

SUBSTANDARD LIVING CONDITIONS SPECIAL COMMITTEE

APRIL 14, 2016

A meeting of the Substandard Living Conditions Special Committee was held on Thursday, April 14, 2016, at 7:00 p.m. in the Aldermanic Chamber.

Alderman Ken Siegel, Chair, presided.

Members of Committee present: Alderman Don LeBrun, Vice Chair
 Alderman-at-Large Lori Wilshire
 Alderman-at-Large Mark S. Cookson

Members not in Attendance: Alderman-at-Large Michael B. O'Brien, Sr.

Also in Attendance: Alderman-at-Large Brian S. McCarthy
 Alderman Benjamin M. Clemons
 Alderman David Schoneman
 Alderman Sean M. McGuinness
 Alderman Tom Lopez

Alderman Siegel

Before we start I would like to explain how the committee meetings work and sort of have a flow so that everybody who typically doesn't go to Board of Aldermen meetings has a better idea of how the committee works so it will work more effectively for everyone. One thing to be very cognizant of is that all of the meeting is recorded and we take verbatim notes and because of that it is important to speak in an orderly manner and speak in front of a microphone so that those poor people that have to transcribe this don't have to go back and forth and try to guess what is going on. For public comment you will come up and give your name and address and then you'll say what you want to say and hopefully keep it on point and recognize that there are other people in the audience that may also want to speak. It's probably good to try to keep your remarks within about 5 minutes or so and also if somebody said something that you were about to say, it's more than acceptable just to say that you agree with the previous speaker and not to repeat the same thing over and over again. If you haven't signed up we are not super formal and if you didn't sign up and you want to provide public comment we are not going to deny you of that right. Normally we debate in committee legislation or whatever happens to be pending and then we take a vote. The actions of committees of the Board of Aldermen are not final actions. We make recommendations which then are forwarded to the full Board of Aldermen so whatever is going to happen, most of the work of modifying legislation and discussing it happens in a committee but the actual vote which results in a decision to adopt or not occurs at the full Board of Aldermen level. Whatever happens tonight and however you may feel about it be aware that you get a second crack at it at the full Board of Aldermen level. I want people to understand that process. I would request that you please don't yell from the gallery. I know we had a meeting before and it got a little bit out of control and I think part of that was just people not understanding how the process works so hopefully understanding how the process works things will be better and it will work better for everybody because you'll be heard, on record and have much more of an affect. Normally we have the debate amongst the Aldermen that are either members of the committee or may not be members of the committee but are present. I'd like to invite one or two people to speak on the behalf of the landlords in the horseshoe as we discuss this so that you feel you have a voice in the horseshoe during the discussions so there is less of a need to feel compelled to yell out from the gallery and that way we can forward the process of trying to get the best possible resolution to what we all want and be as fair as possible. I hope people can appreciate that we are trying to strike a balance here between the requirements to be somewhat formal in how we run our meetings but open to feedback.

PUBLIC COMMENT

Attorney Peter Nicosia, Nicosia & Associates, P.C., 259 Middlesex Road, Tyngsboro, MA

I am here representing 32 separate commercial residential property owners who wish to be heard about their concerns about the pending legislation. I have a more detailed memorandum that expounds upon some of the more summary arguments that I am going to make to you right now. You have heard from some of the residents before about their concerns with this statute. They have tried to unify their voices and speak through me and in a more surgical fashion focus on some of the key issues that they have with the draft ordinance. I tried to expound upon legal analysis of some of those arguments and also set forth in greater detail some of the substantive arguments that we have about our concerns on behalf of these property owners with regard to the ordinance. The property owners understand that by statute the city has the right to take a look at doing something like this but they have been advised that there are limitations upon what a municipality can do in adopting an ordinance like this. Their concerns, from a legal perspective, are more based on constitutional concerns emanating from due process as well as some of the vagueness of the literal drafting of the ordinance which is in front of you right now. At first glance the ordinance appears to be facially valid and they understand what the objective is in terms of trying to promote this ordinance with regards to having another arrow in the quiver of the municipality and the inspectional department to deal with non-compliant property owners on an administrative level. I think ultimately the objective is to try to force compliance without the necessity of going through a formal district court proceeding which you typically embark upon and to short circuit that process and achieve compliance with a fining structure. However, in looking at that ordinance, this committee and ultimately the Board of Aldermen needs to do a balancing analysis of what is to be gained for the public here by the adoption of this ordinance versus what the negative effect might be on these property owners. I have tried to enumerate largely seven main points which address the primary concerns of these property owners. The first point would be that right now on the books you have a state law which allows the municipality to force compliance with whatever code violation you are dealing with and you already have fining capability to ultimately be adjudicated at district court. The touchstone there is that the obligation to pay the fine doesn't arise until the proceeding has been adjudicated and there has been liability established for non-compliance to pay the fine. From the property owners perspective you already have a mechanism in place to do what you want to do with the fining structure that doesn't require this administrative level of fines. We feel that imposing this fining process would be duplicative of what you already have the rights to be able to do. It also doesn't eliminate the need for the municipality to go to court eventually if you have either a defiant property owner or you have a situation where a property owner doesn't agree with the imposition of an administrative fine, eventually it funnels its way into the same statutory process into district court where it's going to have to be adjudicated anyway. The largest concern that these property owners have is that on its face the ordinance looks fine but it is in its administration in the field; there is a large concern of unfair and arbitrary application to the property owners. There appears to me, in reading the current draft of the ordinance, that there was a complete lack of substantive due process before a fine is imposed. Essentially, the way the ordinance is written right now is that you have an inspector come out and on the spot they are making an assessment as to compliance or non-compliance and they are imposing the fine and automatically determining that the property owner is responsible for that. The way the ordinance is written it also compels the property owner to either remedy whatever the alleged violation is or pay the fine within a set period of time. There's no adjudication on the merits as to the validity of what the alleged violation is or who the responsible party is. One way to address that, which is not in this ordinance, which other communities in the State of New Hampshire have done, is to have a layer of administrative appeal prior to a court process taking place. There were a number of municipalities which have considered the adoption of this type of ordinance, some of which were shot down for a lot of the reasons that I am enunciating today, others have adopted an administrative appeal process. For instance, in the municipality of Durham, they have a situation where if an inspector comes out and finds a violation and imposes a fine and you have a property owner that has an issue with it they can they can appeal it to the town counsel for adjudication on the merits before the fine is due and payable. You have no administrative appeal process currently in this draft. You do have a situation in your housing blue book which I've seen where there is a

