

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 AN APPEAL TO  
THE PUBLIC HEALTH APPEAL BOARD BY DAVID LOWE  
OF THE ORDER OF AN EXECUTIVE OFFICER  
ISSUED BY ALBERTA HEALTH SERVICES  
ZONE 5 WHITECOURT  
DATED OCTOBER 16, 2015  
HEARING HELD JANUARY 13, 2016

**Appearances**

David Lowe, Appellant  
Dawna Wells, Executive Assistant to the Appellant

J. Mark Raven-Jackson, Legal Counsel, Alberta Health Services, Respondent  
Ravinder Thind, Executive Officer, Alberta Health Services, Respondent

**Board Decision**

The Board confirms the Order of an Executive Officer dated October 16, 2015.

**Introduction**

The Order of an Executive Officer dated October 16, 2015 was issued pursuant to the *Public Health Act* and its *Regulations* regarding a residential rental property located at 4911 51 Avenue Sangudo, Alberta.

The Appellant was a beneficial owner of the premises at the time the Order was issued, having registered his agreement for sale with the legal owner by way of caveat on the title to the property. The legal ownership transferred to the Appellant in November 2015.

The Order directed the Owners to complete repairs on the property, declared the premises unfit for human habitation and ordered the occupants to vacate the premises on or before October 23, 2015.

The Executive Officer completed two inspections of the property, on August 28, 2015 and October 7, 2015, prior to issuing the Order. A Safety Codes Officer accompanied the Executive Officer for the second inspection and he also issued a report dated October 8, 2015.

The Appellant requested an adjournment and for the Board to compel witnesses at a preliminary hearing on November 17, 2015 by way of a telephone conference. An adjournment was granted and the Board did not compel witnesses to attend the appeal hearing.

The appeal hearing was heard on January 13, 2016 at Sangudo Community Hall, Sangudo, Alberta.

### **Timing of the Appeal**

Section 5(3) of the *Public Health Act* requires the Appellant to serve notice of the appeal within 10 days after receiving notice of the Order. The Board received the notice of appeal dated October 27, 2015 on the same date. The Order was sent to the Appellant via registered mail on October 16, 2015. The notice of appeal was received within the 10 day period.

### **Jurisdiction**

There was no objection from either party to the Board's jurisdiction to hear the appeal.

### **Appellant's Submissions**

The Appellant provided a folder of written materials at the hearing that was entered as exhibit 3. The materials included were:

Schedule 1: *Alberta Bill of Rights*, definitions relating to legal processes, natural justice and bias, the Appellant's credentials and Course Descriptions for Bachelors Environmental Health for Concordia

Schedule 2: Transcript and Board Decision for Preliminary Hearing

Schedule 3: Residential Listing Agreement and Agreement for Sale

Schedule 4: Residential Tenancy Agreement and documents relating to tenants

Schedule 5: Email correspondence with Alberta Health Services

Schedule 6: Photos of the premises.

The Appellant's grounds for appeal were the Executive Officer was biased against him and he did not have the benefit of due process or natural justice prior to the Order being issued. He submitted he was deprived of his property contrary to the *Alberta Bill of Rights* without due process. In addition, the contraventions set out in the Order were exaggerated and did not pose a risk to public health.

The Appellant submitted the Executive Officer was educated but inexperienced. She was biased against him because of their interactions on two occasions. In the first interaction, the Executive Officer believed he was the property manager and requested the contact information for the legal owner of the property. The Appellant advised that he was a beneficial owner and would not provide the legal owner's information due to a confidentiality policy. The Appellant's witness confirmed the confidentiality policy.

At their second meeting, the Executive Officer requested access to the property to inspect the premises with a Safety Codes Officer. The Appellant denied them access as the *Residential Tenancies Act* required a landlord to provide notice to enter the premises.

The Appellant submitted these two interactions were evidence of a personality clash resulting in the Executive Officer being biased towards him. He submitted that she displayed apparent bias in issuing the Order.

The Executive Officer did not provide a business card to the Appellant during the first meeting and only disclosed to him two contraventions, mould and lack of egress, found on the premises at their first meeting.

