

STATE OF MAINE  
SUPERIOR COURT  
CUMBERLAND COUNTY

MARCIA CLEVELAND and  
DANIEL PAUL,  
Plaintiffs,

v.

CITY OF PORTLAND and  
ZONING BOARD OF APPEALS  
Defendant.

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RULE 80B  
COMPLAINT

Docket No.

**INTRODUCTION**

1. This complaint is and appeal from the decision of the Portland Zoning Board of Appeals (ZBA) affirming a Notice of Violation (NOV) and accompanying Order to Comply, issued by Code Enforcement Officer Kevin Hanscombe April 17, 2018. That NOV and order required the Owners of 6 Houlton Street, Portland, ME to install “1-hour fire doors and assemblies including self-closing and self-latching mechanisms.” It did not indicate the number or location of the required doors.

2. The ZBA affirmed the NOV and by a vote on November 8, 2018 and issued a written decision dated November 14, 2018.

3. The NOV, Order to Comply and ZBA's order affirming them are contrary to law and fact and exceed the City of Portland's enforcement authority.

4. Because the initial NOV and accompanying order required compliance by November 18, 2018, Owners installed four fire doors opening into the central stairwell and blocked off two doorways. A seventh doorway does not require a fire door because it opens to a stair well to which no other unit has access.

## FACTS

### **A. The Building**

5. In *Cleveland v. City of Portland*, No. AP-18-009 and AP-18-013 (Cum. Cnty, Sup. Ct. decision filed August 22, 2018) [hereafter *Cleveland I*], Justice Horton summarized the facts and procedural history of this matter up to that point. We rely on that summary. Allegations in this complaint address facts specifically relevant to this appeal.

6. Six Houlton Street, Portland, Maine is a three-unit multiple dwelling. It was built in the 1850's and, as far as we know, it has always been used exclusively for residential purposes. City records show that it was a two-unit building in the

early twentieth century. In the 1950's a kitchen was added on the second floor making it three-unit building.<sup>1</sup>

7. Beginning in 2016 Portland required all multiple dwellings to register with the Permit and Inspections Department. Portland City Ordinance §6-151. The prior owner of 6 Houlton registered it for 2016, as a three-unit building. Owners have re-registered it for 2017, 2018 and 2019.

8. The building has a central stairwell between the first and second floors, which all three units use to enter and exit. Unit A has two apartment doors that open to the central stairwell, one on the first floor that opens into a 5"x 6" area that connects the bottom of the stairs to the outside door. Another apartment door on the second floor opens to one step above the upper landing. The Unit B apartment door opens at the base of the stairs next to the outside door. The Unit C apartment door opens one steps above the second-floor landing. All of the apartment doors are now fire doors. A fifth door that used to open to the stairwell has been blocked.

9. There are no other doors or passageways connecting the central stairwell to any other part of the building.

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<sup>1</sup> A dwelling unit is defined as a living area with a separate kitchen and bathroom. §3.3.61(2009); §3.3.68(2018).

10. Inside the apartments, access to the apartment doors that open to the stairwell is through the living rooms on the first floor (Units A and B) and through hallways on the second floor (Units A and C).

11. In addition to their apartment doors, Units A and B each have two private entrances that lead directly to/from the outdoors. Unit C has one private entrance to/from the outdoors, reached by an interior staircase that cannot be accessed by other tenants.

### **B. Ongoing Injury**

12. Owners were forced by the City of Portland's Kafkaesque, duplicative and lengthy appeals procedure to install fire doors before having a chance to appeal the merits of their case to this Court. This fact changes the nature of their injury, but that injury continues. Specifically, they suffer at least the following kinds of injury:

a) They have incurred the cost of fire doors and blocking doorways, which if they prevail in this case will have been unnecessary.

b) Until this NOV is resolved the City of Portland can deny building permits and restrict the sale of the property. [§§6-1(a)(9); 10-25.6] The City has made no effort to re-inspect the building as contemplated by the NOV, which means our right make improvements or sell the property is in limbo.

c) There is a risk that the City will disagree with our resolution of the NOV and try to impose additional costs.

d) If Portland prevails, that result could potentially require far more expensive changes to the load bearing walls of the central stairwell.

