

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE PUBLIC HEALTH ACT,
CHAPTER P-37, R.S.A. 2000
AND ITS REGULATIONS

IN THE MATTER OF STAY APPLICATION TO
THE CHAIR OF THE PUBLIC HEALTH APPEAL BOARD
BY WILLIAM KULSKY
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 1 SOUTH
DATED AUGUST 5, 2016 ("Order")
STAY HEARING HELD SEPTEMBER 16, 2016

Appearances

William Kulsy, Owner/Appellant

Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent

Chair of Board's Decision

The Chair has decided not to grant a stay of the Order dated August 5, 2016.

Introduction

The Order was issued pursuant to the *Public Health Act*, the *Housing Regulation* and the *Minimum Housing and Health Standards* regarding a residential property located at 1, 6408 4 Street N.E. Calgary, Alberta ("Property").

The Order required the Owner to do some remedial work on the Property and also to:

- a. Hire the services of a professional remediation company that specializes in hazardous materials remediation to clean the house of fentanyl contamination. Cleaning of the house must be completed in such a manner that protects the general public and future occupants from fentanyl contamination during and after the cleanup.
- b. Submit a remediation plan to an Executive Officer of Alberta Health Services for approval and acceptance prior to undertaking any clean-up at house.
- c. Provide documentation of all work completed to an Executive Officer of Alberta Health Services.

The Appellant received verbal confirmation of the Order on July 29, 2016. The written Order was dated August 5, 2016.

The Board received the Notice of Appeal August 24, 2016. The Board decided it was reasonable in the circumstances to hear the appeal.

The appeal hearing dates have been set for October 12 and 13, 2016.

The stay hearing was held on September 16, 2016 by way of a telephone conference.

Issue

Whether a stay of the Executive Officer's Order dated August 5, 2016 ought to be granted.

Appellant's Submissions

The Appellant requested that all items/repairs in the Order be stayed. He stated that most of the work required in the Order (except for a, b and c below) had been completed and he did not disagree with the Order. His appeal was regarding Alberta Health Services not acknowledging his second remediation plan in a timely fashion. He was in a holding pattern due to their tardy response.

However, the Appellant also stated the requirement set out in (a) of the Order below, was objectionable:

- a. Hire the services of a professional remediation company that specializes in hazardous materials remediation to clean the house of fentanyl contamination. Cleaning of the house must be completed in such a manner that protects the general public and future occupants from fentanyl contamination during and after the cleanup.
- b. Submit a remediation plan to an Executive Officer of Alberta Health Services for approval and acceptance prior to undertaking any clean-up at house.
- c. Provide documentation of all work completed to an Executive Officer of Alberta Health Services.

The Appellant submitted he would suffer irreparable harm if the stay was not granted as his livelihood involves travelling the world to areas where thorough background checks are conducted. The Order could affect a country's decision to grant him permission to work. He submitted the Order could result in him being placed on a no fly list.

The Appellant is in the safety analysis/compliance business and the Order may affect him professionally as his name was associated with an alleged health risk. An inference could be drawn that he was responsible for the contamination and that he was a poor judge of tenants.

Finally, the Order resulted in a Notice of Health Hazard being registered on the title to the Property and this could affect his credit rating, his mortgage financing, including not being able to obtain financing on good terms, reduce the property value by as much as 10 to 20% and prevent him from selling or renting the Property.

Alberta Health Services' Submissions

Counsel for Alberta Health Services submitted that the test for a stay is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Other case law was provided as well.

Counsel submitted that the Appellant has the burden of proving the irreparable harm he would suffer if the stay was not granted. The irreparable harm could not be conjecture and must not be quantifiable. He stated the Appellant failed to prove irreparable harm and that all his submissions regarding irreparable harm were conjecture and quantifiable.

Counsel provided thorough and extensive arguments regarding quantifiable harm and the assessment of the balance of inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted.

Reasons

The Chair or Vice-Chair of the Board is empowered to grant a stay pursuant to section 6 of the *Public Health Act*. This section states:

An appeal taken pursuant to section 5 does not operate as a stay of the decision appealed from except so far as the chair or vice-chair of the Board so directs.

A stay postpones the enforcement of the Order until the appeal is heard and decided by the Board. The test for whether a stay should be granted is set out by the Supreme Court of Canada in *RJR- MacDonald*. It is a three-part test:

1. Is there a serious question to be tried?
2. Would the Appellant suffer irreparable harm if the stay was not granted?
3. Assess the balance of inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted. In this part of the test the inconvenience of other parties may be considered as well as the public's interest.

Application of the test

Is there a serious question to be tried? This part of the test has a low threshold and can be met if the appeal is not frivolous or vexatious. Although this part of the test has a low threshold many of the Appellant's submissions did not support his position that there was a serious question to be tried. The Appellant stated he did not disagree with the Order but was unsatisfied with the slow process for obtaining approval for the second remediation plan he submitted. However, at one point he did appear to question the work that was required to be completed regarding the possibility of drug contamination.

In addition, his Notice of Appeal included many grounds of appeal. For these reasons, the Appellant has met the first part of the test to grant a stay.

The second part of the test is whether the Appellant would suffer irreparable harm if the stay was not granted.

The Appellant submitted that his livelihood may be affected for two different reasons. The first was his ability to travel could be affected because access to other countries may be denied and he may be placed on a no fly list. The second reason was that clients who hire him to test products for safety concerns may judge him negatively as the Order relates to safety issues.

The Appellant also submitted he may suffer harm as the Notice of Health Hazard and the Order could affect the value of the Property, his credit rating, mortgage financing and the ability to rent or sell the Property.

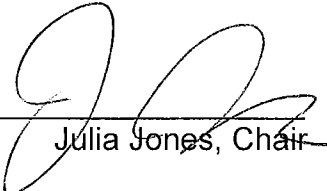
These types of potential harm would be the result of the Order being issued and not the result of a stay not being granted. A stay would not prevent this potential harm as the Order would continue to be in existence as would the potential for negative inferences as described by the Appellant. A stay would merely suspend the enforcement of the Order until the Board heard the appeal, it would not remove or negate the Order or the Notice of Health Hazard. The potential harm that the Appellant may suffer was speculative and would not be prevented with a stay of the Order.

If the Appellant is successful in his appeal and the Board reverses or varies the Order that may assist the Appellant in addressing his concerns about the harm he may suffer but this would not be accomplished with a stay. The Appellant has not shown that he would suffer irreparable harm if the Order was not stayed.

The third part of the test requires an assessment of the inconvenience to the Appellant if the stay is not granted and the inconvenience to the Respondent if the stay is granted. This analysis is not required as the Appellant has not shown that he would suffer irreparable harm if the stay was not granted.

For the above reasons, the Chair of the Public Health Appeal Board has not granted a stay of the Order dated August 5, 2016.

Per: _____



Julia Jones, Chair

Date: September 29, 2016