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 A PRELIMINARY APPLICATION
BY ALBERTA HEALTH SERVICES
AND AN APPEAL TO THE PUBLIC HEALTH APPEAL BOARD
BY 1443028 ALBERTA LTD, GOHAR TASNEEM,
HOME PLACEMENTS SYSTEMS, SARAH FASSMAN,
AND GOHAR (CARMEN) PERVEZ
OF THE ORDER OF AN EXECUTIVE OFFICER
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED AUGUST 27, 2015
HEARING HELD OCTOBER 20, 2015

Appearances
Gohar (Carmen) Pervez, Appellant (Respondent in the Preliminary Application)
Shairose Esmail, for the Appellants

Ivan Bernardo, Legal Counsel, Alberta Health Services/Respondent
(Applicant in the Preliminary Application)
Terry Treiber, Articling Student, Alberta Health Services/Respondent

Preliminary Application

Decision
The Board will hear and decide the appeal of the Order dated August 27, 2015 notwithstanding that the Order was rescinded by Alberta Health Services October 2, 2015.

Introduction
An Order of an Executive Officer Unfit for Human Habitation Order to Vacate dated August 27, 2015 was issued pursuant to the *Public Health Act*, the *Housing Regulation,* Alberta Regulation 173/99 and the *Minimum Housing and Health Standards* relating to a residential rental property located at 11234 – 86 Street, Edmonton, Alberta.

The Order declared the premises unfit for human habitation and directed the occupants to vacate the premises on or before September 11, 2015. The Order also directed the Appellants to immediately undertake and diligently pursue certain work, which included retaining the services of an environmental consultant to analyze the air quality for mould

and asbestos. Alberta Health Services wanted to see reports from environmental consultants and inspect parts of the property before they were covered with finishing materials. There were no set dates in the Order for the work to be completed.

The Appellants applied for a stay of the Order and the Chair heard the application on September 21, 2015. The stay decision was issued on September 24, 2015 and a stay of the Order was not granted.

An appeal hearing date was set on September 29, 2015 for October 20, 2015.

Alberta Health Services filed an Originating Application at the Court of Queen's Bench September 24, 2015 to enforce the Order. They claimed the Appellants had not provided Alberta Health Services with all the required reports from an environmental consultant prior to undertaking other work on the premises including the removal of the basement floor, laminate flooring, elevated subfloor and kitchen cabinets.

The Court of Queen's Bench granted an Interim Order on September 29, 2015. That Order directed the Appellants to cease repairs until Alberta Health Services agreed in writing for them to recommence. The Appellants were to provide detailed reports about the repairs and renovations that had been undertaken and Alberta Health Services would review the reports and advise the Appellants if they were satisfactory. The Interim Order also included the following clause:

> All remaining matters, including the issue of costs and whether or not the within Order* should be varied or set aside, shall be adjourned to a Special Chambers Hearing on a date to be determined and may be heard by any Justice of this Court.

*the Order referred to is the Interim Order issued by the Court and not the Order of the Executive Officer being appealed.

The testing, reports and work were completed to the satisfactory of Alberta Health Services and the Order was rescinded by Alberta Health Services October 2, 2015.

On October 19, 2015, the day prior to the hearing appeal, Alberta Health Services took the position that the appeal hearing should not proceed as the Order had been rescinded. The Appellants opposed. The Board advised the parties to attend at the hearing date and the Board would hear Alberta Health Services' preliminary application and both parties ought to be prepared for the appeal hearing as well.

At the start of the hearing, the Board advised the parties that it would hear Alberta Health Services' application regarding the appeal being moot and then proceed to hear the appeal. The Board would decide the preliminary application after hearing both matters and if it found that it had jurisdiction, that is, the issue was not moot, it would make a decision on the appeal.

Alberta Health Services objected to the process, submitting they may wish to apply for a Judicial Review of the jurisdiction/moot matter before the appeal hearing was heard or decided.

The Board heard the preliminary application and the appeal on October 20, 2015.

Issue
The issue is whether the Board has jurisdiction to hear the Appellants' appeal of the Order of an Executive Officer dated August 27, 2015 notwithstanding that the Order was rescinded by Alberta Health Services on October 2, 2015.

