CITY OF PORTLAND

PERMITTING AND INSPECTIONS DEPARTMENT

In Re: 6 Houlton Street Notice of Violation and Order to Correct

#CBL 055 BO32001

INTRODUCTION

This is an appeal from a Notice of Violation and Order to Correct issued by Code Enforcement Officer Kevin Hanscombe Dated April 17, 2018 based on an inspection of 6 Houlton Street done February 16, 2018 (hereafter “Enforcement Order”). The Portland Code of Ordinances has three provisions that provide for appeals from enforcement orders. Sections 6-96 and 10-23 provide for an appeal to a Board of Appeal, but nothing in the Portland Charter or ordinances creates such a board. This appeal is being filed with the city to ensure that all rights of to appeal are preserved. Section 6-127 provides for appeals to Superior Court pursuant to Rule 80B.

FACTS

A. The Building and the Doors.

6 Houlton Street is a three-unit multiple dwelling. Marcia Cleveland and Daniel Paul, purchased the building October 31, 2016 and live in one unit. The other two units are rented to tenants with leases. A total of six people live in the building. Each unit has one or two exits directly to the outdoors and at least one exit through the central hall.

The building was built some time in the 1850’s and has been a residential building ever since. It is wood frame construction with plaster and lathe interior walls typical of the period. Nothing in the building is plumb or level. The fire doors required by the “Inspections Violations” would mostly be in the central entrance hall of the building and would replace original 19th century doors and molding.

The building qualifies is an apartment building with a residential occupancy as those terms are defined by the NFPA 101 §§ 3.3.37.3, 3.3.196.13. The apartment units have a total square footage of approximately 3000 ft2 and therefore the building has an occupancy load of 15 (3000 ÷ 200 = 15). NFPA – 101 Table 7.3.1.2.

Plaintiffs have preliminary estimates from contractors of the cost of installing the fire doors required by the Notice of Violation and Order to Correct will cost at least $1000 per door. Because the work is being done in a very old building it could easily cost an additional 50% for problems associated with any work in an old building or $10,500.

The two units that are rented out long term lose money. The owners only make a profit by renting out their own unit Airbnb in the summer and they rely on the money to make improvements. In 2017, all rentals produced a net income of $2,529. Before the Housing Safety Office did its inspection, the owners had begun an upgrade of the heating system in the building, which must be completed by the beginning of the next heating season. The upgrade will provide significant fire safety benefits, because it removes a 40-year-old oil burner and oil and kerosene tanks from the basement.

During the Inspection the Code Enforcement Officer admitted that 6 Houlton Street had never been inspected before and that City had not enforced the fire door “requirement” in three-unit buildings until recently. The initial list of violations served April 20, 2018, claimed that fire doors are required by Chapter 7 of the NFPA 101 §7.1.3.2.1. The enforcement order switches legal theories and claims that the fire doors are required by § 31.2.2.1.

ARGUMENT

I. PLAINTIFF’S BUILDING IS EXEMPT FROM THE ONE-HOUR FIRE DOOR REQUIREMENT.

A. The NFPA Code “Grandfathers” the Exit Passageways in Plaintiff’s Building.

The front hall and the private stairs in Apartment C of 6 Houlton Street are passageways that lead to exits to the outdoors. They are explicitly exempted from the requirement of installing one-hour fire proof doors by NFPA Code §7.1.3.1 (1), which states that the requirement to separate exit corridors by one-hour fire resistant doors and walls

“…shall not apply to existing buildings provided the occupancy classification does not change.”

“Existing building” is defined as a building erected before the adoption if this edition of the Code.[[1]](#footnote-1) 6 Houlton Street, which was built in the 1850’s, is clearly an existing building and it has been used as a residence since it was built.[[2]](#footnote-2)

Existing buildings are also regulated by Chapter 31 of the NFPA 101. Section 31.2, which deals with means egress, brings the grandfathering clause of Chapter 7 in into Chapter 31. Section 31.2.1.1 states that “means of egress from dwelling units to the outside of the building shall be in accordance with Chapter 7 and this chapter.” (emphasis added). The rest of the provisions under § 31.2 are striking for how little is actually required. The “Means of Egress Components” are all permissive. Specifically, §31.2.2.2.1 states, “Doors complying with 7.2.1 shall be permitted; §31.2.2.7 states “Exit passageways complying with §7.2.6 shall be permitted”. (emphasis added)

The permissive language used for doors and passageways (the “component requirements”) makes sense because many existing buildings are grandfathered. Other parts of Chapter 31, for which there is no grandfathering clause, are mandatory. For example, the requirements of two fire exits and virtually every other egress feature are mandatory. NFPA 101 §§ 31.2.4.3, 31.2.5, 41.2.6, 31.2.7

B. Chapter 31 of the NFPA 101 Recognizes That Existing buildings are Subject to Less Stringent Exit Acess Requirements.

Section 31.1.1.1 states that the requirements of the chapter apply to apartments that are currently occupied. It identifies four “options” which are subject to additional requirements. None of the options fits 6 Houlton Street, because it has a smoke alarm system, but not sprinklers.[[3]](#footnote-3) This appears to say that 6 Houlton Street is not subject to any requirements beyond those in Chapter 31, which as noted above uses permissive not mandatory language when talking about doors and exit passageways.

