

**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 1443028 ALBERTA  
LTD., OF A DIRECTIVE LETTER DATED AUGUST 2, 2017

AND IN THE MATTER OF AN APPLICATION FOR A  
DETERMINATION AS TO WHETHER THE DIRECTIVE  
LETTER IS CONSIDERED A DECISION OF A REGIONAL  
HEALTH AUTHORITY

**DECISION OF THE PUBLIC HEALTH APPEAL BOARD**

**Board meeting date**

September 7, 2017

**Written submissions:**

For the Appellants:

Erika Norheim, Counsel for the Appellants

For the Respondent

Ivan Bernardo, Q.C., Counsel for Alberta Health Services (“AHS”)

**Decision of the Board**

[1] The Board has determined that the letter of the Executive Officer for AHS, Alaa Farhat, dated August 2, 2017 (the “Letter”) is not a decision of a regional health authority. As such, the Board does not have jurisdiction to hear the Appeal.

**Background**

[2] On August 24, 2016, AHS Executive Officer, Alaa Fahat, issued an order to the Appellants (the “Order”) pursuant to the provisions of sections 59, 60, and 62 of the *Public Health Act* (the “Act”) with respect to lands located at 11721-94 Street, Edmonton, AB (the “Lands”).

[3] The covering letter to the Order stipulated that follow-up action was required to address the mold species that are indicators of existing moisture concerns and may suggest the presence of mold spores. The letter requested that a report from the Environment Consultant outlining the additional steps that were taken be submitted with the air sampling results be forwarded to Alaa Farhat (EO) for review.

[4] *Inter alia*, the Order required the Appellants to retain the services of a licenced environmental consultant or industrial/occupational health hygienist, approved by AHS.

[5] The Appellants hired Cascade Environmental Consulting Ltd. and a post-remediation verification report dated July 17, 2017 was prepared and submitted to AHS for its review (the "Report").

[6] Following AHS's review of the Report, the Appellants received the Letter. The Letter stated that AHS was concerned with the results found in the Report and that further steps would be necessary in order to properly control certain mold species found in the basement and main floor kitchen. Also additional testing would be required.

[7] The Appellants are of the view that they had complied with the Order and therefore did not agree with the Letter. Consequently, they filed a notice of appeal on August 11, 2017 (the "Appeal").

### **Issues**

[8] Whether the Letter is considered a decision of a regional health authority pursuant to s. 5(1) of the *Public Health Act* (the "Act").

[9] Whether the Board has jurisdiction to hear the Appeal.

### **Submissions of the Appellants**

[10] The Appellants submit that an order is not a matter of form but of substance, since section 62 of the Act does not specify a particular format for an order made under that section, other than that it must be written.

[11] The Letter, it is argued, contains statements that require the Appellants to complete certain steps or tasks. As such, the Letter amounts to an exercise of the Executive Officer's authority to compel the Appellants to do certain things and is therefore a written order within the meaning of the Act.

[12] The Appellants further submit that inquiries were made respecting the mandatory nature of the instructions set out in the Letter and, since no response was provided to these direct inquiries, it is argued that the instructions set out in the Letter are "mandatory rather than optional, and therefore constitute a 'written order' as contemplated by s.62 of the Act."

[13] The Appellants also submit that the Letter requires the Appellant to take additional action beyond the Order. As such, the Letter is a new order.

### **Submissions of the Respondent**

[14] The Respondent takes the position that the only instrument that is capable of being appealed is an order and that the Letter is not a decision of Alberta Health Services ("AHS") which is capable of being appealed.

[15] The Respondent argues that AHS orders contain express language on what directions are to be followed. For example, the following clear words are used in orders: NOW THEREFORE, I hereby ORDER and DIRECT...

[16] The Order directed that further tests be conducted at the relevant property with respect to air quality issues. A report was provided to AHS with respect to air quality as directed by the Order. The Respondents submit that the Letter is simply a follow-up piece of communication to ensure that the Appellants understand what may be done in order to be in compliance with the Order. As such, the Letter is an explanatory tool with respect to the Order and not a new order or directive.

[17] The Respondent also raised the issue of the Appellant being late for filing a notice to appeal of the Order. However, since the Appellants have made it clear at paragraph 10 of their submissions that they are not appealing the Order, this point is moot and will not be considered in the Board's decision.

### **Relevant Sections of the *Public Health Act***

[18] Section 5 of the Act governs appeals. It reads as follows:

#### **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.

**(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.

[19] In this case, sub-section (b) of section 5(1) does not apply, as the matter does not involve the issuance of a licence or permit, nor does the matter fall under a regulation that itself provides for the possibility of an appeal (i.e., s. 7 of the Waiver Regulation, Alta Reg. 298/2003). The relevant section under consideration is therefore 5(1)(a). That is to say, the Letter must be an "order" as defined pursuant to s.62 of the Act, which reads as follows:

#### **Order**

**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.

### **Analysis/Reasons**

[20] The Board agrees with the Appellants that an order under s.62 of the Act is not in a prescribed form under the Act or the Regulations. As such, a letter containing those elements found under s.62 may, in certain circumstances, be considered an order.

[21] It follows then that if a letter (which complies with s.62 of the Act) requires an owner and/or landlord to take new additional steps beyond that which is contained in the original order, that letter may be considered an order capable of being appealed to this Board. However, this is not the case here.

[22] The Board is not persuaded by the Appellants' argument that the Letter required them to take additional action not included in the Order.

[23] The Letter specifically raises the issue of mold as identified in the Report and makes suggestions to deal with the same. It is noted that this very issue is identified at paragraph dd of the Order's preamble. Moreover, at page 6, 2(a) of the Order, AHS directs the Appellants to undertake and diligently pursue the completion of the work so listed. That work includes, *inter alia*, carrying out environmental air quality analysis for "water and mold damage", ensuring that all building material are maintained in a safe and sanitary condition at all times, and take any further steps in the interest of preserving and maintaining the health of any person who may occupy the premises as may be required by the Executive Officer.


[24] While the Letter does make recommendations to deal with the mold issue, which are not included in the Order, the requirements to bring the premises into compliance with the Regulations are found both in the Order and the Letter. Accordingly, the Letter cannot be considered a new order.

[25] It is the Board's view that the Letter is simply follow-up correspondence to ensure that the Appellants understand what may (or must) be done to ensure compliance with the Order.

**Conclusion**

[26] Given the foregoing, the Board has ruled that the Letter is not an order and therefore not a decision of a regional health authority under section 5(1) (a) of the Act. Thus, the Board does not have jurisdiction to hear the Appeal.

[27] The Order dated Aug 24, 2016 is still in force until AHS rescinds it in accordance with the Act.

  
Wendy Lickacz, Vice-Chair  
On behalf of the Public Health  
Appeal Board

**Date: October 20, 2017**