remain closed for tenant accommodation purposes.

The above conditions were noted at the time of inspection and may not necessarily reflect all deficiencies. You are advised that further work may be required to ensure full compliance with the Public Health Act and regulations, or to prevent a public health nuisance.

DATED at Grande Prairie, Alberta, December 19, 2019
Confirmation of a verbal order issued to Glenn Taylor on December 17, 2019.
Order amended _____.

Adrea Simmons B.Sc, B.EH, CPHI(C)
Executive Officer
Alberta Health Services

Analysis and Reasons

Whether a standard of review is applicable to PHAB hearings? If so, what is the standard of review?

[60] For a number of years, the standard of review to be applied by courts on applications for judicial review was dictated by *Dunsmuir*.[17] However, the analysis for determining the standard of review in a judicial review of administrative action under Canadian law has changed after the recent decision in *Vavilov*.[18] With *Vavilov*, the Supreme Court of Canada sought to "...chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision" [emphasis added].[19] The Supreme Court confirmed that the revised framework would continue to be guided by the principles underlying judicial review that the Court articulated in *Dunsmuir*. Further, the Supreme Court confirmed that the revised approach was "informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court".[20]

[61] It is the Panel's view that *Vavilov* does not apply to PHAB appeals. The distinction between the courts and internal appellate tribunals is that the role of the reviewing court is to supervise the tribunal, while the appellate tribunal's role is to carry out an internal appellate function outlined by its governing legislation. The Alberta Court of Appeal has previously stated that "the role of an internal appellate tribunal operating within an administrative structure is significantly different from that of an external reviewing superior courts."[21]

[62] The decision in *City Centre Equities Inc. v Regina (City)*, provides a lengthy and detailed summary of the various approaches taken by Canadian Courts in determining the standard of review to be applied to appellate tribunals. While the Court in that case noted conflicting approaches were taken, there was one common element among the decisions: the intention of the legislature as revealed by statutory interpretation ultimately determines what standard of review an appellate tribunal should apply.[22] It is the Panel's view that *Vavilov* does not change this approach.

[63] Accordingly, it is necessary to review the statutory framework surrounding the PHAB to determine the standard of review that it is to apply during its proceedings. The Act provides no express guidance as to the applicable standard of review. However, section 4 of the Act provides for the duties of the PHAB, stating:

> 4(1) The Board shall hear appeals pursuant to section 5.
>
> (2) The Board may engage the services of persons having special technical, professional or other knowledge to assist it in the hearing of appeals.

[17] 2008 SCC 9 (CanLII), [2008] 1 SCR 190.
[18] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
[19] *Vavilov*, supra at para 2
[20] Ibid., at para 12
[21] Newton v. Criminal Trial Lawyers' Association, 2010 ABCA 399 at para 37
[22] *City Centre Equities Inc v Regina (City)*, 2018 SKCA 43, at para 58. For greater detail surrounding this uncertainty read paragraphs 41 to 57.

[64] Section 5 provides for appeals to the Board from decisions by regional health authorities. Section 5(2) states that a person who is affected by a decision by a regional health authority may appeal the decision. Section 5(11) provides the PHAB the ability to reverse, vary, or confirm the previous decision. Finally, for the purposes of conducting the appeal, section 5(10) states that the PHAB has all the same powers, privileges and immunities of a commissioner appointed under the *Public Inquiries Act*.[23]

[65] The *Public Inquiries Act* provides various powers to the PHAB, including the ability to summon witnesses and documents and compel witnesses to give evidence.[24] The PHAB may also hear representations orally or in writing.[25]

[66] In essence, the PHAB' role is quasi-judicial in nature and does not appear to fulfill the traditional appellate role of reviewing an order for errors. The PHAB is instead tasked with listening to arguments, hearing witnesses, and receiving new evidence.

[67] In *Stewart v Lac Ste. Anne* (County) Subdivision & Development Appeal Board the court determined that a hearing before the Subdivision and Development Appeal Board of Lac Ste. Anne County ("SDAB"), a board with powers under the *Municipal Government Act*, was a hearing *de novo*, despite the words *de novo* not being mentioned in the SDAB's home statute.[26] The Court of Appeal concluded that given the SDAB's mandatory duty to hear appeals, and their ability to revoke, vary or make a substitute order, that the hearing was a hearing *de novo*. Given the similarity between these two statutes, the PHAB's hearings are also likely *de novo*.