The Appellant submitted the Executive Officer exceeded her authority and used the sweeping discretionary powers in the *Public Health Act* to his personal discomfort.

The Appellant submitted he was convicted summarily by a kangaroo court without due process. He had no notice, there was no hearing or he was not invited to attend a hearing, prior to the Order being issued. His complaint was with respect to elements of the common law, administrative processes and natural justice. He was entitled to a fair hearing and entitled to cross examine people prior to the Order being issued.

The Appellant also submitted he was denied access to witnesses for the appeal hearing in the Board's preliminary hearing decision.

The Appellant agreed with the state of the property as set out in the inspection report and Order but submitted the Order exaggerated the condition of the property and was not a risk to public health. He also submitted the Safety Codes Officer who provided a report to the Executive Officer was not qualified to provide an opinion about the foundation of the building.

The Appellant has been a general contractor since 1977 and a Realtor for 25 years. He purchases, repairs and rents properties. He employs five people in the community. His experience in this regard is extensive.

The house was one of the better properties in Sangudo and was built in the 1920s. He rented it to two people, one of whom had worked for him in the past. One of the frustrations for the Appellant was his inability to access the property as the tenant did not cooperate and sometimes failed to pay rent. The work required in the inspection

report and Order could not be completed while the property was inhabited and he was required to provide notice for the tenants to vacate.

The Appellant entered into a Purchase Agreement with the legal owner of the property whereby he paid a deposit and was required to pay 18 monthly payments to the legal owner before legal title would be transferred to the Appellant and he would assume the existing mortgage registered on the property.

As a result of the Order being issued, a notice of health hazard was registered on the title to the property and this became a contributing factor to the lender not permitting the Appellant to assume the mortgage. This adversely affected the Appellant and he had explained this situation to the Director, Environmental Public Health, North Zone, Alberta Health Services after the first inspection and before the Order was issued. He estimated his losses to be \$20,000. The Appellant submitted these factors ought to have influenced Alberta Health Services not to issue the Order.

The Appellant also submitted his reputation suffered as a result of the Order.

The Appellant provided a remediation plan to the Executive Officer after the first inspection and before the Order was issued and submitted this ought to have been approved by Alberta Health Services. He submitted this would have eliminated the reasons for issuing the Order. He was frustrated he did not receive a response to his proposal or a response to his requests for meetings with the Executive Officer to review her findings. He was also frustrated because the inspection report dated August 31, 2015 required the foundation to be repaired by September 4, 2015.

The Appellant asked the Board to reverse the Order and remove the notice of health hazard registered on the title to the property. If the Board finds there was bias and he was denied due process, he said the Board was compelled to vacate the Order.

### **Alberta Health Services' Submissions**

Alberta Health Services provided a binder of materials including photos, inspection reports and email correspondence that was entered as exhibit 4 at the appeal hearing.

Counsel for Alberta Health Services submitted there were two issues. The first was whether the Appellant was directly affected by the Order. They submitted that the Appellant was a beneficial owner and therefore directly affected by the Order. The second was whether the Order ought to be confirmed. They submitted the facts were straight forward and substantiated the Order that was issued, including the unfit for human habitation designation.

Alberta Health Services received a complaint on August 24, 2015 about mould in the property. They were mandated to investigate and four days later an inspection was completed. The inspection revealed foundation problems. The Executive Officer provided an inspection report to the Appellant and the legal owner.

The Executive Officer retained a Safety Codes Officer, having received a referral from the County for a private company the County uses for inspections. There was a joint inspection and the Safety Codes Officer issued a report to the Executive Officer regarding the foundation. The report stated:

East and west sides of foundation are structurally cracked and bowed inward. West side repaired. East side will need repair as appears that it will collapse in the future. Time frame not predictable.

After receiving the report, the Executive Officer completed a second inspection report and issued the Order. The report confirmed the foundation and lack of egress from the bedroom windows was a health and safety risk. The unfit for human habitation designation was based on these two contraventions as well.