Alberta Health Services' Submissions (Applicant in the Preliminary Application)
Alberta Health Services submitted the Board does not have jurisdiction to hear the appeal because the Order has been rescinded rendering the matter moot.

Section 5(2) of the *Public Health Act* states a person who is directly affected by a decision may appeal the decision and does not provide for an appeal where someone was directly affected. There is nothing currently affecting any person and therefore nothing to appeal.

The power of the Board with respect to remedies is set out in section 5(11) of the *Act* which states the Board may confirm, reverse or vary the decision of the regional health authority and those are the only remedies available. As there is no decision or Order currently before the Board because it was rescinded by Alberta Health Services, there is nothing to appeal. There should not be a hearing as any remedy that could be sought would be outside the jurisdiction of the Board.

Alberta Health Services submitted the Board had not lost jurisdiction because the matter was before the Court of Queen's Bench for enforcement. If the Order had not been rescinded at the time of the hearing, the Board could decline to hear the appeal because it was before the Court of Queen's Bench but the Board would have jurisdiction to hear the matter.

Alberta Health Services commenced an action at the Court of Queen's Bench as they wanted the testing for mould and asbestos completed and to receive the results of the testing prior to the other required work being completed. They took the position the Order was not being complied with and asked the Court for assistance with enforcement. The Board cannot enforce the Order.

The Court is a more suitable platform for the Appellants to address the issues they have raised in the appeal. Those issues are fairness, targeting and abuse of power. The Court of Queen's Bench enforcement application has been adjourned to a Special Chamber's Hearing (no set date) and the Court can order costs if the Appellants do not prove their serious allegations. Section 66.2(1) of the *Public Health Act* allows the Court to make any order it considers necessary to enforce the *Public Health Act* and the

issues could be heard at the Special Chambers Hearing which is a more suitable forum for these matters to be heard.

Alberta Health Services referred to three cases to support its position. Counsel pointed out that the courts that heard these cases were section 96 courts with inherent jurisdiction to hear the matters and still they declined because the matters were moot. These decisions should be contrasted with the limited jurisdiction of the Board. The third case was an allegation of charter rights being infringed and even then the Court found the matter to be moot and did not hear it.

The first case was *R. v. Shaw, 2015 ABCA 300.* A self-represented applicant attempted to appeal a sentence in a criminal matter. There had been a prior appeal of the conviction that was dealt with in an earlier application. The sentence had already been served in its entirety. As part of her appeal the applicant asked the Court to appoint counsel for her. The Court declined as it found the merits of the appeal did not justify the appointment of counsel. The Court said the appeal was moot and the court should not use scarce judicial resources to appoint counsel particularly given there was no issue of general public concern, or any other issue that would warrant judicial intervention.

Despite the applicant's concerns regarding the serious impact a criminal record could have on her future, the Court said that the question before it must be real. Declaratory relief should not be granted when the dispute is purely academic or has no practical effect.

When the Board asked counsel whether the Order being appealed was comparable to a sentence appeal or a conviction appeal, Alberta Health Services responded that the Order was similar to a sentence appeal.

The second case was *Calgary (City) v Alberta (Human Rights and Citizenship Commission),* 2011 ABCA 65. This case dealt with the issue of mootness and also with the standard of review for the Court to apply to a decision of the Human Rights and Citizenship Commission.

Concurrent to the arbitration process, a human rights commissioner attempted to retain jurisdiction regarding the complainants' concerns. The City applied for a judicial order precluding the Commission from proceeding on the grounds of *res judicata* and mootness. The Court determined that the standard of review for the matter would be correctness. The Commission was trying to rule on core legal issues that had already been adjudicated. Considerations of economy, consistency, finality and the integrity of the system of administration of justice required an end to the dispute.

In *Larouche v Alberta*, 2015 ABQB 25, the applicant brought a court application relating to his judicial interim release. The applicant's ability to do so was allegedly impeded by a "business management" directive issued by the former Chief Justice which stipulated that a bail hearing could not be set if the applicant had outstanding fines or warrants. The Applicant sought to quash the direction by *certiorari*, while also seeking a declaration that the directive was *ultra vires* and contrary to his charter rights.