[68] Previous PHAB decisions have also stated that the appeal hearing is a *de novo* hearing, noting the use of evidence and requirement of witnesses.[27] Moreover, a previous provincial court decision further supports the conclusion that the hearing is *de novo*. In *R. v Beusekom*, the court, in reviewing the PHAB's decision on an appeal of an EO's order and in commenting on the Act stated that, "[t]here is only one appeal from an administrative order and that appeal is the *de novo* process heard by [the PHAB]."[28]

[69] Therefore, a standard of review is not applicable to internal appellate tribunals. Rather, the legislative intent of the Act is to have the PHAB provide a *de novo* hearing for the Appellants.

Whether the Premises' bedrooms comply with the Minimal Housing and Health Standards (the "MHHS") with respect to emergency egress.

[70] The bedrooms that are of concern here are in units 201 and 203 (the "Units"). The Panel will comment on unit 205 below.

[23] Supra note 3.
[24] Ibid. at ss 4 and 5
[25] Supra note 21 at s. 5(7)
[26] *Stewart v Lac Ste. Anne (County) Subdivision & Development Appeal Board*, 2006 ABC A 264
[27] See Public Health Appeal No.: 15-2015 at page 4; Appeal No.: 15-2018 at para 10.
[28] *R v Beusekom*, 2003 ABPC 158, at para 143.

[71] According to Part III, section 3(b), of the MHHS, an owner of residential rental premises must provide adequate emergency egress in each bedroom. That section reads as follows:

> 3. Safe and Secure
>
> (a) **Locking Window and Door Hardware**
> Exterior windows and doors shall be capable of being secured.
>
> (b) **Emergency Egress**
>
> **(i)** For buildings of 3 storeys or less and except where a bedroom door provides access directly to the exterior or the suite is sprinklered, each bedroom shall have at least one outside window which may be opened from the inside without the use of tools or special knowledge.
>
> **(ii)** Windows referred to in section 3(b)(i) shall provide unobstructed openings with areas not less than 0.35 m2 (3.8ft2), with no dimension less than 380 mm (15").
>
> **(iii)** If the window referred in section 3(b)(i) is provided with security bars, the security bars shall be installed so they may be opened from the inside without the use of any tools or special knowledge.
>
> **(iv)** Notwithstanding section 3(b)(i), (ii) and (iii), alternate provisions for emergency egress may be approved by an executive officer where, after consultation with a safety codes officer, the executive officer is satisfied that the alternate provisions provide for means of emergency egress.

[72] The Building is three (3) storeys or less and, according to the evidence before this Panel, neither of the bedrooms in the Units provide access directly to the exterior, nor are the Units sprinklered. Further the evidence presented by both the Appellants and the Respondent confirm that the windows in the Units cannot be opened, and one of the bedrooms have no windows at all. Therefore, the Units are not in compliance with the MHHS.

[73] Section 3(b)(iv) stipulates that notwithstanding the fact that there are no doors that provide access to the exterior of the bedrooms, there are no sprinklers in the Units, or the bedroom windows cannot be opened, alternate provisions for emergency egress may be approved by an EO where, after consultation with the Safety Codes Officer, the EO is satisfied that the alternate provisions for means of emergency egress are satisfactory.

[74] Both parties acknowledge that there were some discussions after the Inspection regarding alternate egress. In fact, the evidence shows that the FD and the City imposed temporary egress measures in order to allow a stay of the Order pending this hearing. Those measures include the installation of interconnected smoke alarms between each of the unit of the Premises and the hallway of the 2nd storey of the Building.

[75] The Appellants argue that the said measures meet the alternate egress requirements under section 3(b)(iv) of the MHHS. The Appellants also argue that the EO cannot determine the requirements for alternate egress under the MHHS, but that determining permissible alternate egress is the responsibility of both AHS and municipalities, including the City. Moreover, the Appellants argue that installing new windows and/or a sprinkler system would be too expensive at this point. None of these arguments is acceptable to the Panel.

