

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 1350647 ALBERTA
LTD. OF THE ORDER OF AN EXECUTIVE OFFICER ISSUED BY
ALBERTA HEALTH SERVICES ZONE 4, EDMONTON, ALBERTA
DATED MAY 28, 2018

DECISION OF THE BOARD

Date of Appeal Hearing

July 12, 2018

ATB Place North, 10025 Jasper Avenue, Edmonton

Sitting for the Public Health Appeal Board (the “Board”):

Denis Lefebvre, chair
Wendy Lickacz, vice-chair
David Rolfe, member
Barbara Rocchio, member

Board Decision

[1] The Board confirms the Order dated May 28, 2018 for the reasons provided below.

Background

[2] The premises that are the subject matter of this appeal are located at 9517 103 Avenue NW in Edmonton (the “Premises”). The owner is 1350647 Alberta Ltd. and is represented by Amedeo Pagliuso (the “Owner” or the “Appellant”).

[3] On May 9, 2018, Executive Officer (“EO”) Mr. Alaa Farhat of Alberta Health Services (“AHS”) had a conversation with the Appellant that a complete site inspection would be conducted on the Premises on May 17, 2018 at 11:00 AM (the “May Inspection”).

[4] Following the May Inspection, an order was issued on May 28, 2018 (the “Order”) by the EO and was posted on the entrance of the Premises. The Order was also emailed to the Appellant as well as sent via registered mail.

[5] The Order required the tenants to vacate the Premises on or before June 29, 2018 and required the Owner to immediately undertake the completion of a list of work in the Premises (the “Work”). As part of the Work, the Owner was ordered to retain the services of an Environmental Consultant and complete asbestos and mould testing prior to commencement of the repairs. Finally, the Order stated that the Premises would remain closed for tenant accommodation purposes until such time as the Work was completed to the satisfaction of the EO. A copy of the Order is found at Exhibit 1.

[6] On June 8, 2018, the PHAB Secretariat received a notice of appeal (the “Notice of Appeal”).

[7] On July 9, 2018, a follow-up inspection (the “July Inspection”) was conducted at the Premises. EOs Allen, Farhat and Dong were in attendance, as were the Owner and Mr. John Lazaruk from the City of Edmonton. The report for the July Inspection is found at Tab 4 of Exhibit 3.

Timing of the Appeal

[8] Section 5(3) of the *Public Health Act* (the “Act”) requires that the Appellant serve the Notice of Appeal within 10 days after receiving the Order.

[9] The Order was served on May 28, 2018. The PHAB Secretariat received the Notice of Appeal on June 8, 2018. The Notice of Appeal was therefore received on time.

Jurisdiction

[10] There are no objections to the Board’s jurisdiction to hear the Appeal.

Documents/Exhibits

[11] The following documents were entered as exhibits:

- (a) **Exhibit 1:** Copy of the Order
- (b) **Exhibit 2:** Copy of the Notice of Appeal
- (c) **Exhibit 3:** Binder containing documents/submissions of the Appellant
- (d) **Exhibit 4:** Binder containing documents/submissions of the Respondent
- (e) **Exhibit 5:** AHS Guideline “Mould Assessment and Mould Remediation in Buildings”, Document # GUI-0004-201708

- (f) **Exhibit 6:** Occupational Health and Safety bulletin entitled “Asbestos Exposure in the Demolition and Renovation Industries: OHS information for employers and workers”

Legal Issues

[12] Based on the materials before the Board, the legal issues for consideration are as follows:

- (a) Whether the EO was justified in requiring the closure of the Premises for tenant accommodation; and
- (b) Whether asbestos testing and mould testing are required.

Submissions of the Appellant

[13] The Appellant explained that it was his understanding that the main reasons for the Premises being ordered closed for tenant accommodation were related to the unauthorized use of basement area. Among other things, the basement bedroom did not meet the minimal standards for emergency egress. The Appellant states that, while he agrees that the basement should not be used as a bedroom, said use was entirely without his knowledge or consent. Further, the issues arising from the use of these non-designated areas should have been resolved by simply asking the tenants to relocate to the bedrooms on the second floor. The Appellant pointed to sworn affidavits found at Tab 2 of Exhibit 3, whereby the deponent tenants, Ms. Gail Yalte and Mr. Matthew Yalte-Lauder, confirm that the Appellant had designated the basement as storage only and that all designated bedrooms were located on the second floor. The Appellant argues that had the tenants simply relocated to the second floor bedrooms, the remaining issues cited in the Order would be insufficient to order the Premises closed for tenant accommodation.