Board of Housing Appeals Committee that can hear certain appeals on certain building issues. However, if you have a code violation here for fire safety compliance or health code compliance, it doesn't fit squarely into the appeal mechanism for building codes that you have in your book right now. We would be advocating that any draft of this type of ordinance that goes forward to the Board of Aldermen should have an administrative appeal mechanism placed in there for a variety of reasons which I will touch upon. The first reason is the way the ordinance is drafted right now is it coins the offender as the person responsible and it automatically presumes that would be the record title holder to the real property but that's obviously not always going to be the case. I am sure you have a number of habitual offender property owners/landlords in this community as other communities have but then you have large groups of property owners that aren't that way and there are situations that can give rise to them that they should not be held personally responsible for whatever the issue is. An administrative appeal mechanism would allow on a case by case basis for an analysis as to truly who was the responsible party. You can have code violations that are caused by a tenant by intentional conduct. You could have a situation where a property owner has hired a contractor to remedy a situation and they were negligent in doing so that gave rise to the particular violation. You could have an act of God cause an issue. There are a whole slew of scenarios where the record title owner of the property did not cause the issue. The way the practical administration of this proposed ordinance would work is they give no regard to what the factual circumstances are and strict liability to all of the property owners liable under this fine structure for specific amounts in a short time period without this case by case analysis. An administrative appeal mechanism would go a long way to try to remedy that type of situation. To just simply impose a fine upon the responsible property owner we think is a failure in due process in its administration. The other significant concern for these property owners is reasonable time to comply with whatever the violation is. The way the proposed ordinance is written right now is that you would have a fine schedule with different categories and the timetable is basically 10 days, pay the fine or you bring your property into compliance and if you don't there are punitive aspects which say based upon calendar day there are increased fines and penalties. Once again, that's deprivation of due process because the circumstances regarding these violations are going to differ from property to property. It could be a situation where compliance in 10 days is not feasible. You may unavailability of a specialty contractor that needs to do the work or an absentee property owner or a very complex job. There should be an administrative appeal mechanism that would afford discretion to someone to hear the evidence of what the issue is if a property owners is so motivated to appeal to allow that administrative body to say okay, we understand the circumstances and we think the deadline to comply should be 30 days and the fine that you received should be turned into a warning because there are merits to support what the inspector found. The way the fine structure is set up right now the definition of a violation is based upon calendar days, not an occurrence so if there is a footing of deck that is failing and the inspector says I am imposing a \$50.00 fine for this first time offense the ordinance reads that even though the circumstances haven't changed and there hasn't been a new violation, the calendar days will trigger further fine penalties if there is non-compliance or non-payment of the fine. There is a state statute which caps the totality of fines at \$1,000. The way your current ordinance is written if you follow the calendar calculations it's a direct violation of the state law which I have referenced. There needs to be a definition section to this ordinance that deals with things like the definition of an occurrence or responsible party. There needs to be further delineation of what the nature of the violation is. Those are all issues for us. The ordinance as it is written right now also talks in terms of "may" fine. There is no warning structure that is in place and the word "may" fine lends itself to an inspector to act arbitrarily capriciously in the exact same circumstances in a different property. Obviously you have very professional inspectors here but could there be a situation where you have a habitual offender versus a first time offender or a personality conflict or anything where an inspector could then choose well in this instance of a broken fire alarm I am going to fine but in this instance I am not. There's no uniformity in its application. There's too much discretion that could result in selective enforcement. It would seem to me that there should be some structure to this inspection process. Is it going to be complaint based, an annual inspection process; there should be a reasonable notification provision unless it is complaint based that deals with the inspection process so that there is some predictability in the administration of this ordinance for property owners to know that they are going to face these types of administrative sanctions if they don't get their house in order. A large concern for some of the residential

property owners, especially multi-family and multi-tenant properties, is the imposition of this type of ordinance arms a tenant with the wonderful opportunity to abuse their landlords. Retaliation is a real concern here because if you have a situation where a landlord is chasing back rent or want to evict, all a tenant has to do is go out and intentionally sabotage some aspect of the property and get the inspector out to the site. The way the ordinance is currently written he imposes the fine and the property owners is responsible and has 10 days to pay and comply or else the fines will continue from there. It is an unreasonable burden to have an ordinance that is written that says okay property owner, here's what you need to do in an event like that, you have to pay the fine and if you don't you are going to risk additional penalties for not paying. You have to then contest the process in district court and then if you are successful you are confronted with perhaps looking for a refund of the fine that you paid to the municipality and chasing your money from the ultimate responsible party. The way the system works right now is they don't have that layer of the administrative fine so basically it's the same situation that the property owners were in before but now they have to prepay an administrative fine without any adjudication on the merits of whether they should have paid in the first place. That's a due process issue. The last point that I am going to make is that if you look to the table of fine categories the definitions are inherently ambiguous and they overlap. Granted, in the table you relate back to either any FBA fire codes or building codes or some of the other codes that are in town but there are lots of instances where an inspector can go out to the site and make a judgement call on what the violation is and apply it to multiple categories. For instance, a building inspector goes out and sees an exterior problem with a deck. He could categorize that as an exterior standards issue or a building violation issue and impose double fines. Once again, it's a failure of not having a definition section for this particular ordinance. The way it is written right now the property owners are adamantly opposed because of the vagueness and the lack of due process that are afforded to them. If the committee is intent on advancing the language as is then these are the types of arguments that you would hear again at the Board of Aldermen level. The other option for this committee would be to engage in a comprehensive redraft; table this for some period of time, have your counsel take a look at the legal arguments that I am making about the constitutionality and attempt to overhaul the ordinance to achieve due process, to eliminate the vagueness and to try to balance the concerns of tax paying commercial and residential property owners. There should be a balance, what's to gain to the public by trying to go after these non-compliant property owners versus what is the harm that you are doing to your business and real estate ownership investment community. There has to be regard given to this. I think, unfortunately the stigma that attaches to this is that it's a landlord driven administrative fine structure. That is not how this is written, this is not for just landlords, this is for any property owner in the city whether it's commercial or residential, multi-family, single-family; the arbitrariness of it, the broad application of it, the wide discretion that's afforded and the lack of due process to challenge these fines are very problematic. I think that the goal that you are trying to achieve by minimizing your litigation is going to backfire and create a large wealth of litigation if this ordinance is enacted as it is currently written. Once again, we would encourage that at a minimum this get tabled so your counsel can take a hard look at some of these legal arguments. If this is passed there are obviously mechanisms for that to be tested into the court system based upon constitutionality. We appreciate your time for us to make these arguments and we hope that you truly engage in that balancing test between the property owners and what you are ultimately trying to achieve.

Ms. Cecile Marquee, P.O. Box 3854

I had talked to a couple of the Aldermen and how I had mentioned before about some of the bad landlords that we are seeing. Maybe where you are paying out rent to some of these landlords, if you could hold the rent and put it in escrow in the Welfare Department they would have a lot of rent being withheld and that would maybe give them more power to get the work done and this way it wouldn't affect all of the good landlords. Some of them I am sure get a few thousand dollars versus a \$50.00 fine here and there. The landlords behind me really do care about their property and Nashua. We are here to help you. If you have any questions, please feel free to call us and we would also like to have one or two landlords call when you have issues so we know and we can come and speak.

Mr. Nick Peck, 99 Taylor Street

I am speaking from myself and the citizens of Nashua who haven't heard anything about this Bill. The information that we have is very limited. Most people don't get the Telegraph or to the Nashua website. Even if they went to the website they wouldn't be able to find this, the website should be changed so we can find new information quickly. Each and every one of you are elected officials and I want to thank you for doing a good job but there are a bunch of people here who have been fighting for this Bill to be done away with. You were elected to voice our opinion, you weren't elected to voice what the city wants, we are the people who put you in this office and we want you to know that we want our opinions heard and want you to represent us.