[76] Firstly, the EO testified that the temporary egress measures do not constitute appropriate alternate provisions for emergency egress. The Panel is satisfied with the EO's evidence on this

point. Secondly, the clear wording of section 3(b)(iv) of the MHHS grants exclusive authority to EOs to determine if, after consulting with the Safety Codes Officer, alternate egress provisions are approved. The fact that an EO may consult with the Safety Codes Officer does not in any way impose joint responsibility between AHS and the City. Only the EO has authority under the Act. Finally, the fact that egress windows and/or sprinklers may be cost prohibitive is irrelevant to the obligations of the Appellants to adhere to the Act, the Regulations and the MHHS.

[77] Based on the evidence and submissions of the parties, the Panel finds that the Units' bedrooms do not comply with the egress requirements under the MHHS.

[78] The Panel also finds that, while it is clearly the Appellants' responsibility to comply with the MHHS and to submit alternate egress plans to the EO for consideration, the EO missed an opportunity to fully explore the educational aspect of her role and more could have been done to ensure that the Appellants fully understood the option for alternate egress and include the same in the Order.

Whether the Appellants can rely on the doctrine of officially induced error of law, and if so, whether the test for officially induced error of law has been made out in the present case.

[79] The Appellants have raised the defence of officially induced error of law in their submissions. The defence of officially induced error of law is available to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law.[29] The criteria required to make out the defence of officially induced error of law has been distilled into the following six elements:

(a) that an error of law or of mixed law and fact was made;

(b) that the person who committed the act considered the legal consequences of his or her actions;

(c) that the advice obtained came from an appropriate official;

(d) that the advice was reasonable;

(e) that the advice was erroneous; and

(f) that the person relied on the advice in committing the act.[30]

[80] The law applicable to this defence is not in dispute as between the parties. However, it is the Panel's view that this defence does not apply in these circumstances for three (3) reasons. First, the Appellants were not given any advice. Second, there was no "appropriate official" providing said advice. Finally, even if the Appellants proved the defence, the MHHS still require the Appellants to comply with the Order – in other words, it would protect them from enforcement, but not compliance.

[29] *R v Cancoil Therman Corporation and Parkinson*, 1986 Can LI I 154 (ON CA).
[30] *Lévis (Ville) c Tetreault*, [2006] 1 SCR. 420.

[81] The tenor of the Appellants' argument is that the City and the FD had a duty to advise the Appellants of the work that needed to be done to comply with the MHHS. In other words, the argument is that these inspectors failed to provide important information and guidance, and therefore, implied to the Appellants that the Premises was in compliance with the MHHS.

[82] The Appellants do not allege that the City or the FD told the Appellants that they complied with the MHHS. The Appellants are relying upon the City's and FD's opinions on building codes, and upon their silence as to any other legal requirements. The Appellants took this advice to imply an opinion on the overall lawfulness of the Premises, apparently including the MHHS.

[83] However, the City and FD did not actually provide any advice or opinion. It appears clear from a reading of the test for this defence that some form of positive advice or opinion is required. In the Panel's view, inducement by omission would not satisfy the requirement to obtain advice from an appropriate official.

[84] The Respondent is correct to submit that, as the owners of the building, the Appellants are responsible for maintaining the Premises to all applicable legal standards, not the City or FD.[31] Therefore, any alleged omission or opinion on building codes from the City and FD cannot fulfill the requirement of advice for this defence.

[85] The Appellants contend that the City and the FD were the appropriate officials to consult about the statutory framework applicable to rental housing. While both the City and the FD are subject to provincial legislation, neither is subject to the Act nor do they have any authority thereunder, and as such, are not officials responsible for the administration or enforcement of that law.

[86] The PHAB has no jurisdiction over any findings of the City or the FD, nor are these the entities the Appellants should have sought advice from regarding the MHHS.