Section 31.1.1.1 is rather opaque. Why does it speak of “options” for different requirements? Who has these options and how and when are they exercised? However, Table A.31.1 in the Annex to the Code makes it abundantly clear that existing buildings are not required to have hour resistant doors. Option 1, which is closest to the 6 Houlton situation, only requires 20-minute doors.

II. PORTLAND HAS NOT PROPERLY INCORPORATED THE NFPA 101 AS ITS FIRE CODE.

Two sections of the Portland Code of Ordinances purport to incorporate the NFPA 101by reference. Section 6-116(e) incorporates “the most current version” of the NFPA Code. Section 10-1 incorporates the 2009 edition. Both sections violate well settled case law that prevents the City Council from delegating its legislative power to a private non-governmental entity. Section 6-116(e) is invalid because it incorporates versions of the Code not in existence at the time that section was adopted. *State v. Intoxicating Liquors*, 121 Me 438 (1922) (Prohibition era statute defining “intoxicating liquors” by reference to federal law enacted later was unconstitutional delegation of legislative authority.) *State v. Emery*, 55 Me. 364 (1896) (Statute referring to U. S. Pharmacopoeia for definition of adulterated drugs must be interpreted as incorporating edition in effect at the time the statute was enacted.)

By having two contradictory sections that incorporate the NFPA 101, the Code of Ordinances creates confusion about which edition controls and that violates state statute and the Maine Constitution. The Municipal Law 30-A MRSA §3003(2) permits municipalities to incorporate fire codes by reference but requires that they be “properly identified as to date and source.” The confusion in Portland’s ordinance fails to meet that basic requirement. The Municipal Law also requires that a copy of the incorporated version be made available to the public by keeping a copy in the office of the Clerk. 30-A M.R.S.A. §3003(2)(A). When I checked the Clerk’s office on April 19th there was no edition of NFPA 101 on file.

Portland’s confusing incorporation sections are also contrary to the Maine Constitution, because they delegate legislative authority without identifying specific guidelines. *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983) (Delegation of authority to grant exceptions to the zoning ordinance was invalid because it lacked clear criteria.)

III. IF THE APPEALS BOARD IGNORES THE GRANDFATHER CLAUSE ITS ENFORCEMENT ORDER IS UNCONSTITUTIONAL.

No part of the City of Portland has the authority to rule on the constitutionality of city ordinances or the enforcement order. However, any court reviewing its decision will interpret the Code of Ordinances and NFPA 101 to avoid constitutional problems if possible. In ruling on this appeal, the City may want to keep in mind the court’s perspective. For that reason, I describe the arguments that may be presented on appeal.

A. The Enforcement Order Imposes Retroactive Liability in Violation of Due Process Clauses of Maine and United States Constitutions.

When the owners bought 6 Houlton Street, it had never been inspected, the City did not enforce fire door requirements in three-unit apartment buildings, and most importantly the grandfathering clause of the NFPA 101, was in effect. Had the owners known that within 18 months the City would issue an enforcement order, they could have bargained for a lower price or correction of the problem. The enforcement order disrupts the owners’ “reasonable investment backed expectations.” It is unfair and violates the owners’ due process rights. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

B. The Enforcement Order Is a Taking Without Compensation in Violation of Maine and United States Constitutions.

When government regulation of businesses imposes unfair and unreasonable liability on an enterprise like an apartment building that is an unconstitutional taking. In *Eastern Enterprises*, four of the Supreme Court Judges held that even though Coal Act had legitimate health and welfare goals, imposing significant economic liability on a relatively narrow group of businesses was an unconstitutional taking.

Here the enforcement order imposes liability between $7000 and $10,000, which is three to four times the rental income in 2017. While the owners have always intended to invest in upgrades to the building, we cannot manage a surprise $10,000 bill.

The enforcement order is also a taking because Portland’s Code of Ordinances Restricts the transfer or sale of the property in question AND prohibits any stay of enforcement while. §§ 10-25.6, 10-25.7 and 6-96 (c). These provisions mean that a citizen who is subject to an unauthorized order relating to fire safety loses the ability to manage their property for their own benefit and safety and have no recourse to protect their property rights until the order is reviewed by a court. The Maine Constitution Art. I, § 1 declares that all people have the right of “enjoying and defending…acquiring and protecting property, and of pursuing and obtaining safety and happiness.” The enforcement order violates these rights.

CONCLUSION

The Appeal Board should reverse the enforcement order.

Date: April 25, 2018 Respectfully submitted,

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Marcia J. Cleveland

6 Houlton Street

Portland, ME 04102

Certificate of Service

I hereby certify that on April 25, 2018 I filed a a copy of the attached Appeal from a Notice of Violation and Order to Correct by personally delivering a paper copy to the Clerk of the City of Portland and by emailing copies to the Anne Torregrossa in the office of the Corporation Counsel and Kevin Hanscombe the Code Enforcement Officer who issued the order.

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Marcia J. Cleveland

1. In Point II below we argue that the City of Portland has not effectively adopted any version of the NFPA 101 because its attempts to do so violate Maine’s Constitution. For the purposes of this argument we rely on and quote the 2018 edition. [↑](#footnote-ref-1)
2. It has a residential occupancy. NFPA 101 §3.3.196.13 (2018) [↑](#footnote-ref-2)
3. Option 1, which is for buildings that have neither, is the closest to our situation. [↑](#footnote-ref-3)