



THE Landlord's Rental Resource



POSITION PAPER

October 17, 2008

This Position Paper is prepared on behalf of the Edmonton Apartment Association and the Calgary Apartment Association. These bodies constitute all non-profit organizations that address issues relevant to landlords and property managers on rental apartments and other residential housing. The purpose of the position paper is to address an issue that is presently confined to the Capital Region area but potentially has a province-wide application. In short form, the problem is the conflict between two statute structures in Alberta dealing with rental properties and the inappropriateness of the treatment of that conflict to date in the Capital Region.

The Nature of the Problem

The summary of the nature and a short statement of the history of the problem is as follows:

1. There is a well-established concept that is preserved in the *Municipal Government Act* and in the building codes that grandfathers improvements that have been made in accordance with municipal and code requirements that applied at the time of construction of a building. Those grandfathering standards apply to all varieties of buildings, including residential rental buildings. The idea is that if a person builds a building that complies with the applicable code and other requirements of the day and is kept up from year to year without major revisions the law does not require those buildings to be modified, upgraded or otherwise changed to meet changing standards under the *Municipal Government Act* or the building code (hereafter “municipal/code law”). So if a building was built in 1965 and met all of the requirements applicable to that building at that time and continues today to be a reasonably maintained building in keeping with the standards that then applied municipal/code law does not require any changes. This is true even if the current day municipal/code standards would require different materials or different treatment in a number of respects on a new building commenced today. There are good reasons for this. The most important is the recognition by the municipal/code law that it would be an unfair burden on property owners to have to rebuild their properties every time there is a change in the standards or codes. This concept applies to all manner of properties from the simplest of single-family homes to the tallest of highrise buildings.
2. The *Public Health Act* of Alberta provides a comprehensive structure for protection against public health concerns and the protection of the public health. That statute is expressed as an overriding statute, and of course legitimately so expressed when one thinks in terms of what might happen in the case of a pandemic or outbreak of illness or risk of infection or similar adverse affect upon the health of the public. That legislation specifically addresses not only public places but also private residences, although it creates a different level of powers in the health authorities for public places (a higher level of power) than it does for private residences. Under this statute there is an ability on the part of a health authority to do a number of things including the issue of orders and directives that are directed at protecting the “public health”. There is nothing in this statute that addresses the question of the treatment of building or safety standards or upgrading standards or requirements for buildings (public or otherwise). There is no grandfathering in this statute, for example. This is a health statute, not a

building code statute. There are other statutes (the municipal/code laws) that deal with those things.

3. One of the matters quite properly addressed in the public health statute is the ability of the public health authorities to deal with circumstances that might be adverse to public health in reference to residential properties of all kinds, including residential rental properties.
4. In 1999 a ministerial regulation dealing with the standards of residential rental housing was adopted. That regulation is copied as **Appendix I** to this Position Paper. This minimum housing and health standard (the "Standards") addresses not only health matters but also housing matters. It goes without saying that housing matters can be relevant to the comfort, and, in a sense, also the health of persons residing in housing. The same is true of the driving of motor vehicles on the highways and any of a host of other events and circumstances that apply to day-to-day living. Some, such as uninhabitable conditions (infested or polluted property conditions), quite properly are subject matters of public health and legitimately and fairly treated by the Standards and by the health authority. Other matters, such as building code compliance, are not so readily characterizable as matters of public health. It is these others that are the source of concern for the apartment associations. It is these others that are the source of the interface conflict between municipal/code law and the *Public Health Act* insofar as the administration of the latter is evident in the Capital Region area over the past several years.
5. The *Residential Tenancies Act* before 2004 specifically addressed the Standards that landlords had to meet in renting out residential rental premises. They were minimalist. They required:

“that the premises will be habitable by the tenant at the beginning of the tenancy.”

In 2004 the *Residential Tenancies Act* was comprehensively replaced and the equivalent provision now is the following:

“that the premises will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulation.”

Insofar as legitimate public health issues are concerned, the change in the language and the change in the concept in the *Residential Tenancies Act* that occurred in 2004 seemed to be insubstantial. Clearly if a residential premise was infested with vermin or afflicted with toxic mold or other such substance the concept that a landlord had to deal with those issues and eradicate them as a condition of renting the premises out was really not much more than the concept that previously applied of renting out only habitable premises. The changeover legislatively in 2004 has not been a problem as a result in jurisdictions anywhere in Alberta (to our knowledge) other than the Capital Region.

For whatever reason, the Capital Region Health Authority, both before and after 2004, began aggressively to pursue enforcement of the Standards, not only to deal with matters of public health in the broader sense that is the substance of the *Public Health Act* but also in the context of building standards. So the Capital Health Authority began to require landlords to upgrade properties even though they met municipal/code law requirements and did not require upgrading under those requirements. Specific illustrations, one widely publicized in a prosecution in the summer of 2008, and others involving court actions against various landlords over the past five years include:

- a. Redoing staircases because the risers which met the standards that applied when the building was built do not meet the standards for spacing that apply under the current codes;
- b. Redoing handrails on staircases to bring the height standard up to current code, even though the height conditions met the standards of the day when the building was constructed;
- c. Increasing the area of windows in existing buildings that complied with the standards of the date of building but no longer meet current code expectations for fire exit; and
- d. Modification of the spacing and configuration of balcony rails.

In all these cases the orders and directions did not involve contaminated buildings or situations of vermin or situations of direct impact on public health. All were situations in which the exercise was to achieve the revision of a building to bring it up to current standards for the particular features that were in question. All were matters of municipal/code or building standards. The connection to health was no closer to legitimate jurisdiction of the public health authority than jurisdiction over speed controls on highways. However, the Capital Health Authority, uniquely, in Alberta, successfully brought many of these cases through the courts and won.