[87] The Appellants also fail to acknowledge the various duties incumbent on them as owners under the MHHS. The Respondent correctly points out that these duties exist even if an inspection of the Premises had never occurred.[32] Section 3 of the *Housing Regulation*[33] sets out various requirements an applicant must adhere to. Section 4 also places a positive duty on the owner of a premises to comply with the MHHS. Based on these sections, the Appellants have a legislated duty to maintain the Premises in accordance with the *Housing Regulation* and the MHHS. Should the Premises fall below these standards, the obligation to correct the issues is on the Appellants. As such it is the Appellants, not the inspectors, who must ensure the Premises comply with the MHHS. A defect missed during an inspection does not alter that duty.[34] Therefore, even if the defence of an officially induced error of law is available (which for the reasons given, is not the case), the Appellants must still comply with the Order.

[31] *R v Goebel*, 2003 ABQB 422, at paras 22 to 28 ["*Goebel*"].
[32] *Goebel* note 29 at para 25
[33] Alta Reg 173/1999
[34] *Goebel* note 29 at para 28

Whether the EO erred in finding a violation under the Act and the Regulations with respect to unit 205, as she did not actually inspect the unit.

[88] At the outset of the submissions, AHS made some concessions (see paras. 40 to 43 above). The Panel appreciates those concessions; errors can occur and it is appropriate and desirable to correct them as soon as possible.

[89] Per the EO's own admission, she did not inspect unit 205. Rather, she relied on the information provided to her by the City's Safety Codes Officer. Consequently, the Panel finds that the EO erred in including unit 205 in the Order. However, based on the evidence presented at the hearing, the Panel would like to remind the Appellants that while the EO should not have included unit 205 in the Order, it would be practical and prudent for the Appellants to make sure that the bedrooms in unit 205 also comply with the MHHS.

[90] This is also another learning opportunity. The Panel says "another" because of the PHAB's findings in Appeal 04-2019 where the Panel was critical of the EO's reliance on assumptions to find violations under the MHHS. As stated in the written reasons in Appeal 04-2019, EOs must only rely on facts and evidence, not assumptions or hearsay, as is the case here. It is also worth reminding that EOs have a tremendous amount of authority pursuant to the Act. That authority must be used judiciously and firmly within the four corners of the Act, the Regulations and the MHHS. To do otherwise erodes public confidence in the important work of EOs and AHS.

[91] With respect to lack of operating smoke alarms in the common area hallways (see para. 42 above), the Panel accepts the explanation of the Respondent and there is no need to address that issue in these written reasons, especially since it was not included in the grounds of the Appeal.

Findings and Conclusion

[92] After reviewing the evidence and submissions made by the Parties, the Panel makes the following findings:

(a) The standard of review does not apply to this Appeal.

(b) The Premises' bedrooms in units 201 and 203 do not comply with the *Minimum Housing and Health Standards.*

(c) The doctrine of officially induced error of law is not applicable in the circumstances. The doctrine cannot be relied upon to circumvent compliance with safety requirement under the *Minimum Housing and Health Standards*.

(d) Even if the Panel is incorrect in its assessment of the applicability of the doctrine, its six-part test is not made out. Specifically, neither the City of Grande Prairie nor the Fire Department has statutory authority to enforce or make representations

with regards to the *Public Health Act*, the Regulations thereunder or the *Minimum Housing and Health Standards*.

(e) The Panel finds that the Executive Officer did not adequately explain alternative measures for egress.

(f) The Panel also finds that the Executive Officer erred in including suite 205 in the Order without having inspected the same.

(g) The Order shall therefore be varied (the "Varied Order").

[93] The Panel accepted the recommended form of Varied Order prepared by the Respondent. However, the Panel further directed that the preamble of the Varied Order include the temporary egress measures put into place as to allow a stay of enforcement of the Order in the first instance. Further the enforcement of the Varied Order was also stayed until 30 days after the Panel's decision was served upon the parties.

[94] The Varied Order shall remain in place until it is rescinded by Alberta Health Services in accordance with the *Public Health Act.*

[95] The Panel would like to thank both Parties for the respectful manner in which the hearing proceeded and for their written submissions, which were very helpful to the Panel when preparing these written reasons.

Original Signed
Denis Lefebvre, Chair
On behalf of the Hearing Panel of
the Public Health Appeal Board

Date: June 3, 2020