Alberta Health Services submitted that if the Executive Officer was biased, she would have issued the Order without waiting for independent expertise to assess the health and safety risk of the foundation.

Alberta Health Services submitted the Appellant provided no evidence supporting his position that the foundation was not a health and safety risk. In addition, the Appellant had not requested a re-inspection of the property so that the Order could be rescinded.

The Appellant would have known or ought to have known the property was required to meet the requirements of the *Public Health Act* and *Regulations* as the *Residential Tenancies Act* states:

**16** The following covenants of the landlord form part of every residential tenancy agreement:

- (c) that the premises will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations.

Alberta Health Services' concern is the health and safety of Albertans. If the property was a poor financial investment or the Appellant had landlord - tenant issues, this was not a public health concern.

The evidence substantiated the Order that was issued and the Board ought to confirm it and dismiss the appeal.

## **Issues**

Did the Executive Officer display apparent bias in issuing the Order?

Was the Order properly issued pursuant to the legislative requirements and with the required due process?

## **Reasons**

The Board carefully reviewed the Appellant's evidence alleging the Executive Officer was biased and that resulted in an "over reaching or draconian" Order being issued. The Appellant believed the Executive Officer was upset by his behavior and that caused her to be biased. However, the Board finds there was minimal contact between the parties and other than the Appellant's unwillingness to provide the Executive Officer with contact information for the legal owner or access to the property, there was no conflict. There was no evidence the Appellant's conduct affected the Executive Officer's exercise of professional discretion.

The Board finds the Executive Officer was cautious in issuing the Order, obtaining the opinion of a Safety Codes Officer to address her concerns about the building's foundation before determining whether to issue an Order and if so, its contents. There were sufficient contraventions and concerns about the foundation found during the first inspection to support a designation of unfit for human habitation and an Order being issued to repair the contraventions. Her caution and willingness to ask for a second opinion was professional and was evidence that she was not biased against the Appellant.

The contraventions found on the property and the report of the Safety Codes Officer was serious and supported the Order that was issued. The Appellant submitted that the contraventions were exaggerated but provided no reports from third parties or other experts to support those claims. The pictures he provided supported the findings of the Executive Officer. The Appellant submitted the contraventions were not a risk to public health but those contraventions are set out in the *Act, Housing Regulation and Minimum Housing Standards*. The cracks and bowing found in the foundation and lack of egress in bedrooms supported a designation of unfit for human habitation and order to vacate.

One of the major issues raised by the Appellant was the lack of fairness in the process leading up to the Order being issued. The Appellant mistakenly believed an Order is issued after there is a hearing or meetings with the parties that may be affected by the Order. He also believed he was entitled to cross examine anyone who provided information to the Executive Officer about the premises prior to the Order being issued. In other words, he did not understand that the *Public Health Act* is regulatory legislation and contraventions are sufficient for an order to be issued. There are no requirements in the legislation or in the common law for an Executive Officer to consider all the factors that may affect an owner's ability to address the contraventions or the consequences of issuing an order. Contraventions of the *Act* and *Regulations* are a regulatory offence.

The Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154, addressed a similar matter when it stated as follows:

The distinction between criminal and regulatory offences and their differential treatment for Charter purposes is in some ways explained by a "licensing argument" and by the vulnerability of those being protected by the regulatory measures. The regulated person chose to enter the regulated field and accordingly can be taken to have known of,

in most cases, and to have accepted certain terms and conditions of entry. The nature of the conduct will largely determine if the licensing argument should apply. The procedural and substantive protections a person can reasonably expect may vary depending upon the activity that brings that person into contact with the state. The extent of Charter protection may differ depending upon whether the activity in question is regulatory or criminal in nature. Vulnerability is also a component in the contextual approach to Charter interpretation and should be considered whenever regulatory legislation is subject to Charter challenge.

Governments must have the ability to enforce a standard of reasonable care in activities affecting public welfare. The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context. The tremendous importance of regulatory legislation in modern Canadian industrial society requires that courts be wary of interfering unduly with the regulatory role of government through the application of inflexible standards.