## **PROCEEDINGS BELOW**

### **A. Administrative Appeals**

13. Code Enforcement Officer Kevin Hanscombe inspected 6 Houlton Street on February 16, 2018. He verbally told Owner Cleveland which doors would require fire doors and agreed that if the interior door in Unit B was walled off the seventh door would not be required.

14 He issued the NOV (February NOV) the next day and cited four violations. Three have been resolved by the Owners; the fourth required seven fire doors but did not identify them by description, floor plan or photos. The NOV asserted a violation of the fire door provision NFPA Code §7.1.3.2.1.

15. CEO Hanscombe withdrew the February NOV in an affidavit filed with the Court in *Cleveland I*. He issued a new NOV April 17, 2018 based on the same inspection and asserted the same four violations including three that had been fixed. He now asserted a violation of NFPA Code §31.2.2.1 as the basis for requiring fire doors. That section permits existing apartment buildings to have

listed “Means of Egress Components,” but does not require a building to have any particular components.

16 The April NOV does not make any factual findings about what “Means of Egress Components” are present at 6 Houlton. The NOV makes no mention “exit passageways” nor assert any facts that describe and “exit passageway”.

17. The City of Portland has not inspected 6 Houlton Street to determine whether it is in now in compliance with the requirements of the April NOV.

18. Owners immediately appealed the April NOV and the compliance order that was served with it. After several administrative appeals, two 80B proceedings an initial Zoning Board of Appeals and 10 months the matter was considered by the ZBA for a second time.

19. At no time before the second ZBA appeal was underway did Portland contend that 6 Houlton Street had to have fire doors because it is in fact an “exit passageway.”

#### **B. ZBA Decision Appealed From**

20 In its decision the ZBA acknowledged that the first NOV, which was based on the fire door requirement in §7.1.3.2.1, had been withdrawn.

21. The ZBA ignored the legal basis relied on by the April NOV, not doubt because §31.2.2.1 does not require fire doors; it merely states that listed

components of the means of egress, including doors and stairs that comply with specific technical standards .... “are permitted.”

22. The ZBA further held that the size limit and grandfathering clause found in §7.1.3.1. do not protect Owners from the being required to install seven fire doors.

23. The ZBA based its decision on §7.2.6, a section not mentioned in either the February or April NOV’s and on which Portland had not previously relied.

24. Section 7.2.6 states that “exit passageways” must be separated from all other parts of the building as required by §7.1.3.2.1, the fire door section, which Portland had abandoned as a legal theory in April.

25. “Exit passageway” is not defined in the Code and the ZBA offered no interpretation support its apparent conclusion that 6 Houlton St has one of these.

26. The ZBA, like the CEO who issued the April NOV, made no factual findings to support any of its legal reasoning. Nonetheless it affirmed the NOV.

## **THE NFPA 2018 AND 2009 CODES**

### **A. Adoption by Portland Code of Ordinances**

27. The Portland Code of Ordinance purports to adopt both the 2018 and 2009 editions of the NFPA Code. Section 6-116(e) would adopt the “most current

version” of the Code, which is the 2018 version. Section 10-1 of the Code of Ordinances would adopt the 2009 version.

28. Code Enforcement Officer Hanscombe’ enforcement authority derives from Chapter 6 of the Portland Code of Ordinances.

29. Section 6-94(1) defines a violation to include violations of “any codes adopted according to this article,” which is Article II of Chapter 6. Since §6-116(e) is in Article II, any authority the CEO might have would be to enforce the 2018 edition of the NFPA.

30. Chapter 10, which purports to adopt the 2009 edition, defines the Fire Department as the “authority having jurisdiction” to bring enforcement actions.

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31. Section 10-25 provides that a violation of “codes adopted under this Chapter,” is a violation of Chapter 10.

32. Neither edition is on file with the City Clerk as required by Portland Ordinance §10-1 and the Maine Municipal Law 30-A M.R.S.A. §3003(2)(A).

### **B. Differences between 2018 and 2009 Editions**

33. If either edition of the NFPA Code were properly adopted, the Code Enforcement Officer would be enforcing the 2018 edition and the Fire Department would be enforcing the 2009 edition.