Mr. Fred Teeboom, 24 Cheyene Drive

I don't own a business now but I owned four businesses, three in this community and one in Hudson that was a restaurant. When I first watched the proceedings before a different committee, it was a Personnel/Administrative Affairs Committee; I think the chair of this committee presented this as being simply like a parking ticket. He said there were plenty of warnings.

Alderman Siegel

That was not the chair of this committee; I just want to make that clear.

Mr. Teeboom

Chair of the Personnel committee. He said the fines were small and he actually said all of that on the television programs that he wished that the fines were bigger. The first thing that struck me was that when we have an ordinance before the city it always has an analysis and a sign-off by the Corporation Counsel's office. The copy that I printed out off of the city's website had none of that. Do any of you have a sign-off from the City Attorney?

Alderman Siegel

My copies are electronic, Fred, I'm not sure I have a current signature on that. I don't think it is germane to what we will be discussing tonight but thank you.

Mr. Teeboom

It's extremely germane. Every single ordinance on the website has a sign-off and a legal analysis.

Alderman Siegel

Fred, as a former Alderman you know that every piece of legislation goes through the Legal Department and it doesn't emerge from that department unless it has their sign-off. I just want to make that clear.

Mr. Teeboom

I don't know that and I didn't see it and that's the question. I think it is amateurishly drafted so my question is who drafted this ordinance?

Alderman Siegel

We are not doing a Q & A here, Fred. If you have something to say that's fine. I personally doubt that it went through the legal office. Within 10 days you have to fix a problem? How do you fix an electrical

problem, as an example, if your electrical is wrong you can't fix that in 10 days? So 10 days later you get a fine. There's no procedure spelled out for those things that take time. The attorney addressed that and I am familiar with electrical problems. It mentions a court appearance as one of the second and third options in the table. There's no court appearance defined, which court do you go to and how does that procedure work? Mr. Chairman, you mentioned warnings; there actually was a paragraph 182:24 that's in this ordinance that is struck out. The warning is gone, why is it gone? This is a due process issue. The enabling state legislation allows you to issue fines up to \$1,000.00 and somewhere in the paragraph it says you have a fine that goes up \$50.00 up to \$1,000.00. Well, if you have a \$250.00 fine that goes up by \$50.00 when do you reach \$1,000.00? It's not defined. This is amateurishly written. It mentions RSA:47.17 the Purpose of Fines; that's not the authorizing legislation, the authorizing legislation is 31:39 (III). The final page references RSA:112 which is the one that I thought you tried to avoid. RSA:112 is a very general statement saying the general penalty for violations is up to \$1,000.00 per case and it's not specific so behind 112 there's going to be all kinds of stuff. If you are going to have a table why refer back to 112, it makes no sense. This ordinance hangs together like a wet noodle. It needs to go back to Corporation Counsel, certainly Attorney Bolton and Attorney Clarke are very capable people and they ought to review this. I am completely unconvinced that they have reviewed it and if they have it didn't go past Attorney Clarke; I can guarantee you of that.

COMMUNICATIONS

From: Attorney Peter J. Nicosia, Nicosia & Associates, P.C.
Re: Memorandum in Opposition to Proposed Nashua Ordinance O-16-003, Chapter 74

MOTION BY ALDERMAN WILSHIRE TO ACCEPT AND PLACE ON FILE MOTION CARRIED

From: Alderman Benjamin Clemons
Re: Further Recommended Changes By Alderman Ben Clemons to O-16-003, Chapter 74

MOTION BY ALDERMAN WILSHIRE TO ACCEPT AND PLACE ON FILE MOTION CARRIED

UNFINISHED BUSINESS – RESOLUTIONS – None

UNFINISHED BUSINESS – ORDINANCES

O-16-003, Amended

Endorsers: Mayor Jim Donchess
Alderman Ken Siegel
Alderman Don LeBrun

ADMINISTRATIVE ENFORCEMENT OF ORDINANCES

- Personnel/Administrative Affairs Committee Recommends: Final Passage as Amended
- Amended & Referred to Substandard Living Conditions Special Committee – 3/22/16

MOTION BY ALDERMAN COOKSON TO RECOMMEND FINAL PASSAGE

ON THE QUESTION

Alderman Siegel

I will invite one or two members of the audience to join us. I assume that Attorney Nicosia will join us. I will also ask some city staff to join us.

Alderman Siegel

Is there anyone who has an opening comment?

Alderman Clemons

I appreciate everyone coming out this evening to voice their concerns on the legislation. I gave the Aldermen a proposal to amend the ordinance as it is written by adding a warning to the ordinance. I'd like to go through that and talk about how that might quell a lot of the concerns. This adds a warning to what is currently written so rather than have it just open up with the citation it adds a warning. It says a warning as defined in Section 742(A) must first be issued before any citation may be issued for any violation. It defines a warning and defines a process by which a warning must be issued. It says a warning is a written or printed notice describing a specific violation of a city ordinance or code which is served on the person responsible for the violation. A warning shall be served in the manner described in this chapter and shall contain the following information: (A) A clear and concise description of the violation (B) The location of the violation and the date and time on which it was observed and (C) The name and address of the person responsible for the violation (D) Establishes a reasonable timeframe by which said violation must be remediated to avoid a citation (E) Notification that failure to remediate the violation within the established timeframe will result in the issuance a citation and (F) The signature and printed name of the department or individual issuing the warning. There are some other minor clerical things that goes on but essentially what that does is it adds a layer for protection for the landlord and it gives a process by which the individual has to do to give the warning. It will be a uniform warning and it's very much the same as what the citation would look like. A lot of what I've heard this evening and in the past was that there was no warning so this takes care of that but in addition some of the other concerns were who is responsible for the fine. For example, what if it was the tenant that did the damage? Well, we have to understand that from the cities prospective any unit that is rented out has to be up to code. It doesn't matter who put the hole in the wall, it just needs to be fixed. As far as who is responsible that is a matter between the landlord and the tenant. When we see a violation it has to be remediated. I think by adding a layer of a warning it gives the opportunity for the landlord to say I have a terrible tenant here and this is the third or fourth time that something has happened and I'm trying to evict them, you can talk to the code enforcement person and they can say okay, so I am going to write you a warning, it needs to be fixed but at least they are aware of it. You can fix the problem and no fines have to be issued because in the end we all want properties that are nice and livable. I think that this addresses a lot of the concerns. I don't think that it addresses all of the concerns and nor do I think that all of the concerns are something that can be addressed, in particular, going back to the fact that it's the city's responsibility to make sure that what is being rented is habitable and there are state laws and city ordinances that dictate what is habitable and if it doesn't meet those standards then we have to issue a warning for you to fix it. I hope the committee receives this well.