The government cannot adequately monitor every industry so as to be able to prove actual intent or *mens rea* in each case. It can, as a practical matter, do no more than to demonstrate that it has set reasonable standards to be met by persons in the regulated sphere, and to prove beyond a reasonable doubt that there has been a breach of those standards by the regulated defendant. The regulated person is taken to be aware of and to have accepted the imposition of certain objective standards of conduct as a pre-condition engaging the regulated activity. It misses the mark to speak in terms of the "unfairness" of an attenuated fault requirement because the standard of reasonable care has been accepted by the regulated actor upon entering the regulated sphere.

And

Regulatory legislation is essential to the functioning of our society and to the protection of the public. It responds to the compelling need to protect the health and safety of the members of our society and to preserve our fragile environment. The imposition of strict liability is both reasonable and essential to the operation of regulatory schemes.

The primary objective of the *Minimum Housing Standards* 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.

The *Public Health Act* gives an Executive Officer the discretion of issuing an order after an inspection has been completed. Section 59 pertains to inspections that are not private dwellings. In this instance that section applies to the premises as it was residential rental property. The section states:

**Inspection of place other than private dwelling**

**59(1)** 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.

- (2) An executive officer making an inspection under subsection (1) may
- (a) at any reasonable hour enter in or on the public place that is the subject of the inspection;
  - (b) require the production of any books, records or other documents that are relevant to the purpose of the inspection and examine them, make copies of them or remove them temporarily for the purpose of making copies;
  - (c) make reasonable oral or written inquiries of any person who the executive officer believes on reasonable grounds may have information relevant to the subject-matter of the inspection;
  - (d) inspect and take samples of any substance, food, medication or equipment being used in or on the public place;
  - (e) perform tests, take photographs and make recordings in respect of the public place.

Section 62 gives the Executive Officer the discretion of issuing an Order when a nuisance exists. It states:

**62(1)** 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.

(2) An order shall be served on the person to whom it is directed and shall set out the reasons it was made, what the person is required to do and the time within which it must be done.

(3) Where the order is directed to a person who is not the registered owner, a copy of it shall also be served forthwith on the registered owner.

(4) 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 in, 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.

The *Public Health Act* does not require that a hearing or meeting be held for affected parties prior to the Order being issued. The existence of the contraventions was sufficient to issue the Order notwithstanding the circumstances that existed for the Appellant. The issuance of the Order was part of a process, once the work is completed as required in the Order, the Order will be rescinded.



The Appellant submitted he had been deprived of the enjoyment of his property without due process contrary to s.1(a) of the *Alberta Bill of Rights*. He gave notice to the Director of Constitutional Law, Ministry of Justice and Solicitor General's Department. The Appellant and the Board were advised as follows:

On behalf of the Minister of Justice and Solicitor General of Alberta (Alberta) I acknowledge receipt of

- the Public Health Order dated October 16, 2015
- the Public Health Appeal Board decision to Adjourn dated November 18, 2015
- your Response dated November 19, 2015; and
- the Public Health Board Appeal Information

Alberta will not intervene in this matter. Thank you.

Margaret Unsworth QC  
 Director, Constitutional Law  
 Alberta Justice and Solicitor General

The Board finds that issuing the Order and registering a notice of health hazard on title to the property did not deprive the Appellant of the enjoyment of his property. The notice was a warning to potential buyers and lenders that the property was unfit for human habitation and advised of the work required. It simply gave notice of the condition of the property so that all parties could make decisions with full disclosure, including the existing lender that did not formally permit the Appellant to assume the mortgage.

The Appellant also submitted he was not afforded due process when the Board, in its preliminary decision, decided against compelling two witnesses, the Safety Codes Officer who inspected the property and issued a report and the Director, Environmental Public Health, North Zone. The Board decided as follows:

There is no evidence that the witnesses who will attend the hearing will not be sufficient for the Board to determine the matter. There is no evidence that the 2 witnesses the Appellant wishes to cross examine would provide any evidence that would go to the issues that have been raised in this appeal. In addition, information these witnesses may provide if called, could be adduced from other witnesses as the Board is not obligated to follow the strict rules of evidence followed by courts.