34. Many of the sections relevant to this case are the same in both editions. But there are at least two significant differences.

35. The 2018 version of the fire door section explicitly exempts existing walls and doors that separate an exit from the rest of the building. Section 7.1.3.2.1(2018) states:

“Where this *Code* requires an exit to be separated ....

(1) The separation shall have a minimum 1-hour fire resistance rating separation, where the exit connects three or fewer stories.

(2) The separation specified in 7.1.3.2.1(1), **other than an existing separation**, shall be supported by construction having not less than a 1-hour fire resistance rating.” [emphasis added]

36. Section 4.4.2.3 of both the 2009 and 2018 editions of the NFPA Code provides that when two provisions conflict, the more specific applies. The 2009 edition only covers situations where a provision in Chapters 11-43 conflicts with provisions in Chapters 1-4 and 6-10. The 2018 edition extends that principle to conflicts between different sections of Chapters 1-4, and 6-10. [§4.4.2.3(2) (2018)]

### **C. Structure of the Codes**

37. The 2018 and 2009 have similar structures. Chapters 1 – 10 are provisions that can apply to any type of building. Chapters 11 – 43 are provisions that apply to specific types of buildings.

## **1. Chapter 3 Definitions; Applied to 6 Houlton**

38. “Means of egress” is a “continuous and unobstructed way of travelling” out of the building and is composed of “the exit access,” “the exit” and “the exit discharge.” [§3.3.178(2018); §3.3.161(2009)].

39. “Exit” is defined as “[t]hat portion of a means of egress that is separated from all other spaces of the building ....” [§3.3.86(2018); §3.3.75(2009)].

40. An exit is defined as an enclosed space; it is not doors opening into that space. At 6 Houlton the only exit is the central stairwell into which all the apartment doors open.

41. “Exit Access” is defined as “[t]hat portion of a means of egress that leads to an exit.” [§3.3.87(2018); §3.3.76(2009)].

42. At 6 Houlton Street, exit access on the first floor is through the living rooms of Units A and B to the apartment doors. On the second floor, it is through interior hallways to the apartment doors of Unit A and Unit C.

43. “Exit discharge” is defined as “[t]hat part of a means of egress between the termination of an exit and the public way.”

44. At 6 Houlton the outside door that leads from the stairwell through the parking area and to the street is the exit discharge.

45. The term “exit passageway” which is central to the ZBA’s decision, is not defined by the Codes. However, the technical standard for exit passageways

makes it clear that it is a narrow hallway into which other exits discharge in “mercantile occupancies” like shopping malls. [§§7.2.6.4.1(2), 7.2.6.4.2 (2018 and 2009 editions have same numbering); Chapters 36 and 37 (2018 and 2009)] Exit passageways can also serve as “discharge from a stair enclosure.” [§7.2.6.3 (2018 and 2009)]

46. There is no “exit passageway” at 6 Houlton Street.

47. Other important defined terms include “Apartment Building” which is building with three or more “dwelling units”. [§3.3.37.3 (2018); §3.3.32.3 (2009)]

A “dwelling unit” is a room or rooms with a separate kitchen and bathroom.

[§3.3.68 (2018); §3.3.61(2009)] “Existing” means built before the adoption of the adopted version of the NFPA code. [§3.3.84 (2018); §3.3.73 (2009)]

48. Six Houlton Street is an existing apartment building with three dwelling units. [§3.3.37.5 (2018) §3.3.74 (2009) It is a “residential occupancy.” [§3.3.196.13 (2018); §3.3.178.13 (2009)]

## **2. Chapter 4 -General**

49. This Chapter defines the goals of the NFPA Code. Section 4.1.1

states:

“**Fire.** A goal of this Code is to provide an environment for occupants that is reasonably safe from fire....” [Numbering and text are the same in 2018 and 2009 editions.]

50. Chapter 4 provides that when provisions in different parts of the NFPA Code conflict the more specific provision governs. [§4.4.2.3(2018); §4.4.2.3 (2009)] The 2014 edition of the Code applies that decision rule to all conflicts.