The Court found the matter to be moot when the Chief Justice's directive was withdrawn. While the Court acknowledged that declaratory relief can sometimes be a viable discretionary remedy, it was moot as there was nothing left to quash or to declare void.

In response to submissions presented by the Appellants about the Notice of Health Hazard registered against the title to the property, Alberta Health Services submitted they would undertake to discharge the Notice so that it would not remain on the title to the property.

Alberta Health Services objected to the Board's decision to hear the preliminary application and then the appeal hearing on the same day and before deciding the preliminary matter. Alberta Health Services did not present any evidence at the appeal hearing and submitted only that the Board had no jurisdiction to hear the appeal.

Appellants' Submissions (the Respondent in the preliminary application)
The Appellants submitted that they were aggrieved by the Order.

It is the Board's purpose is to be fair, hear the parties and obtain all information to make a good decision.

The Board has jurisdiction because the Order becomes part of the record for the property and stays with the property even if rescinded. When a potential buyer or lender requests the history of the orders issued for the property from Alberta Health Services, the Order being appealed would be included and there would be no record that the Order had been improperly issued if the appeal was successful. The Order would also show up on a google search of the property. This Order was also registered as a Notice of Health Hazard on the title to the property.

The Appellants claim that a series of unfit for human habitation orders impacts them significantly because they own multiple properties.

The Appellants submitted that the Order was rescinded because they had to comply with the Order under duress, primarily because the lender called in the mortgage. As a result of the Order and the Notice of Health Hazard that was registered on title, the Appellants had to payout the mortgages. Time was of the essence and to not comply with the Orders would have resulted in foreclosure proceedings.

The Appellants submitted that a hearing with the Board provides them with an opportunity to give the history and circumstances of the property. It is the only platform available to address the issue that Alberta Health Services misused its power.

The Appellants alleged there was selective targeting and the evidence will support that claim as well as allegations that Alberta Health Services had tunnel vision and abused their powers. They alleged there was a lack of education on the Executive Officers' part and no proper protocols were in place.

Finally, Alberta Health Services knew the Order was rescinded two weeks before the hearing date and did not raise the issue of the appeal being moot until the day prior to the hearing.

Reasons

In determining whether the appeal of the Order is moot the Board first reviewed the common law. The leading case concerning the doctrine of mootness is the Supreme Court of Canada's 1989 decision in *Borowski v Canada (Attorney General),* [1989] 1 SCR 342. The Court provided a test to determine whether a matter is moot and if so, whether the Court should exercise its' discretion and hear the matter, notwithstanding that is moot:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

The first part of the test is to determine whether a live controversy exists between the Appellants and Alberta Health Services. The Board finds that there was a controversy when the appeal was submitted to the Board but at the time of the appeal hearing, the controversy no longer existed because the Order had been rescinded.

The second stage of the analysis is to determine whether the Board ought to hear the appeal notwithstanding that the matter is moot. This analysis considers the three rationales for the mootness doctrine. The absence of one factor may weigh heavier than the presence of other factors - it is not a mechanical process. The three rationales for hearing a moot appeal are as follows:

(a) An adversarial context still exists; the parties have an interest in the outcome and will fully argue the issue before them.

(b) Judicial economy is preserved; and

(i) The concern for preserving judicial resources can be partially

alleviated if the Court's decision will have some practical effect on the rights of the parties.

(ii) The expenditure of judicial resources can also be warranted in cases where the issue, although moot, occurs frequently and is of a brief duration (e.g. labor strikes) so as to preclude an appeal hearing. This does not necessarily indicate that a decision-maker should not wait until a genuine adversarial context exists.

(ii) Finally, when considering the preservation of judicial economy, a Court also has the discretion to hear a moot appeal where the issue is of national importance, like a constitutional issue. There must be an added societal cost if the matter were left unresolved.

(c) The Court can maintain its role as an adjudicator. It cannot usurp the legislature's role as a law maker.

An analysis of the second part of the test demonstrates there can be several reasons for the Board to hear the appeal notwithstanding the matter is moot. These reasons are set out in *Borowski v Canada (Attorney General), supra*:

- despite the cessation of a live controversy, the necessary adversarial relationships prevail;
- there may be collateral consequences of the outcome that will provide the necessary adversarial context;
- the Board's decision will have a practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action;
- although moot the matter is of a recurring nature and brief in duration; and
- the order might evade review by the Board and the Court.

