Appeal No.: 24-2017

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 DRAGO MARJANOVIC and NADA MARJANOVIC OF A LETTER DATED JUNE 30, 2017 FOLLOWING AN INSPECTION CONDUCTED BY AN EXECUTIVE OFFICER OF AHS, ZONE 3

AND IN THE MATTER OF AN APPLICATION FOR A DETERMINATION AS TO WHETHER THE LETTER IS CONSIDERED A DECISION OF A REGIONAL HEALTH AUTHORITY AND FOR A DETERMINATION AS TO WHETHER THE BOARD CONSIDERS IT APPROPRIATE TO ACCEPT A LATE FILING OF THE APPEAL

DECISION OF THE PUBLIC HEALTH APPEAL BOARD

Board meeting date

December 20, 2017

Board members present:

Denis Lefebvre, Chair

Wendy Lickacz, Vice-chair

Linda Klein, Member

David Rolfe, Member

Written submissions:

For the Appellants:

None provided

For the Respondent

Linda Svob, Counsel for Alberta Health Services ("AHS")

Decision of the Board

[1] The Board does not consider it appropriate to extend time within which to accept the appeal. As such, this matter will not proceed to a hearing.

Background/Facts

[2] On June 27, 2017, Executive Officer Jamie Carbert ("Carbert") inspected the Old Cinema Night Club, located at 4917 48 Street, Camrose, AB (the "Establishment") operated by the Appellants. This inspection was carried out to determine the extent of food-related services that may be approved given the requirements of Alberta Liquor and Gaming Control.

[3] On June 30, 2017, Carbert wrote a letter (the "Letter") to the Appellants, which contained steps required to obtain a food handling permit as well as the expectations of AHS to maintain said permit. The Letter also identified a violation under the *Public Health Act* (the "Act") and Food Regulation (the "Regulation"), which Carbet required the Appellants to rectify.

[4] The Letter stated the following:

> ...
>
> We have also received reports regarding the illegal preparation and sale of foods from a barbecue that was in concert with the business operation of the facility. We further understand that this occurrence happened under the full knowledge and consent of the manager of the nightclub. This event raises concern with us about the possibility of foods currently stored in the commercial restaurant of the nightclub, being served to the public.
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> For this reason we require the following:
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> 1. All food in the upstairs kitchen facility, including those contained in the freezer and fridge as reference above, must be removed from the premises so as to ensure that foods beyond those that are approved are not served to the public; complete by September 30, 2017. Only foods intended for customer consumption may be stored at this facility and only in the main floor bar storage area.
>
> 2. Foods that may be permitted for sale and service to the patrons must be pre-packaged foods, such as burritos, hotdogs or other similar foods that are manufactured from an approved source. Only minimal food handling will be permitted. For the purpose of procuring a valid Food Permit, please provide us with a list of foods that will be served.
>
> 3. The freezer and microwave oven used to store and heat such foods must be located on the main floor service area at or near the bar from where the foods are dispenses and must be in close proximity to a hand wash basin fully equipped with hot and cold water, a hand soap dispenser and disposable hand towels. Lighting must be adequate in these areas.
>
> 4. All plates and utensils used for food service must be single use disposable.
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> 5. A food handling permit application form (attached) along with the menu needs to be submitted to the Environmental Public Health Camrose office prior to the approval inspection.
>
> ...

[5] On July 20, 2017, the Appellants wrote to Carbert expressing their disapproval with the Letter. They insisted, *inter alia,* that the food stored in the upstairs kitchen facility was located away from the public area of the Establishment and was for personal use only.

[6] On September 29, 2017, following a telephone discussion with the Appellants, Carbert wrote a second letter stating that for the purposes of the Regulation, "all food in a food establishment is deemed to be intended for public consumption unless it is clearly segregated and is identified to the satisfaction of the executive officer…"

[7] On October 23, 2017, Carbert conducted a re-inspection of the Establishment. The same violation (being the improper storage of personal food) was observed.

[8] On November 2, 2017, Carbert conducted another re-inspection and issued a report (the "Inspection Report"). This time however, the inspection passed. It was noted that the all food had been removed and there was no further violations under the Regulation.

[9] On November 30, 2017, the Public Appeal Board Secretariat received a Notice of Appeal (the "Appeal"). The Letter was attached to the Appeal.

[10] The Board notes that the Letter is dated June 30, 2017. Further, the Notice of Appeal states that the decision of AHS is dated November 22, 2017.

