

**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, ZONE 4, DATED DECEMBER 6, 2019**

**PANEL:** Denis Lefebvre, Esq., Chair  
Wendy Lickacz, Vice-Chair  
Ike Zacharopoulos, Board Member  
Barbara Rocchio, Board Member

BETWEEN:	)	
	)	
	)	
<b>PHILLIP LEUNG</b>	)	Phillip Leung,
	)	Self-represented
(Appellant)	)	
	)	
- and -	)	
	)	
<b>ALBERTA HEALTH SERVICES</b>	)	Linda A. Svob,
	)	Alberta Health Services,
(Respondent)	)	for the Respondent
	)	
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	)	
	)	Stuart Chambers, Esq.,
	)	McLennan Ross LLP,
Heard: February 15, 2019	)	Independent Counsel for the Board
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**DECISION AND REASONS FOR DECISION**

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This matter came before a panel of the Public Health Appeal Board (the “Panel”) February 15, 2019, in Edmonton, Alberta. A notice of appeal was received on December 13, 2018. The hearing was subsequently set for February 15, 2019.

## The Appeal

[1] This is an appeal (the “Appeal”) to reverse an order of an Executive Officer dated December 6, 2018 (the “Order”).

## Board Decision

[2] The Order is varied for the reasons provided below.

## Background

[3] The subject-matter property is an attic suite municipally located at 9620-110A Avenue, Edmonton, Alberta (the “Suite”).

[4] On November 23, 2018, Alberta Health Services (“AHS”) received a complaint from a tenant residing in the Suite. The tenant stated that the Suite had no heat.

[5] On November 26, 2018, EO Al Farhat (“EO Farhat”) inspected the Suite (the “Inspection”).

[6] Following the Inspection EO Farhat issued the Order.

[7] The Order required the Suite to be closed for tenant accommodations on the basis that:

- (a) There are no windows in the bedroom of the Suite that could be used for emergency egress; and
- (b) The entrance staircase to the Suite is too narrow and too steep, which is in contravention of the *Minimum Health and Housing Standard* (the “Standards”).

## Grounds of the Appeal

[8] In his Notice of Appeal, the Appellant submits six grounds for appeal:

- (a) Ground 1: The Order declaring the Suite closed has been rescinded and re-occupancy had been allowed;
- (b) Ground 2: An inspector had inspected the Suite three times prior to the Order;
- (c) Ground 3: The low head room is permissible in well-lit conditions;
- (d) Ground 4: The narrow stairwell had been approved in the three above-noted inspections;
- (e) Ground 5: The cost of the required renovations is excessive and unreasonable; and
- (f) Ground 6: The Suite has received Fire Marshall approval.

### Timing of Appeal

[9] Section 5(3) of the *Public Health Act* (the “Act”) requires the Appellant to serve the notice of an appeal within 10 days after receiving notice of the decision being appealed.

[10] The Public Health Appeal Board Secretariat received a notice of the appeal dated December 8, 2018 (the “Notice of Appeal”) on December 13, 2018. The Notice of Appeal was therefore filed on time.

### Jurisdiction

[11] There were no objections to the Panel’s jurisdiction to hear the Appeal.

### Documents/Exhibits

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

- (a) **Exhibit 1** – Order of AHS dated December 6, 2018
- (b) **Exhibit 2** – Notice of Appeal dated December 13, 2018
- (c) **Exhibit 3** – Binder of documents provided by the Appellant
- (d) **Exhibit 4** – Binder of documents from AHS
- (e) **Exhibit 7** – Stair Diagrams provided by the Appellant.

[13] During the hearing, the parties and the Panel agreed to enter the Appellant’s opening and closing statements as exhibits 5 and 6 respectively. However, upon further consideration by the Panel, these documents form part of the parties’ arguments rather than evidence. Accordingly, they have been removed from the exhibits list. In order to avoid confusion, the exhibits will not be renumbered and remain as presented at paragraph [12] above.

### Legal Issues

[14] The legal issues on this Appeal for consideration by the Panel are as follows:

- (a) Issue 1: Whether the stairs comply with the Standards.
- (b) Issue 2: Whether one of the Suite’s windows complies with the Standards regarding emergency egress.
- (c) Issue 3: Whether the headroom height of the Suite complies with the Guidelines<sup>1</sup>.