Alderman Cookson

Rather than jumping to a solution by adding language, I'd be interested in hearing from our representatives from the departments. I believe you were here for Attorney Nicosia's comments and I'd like to get your impressions on his perspective, especially the written comments that we have received, that the due process is an issue and the vagueness of the ordinance. I'd like to know how you think we could or should address it and that would give the committee some guidance as to what our next steps may be.

Attorney Nicosia

This dovetails into his comment for the inspection department to respond, the most significant analysis that I am looking for from you as an inspection department is this theory of an administrative appeal mechanism to be put in place. I had mentioned that the Town of Durham has that and there are other municipalities that have that as well. You have on the books right now a Board of Housing Appeals that

seems to be the mechanism in place for building code type violations, condemnation appeals; couldn't there be either expanding the duties of this particular Board or could there be a separate Board created that would hear the appeals of any of these inspectors that would result in a stay of the imposition of the fine pending the results of this administrative hearing. In responding to the Alderman's comments; that is probably the most focused are that I am curious about, building that into the ordinance itself.

Mr. Nelson Ortega, Code Enforcement Manager

This is strictly code enforcement and the Building and Safety Department follows their building code and the housing appeal you are speaking about doesn't reference our housing code. As far as expanding on it, I would defer that to the Community Development Director.

Mr. Bill McKinney, Building Official

As far as an Appeals Board in the city there is the Appeals Board for the housing code but there are also building code Boards of Appeals that are established by NRO and there is also a fire code Board of Appeals. When there are questions about the interpretation or the enforcement of either the building inspectors or fire officials in the city, the citizens in the city also have the right to appeal any of those decisions and request a review of the interpretation of the codes from those specific appeals Boards.

Alderman McCarthy

Yes but those Boards are generally intended to appeal an interpretation of the code and not the nature of the violation. If somebody just says I need more time to fix that, that doesn't seem to be an appeal that we would take to the building code Board of Appeals which is basically independent experts on building codes, for example. That would seem to be something that needs to be done more by our administrative officers.

Ms. Sarah Marchant, Community Development Division Director

I think you are correct and I think that looking at the administrative appeal's process through legal is a very good idea at this point. I will say about the timeframe, this ordinance says nothing about the timeframes; we've had many discussions about timeframes. Those are not in the warning processes that are currently in place by many other RSA's. The ticketing ordinance does not specifically state a mandatory timeframe within which compliance must be obtained. I think that is a separate issue. I think that there is a very valid issue with an appeals process that should be brought to legal's attention but as far as the mandatory fixing within 10 days, I do not agree with statement at all and I think that we have the authority that's given to all of our inspection agencies to determine a reasonable timeframe for compliance that we use on a regular basis and will continue to do so based on the specific violation or potential violation.

Attorney Nicosia

The way the ordinance is drafted right now it does not afford that discretion to inspectors. If they decide to issue a citation, fine but the timeframe is spelled out so that would have to be a further amendment to the current draft of the ordinance to afford discretion to an inspector to enhance that time period or in the alternative vest that authority in an Administrative Appeal Board to expand that timeframe.

Ms. Marchant

I guess I just disagree.

Mr. McKinney

I would also caution the committee on amending this with regards to warnings because warnings are already covered in the housing ordinance but as far as the building code, health and fire; when we get into situations where we may have work being performed without permits or we have work being performed by unlicensed individuals, which happens quite often or we have situations of imminent hazard, if written into this ordinance it would force us to write a warning for an imminent hazard or unpermitted work rather than a citation which would be a violation of the code and the law.

Alderman Siegel

This was discussed several time during the initial discussing which was in the last term of the Board of Aldermen and then further during some public comment hearings, the broad spectrum of issues were brought up and in fact the fact that the warning wasn't put in here was because it was duplicative and also we have certain instances like life/safety issues which are immediate and then there are things like a roof which clearly 10 days is absurd or the issue where you are getting a boiler or something. I think the way that code enforcement has been going about their business so far is that as long as there is due diligence to pursue a remedy then I don't see that there is an issue and in general they have been functioning right now without giving any warning. Basically they get a call and they will ask you to resolve it and then you call them back and you say we got it taken care of and in general there are a lot of steps even before a warning is given. Many of your concerns, Attorney Nicosia, as I see, are exactly the same as they would be now. This is an administrative fine mechanism and so the things that you talk about, landlord/tenant relationships and retaliatory destruction of property doesn't go away with any of these changes. The appeals process, I think it's interesting, on the one hand you were against this idea of going to court but you then say you want an appeals process. I would say that there is an appeals process right now if this were adopted unchanged. I'm not saying that we are not going to make any amendments to it but right now you have that process, there is a civil option for you if you so desire. This is at the point at which we've got "willful violations" where there is a lack of pursuit of due diligence to remedy. Nothing changes if we enact this or don't enact this, code still has the ability to desire and try to make that happen, it's just the next step whether it be an initial administrative fine or whether we have to go to court to pursue the remedy. I think of all of the people in this audience, I would bet that almost none if any have had any issues and this ordinance covers more than landlords; this is restaurants and while it may be applicable to individual homeowner's since they are generally complaint driven, I don't believe that this is an issue for individual homeowners.

Attorney Nicosia

There is no contradiction in terms of what I am looking for or supporting for process. I've read some of the meeting minutes so I've seen the comments that have been made. It seems to me that there is an underlying legislative intent that you are trying to minimize the times that you, as a municipality, have to advance the matter to a court system because it takes too long, it's costly, it's not productive and it doesn't result in quicker compliance and you are hopeful that the administrative fine structure is going to be something that will force quicker compliance without having to go to court. What I am saying to you is that I am advocating for an administrative appeal process which can be streamlined and be quick and be internal and not involving the district court process. What I am also saying is that if you have a defiant property owner or a property owner with merits as to why they are defiant, these fines don't negate the court process to be had on either side; it doesn't eliminate that but what it does is it unfairly imposes a penalty on a landlord that wants to avail themselves of appellate rights into district court by requiring them to pay the fine no matter what or comply within the 10 day time period under ordinance. So, as opposed to following the normal legal procedures now they have to do it by paying a fine on top of that without any adjudication as to liability whatsoever and that's a big due process problem. I understand what you are saying the objective is, it's these habitual offenders that are non-compliant, dead beat landlords that you want to have something strong with teeth to go after them to force compliance and that you are going to afford broad discretion and lots of time and warnings and work with property owners but that's not how the ordinance is written. This ordinance was drafted very poorly from a

constitutional vantage point and as much as the property owners I am sure have great faith in all of the inspectional people here who they all speak very highly of, it allows arbitrary and capricious actions by inspectional authorities down the road if they don't want to show that type of good faith. The points that I have raised in my memorandum I am hoping that your legal counsel will take a look at those because I think that in looking at other towns ordinances that have been adopted that there can be a comprehensive redraft that balances everybody's concerns. I think you need to get it right the first time rather than getting it wrong and feeling the effects of getting it wrong and then trying to correct it. I would advocate that it goes back to legal for an analysis for a comprehensive redraft.