Although the Order was rescinded, it was not because the controversy had been arbitrated, mediated, adjudicated or settled. It was rescinded because the Appellants completed the work required in the Order and Alberta Health Services' internal process is to rescind an order when the requirements have been met.

An adversarial relationship prevails because the parties continue to disagree about the accuracy of the Order and whether the terms of the Order were a proper exercise of the Executive Officer's professional discretion. In addition, there is the

enforcement proceedings at the Court of Queen's Bench which is adversarial. The outcome of the appeal may affect the enforcement proceedings before the Court if, for example, the Board reverses or varies the Order. There may be a practical effect on the rights of the parties by hearing and deciding the appeal.

Moreover, the nature of the Appellants' business results in many dealings with Alberta Health Services. This is the second appeal in 2015 and the Board was advised that a third appeal will be submitted. These matters are of a recurring nature and brief in duration.

One of the reasons these matters are brief in duration and result in the orders being rescinded prior to the Board hearing the merits of an appeal, is the realities of the business world. The Appellants were compelled to comply with the Order whether they disputed it or not because they had to address the concerns of their lender. Waiting for the appeal to be heard and the Board to make a decision about the merits of the appeal before meeting the demands of a lender or receiving rental revenue is impractical in the business world. This is particularly true when the order directs the Appellants to "immediately undertake and diligently pursue the completion" of the work or when no stay of the order was granted. In this situation, both conditions existed.

In these circumstances, the Order might evade review if the Board does not hear the appeal because the Appellants were compelled to comply with the Order prior to the appeal being heard. It is not a logical conclusion that an Appellant, who for business reasons and because of the terms of the order, must complete the work set out in the order and then be deprived of the opportunity to challenge the accuracy and reasonableness of the Order when they have an ongoing adversarial relationship with Alberta Health Services.

The Board finds that in these circumstances there ought to be a record of whether the Order is confirmed, varied or reversed by the Board notwithstanding that it has been rescinded by Alberta Health Services.

Section 62(8) of the *Act* requires Alberta Health Services to maintain a record of all orders issued and to make them available for inspection by the public. These records ought to include the Board's decision on this appeal and not merely a rescission of the Order as a result of the work being completed as required in the Order. This could potentially be a very different record of the property if the Board varies or reverses the Order. These records would be provided to potential lenders and buyers which affects the Appellants' business interests.

Alberta Health Services submitted that the matter could be heard by the Court of Queen's Bench where enforcement proceedings had been commenced. This is true but the Board has not lost jurisdiction to hear the appeal because enforcement proceedings are before the Court. Both the Appellants and Alberta Health Services may wish to have the Court of Queen's Bench hear the dispute and it may be a more suitable forum for the type of issues raised by the Appellants, such as targeting,

unfairness and abuse of power. However, this does not preclude the Appellants from having the appeal heard by the Board if the Court has not assumed jurisdiction for the appeal of the Order.

Finally, the Board can maintain its role as an adjudicator. In hearing this appeal it does not usurp the legislature's role as a law maker or role of the Court of Queen's Bench's.

The Board must also consider if section 5(2) of the *Public Health Act* precludes it from hearing this appeal. It states:

> 5(2) A person who
>
> (a) is directly affected by a decision of a regional health authority, and
>
> (b) feels himself or herself aggrieved by the decision may appeal the decision to the Board.

The Board finds that it is sufficient to meet the legislative requirements if, when the appeal is commenced and the Notice of Appeal is served to the Board, the person is directly affected by the order or decision. If the Order is rescinded due to compliance with the Order prior to the appeal being heard, the legislation does not preclude the appeal from being heard and decided. The Board may confirm, reverse or vary the Order as it was issued and this would form part of the property's record.

For the above reasons, the Board has decided to hear and decide the appeal of the Order dated August 27, 2015.

Appeal Decision

Timing of the Appeal

The Order was emailed to the Appellants on August 29, 2015. The Notice of Appeal was received by the Board on September 9, 2015.