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<sup>1</sup> EOs use guidelines for headroom clearance contraventions and the relevant excerpts are found at pages 4 and 5 of the PHAB decision in Appeal 07-2016.

- (d) Issue 4: Whether the inspection by EO Lena Jobb (“EO Jobb”) dated December 30, 2009, covers what is required by the Standards.
- (e) Issue 5: Whether the letter by Fire Marshall R. Jeske dated November 29, 2010, covers all that is required by law for the fire department and all emergency responders.
- (f) Issue 6: Whether the letter of re-occupation of then AHS Supervisor N. Skipping (“N. Skipping”) dated August 12, 2010, prevents AHS from issuing the Order.
- (g) Issue 7: Whether EO Farhat has the authority to overrule an order by a Supervisor who has since retired.

### **Submissions of the Appellants**

[15] The general tenor of the Appellant’s submissions is that the Suite is safe for tenant accommodation.

[16] The Appellant contends that the stairs, at 22.5 inches (or 57 cm) are wide enough, since the air conditioning unit that is shown on the bottom left corner of the photo at Exhibit 3, Tab A-11 was brought up those stairs, as were the table and chairs from the same photo. He further argues that there are no requirements for stair widths and stair risers for rooming houses according to the Standards. The Standards, according to the Appellant, only requires handrails on every staircase and guardrails with opening no greater than four inches apart. The Appellant argues that the Standards do not require the stairs to meet the current Alberta Building Code (the “Building Code”). He submits that the cost is too great for him to comply with the current Building Code and that he is actually serving a greater social good by providing affordable housing for low income tenants.

[17] The Appellant submits that the headroom at the beginning of the raised floor (or platform, as the Appellant calls it) in front to the north window (see Exhibit 3, Tab A-1) measures 73 inches and gradually slopes down to 70 inches when it reaches the window. Below the raised floor, the headroom height is 76 inches. The Suite is essentially an open concept and has two windows (one at each end of the bedroom) and the north window could be used for emergency egress purposes, as it complies with the Standards. The measurements are provided at Exhibit 3, Tabs A-9 and A-10. Specifically, the unobstructed opening of the window measures 16 inches by 36 inches.

[18] In support of his assertion that the Suite meets the Standards for rental accommodations, the Appellant submits that N. Skipping, since retired, rescinded an unfit for human habitation order and permitted re-occupancy of the Suite on August 12, 2010. The Appellant argues that the Suite passed inspections in the past. For example, EO Jobb inspected the Suite in 2009 and found no violations. Moreover, N. Skipping and Audrey A. (who signed the August 12, 2010, letter) allegedly agreed with the Appellant that there was no requirement for the stairs to comply with the current Building Code. The Appellant further argues that since N. Skipping was a Supervisor, the Order of EO Farhat, who was a subordinate, cannot overrule the re-occupancy letter dated August 12, 2010.

[19] Finally, the Appellant states that Fire Marshall, R. Jeski, wrote a letter dated November 29, 2010, stating that the Suite complies with the Fire Department's Guidelines. As such, the Appellant argues that the Order should be rescinded.

### **Submissions of the Respondent**

[20] The Respondent submitted that on April 7, 2010, the first order of an EO was issued as an Unfit for Human Habitation order (the "2010 Order") on the basis that there was no appropriate emergency egress window and the stairs were too narrow. As a result of the 2010 Order, the Respondent caused a Notice of Health Hazard (the "Notice") to be registered on the title to the property that contains the Suite (the "Property") pursuant to s. 64 of the Act.

[21] In the months following the 2010 Order, the Appellant kept the Suite vacant. In fact, the Appellant told AHS that he would use the Suite for storage only. As such, he requested that the Notice be removed from the title to the Property. On August 10, 2010, AHS rescinded the 2010 Order on the condition that:

- (a) The Suite is to be used for storage purposes only; and
- (b) The Appellant (as owner) would inform any future purchasers of the above condition.

[22] The letter rescinding the 2010 Order is found at Exhibit 5, p. 56.