Alderman McCarthy

It seems to me like I just want to lay out three specific cases we can look at where enforcement is a little different. The first is that while we know that work is being done by someone who is not legally qualified to do the work and in those cases it needs to be dealt with and halted immediately because they may be creating a safety hazard. The second is the case where real safety hazards exists, toilets don't flush, the electrical systems is faulty, etc., where there is some imminent danger to the tenant or people in the surrounding buildings. The third one is if I have a site plan where I require 15 parking spaces for a convenient store and I plunk down a storage unit across four of those spaces then I am in violation of the site plan. In all likelihood that is not causing any problems on a daily basis except that traffic may back up now and then so it's not imminent and I suspect in the case of the building code there are cosmetic issues; like a window is broken but has been covered up by plastic but the building is secure and in that case we just need to get compliance. It seems to me that the way to do that is to differentiate those in terms of timeframes. At the time of the violation we set when we expect it to be fixed and the fine becomes payable if it's not fixed or there hasn't been a request for an administrative appeal to look at it again. That would seem to solve a lot of the issues.

Alderman Clemons

I agree with what Alderman McCarthy said but I go back to the...I do believe that the ordinance should have written in it a warning. It's not to say that somebody that is unqualified or unlicensed doing work to say that the warning isn't stop immediately, if you don't stop immediately you will be fined. I do think that there needs to be a uniformed warning and I don't think that it needs to be specific but I do agree that there are different levels and perhaps an administrative appeal might not be a bad thing to look at but that would have to be something that isn't time consuming but can also be done in a fair manner. You don't want somebody to have a violation and then say I'm going to do an administrative appeal and have that take two to three weeks.

Mr. Ortega

Alderman McCarthy made a comment about the three different types of violations. Nothing that has been mentioned here is done differently already other than we don't issue a ticket. Everything we are talking about we do now other than issuing tickets. Broken windows, door jams that don't fit, torn wallpaper; those are what we consider to be general maintenance. Landlords are given plenty of opportunities to take care of those issues. The ordinance as it stands now which was written and submitted several years ago by Alderman Clemons, which was the 14-day notice to all landlords that tenants must give 14-days' notice. When we get a call from a tenant we ask if they notified their landlord. The landlord's notice starts when you have notified them in writing of that violation. We choose to call the landlord as a courtesy call and we log it as pending because we are waiting for the letter to come in from the tenant. Most of the landlord's here know that's how we work. We call and the get the warning and we give the landlord a heads up as a courtesy. Most of the landlord's jump right on it, even if they don't get a letter from the tenant. If we don't hear from the tenant then we don't have a complaint. For life/safety issues, the City of Nashua has its own housing code which was established as far as 1974. In the City of Nashua if the sewer pipe is even dripping water, health or code enforcement can shut that building down. That's considered a condemnable offense but we don't do that; we give the landlord an opportunity to take care of it. I appreciate all of the points you made, I think there are some issues with the appeal process. My position is that nothing is changing, we have a warning system and

the warning system we have now if you want to put it in there then we are going to say okay then here is your written warning and you have 5 days and we will be locked into that warning, I can't take that back. Landlord's will call me and say Nelson, I can't take care of this right now or they will say give me 5 days. If you give any code enforcement officer a valid reason why you need to wait and if it is not a life/safety or health/safety issue then we will give them the time. I have been here for 18 years and it hasn't changed.

Attorney Nicosia

I understand that those policies and procedures are in place and they are good ones. The issue that I have is that those policies and procedures are at odds with the literal language of this ordinance. In the table of violation offenses you have them tied to the various codes that apply. One suggestion could be is to also reference these types of policies and procedures that are in your departments to coincide with the imposition of these types of fines. I look at this as a lawyer and a strict constructionist in the most unfair and adverse hypothetical that I can construe because that is my job. In looking at this everything that you just said doesn't need to be followed in terms of this fine structure right now by the way the ordinance is written. There is a way to redraft this to account for those things to balance everybody's interests. The current draft does not do that. The second point is that I agree with Alderman McCarthy and Alderman Clemons that an administrative appeals process needs to be quick. It's meant to be the exact opposite of what you are trying to avoid in district court; 6 to 8 months, discovery drawn out, no resolution, legal fees and bureaucracy. That's not what I am advocating here. There is a level of abuse that can take place and I am appealing it knowing that it's going to get tied up in infinity. That's not what I am advocating here. I am advocating quick notice, quick evidentiary hearing and quick resolution. Whether that takes a few days or a week I am wide open to that type of analysis. The other communities that I looked at have quick administrative appeal processes. It doesn't have to be a Board it can be an individual within a department. If they don't avail themselves of that then they waive those rights and you deal with those issues that way. These are drafting issues; this ordinance appears to be a cookie cutter from the recommended standard provisions when 31:39(C) was first enacted. There were some templates that were issued by the state and that is what it looks like this was taken from. A lot of communities have shot it down on its face and others have tried to get it right.

Alderman Cookson

Mr. Ortega, I certainly respect the amount of time that you have been with the city, my question is that you speak of a heuristic rule of thumb that you deal with when dealing with these landlords. Is that actually codified? Do you have policies and procedures written down that we can reference that this is the action that we will take, is it that detailed or is it something that you have grown accustomed to. I am concerned about when you decide to retire or when some of your other inspectors are no longer doing this, will new people have the same type of reaction that you and your team do now?

Mr. Ortega

We do have steps as to when the warning goes out. The verbal is at our discretion and we work with the landlords. We've worked with them for so long and we want to hear what their problem is. We know we have tenants out there...we know what tenants call us when they are retaliating and if they are trying to get out of an eviction. The City of Nashua's Code Enforcement does not get involved in evictions that involve non-payment of rent or for the destruction of property. The retaliation clause does not protect those tenants. We go out and see the violation and other than life/safety we have all grown to do that. I can only speak for today and myself today, and anyone else who comes aboard that is trained by me will also learn that way. Up until the discretion of the warnings, someone could pick up and say this is what the policy will be for issuing for a housing code or a zoning code.

Alderman Cookson

I only hear positive things about the great teamwork between the department amongst all of you and I do

believe you are looking out for the betterment of the city. My comment was solely based on what happens when one of you decides to do something else and you are no longer in that capacity. I want to make sure that your legacy lives on and the way you treat these tenants and landlords continue because it's very positive and I want to make sure that relationship stays strong. In that capacity I am an advocate of making sure that it's written down so that there is a consistent uniform way that you know that you have treat them and they know that you will be treating them. That's all I am advocating.

Alderman Clemons

I agree with Alderman Cookson on that point as well. I would like to say that by writing in a warning as well there is nothing that precludes a warning to be extended or a second warning to be issued as well. I think one of the things that I've heard the most is that we need a warning system and it needs to be written into the ordinance and really can't support the legislation without that.