At this time, the Board will not compel any witnesses to attend at the appeal hearing. If, the Board determines at the appeal hearing that it is necessary to hear from a particular witness in order to fully understand and decide the appeal issues it will reconsider the matter at that time.

The appeal hearing is a "de novo" hearing. There is an onus on Alberta Health Services to present the evidence necessary for the Board to confirm the Order. This includes witnesses that support their position that the Order ought to be confirmed. If they do not,

the Board may vary or reverse the Order. The Appellant may call any witnesses that he believes will support his position that the Order ought to be reversed or varied.

The Appellant advised he asked the Safety Codes Officer to attend the hearing but he was unavailable. The Appellant submitted his evidence at the appeal hearing would have been a less draconian opinion than the Executive Officer's and it would have been different than his written report, more expansive.

The Board finds that the evidence of the Safety Codes officer, while helpful, was not required to support the Order that was issued. The photos and findings of the Executive Officer supported the designation of unfit for human habitation and requirement for repairs.

Regarding the second witness the Appellant wanted compelled at the appeal hearing, the Director of Environmental Public Health, North Zone, the Appellant did not ask him to attend the hearing. He submitted his evidence would have confirmed the Appellant:

- told him he would suffer financial damage if an order was issued;
- was assured there would be cooperation with the Executive Officer or her supervisor and one of them would contact him; and
- spoke to him about the Executive Officer's conduct.

The Board finds this information would not have altered its decision to confirm the Order as they are not factors considered when an order is issued or when the Board is considering whether an Executive Officer properly exercised her professional discretion.

The Appellant had certain expectations about the possible results of communication with the Executive Officer, including reviewing a vague remediation plan forwarded to her after the inspection report was completed. The expectations that an Order would not be issued was not supported by the evidence or the *Act*. However, more communication between the parties would not have prevented the Order from being issued but it may have helped the Appellant better understand the process.

Finally, the Appellant asked the Board to remove the notice of health hazard from title. The notice of health hazard was registered pursuant to s. 64 of the Act which states:

**64(1)** When an order is issued under section 62, the regional health authority may cause to be filed with the Registrar of Land Titles a notice of health hazard against the registration of any person as transferee or owner of, or of any instrument affecting, the land that is the subject of the order, unless the instrument or certificate of title is expressed to be subject to that notice.

**(2)** A notice of health hazard registered under this section does not lapse and shall not be cancelled or withdrawn except on the receipt by the Registrar of a notice in writing from the regional health authority requesting cancellation or withdrawal.

**(3)** On registering a notice of health hazard, the Registrar shall notify the person against whose title the notice is registered and notify caveators and mortgagees when the addresses of those persons may be ascertained from the certificate of title.

The Board's jurisdiction to hear appeals is found in s. 5 of the *Act* and it states:

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.

**Appeal to Board**

5(1) In this section, "decision of a regional health authority" means

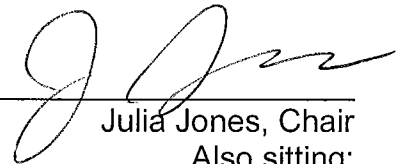
- (a) an order issued under section 62, and
- (b) a decision to issue or to cancel, suspend or refuse to issue a licence, permit or other approval provided for in the regulations, and any other decision in respect of which an appeal to the Board is permitted under the regulations, whether any of those decisions is made by the regional health authority itself or one of its employees or agents.

As the registration of the notice was not an order issued under section 62 of the *Act*, the Board finds it does not have jurisdiction to direct the removal of the notice. If the Order issued pursuant to s. 62 were reversed, the pre-requisite for registering the notice, "when an order is issued under section 62", would not be met but in this instance, the Board has confirmed the Order and not reversed it.

**Summary**

After considering all the evidence, the Board confirms the Order dated October 16, 2015.

Per: \_\_\_\_\_



Julia Jones, Chair  
Also sitting:

Linda Cloutier, Alternate Vice-Chair  
Linda Klein, Member

Date: February 12, 2016