A classic illustration of the inappropriateness or unfairness of the treatment of building upgrading expectations of the Capital Health Authority occurs in the case of condominium properties. There have been a couple of instances where the upgrading requirement is directed at the landlord owner only and not directed at the neighbouring owner occupant. There is good reason for this from the authority limitation point of view. Capital Health Authority has much more limited authority to direct building improvements towards persons who are owners and occupants of their own homes (private dwellings). So in a condominium building with identical balconies or identical stair risers or identical balusters spacings the landlord owner is in violation of "public health concerns" unless he upgrades his facilities; whereas the owner occupant next door is evidently not in breach of public health concerns and not required to make any upgrades. In the case of a highrise condominium building where all the balconies and all of the exteriors are common property the concept is unworkable to say the least and absurd to state it more strongly.

What are the implications of the treatment?

1. The cost to landlords of treating the directives from Capital Health Authority are substantial. For example, in the case of windows, the cost to upgrade is approximately \$750 per window, or an approximate cost of \$95,000 per 100 unit apartment project. In the case of railings, the cost is approximately \$2,250 per apartment, or \$180,000 in an 80 unit apartment complex. On a macro/province wide level, we estimate that 10 to 15% of the apartment buildings in Alberta have windows and guard rails that do not meet the ministerial regulation. We estimate that upgrading same would cost between \$50 to \$75 million (170,000 apartments x 10 to 15% x \$3,000 capital cost). In the capital region alone, there are approximately 80,000 apartment units. Accordingly, we estimate the cost to make the same upgrades there would be in the range of \$25 to \$35 million.
2. Applied even more broadly, the costs include potentially the continuous upgrading of buildings every time there is a change in code or standards. It would be impossible to estimate or fairly assess the implications of those costs for the landlord. There are sound policy reasons for municipal/code laws to grandfather buildings that were originally constructed in accordance with then-applicable municipal and building code requirements. The implications of a contrary treatment are massive. Not only for property owners, but also for persons who ultimately have to pay for the expense of continuous upgrading (i.e., occupants of rental properties).

Our government has made one of its prime directives for the next while the establishment of more affordable housing for members of the public who need it. This is a priority item in the April 15, 2008 Speech From The Throne and legitimately so. It is clear that over the last 10 to 15 years there has been a dearth of new rental accommodation development in the major cities in Alberta. While many condominiums have been built and provide a level of lower cost housing for many Albertans, for the most part it has been uneconomical for property owners to develop strictly rental accommodation within the context of rental rates that have historically been available in this province. This issue was addressed rightly by our government when it dealt with the pressures and demands for rent controls in 2007. The hard reality is that it is uneconomical to build even stick built housing at \$200.00 per square foot and then rent the units out for \$1,000.00 per two-bedroom suite. The numbers do not work and property owners cannot justify the cost or risk of development of apartments. In Edmonton, for example, permits for new residential apartment units in 2008 are substantially below even prior years' levels and those levels in turn are very substantially below any levels that would have applied 15 years ago.

If one were to add to the cost of ownership, operation and development of residential rental properties the obligation to continuously upgrade and redo the rental accommodation, the negative impact is obvious. Only one of two things could result. Either people would stop building and stop operating residential rental accommodation or they would have to increase rents to a very substantial degree to deal with the added costs. Neither of those circumstances is going to help the Government's aim to increase the level of affordable housing in the province or to accommodate the substantial influx of people into this province

who need that housing. It is precisely this kind of concern that supports the municipal/code concept of grandfathering.

What are the solutions?

1. An interim or easy fix of the problem would be to reconsider and rewrite the ministerial regulation that contains the Standards. In that regard, for example, a general statement within the Standards that grandfathers buildings that met the requirements of the building codes or other municipal requirements at the time of development would be helpful. Rewriting the Standards to get rid of the concept that it is a matter of public health whether or not a screen is torn or a tile on a floor is cracked would also be helpful. But it is the grandfathering that is the most serious concern. We defer to legislative draftspersons as to how to deal with this solution; but note in particular that it is a readily obtainable solution that would really do no more than reflect what is happening in all of the other health jurisdictions in the province in terms of their treatment of the Standards.
2. Broadly speaking the solution is to rationalize the legislation to make sure that the conflict between the two structures is resolved. The *Public Health Act* requirement should focus on matters of public health in a proper broad sense and not on municipal/code issues. This may require some adjustment to the *Public Health Act* itself including rationalization of the distinction between private and public properties (in our view the residential apartment is in fact a private property not a public property, which is a distinction that is not very well treated in the *Public Health Act*). Some care needs to be taken to be sure that any legislative change fairly and reasonably looks after the public interest, as always; and of course we support that care and are cognizant of those concerns. However, the underpinnings for the unique form of treatment of building standards by the Capital Health Authority will only be effectively removed if the legislation is rationalized.

Who are the proponents of this Position Paper?

This Position Paper is prepared on behalf of the Edmonton Apartment Association and the Calgary Apartment Association. For the most part both of these Associations represent landlords, although they collectively represent most of the significant residential rental properties in the province. They also have strong membership in the service industries that deal with apartment rental and operation, including management firms and service firms of all kinds. The Edmonton Apartment Association has amongst its membership approximately 300 owner and service members; with the Calgary Apartment Association has about 600. Collectively, the members include (at a guess) about 100,000 residential units. Collectively, these Associations support the balanced operation of legislation relevant for rental residential housing. Collectively, they strongly support the importance of good, clean, safe and supportable housing for Albertans. Collectively, however, they also support the concept that housing that is clean, safe and habitable, housing that has been reasonably occupied and managed for many years and that is reasonably maintained should not have to be rebuilt or reconstructed or in major fashion revised, when it is not required under the municipal/code law regime.