Section 5(3) of the *Public Health Act* requires the Appellants to serve the notice of the appeal within 10 days after receiving notice of the decision. If the Notice of Appeal is not served within the 10 day time frame, the Board may extend the time within which an appeal may be taken if it considers it appropriate to do so. The Notice of Appeal was received 11 days after the Order was emailed to the Appellants. The Board found it appropriate to extend this time period.

Appellants' Submissions

The Appellants contend that finding the premises unfit for human habitation, requiring the tenants to vacate and requiring mould and asbestos testing were an improper exercise of the Executive Officer's professional discretion. The Appellants submitted they were unfairly targeted by Alberta Health Services and the Order was excessively harsh when compared to orders issued to other owners of residential rental properties in comparable circumstances.

The Appellants asked the Board to vary the Order by removing the finding that it was unfit for human habitation and the requirement for mould and asbestos testing.

The Appellants did not dispute the condition of the premises as set out in the Order other than that there was no sewage leak.

Regarding the unfit for human habitation designation, the Appellants submitted the Order did not set out any major contraventions and the suspected sewer backup was later found not to exist. The Appellants submitted there was a smell of sewage and liquid pooled in the basement but had the Executive Officer inspected the premises more carefully, she would have easily determined there was no sewage back up.

The Appellants pointed to examples of orders issued to other owners where there were actual sewage backups/leaks, yet these premises were not found to be unfit for human habitation. They submitted that a warning would have sufficed in the circumstances or an order requiring the work to be completed, referred to by the Appellants as a work order.

The Appellants questioned how the premises could be found unfit for human habitation and yet the tenants could remain for two weeks after the Order was issued. They submitted it was extreme for the Executive Officer to order the tenants to vacate.

The Order with the unfit for human habitation designation negatively affected their reputation and financial standing and would continue to affect them notwithstanding that the Order had been rescinded because the Order forms part of the property's record.

Regarding the requirement of asbestos and mould testing set out in the Order, the Appellants submitted there is no protocol or consistency on the part of Alberta Health Services, resulting in unfairness to them. They pointed to other orders as examples of buildings where no environmental/air testing was required and yet the buildings were as old or older. The Appellants maintained the contraventions existing at the time the Order was issued did not warrant environmental/air testing, and this testing appeared to be a requirement for their properties only.

The Appellants submit that finding the property unfit for human habitation and requiring mould and asbestos testing were evidence that Alberta Health Services was targeting them and catering to media attention which is an abuse of power. The media attention was the result of a zoning change to the property to allow a secondary suite. The

neighbourhood and an alderman were opposed. The Appellants submitted it was the media that advised the tenants to contact Alberta Health Services about the suite and as a result, they were targeted by Alberta Health Services.

The Appellants submitted a binder, marked as Exhibit D, comprised mainly of copies of Alberta Health Services' orders issued for other properties. The Appellants attempted to enter into evidence the transcripts for the cross examination of the Executive Officer's Affidavit supporting the enforcement action commenced at the Court of Queen's Bench. It was their position that the transcripts were part of the public record as they were the result of the Court proceedings and not discovery transcripts. It would not be a breach of an implied undertaking on the part of their counsel for the transcripts to be used in this appeal.

Alberta Health Services' Submissions

Alberta Health Services did not provide any evidence at the appeal hearing. They repeated their position that the Board had no jurisdiction because the Order had been rescinded rendering the appeal moot. They objected to the Board hearing the appeal prior to deciding the issue of jurisdiction/mootness.

Alberta Health Services objected to the Appellants submitting into evidence the transcripts for the cross examination of the Executive Officer's Affidavit supporting the enforcement action commenced at the Court of Queen's Bench. The objection was based on the implied undertaking of the Appellants' counsel not to use the transcripts for a collateral purpose.

Issue

At the time the Order was issued, did the condition of the premises support the unfit for human habitation designation and the requirement for mould and asbestos testing.

Reasons

Section 59(1) of the *Public Health Act* states:

> An executive officer may inspect any public place for the purpose of determining the presence of a nuisance or determining whether this Act and the regulations are being complied with.