[23] The Respondent explained that, concurrent with the rescission of the 2010 Order, AHS issued a closed for tenant accommodations order (the "CTA Order" Exhibit 4, p. 58). However, the AHS letter dated August 12, 2010, which was sent to various provincial agencies advising that the 2010 Order was rescinded, erroneously contained the line "and granted permission for re-occupancy." due to the unedited use of a template. This error was subsequently corrected by AHS and a letter was sent to the Appellant on April 17, 2012, advising him of the same (Exhibit 4, page 94).

[24] The Respondent submits that, over the years following the issuance of the CTA Order, the Appellant had numerous communications with AHS whereby AHS consistently and repeatedly confirmed to the Appellant that the Suite is to remain closed for tenant accommodation until the necessary repairs were complete in order for the Suite to comply with the Standards. In all, AHS recorded 17 such communications (phone calls, emails and letters) between September 30, 2010 and November 30, 2018.

[25] Following the Inspection, the Respondent conducted a file review regarding the Suite and confirmed that the CTA Order was still in force.

[26] On December 4, 2018, EO Farhat re-inspected the Premises (the "2<sup>nd</sup> Inspection"). The measurements for the headroom clearance, window sizes and stairway were confirmed.

[27] The Respondents argue that the purpose of the Act, the Regulations and the Standards is to prevent harm and, as such, must be strictly enforced. Given the information and measurements

gathered during the Inspection and 2<sup>nd</sup> Inspection, the Respondents argue that the Order should be confirmed.

### **Analysis and Reasons**

#### *Whether the stairs comply with the Standards*

[28] The Panel cannot accept the Appellant's arguments with respect to the Standards as they pertain to the stairs. Firstly, the Standards make reference to the requirements of the Building Code or a Professional Engineer design. Since no Professional Engineer design was put into evidence, the Panel relies on the Building Code.

[29] In *Boardwalk Equities Inc. v. Capital Health Authority*,<sup>2</sup> the Court considered the interpretation of the "Alberta Building Code" as it appears in s.3(c) of the Standards (relating to handrails). Boardwalk Equities Inc. argued that the reference to the "Alberta Building Code" in the Standards should be interpreted to include the current Building Code *only* to the extent it applied to new construction. Boardwalk argued that existing construction was grandfathered under the previous Building Code (which did not require the stair renovations recommended by Alberta Health). However, the Court determined that if a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person of a vested right. Ultimately, the Court held that the "Alberta Building Code" as referenced in the Standards, should be interpreted as the most up to date Building Code.

[30] Therefore, while the Standards do not specify the version of the Building Code being referenced, it is reasonable, from a public safety perspective, that the Standards would reference the most up-to-date version is the Building Code.

[31] Secondly, the Standards do in fact deal with stairs and not simply handrails. It is a curiosity that the title at section 3(c) of the Standards reads "Handrails", but the plain reading of the text that follows makes is clear that this article deals with all aspects of stairs including "all treads, risers, supporting structural members, handrails...". Those components of the stairs as listed must comply with the requirements of the Building Code.

[32] The Appellant admits, through his testimony and submissions, that the stairs leading to the Suite measure 22.5 inches (57 cm). The Building Code, at section 9.8.2.1 (2), requires that stairs "between each floor level within a dwelling unit...shall have a width of not less than 860 mm (86 cm). With respect to the risers, the Suite's stairs measure nine inches (or 22.5 cm) while the Code requires risers to measure no more than 200 mm (20 cm). The evidence therefore indicates that the stairs to the Suite do not comply with the Building Code and is therefore not compliant with the Standards.

#### *Whether one of the Suite's windows complies with the Standards regarding emergency egress*

[33] The Suite is essentially an open concept. As such, either window may be used for emergency egress, provided they comply with the Standards. According to the evidence

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<sup>2</sup> 2005 ABQB 34

presented, the north window has an unobstructed opening of 16 inches (40 cm) by 36 inches (90 cm), or 4.0ft<sup>2</sup> (.36 m<sup>2</sup>). The Standards at section 3(b)(ii) reads as follows: “Windows referred to in section 3(b)(i) shall provide unobstructed openings with areas not less than 0.35 m<sup>2</sup> (3.8ft<sup>2</sup>), with no dimension less than 38 cm (15”).”