### **3. Chapter 7 – Means of Egress; Applied to 6 Houlton.**

51. Chapter 7 defines means of egress requirements for both new and existing buildings. [§7.1.1(2018) and (2009)] Section 7.1.3 deals with “Separation of Means of Egress.” Section 7.2 gives technical standards for “Means of Egress Components.” Section 7.3 “Means of Access Capacity” provides rules for determining occupant loads for buildings. Section 7.5 “Arrangement of Means of Egress” sets rules for the location and dimensions of “means of egress” when they are required.

52. The central provision in this case, and the only one that requires fire doors, is §7.1.3.2.1, referred to in this complaint as the fire door section or fire door requirement. The February Notice of Violation, which Portland has abandoned, cited a violation of this section.

53. The 2018 version of the fire door section states:

§7.1.3.2.1 Where this *Code* requires an exit to be separated from other parts of the building, the separating construction shall meet the requirements of §8.2 and the following:

- (1) the separation shall have a minimum 1-hour fire resistance rating where the exit connects three or fewer stories.

(2) The separation specified in 7.1.3.2.1(1), other than an existing separation, shall be supported by construction having not less than a 1-hour fire resistance rating...

(8) Openings in the separation shall be protected by fire door assemblies equipped with door closers complying with §7.2.1.8

54. The 2009 edition of the NFPA does not contain (2) and (8) is numbered (7). Otherwise the language of the two editions is the same.

55. The fire door section only applies “Where this *Code* requires an exit to be separated...” [emphasis added]. This requirement appears to be circular because “exits” are by definition separated from the rest of the building. But, it is not circular because existing separations, those that predating the NFPA Code, were not and are not “required.”

56. Subsections (1) and (8) taken together are the fire door requirement. Walls and doors that separate an exit from the rest of the building are the “separation” that must be 1-hour rated. Subsection (8) adds the requirement that doors be self-closing. Subsection (2) in the 2014 edition explicitly removes “existing separations” from the 1-hour resistance rating requirement.

57. At 6 Houlton the walls and doors that separate the central stairway from the rest of the building are existing separations that are exempt from the 1-hour requirement.

58. Section 7.1.3.1(2018 and 2009), which immediately precedes the fire door section, defines when an exit access corridor must be separated. It limits that requirement to buildings with an occupancy load greater than 30 and grandfathers existing buildings as long as they are not changing use.

59. Six Houlton Street has an occupancy load of no more than 17 and as an existing building that is not changing use it is not required to separate its exit access corridors. And the apartment doors that connect them to the stairwell do not have to be fire doors.

60. Section 7.2.1 (2018 and 2009) defines the technical requirements for doors in general, but does not independently require fire doors. Section 7.2.2 (2018 and 2009) defines technical requirements for stairs.<sup>2</sup> Section 7.2.6 requires that all “exit passageways” be separated from other parts of the building in accordance with §7.1 and §7.1.3.2.1.

#### **4. Chapter 31 – Existing Apartment Buildings; Applied to 6 Houlton**

61. The Notice of Violation that is the focus of this appeal cites Owners for a violation of §31.2.2.1. That section states, “components of means of egress shall be limited to types described in §31.2.2.2 through §31.2.2.12.”

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<sup>2</sup> There are many changes in the technical requirements between 2009 and 2018, but the differences are not critical to this case. However, the numbering is the same.

62. The sections referenced by §31.2.2.1 are all permissive. They state that specific components “are permitted” if they comply with the corresponding technical requirement.

63. The only components of the means of egress listed by §32.2.2.1 that are present in 6 Houlton Street are doors and stairs. There is no “exit passageway.

64. Finally, §§31.2.2.3 and 31.2.4.4 require every dwelling unit in an Apartment Building to have two separate means of egress, one of which can be an “exit doorway” directly to the outdoors or an interior stair that leads to an “exit doorway” to the outside.

65. At 6 Houlton Units A and B each have two doors directly to the outside. Apartment C has an interior stair that leads to a door directly to the outside.

## **COUNT I**

### **Failure to Adopt NFPA Code Properly**

66. Plaintiff’s repeat and reallege paragraphs 1-65 above.

#### **A. Contrary to Maine Constitution**

67. Section 6-116(e) adopts “the most current version of the NFPA Code, which is the 2018 NFPA Code. It does not identify a specific edition.