The Executive Officer had the authority to inspect the premises which were being used for rental accommodation purposes. The evidence provided by the Appellants indicated the tenants of the premises contacted Alberta Health Services with concerns about the smell of sewage. Alberta Health Services did not, on their own initiative, inspect the premises. The Appellants had submitted that the media had encouraged the tenants to contact Alberta Health Services and that contributed to them being targeted. The Board finds it irrelevant why the tenants decided to contact Alberta Health Services or who encouraged them to so. The Appellants' position that this contributed to them being targeted by Alberta Health Services is not supported by this evidence.

Section 62(1) of the *Public Health Act* states:

> Where, after an inspection under section 59 or 60, the executive officer has reasonable and probable grounds to believe that a nuisance exists in or on the public place or private place that was the subject of the inspection or that the place or the owner of it or any other person is in contravention of this Act or the regulations, the executive officer may issue a written order in accordance with this section.

The Board finds that the Executive Officer had the legislative authority to issue an order after inspecting the premises.

The question remains if this particular Order, declaring the property unfit for human habitation and requiring air quality testing, was a reasonable exercise of professional discretion given the circumstances that existed when the Order was issued.

The issuance of an order is discretionary pursuant to section 62(1) of the *Public Health Act.* Section 62(4) of the *Act* sets out several options available for the Executive Officer to include in an order. It states:

> An order may include, but is not limited to, provisions for the following:
> a. requiring the vacating of the place or any part of it;
> b. declaring the place or any part of it to be unfit for human habitation;
> c. requiring the closure of the place or any part of it;
> d. requiring the doing of work specified in the order, on or about the place;
> e. requiring the removal from the place or the vicinity of the place of anything that the order states causes a nuisance;
> f. requiring the destruction of anything specified in the order;
> g. prohibiting or regulating the selling, offering for sale, supplying, distributing, displaying, manufacturing, preparing, preserving, processing, packaging, serving, storing, transporting or handling of any food or thing in, on, to or from the place.

It is the responsibility of the Executive Officer to exercise his or her professional discretion, taking into account all relevant information. In the decision making process the relevant information gathered must be weighed according to its importance and support the decision to issue the order with the particular provisions.

The Board found there were four serious contraventions set out in the Order: evidence of a sewer backup in the basement; low head clearance in the basement; a basement bedroom window that did not meet egress requirements; and water infiltration in the basement bathroom ceiling. These contraventions support a finding that the premises were unfit for human habitation.

The primary objective of the *Minimum Housing and Health Standards* is to protect and promote the health and well-being of occupants of rental housing premises. It was reasonable to order the tenants vacate the premises under these circumstances as the conditions potentially posed a health risk to the tenants.

Although the Appellants provided evidence that there was no sewage backup it was not unreasonable, given the odour and the liquid pooled in the basement, for the Executive Officer to suspect a sewage leak.

The Board carefully reviewed the orders provided by the Appellants that were intended to demonstrate that the Appellants were being treated more harshly than others by finding the property unfit for human habitation. There were three orders summarized as follows:

tab*	date	issues identified in order	order issued and work required
5	Sept 4, 2015	• Floor covering disrepair • Vermin infestation • Bath deficiencies • 1 egress window with improper hinge • Low head room clearance	Outstanding Violation Report required repairs to deficiencies
6	May 29, 2015	• Walls unfinished • Window broken • Ceiling water damage • Floor covering in disrepair • Sewage gas smell	order issued Closed for Tenant Accommodation Purposes order to Vacate
6	January 20, 2015	• Sewer backup and contamination • Drain pipe leaking	order issued Closed for Tenant Accommodation Purposes order to Vacate

*Tab number in Binder of Evidence provided by the Appellants

None of the sample orders included the same four main concerns found at the Appellants' premises: evidence of a sewer backup in the basement; low head clearance in the basement; a basement bedroom window that did not meet egress requirements; and water infiltration in the basement bathroom ceiling. The sample orders had fewer serious contraventions and yet in two of the three sample orders, the premises were closed for tenant purposes and the tenants ordered to vacate. The Board finds that the unfit for human habitation designation was within a reasonable scope of professional discretion and was not out of the ordinary when compared to the sample orders provided by the Appellants.