[34] The Respondent argues that notwithstanding the measurements of the north window, the low headroom clearance at the window only measures 70 inches, while the Guidelines call for a minimum of 72 inches. However, the Panel noted, from submissions made and evidence presented, that the headroom clearance on the platform in front of the window measures 73.5 inches and eventually slopes to 70 inches within only a few inches of the window. That is to say, the headroom at the window itself is 70 inches. The space immediately in front of the window is not considered a path of traffic and cannot, in the Panel’s view, be considered a violation of the headroom space.

*Whether the headroom height of the Suite complies with the Guidelines*

[35] The headroom for the rest of Suite measures 76 inches. Since the minimum calls for 72 inches (provided the space is well lit), the Suite appears to comply with the Guidelines. The Panel heard evidence from the Appellant that the area is well lit. The Panel heard no evidence to the contrary from the Respondent.

*Whether the inspection by EO Jobb dated December 30, 2009, covers what is required by the Standards*

[36] The Panel has not considered this issue, as it does not pertain to the Order. The Panel is of the view that an inspection completed in 2009 does not have any relevance to inspections completed in 2018. This is so because the Standards and the Building Code will be amended from time to time. Moreover, the Appeal deals with whether the EO properly issued the Order, not whether decisions made some eight years ago should stand. In fact, the 2009 inspection was, in effect, rendered null and void once AHS issued the 2010 CTA Order, making this issue moot.

*Whether the letter by Fire Marshall R. Jeske dated November 29, 2010, covers all that is required by law for the fire department and all emergency responders*

[37] The Panel has not considered this issue. The Public Health Appeal Board has no jurisdiction over the findings of a Fire Marshall, nor does the Panel have jurisdiction with respect to the guidelines used by Fire Marshalls.

*Whether the letter of re-occupation of Nick Skipping dated August 12, 2010, prevents AHS from issuing the Order closing the Premises for occupation*

[38] The Panel has not considered this issue for the same reason found at paragraph [36] above. Even if the Panel is in error in not properly considering this issue, the record clearly shows that the letter of Nick Skipping dated August 12, 2010, contained an error. This error was corrected and the Appellant was notified via letter (Exhibit 4, page 95).

*Whether EO Farhat has the authority to overrule an order by a Supervisor who has since retired*

[39] Based on the testimony of the EO and documentary evidence provided (including the revised letter dated May 2, 2017 found at Exhibit 4, p. 95), this is not a matter of an EO overruling a Supervisor. The CTA Order was clearly in force once the 2010 Order was rescinded. AHS noted the error in the letter and issued a correction letter on April 17, 2012. It is a matter of record that AHS's intent was to keep the CTA Order in place until the Suite complied with the Standards.

### Findings and Conclusion


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

- (a) With respect to issue no. 1, the Panel finds that the stairs do not comply with the Standards.
- (b) With respect to issue no. 2, the Panel finds that the north window complies with the Standards with respect to emergency egress.
- (c) With respect to issue no. 3, the Panel finds that headroom height complies with the Guidelines.
- (d) With respect to issue no. 4, the Panel has not considered this issue, as it does not pertain to the Order being appealed.
- (e) With respect to issue no. 5, the Panel has not considered this issue, as it does not pertain to the Order being appealed.
- (f) With respect to legal issues 6 and 7 (as they relate to the same matter), the Board finds that an AHS closure order on the Suite was ordered on August 10, 2010, and remained in effect. Further, that an AHS supervisor had communicated to the Appellant on April 17, 2012, regarding the status of the Suite. While the Board is of the view that AHS Environmental Health staff members could have done a better job communicating information to the Appellant, the evidence makes it unequivocal that the status of the Suite was closed for tenant accommodation purposes on August 10, 2010.

[41] Based on the aforementioned findings, the Board varies the Order as follows:

- (a) Paragraph b. on pages 1 and 2 of the Order shall be removed.

[42] The varied Order shall remain in force until such time as it is rescinded by AHS in accordance with the *Public Health Act*.

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

**Date: August 19, 2019**