[14] During the July Inspection, the EO suggested that one way to ensure that the basement is not used as a bedroom is to permanently seal off that section of the basement. The Appellant stated that he agrees with this suggestion.

[15] As at the July Inspection, the Appellant submits that all 35 issues cited in the May 28, 2018 Order have already been corrected with the exception of item g., which reads, “the main floor southeast bedroom ceiling and drywall showed evidence of water damage.” The Appellant only decided to leave those areas unrepaired as a visual reference for the extent of the water damage.

[16] While the July Inspection cited additional items not present in the Order, the Appellant submits that all items in the Order have been corrected except for item g. as stated above.

[17] With respect to the second issue (which covers paragraph 2 of the Order), the Appellant argues that the requirements for extensive and costly third-party testing for asbestos and mould as well as the removal of water-damaged materials are unfounded because the EO has not performed any testing nor has he taken any samples to establish the presence of a nuisance with

respect to asbestos or mould as contemplated at s.59(2)(d) and (e) of the Act. The Order itself, it is argued, lists no citations for asbestos or mould and no evidence has been provided to show that asbestos or mould is present on the Premises. Instead, the Order seeks to shift the cost and burden of establishing the presence of a nuisance to the property owner.

[18] Further, the Appellant submits that the materials that have been identified as water-damaged do not affect the structural integrity of the building and therefore do not require removal. Repairs to these materials can be accomplished by using non-invasive surface treatments such as cleaning, drywall mudding, and painting. This repair method avoids the potential risk associated with the removal of building materials.

[19] The Appellant argues that the Order should be reversed because he was not given the opportunity to correct any of the issues that were of concern to the EO (especially the use of the basement as a bedroom) and because the requirement for asbestos and mould testing is not appropriate.

Submissions of the Respondent

[20] There is a significant history of AHS's involvement with the Premises dating back to 2008. AHS explained that in May of 2018, the Residential Living Governance Committee (the "RLGC") identified the Premises as one that would fall under its watch. The RLGC is a multi-agency committee that is comprised of agencies such as Occupational Health and Safety, AHS, the Edmonton Fire Department, and the Edmonton Police Services ("EPS"), among others. The RLGC established a formal process through which various agencies work together to deal with properties that have had multiple complaints and cause on-going concerns for the City of Edmonton. Over the years, the City has received calls from residents regarding the Premises and the EPS has noted continued safety issues.

[21] As part of the RLGC's list of properties to inspect, the Premises were inspected on May 17, 2018. Present at the May Inspection was AHS, members of the EPS, City of Edmonton Development and City of Edmonton Bylaw Officer.

[22] During the Inspection, the EO observed several violations of the *Minimum Housing and Health Standards* (the "MHHS") including strong offensive odors, animal urine and feces throughout the Premises, extensive water damage, lack of functional smoke alarms, and a lack of electrical cover plates. There was also evidence that the basement bedroom was being used, despite representations by the Appellant to the contrary. Details of the EO's observations are provided in a report found at Tab 21 of Exhibit 4. Photographs were also taken during the Inspection. Those photos are found at Tab 22 of Exhibit 4. Given the numerous infractions observed and the health risk they posed, the EO issued the Order.

[23] AHS returned to the Premises on July 9, 2018. The July 2018 Inspection listed a number of issues that needed to be addressed before the Order could be rescinded. The EO's report with respect to the July 2018 Inspection is found at Tab 4 of Exhibit 3.

[24] With respect to the requirement for asbestos testing, AHS explained that any house built prior to 1990 poses a greater risk that asbestos may be present. As such, fibres may be released if building materials containing asbestos are disturbed. Given the nature of some of the Work required per the Order, asbestos testing was required to determine the presence of asbestos prior to commencement of the Work. If asbestos is found, then appropriate abatement protocols must be employed.

[25] EO Allen stated that it is the duty of the owner not AHS to determine that a nuisance such as mould or asbestos is not present prior to the commencement of the Work. AHS further submits that mould testing is required because of the extent of the water damage, which could lead to the accumulation of mould that could be harmful to public health. According to the EO, it is standard practice to require the owner to hire a consultant to conduct mould testing when there is evidence of significant water damage, which is the case here. AHS also submits that it is the responsibility of the Appellant to ensure that the Premises comply with the MHHS.