Mr. McKinney

I think we are forgetting some important pieces here when we talk about due process and constitutional law. Each of us that enforces the ordinance for the city; we are also bound by the laws that are adopted by the State of New Hampshire and for our nation. Each of us has to take the time go get educated in those and we have to follow those first and foremost and we have to follow the ordinances that are adopted by the city. This ordinance is intended to provide us with a couple of extra steps rather than the sole step we have now of court. In our building codes as they are written there is a process which I would call a warning, it's called a stop work order which can be written by our officers which we do. If someone violates that stop work order they go to court; \$275.00 fine per day and off to court we go. It's not only expensive for the city but expensive for the person involved in that court process. This ordinance allows us in those cases where we give the stop work order and it's ignored we could issue a much more minimal fine than \$275.00. In fact, on the building side of it starts at \$50.00. It steps up to \$100.00 if you continue to ignore it and at that point we can go to RSA:676 and go with the \$275.00 but this step is trying to design it so that we are not impacting someone with that really large bill, the court time and the cost to the city and the property owner or the offender by immediately going to court. There are processes in place that are very clear on how we handle our violations. In essence, I think you will find that in each of our departments we already have a warning process that are in the codes that are adopted in the ordinances and laws.

Attorney Nicosia

The state statute which is the genesis for this, 31:39(C) provides no guidance to municipalities on how to draft these ordinances. It basically says that it's within your discretion to adopt a set of ordinances that deals with administrative fines however you think is appropriate under the circumstances. I think everyone wants to achieve speed, accuracy and justice and I think they can co-exist. I don't think speed is paramount to accuracy and justice. I understand we are trying to avoid cost and the intent behind the administrative fine but there has to be a basic fundamental component of due process to get this right that extends beyond the field discretion of an inspector that talks to no one and understands no facts on how the situation arose and then embarks upon the application of the ordinance as it's currently written. I see no harm to have a quick administrative appeal mechanism in place. Evidence of that is that you already have them in all of your departments, as you just stated. If there is a violation there is a Housing Appeals Board or wherever the other Boards are for health and fire. If it works in those instances dealing with the merits of those violations then it should work here in terms of its primary focus being on the nature of the offense and more practically the time to correct it and whether or not there should be a fine. There has to be some discretion there to adjust on a case by case basis and you can do it quickly enough where it still balances your interest of achieving the end result in a much quicker and cost effective time than going to court. I strongly encourage that in addition to a warning mechanism, which I whole heartedly agree with, the has to be an administrative appeal mechanism here, whether that causes the creation of a separate Administrative Appeals Board that has a member from each one of these departments or something,

something has to be put in place for the very reason that Alderman Cookson just referenced. Right now the people in this audience are very fond of all of you and how you handle situations from a policies and procedures vantage point but as I have heard those things are not codified or in print, it's just the custom and practice of a good person. New people coming in are not bound by that. They are going to go by the literal language of the statute that lends itself to arbitrary conduct and abuse of authority. Unless we are going to incorporate these policies and procedures into this ordinance then there has got to be a layer of security for these property owners on an administrative appeal.

Ms. Heidi Peek-Kukulka, Manager of Environmental Department

I'd like to explain a couple of things. The Department of Environmental Health has an appeals process within the ordinances specifically for a suspension of license where those come to me and I review those. If it's a revocation of a license then that goes before the Board of Health. We are a little bit different because we license these facilities and we are in them all of the time. Lack of a food service license is a third offense and it goes to court which is far more alarming than someone we don't have a relationship with who is out there in the community. We strive to make sure that our people are on the same page. You can't account for personalities. One of the things that we are looking at in environmental health is credentialing specifically for the different roles. In each department you don't just walk into the job. For environmental health you have to have a Bachelor's Degree and then we put you through rigorous training and then there is a set of standardization measures that are taken as well.

Ms. Marchant

I would like to repeat that we agree that this should be an appeal process and a fast appeal that should be looked at by legal and added into this. I don't think we need to belabor that point any further but we have written procedures that we follow and those are certainly things that we can bring to the discussion with legal.

Alderman Siegel

Attorney Nicosia, one of the things that I am hearing; we have varying opinions about the warning process and how that's incorporated or not but it seems like a major thrust of what you are trying to do is put this appeals process in place and it sounds like if that were the case then that would satisfy a lot of the concerns, is that correct? We are trying to be fair and I want to make sure that we are on the mark.

Attorney Nicosia

The property owners are trying to be fair as well. If this were an a la carte menu then option number one would be to abolish this ordinance and its proposal and rely upon the state statute that is in place and have no fining mechanism whatsoever. The second choice, if that were not going to be an option, and they were faced with appealing an Aldermen's decision at the superior court to test constitutionality or accept a revised ordinance the most significant component that I see from my legal vantage point is that administrative appeal mechanism because it provides an opportunity for justice to be done and it doesn't vest in the municipality a cookie cutter statutory scheme that has rigid timelines and fines that don't necessarily apply to every circumstance. There has to be a warning provision put in there too. The other major component of this is from the definitional vantage point. A lot of the points which I raised in my memorandum are definitional based because the less ambiguity that you have the less arbitrary issues you are going to have in the application of the ordinance out in the streets. Most ordinances and statutes have a definitional section which defines things like occurrence, responsible party and further define the nature of a particular violation so that it reasonably applies as property owners as to what they should expect; it gives them a certain degree of predictability and comfort knowing that it is unambiguous.

Alderman Siegel

We've gone through those things; I just wanted to get your take on...

Attorney Nicosia

I would say the three primary things are the warning system, the administrative appeal and a definitional re-write of the ordinance.

Alderman McCarthy

I like the warning idea but I prefer to call it a deferred fine. The reason being is look what happens with the interactions with the police department. The police pull you over and give you a warning for having a headlight out and you toss it on the passenger seat and that's the last of that. If they give you a warning that says you have to have it fixed tomorrow or pay a fine you will get it fixed tomorrow. I think we can work that out and I think we need to approach the appeals process...it seems to me that those two things address menu options B and C. Attorney Nicosia, you had said that you looked at some other communities that had administrative appeals procedures, is there a particular good example you can point us to?

Attorney Nicosia

The ones that I have seen, for instance the Town of Durham, Rochester; most of them did not find the timeframe or the nature of the appellate process, it designated an appellate authority and afforded that appellate authority broad discretion to re-fashion whatever the penalty was. They could extend the time period of fine deferral, eliminate the fine, reduce the fine; it afforded them that type of discretion. I think an appellate authority here should have that same discretion but I think that you need to construct it in such a way that balances the inspectors concerns for avoiding abuse by people that are just filing frivolous appeals. Once again, all of these issues are drafting issues of the ordinance. That's why I am advocating that this Board table the current draft, get your lawyers involved, talk to inspection and come back with another draft that is closer to what fundamental fairness would be.

Alderman Siegel

Every discussion in committee is about the drafting of an ordinance so this is one of many.

Attorney Nicosia

The only reason why I make that point is because you have a motion on the floor to support the current draft.

Alderman Siegel

That's just standard procedure.

Attorney Nicosia

I've sat in that chair in my community so different procedures have different meanings to me.

Alderman McCarthy

Some notations in the memo you gave us, as is often the case when looking for case law in New Hampshire there isn't much that's really on point to what we are looking at. Most of them seem to be

taken from cases of the discontinuance of road uses and one of them is a sign taking case. I'm looking for somewhere where the court has given us guidance on the specific issue of the application of administrative fines.