68. Section 6-116(e) violates Art. III; Art. IV, §1 of the Maine Constitution because it incorporates by reference future editions of the NFPA

Code, not in effect at the time the ordinance was adopted. The section impermissibly delegates legislative authority to a private entity, the National Fire Protection Association.

**B. Failure to Identify Identify Edition**

69. Title 30-A M.R.S. §3003, authorizes a municipality to adopt codes but requires they be identified by author and edition. Section 6-116(e) violates this requirement because it does not identify any specific edition of the NFPA.

70. The Portland Code of Ordinances, by having two contradictory incorporation sections, one which points to the 2009 edition and another that points to the 2018 edition, violates the identification requirement of 30-A M.R.S. §3003(A)

**C. Failure to Make Copy of Code Available to the Public.**

71. The City of Portland has not made a copy of either the 2018 or 2009 edition of the NFPA Code available to the public by keeping a copy available for the public as required by 30-A M.S.A. §3003(2)(A).

**D. ZBA Decision**

72. The ZBA's decision is contrary to law and arbitrary and capricious for the following reasons:



a) It is not based on findings of fact or conclusions of law that support a conclusion that the City Portland has properly adopted any version of the NFPA Code.

b) Contrary to law it does not identify which edition of the NFPA Code it relies on for the rest of its decision.

c) Contrary to law because the CEO is not the “agency having jurisdiction” to enforce Portland Ordinances, Chapter 10, which purports to adopt the 2009 edition of the NFPA Code.

## **COUNT II**

### **Inadequate Notice**

73. Plaintiffs repeat and reallege paragraphs 1-72 above.

74. The only notice of violation at issue in this case is the April NOV, which does not give the owners sufficient information to understand and respond to the asserted violation.

75. The April NOV does not identify which edition of the NFPA it is based on. If the intent is to enforce the 2009 Edition, CEO has no authority to do so. (¶31, 32 infra).

76. The NOV does not adequately identify where fire doors are required. It describes the violation as “1-hour fire rated doors and assemblies including self-closing and self-latching mechanisms,” with no added information.

77 The NOV does not identify sufficient facts to support the asserted violation.

78. The NOV fails to identify any requirement with which Owners have not complied. The NOV cites a violation of “NFPA 101-31.2.2.1.” That section does not require fire doors or any other component of a means of egress. It merely states that listed components are allowed as long as they comply with the technical standards of Chapter 7.

79. The adequacy of the notice is further undermined by the fact that the City of Portland does not make copies of the NFPA Code available to the public as required by state law.

80. Because the Codes are copyrighted work, Owners had to purchase copies of the 2009 and 2018 editions from the NFPA to find out that they were charged violating almost wholly permissive provision of the Code. The Codes cost \$210.

81. The vague NOV and its reliance on a section that does not imposes no duties, does not adequately inform Owners of the City’s grounds for taking action against them, in violation of their procedural due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. Being required to purchase the Codes to discover what our legal obligations might be is a further violation of procedural due process.

82. The Decision of the ZBA affirming the NOV is contrary to law and arbitrary and capricious for the following reasons:

a) The ZBA decision ignores the Notice of Violation that was the subject of the appeal. It does not address the question of whether §31.2.2.1 requires anything.

b) The ZBA affirms the NOV on a wholly different legal theory that was not mentioned in the NOV.

c) The ZBA made no findings of fact concerning the adequacy of notice.

d) The ZBA decision is contrary to law because the NOV is constitutionally deficient.

### **COUNT III**

#### **Fire Doors Not Required by NFPA Codes**

83. Plaintiffs repeat and reallege paragraphs 1-82 above.

84. NFPA Code requirements always apply to specific structures in particular kinds of buildings. It is therefore impossible to identify which requirements apply without facts about the structures.

85. The NOV identifies no facts and the ZBA's decision makes no factual findings that support a conclusion that 6 Houlton is required to have fire doors.

86. Six Houlton Street has all of the components of a means of egress.

87. The “exit access” is the ground floor living rooms and second floor corridors that lead to the apartment doors and stairwell. Section §7.1.3.1 exempts these structures from being separated. Since they are not “exits” they do not have to have fire doors.