[11] Upon review the documents, the Board notes that the Appellants have inscribed on the Inspection Report that the Inspection Report was received on November 22, 2017.

[12] While the Appellants have not listed any ground for the Appeal, the Board has inferred upon review of the documents provided, that the Appellants intend to appeal the directive of AHS to remove all foods in the upstairs kitchen facility per the Letter.

Issues

[13] There are three (3) issues for the Board's consideration:

(a) Whether the Board should allow the late filing of the Appeal;

(b) Whether the Letter is considered a decision of a regional health authority pursuant to s. 5(1) of the Act; and

(c) Whether the Appeal is moot and, if so, whether the Board should proceed despite a moot appeal.

[14] While AHS has not put the issue of mootness forward, the Board has exercised its discretion to do so.

Submissions of the Appellants

[15] The Appellants did not provide any written submissions.

Submissions of the Respondent

[16] AHS submits that the Appellants are out of time to file the appeal and, in particular, the Appellants have not even requested that the Board consider their late appeal, let alone provide any reasons for allowing the same.

[17] With respect to the Letter, the Respondent takes the position that the Letter is not a decision of a regional health authority. The Respondent also submits that notwithstanding the determination of the whether the Letter is a decision, the Appellants are out of time for appealing the decision and the matter should not proceed to a hearing.

[18] The Respondent submits that no order was issued under section 62 of the Act in this matter and therefore, section 5(1)(a) of the Act does not apply. The Respondent further argues that the Letter is not a decision that is the subject to appeal before the Board, nor does the Letter contain a decision respecting the issuance or approval of a Food Handling Permit. As such, the Letter is not an order or directive and is simply a piece of communication outlining certain expectations in light of the findings at the June 27, 2017 inspection.

Relevant Sections of the *Public Health Act*

[19] 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
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> (a) an order issued under section 62, and
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> (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.
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> **(2)** A person who
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> (a) is directly affected by a decision of a regional health authority, and
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> (b) feels himself or herself aggrieved by the decision
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> may appeal the decision to the Board.

[20] In this case, sub-section (b) of section 5(1) of the Act does not apply, as the matter does not involve the actual 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 of the Act 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.
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> **(4)** An order may include, but is not limited to, provisions for the following:
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> (a) requiring the vacating of the place or any part of it;
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> (b) declaring the place or any part of it to be unfit for human habitation;
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> (c) requiring the closure of the place or any part of it;
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> (d) requiring the doing of work specified in the order in, on or about the place;
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> (e) requiring the removal from the place or the vicinity of the place of anything that the order states causes a nuisance;
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> (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.

[21] With respect to the late filing of appeals, s. 5(9) reads as follows:

> (9) Notwithstanding subsections (3) and (4), the Board may, if it considers it appropriate to do so, extend the time within which an appeal may be taken under subsection (3) or within which the Board must act under subsection (4).

[22] Accordingly, the Board may allow for the late filing of an appeal in keeping with the principles of natural justice and procedural fairness.

[23] Whether the extension is "appropriate" is a very broad test. The Board has considered the following list of criteria (the "Criteria") to guide its decision:

(a) Whether the Appellant had a *bona fide* intention to appeal before the expiration date of the appeal period;

(b) Whether the Appellant, either expressly or impliedly, informed the respondent of his or her intention to appeal;

(c) Whether the Respondent would be unduly prejudiced by an extension of time;

(d) Whether there was merit in the appeal in the sense that there was a reasonably arguable ground;

(e) Whether the Appellant had a valid explanation for the late filing of his or her appeal; and

(f) Whether it was in the interests of justice that the extension be granted.

[24] The Board is not bound by the Criteria in the exercise of its discretion pursuant to Act. Ultimately, the Board is required to determine if it considers it appropriate to extend the time within which an appeal may be accepted.

Analysis/Reasons

[25] The Appellants have waited six (6) months before deciding to take action on the Letter and have not provided any reasons for filing such a late appeal.

[26] No evidence was provided by the Appellants to show that they had a *bona fide* intention to appeal before the expiration date of the appeal period, nor did they inform AHS of their intention to appeal the Letter.

[27] In reviewing the fact and the submissions of the Respondent, the Board does not consider it appropriate to accept the late filing of the Appeal.

[28] Given the foregoing, the Board will not deliberate on the two remaining issues.

Conclusion

[29] For the above reasons, the Board has unanimously decided to not consider this Appeal any further.

[30] The Appeal will not proceed to a hearing.

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

Date: January 22, 2018