Attorney Nicosia

I don't believe there is a case on point for the Supreme Court testing the constitutionality of a 31:39(C) ordinance. There are cases that I cited, one which dealt with an environmental fine under 31:39(C) and another one in which a fine structure that a community was trying to adopt where if an Alderman had a conflict of interest in a vote then the same Alderman were authorized to fine that elected official and that ultimately failed. In terms of a landlord/property owner constitutionality test, I have not found that case. I think I am a pretty good researcher and I would be citing it if I did find it.

Alderman Cookson

In the effort to be educational and to make sure that everybody in the audience understands, the motion that I made at the very beginning of this conversation for final passage was strictly procedural. It was the opportunity to exchange the dialogue. The final motion that is made will probably not be for final passage, it may be tabled or some other recommendation. My motion does not mean that I am in support of final passage; it was only to begin the dialogue.

Alderman Siegel

Are there any further comments at this time?

Alderman Cookson

I believe that this was a great conversation. I didn't know if fire had any additional commentary to add.

Mr. Adam Pouliot, Acting Fire Marshall, City of Nashua

I am in agreement with what the other departments have said.

Alderman Schoneman

With regard to the life/safety issues, my understanding was that the fire department had authority to inspect and issue fines already, is that correct?

Acting Fire Marshall Pouliot

We have the authority to inspect buildings. Serious life/safety violations that can't be immediately remedied, we do have the ability to order the buildings vacated. For example, a building where the fire alarm system has gone down or say the downtown bars on St. Patrick's Day are overcrowded, we can order the building vacated.

Alderman Schoneman

Do you have the option to fine or only to order the building vacated?

Acting Fire Marshall Pouliot

I don't know if we have the ability to fine.

Alderman Cookson

An additional item that I would like to bring up for consideration is a suggestion by one of our public speakers this evening. If you looked at the audience this evening regarding withholding or escrowing welfare payments to landlords or owners, a lot of the people in the audience were shaking their head in agreement. She mentioned this was happening in the 70's or 80's, is this something we can consider and can we have legal look into that?

Alderman Wilshire

The Housing Authority can make Section 8 payments on behalf of tenants directly to landlords. They might do that if they do an inspection and the property owner doesn't rectify those issues they can withhold rent.

Alderman Siegel

This came up last term, I was the one that we withhold to 23 Temple and the problem is that the voucher system allows people to make voluntary choices and we cannot withhold the payment for services as long as those services were provided. That was from legal.

Alderman Cookson

That was an opinion from last term, can we get an opinion from this term.

Alderman Siegel

We could potentially get a more aggressive opinion but that was the opinion of legal at the time.

Alderman McCarthy

Which agreements does that refer to? If we had a contract with a particular landlord that took our welfare payments then we could put that language in there.

Alderman Siegel

We don't have a contract, they have the agreement. We are presented with a bill for services and to the extent that service was provided within the agreement that the tenant and the landlord have then we are obligated to pay for that and we don't have discretion to withhold that payment.

Alderman Cookson

So we couldn't put that in escrow and once they make the corrections that are required then they would receive their payment in full?

Alderman Siegel

Based on what I was told the answer is no.

Alderman Cookson

I think it's worth exploring again.

Alderman Clemons

I would want to get Attorney Bolton's opinion on that too because I am fairly certain that written into the contract between the landlord and tenant wasn't that you are living with bedbugs and rats. I am pretty sure that is a violation of the contract.

Alderman Siegel

Again, this wasn't just Attorney Bennett, this was Bob Mack at the Welfare Department offering his opinion on this but we can certainly check on that.

In my mind it would not be appropriate at this to vote on this legislation because I think there was some really good input and we should see what we can come up, something better if possible.

Alderman Cookson

A motion to table is non-debatable but we could make a motion to hold at the committee level and allow legal to review Attorney Nicosia's document and provide further guidance to the committee and that is debatable.

**MOTION BY ALDERMAN COOKSON TO HOLD AT THE COMMITTEE LEVEL
MOTION CARRIED**

Attorney Nicosia

Will there be a date certain for a further committee hearing or will we be notified?

Alderman Siegel

If you can provide some address for notification and our e-mail addresses are available on the city website. If you send it to me as the committee chairman I will make sure that it gets to everyone. All city meetings are noticed. Typically this committee meets every two weeks. We will make sure that there is proper notice given and you can participate and nobody feels left out of the process. As the chair I want to make sure that everyone knows there is nothing punitive about what we are trying accomplish, we are trying to accomplish the best possible outcome across a wide spectrum of interests and I hope that everybody appreciates that we were willing to listen and I appreciate the way this meeting was conducted and I thank everyone who has participated.

NEW BUSINESS – None

DISCUSSION - None

PUBLIC COMMENT

Mr. Bradley Whitney, 38 Fifield Street

If you let somebody borrow your automobile and they get arrested for speeding then they pay the fine. If you own a piece of property and the tenant violates the law and removes a smoke detector that's an arrestable offense but you pay the fine. The wrong person is paying the fine and I just don't understand that. There needs to be something that allows the landlord to threaten the tenant. The city provides a Tenant Bill of Rights and it says that the tenant has the right to live in a lead free environment. Does that mean if there is lead in the house the tenants can demand that it be removed? How many houses in Nashua were built before 1978? It's too ambiguous and it leads the tenant to think that they can do things

but do they have the right to demand that the lead be removed from any house in Nashua? If that is what it needs then the property value is going to go way down because who is going to buy the house if there is lead pain in it? We lost a tenant because he lost his job and he had to move down to Georgia for another job but people aren't buying homes because they feel like their job is insecure. You should allow people to build a studio in their home so people can stay in their homes. We've lost a lot of industry so what makes you think we are not going to lose any more? I want you to think about this so Nashua can survive. We've got five empty buildings and I've never had that before. When I started there were thirteen vacancies in Nashua in 1957 and downtown Nashua was the only business. We've done a lot but we haven't done a lot with debt. We want you to be thinking of the future.

Ms. Cecile Marquee, P.O. Box 3854

I know that if people owe property taxes the city holds rent and uses it towards the property tax unless they have changed so I think they can do the same with rent. Every landlord here is willing to work with the city and if you want to call us we would sit down with you for any issue.

Mr. Nick Peck, 99 Taylor

I keep (inaudible) code enforcement and we already have everything in place; the only difference is we want to check, we want due process, you've done a great job. According to Steve Bolton, last year there were 10 court cases. In 2014 there were 16 and that seems like a pretty low number for the amount of property that you people oversee. I think you should be able to handle 10 cases a year to take care of these problem landlords.

REMARKS BY THE ALDERMEN

Alderman Wilshire

I think it was a good meeting tonight and I want to thank everyone who came out.

Alderman Cookson

I will echo Alderman Wilshire's comments. We appreciate your consolidated comments.

Alderman LeBrun

I would like to address Mr. Whitney's comments about the lead paint issue and also the apartments that you spoke of. Both those of issues are currently in legislation at the State House. One is in the Senate and one is still in the House.

Alderman Siegel

For me I would like to thank everyone for coming out and hopefully you got something out of this too.

POSSIBLE NON-PUBLIC SESSION

ADJOURNMENT

MOTION BY ALDERMAN WILSHIRE TO ADJOURN MOTION CARRIED

The meeting was declared closed at 9:00 p.m.