88. The central stairwell is the “exit” for the dwelling units in 6 Houlton. It is the only structure in the building that is separated from all other areas of the building and used to leave the building. The walls and doors that enclose it are “existing separation.”

89. The 2018 edition of the NFPA explicitly exempts “existing separation” from the 1-hour fire resistant requirement. [§7.1.3.2.1(2) (2018)] This section makes explicit the correct reading of the 2009 version of that section.

90. The stairwell discharges through the front door. There is no “exit passageway” between the stairs and the outdoors or anywhere else.

91. The ZBA’s finding the NFPA Code requires fire doors is contrary to fact and law for the following reasons:

- a) The CEO only has authority to enforce the 2018 NFPA Code if any.
- b) Six Houlton has an “exit access” in each apartment but they are exempt from any separation requirement under §7.1.3.1(2018), because it has an occupancy load less than 30 and is a grandfathered building .

c) The central stairwell is the “exit.” It is separated from the rest of the building by walls and doors that are “existing separation,” and are therefore exempt from the 1-hour resistance rating under the 2018 version of the fire door section.

d) There are no factual findings to support the conclusion that there is an no “exit passageway” at 6 Houlton. In fact there is no “exit passageway” and therefore, the fire door requirement of §7.2.6.1 is irrelevant.

#### **COUNT IV**

##### **Declaratory Judgement; Civil Rights Act**

92. Plaintiff’s repeat and reallege paragraphs 1-91.

93. Code Enforcement Officer Hanscombe acted under color of state law when he inspected 6 Houlton Street and issued two notices of violation requiring the installation of seven fire doors. The ZBA acted under color of state law when it affirmed the April NOV.

94. At no time relevant to this case did CEO Hanscombe have the authority to require installation of fire doors at 6 Houlton Street.

95. Installing fire doors costs at least \$1000 per door.

96. Officer Hanscombe and other City officials, knew or should have known that the City of Portlands Codes and ordinances did not give him authority

to require fire doors in or after June 2018. None the less the City of Portland continued to fight Owners appeal.

97. As a result Owners were forced to install four fire doors due to delay in the administrative appeal process.

98. The actions of defendants have violated Owners right to procedural Due Process under the Fifth and Fourteen Amendments of the United States Constitution have been denied, by the completely deficient notice of supposed violations of the NFPA Code. [¶¶ 73-82]. Defendants action have injured and continue to injure Owners. [¶¶ 12, 95, 97]

99. Defendants, by acting without legal authority and continuing to pursue this enforcement action, after they knew or should have known they had no legal authority to require fire doors violated Owners Due Process Rights under the Fifth and Fourteen Amendments of the United States.

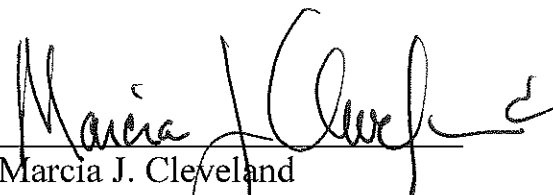
100. Owners seek declaratory and injunctive relief pursuant to Maine's Declaratory Judgement Act, 14 M.R.S. §§ 5953 and the Civil Rights Act, 42 U.S.C. §1983.

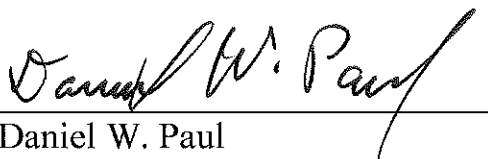
WHEREFORE Plaintiffs seek the following relief:

1. An order reversing the decision of the Zoning Board of Appeals rendered by a vote November 8, 2018 and a decision dated November 14, 2008.

2. A declaration that the April NOV is void.
3. An order requiring all records of February and April NOV's and the inspection it was based on be expunged from Portland's records relating to 6 Houlton Street.
4. A declaration that the April NOV violated Owners Due Process rights because it did not give sufficient detail about the alleged violation to enable Owners to understand the basis of the alleged violation.
5. A declaration that the City of Portland violated Owners Due Process rights by exceeding their authority and effectively forcing Owners to install fire doors by procedural delay and bureaucratic stalling.
6. Costs and attorney's fees.
7. Such other and further relief as this Court deems appropriate.

December 19, 2018

  
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