[26] AHS argues that the Premises are a public place as defined at s. 1(ii) and (viii) of the Act. As such, the EO is authorized to enter upon the Premises for the purposes of conducting an inspection pursuant to s. 59 of the Act. The purpose of the Act and its Regulations is to prevent harm by imposing minimum standards of care, which is essential for the protection of vulnerable parties. The Act and its Regulations (including MHHS) serve to protect the public in various situations, including tenants who occupy rental premises. The stated primary objective of the MHHS is to “protect and promote the health and well-being of occupants of rental housing premises and of those who may reside in the immediate vicinity of such premises.”

[27] The Respondent also submits that individuals who participate in activities that are regulated must accept the responsibilities inherent to that role as explicated in *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at para 229. As such, the Owner has a positive obligation to comply with both the *Housing Regulation* and the MHHS.

Analysis and Reasons

[28] The Appellant does not dispute the authority of AHS to enter upon the Premises pursuant to the Act, nor does he dispute the Work required as evidenced by the fact that, based on the July 2018 Inspection, the Owner had already complied with most of the Work pursuant to the Order. As stated in his submissions, the Appellant challenges AHS’s justification for the closure of the Premises to tenant accommodation purposes as well as the requirement for asbestos and mould testing.

Closure for Tenant Accommodation

[29] There are instances where it is possible for repairs to be conducted while the tenants continue to reside in the home. This is not the case here. The EOs, Farhat and Allen, testified that closure of the Premises was required because of the extent of the Work as a whole. Even if the tenants were relocated to the second floor bedrooms, not having access to the kitchen and washrooms on the first floor while the Work is underway is neither safe nor sanitary and is

contrary to the MHHS. The photos found at Tab 22 of Exhibit 4 are quite telling, as are the notes prepared by the EO and the list of offences per the Order.

[30] The Board cannot accept the Appellant's argument that the remaining issues cited in the Order (once the tenants are relocated to the second floor bedrooms) are insufficient to order the Premises closed for tenant accommodation.

[31] It is also noted that the Order gave the Owner 30 days to bring the Premises to acceptable standards as to avoid closure for tenant accommodation.

Mould and Asbestos Testing

[32] The Appellant argues that AHS has not proven the presence of mould or asbestos, and that AHS should be responsible for conducting the necessary tests to determine the presence of harmful mould particles and asbestos. The Board cannot accept this argument.

[33] Owners are responsible to ensure that "all rooms including other areas used in common by the occupants of a housing premises must be maintained in a clean and sanitary condition" (MHHS, page 3). Further, owners of rental properties must be able to demonstrate, to AHS's satisfaction, that those tenant accommodations are in compliance with the MHHS. It therefore follows that AHS, upon lawful entry and inspection of tenant accommodations under Section 59 of the Act, may issue an order for third party testing when there are sufficient grounds to believe that a nuisance, such as mould or asbestos, is present.

[34] While EO Allen did not detect the presence of moisture or mould at the time of the July 2018 Inspection, the EO found evidence of significant water damage during the May Inspection. During questioning by panel members, the EOs testified that the water damage in the Premises spanned three floors and fell within the category of damage found at page 5, paragraph f) of the AHS Mould Assessment and Remediation in Buildings Guideline (see Exhibit 5).

[35] Because of the extent of the water damage, the expected remediation would require the removal of affected drywall. And, given the age of the Premises (built prior to 1990), it is possible that asbestos may be present in the building materials. As such, it is essential that asbestos testing be undertaken before renovations/remediation can begin (see Exhibit 6).

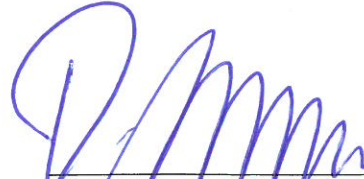
Decision of the Board

[36] Based on the submissions of the parties and the evidence presented, the Board finds that:

- (a) the EO was justified in requiring the closure of the Premises for tenant accommodation; and
- (b) the requirement for asbestos and mould testing is appropriate in the circumstances.

[37] Accordingly, the Board hereby confirms the Order dated May 28, 2018.

[38] The Order remains in force until it is rescinded by AHS.



Denis Lefebvre, Chair
On behalf of the Public Health
Appeal Board

Date: August 31, 2018