Regarding the requirement for asbestos and mould testing (environmental air quality analyses), the Board carefully reviewed the orders provided by the Appellants intended to demonstrate they were being treated more harshly than other property owners by requiring mould and asbestos testing. There were three orders summarized as follows:

tab*	date	issues Identified in order	order issued and work required
12	January 16, 2015	• Foundation issues • Roof line dropped • Water infiltration/damage • No hand rail • Sewer stack leak • Gas stove not working	order including finding of unfit for human habitation and order to vacate Engineer report on entire building
12	April 3, 2015	• Bed bugs • Broken window • Water damage in kitchen ceiling • Floor around tub not sealed • Kitchen wall in disrepair • Floor transition strip missing	order issued Closed for Tenant Accommodation purposes order to vacate Repair deficiencies including retaining licensed pest control operator
17	June 29, 2015	• Mould in bathroom ceiling and surrounding tub • Mould on window frame	order issued Closed for Tenant Purposes order to Vacate Remove mould and material surrounding mould Clean and dry areas and contact Executive Officer for approval and inspection prior to proceeding to repair areas

*Tab number in Binder of Evidence provided by the Appellants

There was also a page in tab 11 of the Appellants' binder of evidence that listed 30 Edmonton properties where orders had been issued by Alberta Health Services. The information included the year the properties were built. Except for one, they were built prior to 1970. Only three buildings required air quality analyses and those three were owned by the Appellants. The Board found that if the only determining factor for requiring air quality testing was the age of the building then it did appear that the Appellants were being treated differently than other owners.

However, the requirement for testing in this situation was, on a balance of probabilities, for several reasons: the age of the building; the existence of standing liquid in the basement; and renovations to correct the ceiling height would disturb materials. The totality of these conditions was sufficient for the Executive Officer to be concerned about mould and asbestos contamination. The requirement for environmental air quality analyses was reasonable in the circumstances.

In addition, none of the sample orders provided by the Appellants contained these three particular reasons or risk factors for mould and asbestos and therefore do not support the Appellants' position that they were being treated more harshly than other property owners in the circumstances.

The Board also reviewed the Appellants' email correspondence submitted to support their claim that Alberta Health Services did not have a consistent protocol for requiring environmental air quality analyses. It appears this is an accurate claim but the absence of a standard protocol did not result in an unreasonable requirement for air quality testing in these circumstances.

There were two procedural issues the Board addressed during the hearing. The first was the decision to hear the appeal prior to deciding Alberta Health Services' application to dismiss the appeal because it was moot. Alberta Health Services did not submit the preliminary application until one day prior to the hearing, on October 19, 2015, but the Order had been rescinded on October 2, 2015. By October 19, 2015, the Appellants would have organized their schedules to accommodate the hearing as had the Board members. Potentially hearing two separate matters, the preliminary application and the appeal hearing on two separate days would be wasteful of the Board's resources and those of both parties. Had Alberta Health Services submitted the preliminary application earlier, a telephone hearing could have been arranged in advance for the preliminary application and decided by the Board prior to the scheduled appeal hearing. Both parties had been advised to be prepared for the preliminary application and the appeal hearing on the same day. There was no disadvantage or prejudice to Alberta Health Services in hearing the appeal prior to the preliminary application being decided. The same cannot be said for the Appellants who had less than a day to prepare for the preliminary application submitted by Alberta Health Services one day prior to the scheduled appeal hearing.

The second procedural issue was regarding the Appellants' request to submit into evidence the transcripts for the cross examination of the Executive Officer's Affidavit supporting the enforcement action commenced at the Court of Queen's Bench. Alberta Health Services objected stating the Appellants' legal counsel was subject to an implied undertaking not to use the transcripts for a collateral purpose and the appeal hearing was a collateral purpose. The Appellants disagreed submitting that the transcripts were in the public record.

The Board decided that if the Appellants wished to adjourn the hearing to have sufficient time to provide proof there would not be a breach of an implied undertaking on the part of their legal counsel retained for the enforcement proceedings, the Board would grant the adjournment. The Appellants decided to proceed with the hearing and not adjourn the matter to provide the requested proof.

Decision

For the above reasons, the Board confirms the Order of an Executive Officer Unfit for Human Habitation Order to Vacate dated August 27, 2015.

Per: _____
Julia Jones, Chair

Date: January 9, 2016

Also sitting:
Linda Cloutier, Alternate Vice-Chair
Linda Klein, Board Member