Alderman Don LeBrun
Committee Clerk, pro tem

Item #1

LAW OFFICE OF
NICOSIA & ASSOCIATES, P.C.

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MEMORANDUM IN OPPOSITION TO
PROPOSED NASHUA ORDINANCE O-16-003, CHAPTER 74

The Petitioners¹ oppose proposed Ordinance O-16-003, Chapter 74 on the grounds that it is unconstitutional for lack of due process and vagueness. In that regard, the Petitioners respectfully request that the Substandard Living Conditions Special Committee and the Board of Alderman reject the enactment of the proposed Ordinance.

Standard of Review

RSA 31:39-c adopted in 2010 along with the state zoning-enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community. *Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633, 636, 903 A.2d 1021 (2006) (citing *Taylor v. Town of Plaistow*, 152 N.H. 142, 145, 872 A.2d 769 (2005); RSA 674:16, I (1996)). Although a town generally has the authority under its police power to enact zoning and other related laws in the interest of the general welfare, this authority is not unlimited. *Loundsbury v. City of Keene*, 122 N.H. 1006, 1009, 453 A.2d 1278 (1982.)

Due Process

A substantive due process challenge to an ordinance questions the fundamental fairness of an ordinance both generally and in the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation. *Caspersen v. Town of Lyme*, 139 N.H. 637, 642, 661 A.2d 759 (1995). In determining whether an ordinance is a reasonable exercise of the municipality's police powers and, therefore, can withstand a substantive due process challenge, the Courts have consistently applied the rational basis test. Under this test, we consider whether the ordinance bears a reasonable relationship to its objective and does not unduly restrict fundamental rights. *Powers v. Town of Hampton*, 125 N.H. 273, 276, 480 A.2d 143 (1984).

Although an ordinance may be facially valid because it promotes the public health, safety and the general welfare, this does not end the matter. In order to respect the property owner's rights, it is also necessary to determine whether the ordinance is nevertheless arbitrary and unreasonable as applied to the plaintiff's land." *Metzger v. Town of Brentwood*, 117 N.H. 497, 501, 374 A.2d 954 (1977) (emphasis added). To determine

¹ The Petitioners are comprised of thirty-two (32) Nashua property owners whom have retained this law firm to oppose the proposed Ordinance. For purposes of this advisory committee hearing the property owners can be identified as the 'Association of Nashua Property Owners Opposed to Proposed Ordinance O-16-003 Chapter 74.'

whether an ordinance is arbitrary and unreasonable, the injury or loss to the landowner must be balanced against the gain to the public." *Buskey v. Town of Hanover*, 133 N.H. 318, 323, 577 A.2d 406 (1990).

Vagueness

The vagueness doctrine rests upon the Due Process Clauses of the Fifth and Fourteenth Amendments and applies solely to legislation which is lacking in clarity and precision." *State v. Gaffney*, 147 N.H. 550, 553, 795 A.2d 243 (2002). Due process requires that an ordinance proscribing conduct not be so vague as to fail to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Webster v. Town of Candia*, 146 N.H. 430, 434, 778 A.2d 402 (2001) (quoting *In re Justin D.*, 144 N.H. 450, 453, 743 A.2d 829 (1999)). An ordinance is unconstitutionally vague when people of common intelligence must necessarily guess at the statute's meaning and differ as to its application. *State v. Pike*, 128 N.H. 447, 449, 514 A.2d 1279 (1986).

ARGUMENTS

1. The City of Nashua already has a mechanism for enforcement of building, fire and health code violations pursuant to RSA 502-A:11-a and RSA 676:6. Inclusive in those statutory protections is the ability to also fine non-compliant property owners. As such, the proposed ordinance is duplicative. Moreover, the adoption of the ordinance will not eliminate the need for a future District Court proceeding if a property owner wants to contest the violation.
2. Unlike the current statutory scheme referenced in paragraph 1, the proposed ordinance does not afford a property owner due process prior to imposition of and obligation to pay the fine imposed. An inspector determines the merits of an alleged code violation, issues the citation and the fine is then due and payable under the current wording of the ordinance without any form of due process. If a property owner wants to contest the fine the property owner must pay it within the time allotted or be faced with additional fines for non-payment as the matter proceeds into a District Court litigation.²
3. The proposed ordinance fails for vagueness and due process as it relates to the City's determination of the 'person responsible' for the violation. The current wording of the ordinance does not define 'person responsible' and presumes that it is simply the record title owner of the property that should be obliged to pay the

² Contrast the proposed Nashua ordinance with the town of Durham NH and others. In that community, a similar ordinance was adopted pursuant to RSA 31:39-c. However, after issuance of a citation the aggrieved property owner is afforded with an Administrative Appeal to the town council prior to the ultimate imposition of the fine. Here there is no Administrative Appeal structure proposed that would be specifically related to this ordinance. Within the Nashua Housing Code Blue Book there is reference to a Board of Housing Appeals and Appeals from a Condemnation Order but nothing that would relate to Appeals from these types of Citations. What if it is a commercial property? What if it is a fire or health code violation? An Administrative Appellate process would need to be written into the proposed Ordinance to afford due process.

- fine. What if the alleged code violation were caused by a tenant, negligent contractor or act of mother nature and not the property owner? Shouldn't the fine then be imposed upon the actual person that caused the violation? A property owner should not be assessed a fine without a due process evidentiary hearing to determine who ultimately caused the alleged code violation. It is inherently unfair for a property owner to pay a contested administrative fine up front, force them into a District Court appeal process and then also force them to chase whoever the ultimate responsible party is for such property condition. What if the property owner is successful in the contest and has already paid the administrative fine? There is no mechanism written into the proposed ordinance to prescribe a refund of said monies.
4. The proposed ordinance fails for vagueness and due process as it relates to a 'reasonable time to comply.' The way the ordinance is currently written appears to impose a ten (10) day time line to comply or pay the designated fine. Depending upon the nature and cause of the alleged fire, building or health code violation such a time frame is patently unreasonable. There needs to be an Administrative Appeal mechanism that allows a property owner to provide evidence to justify expansion of the time frame to comply on a case-by-case basis. One size does not fit all here. What if the job is complex? A contractor is unavailable? A property owner is out of state/communication? A natural disaster occurred? There are insurance or tenant issues? The way the proposed ordinance is written does not comport with a fair analysis of what reality is likely to be here.
 5. The way the table of fines is currently proposed in the ordinance will result in unfair penalties that are in direct violation of RSA 31-39-III in that the totality of a fine for an 'offense' cannot exceed One Thousand Dollars (\$1,000.00.) The way the ordinance is currently drafted it defines offense as 'each day' being a new offense as opposed to each code violation 'occurrence or existence.' Offense should be redefined to an event occurrence tied to the merits of the violation and not the calendar days of which the one-time violation continues to exist. Moreover, the proposed ordinance should contain 'warning' provisions and it does not. The fines are also excessive in 'amount' for limited resource property owners that are already paying substantial real estate taxes to the City. Moreover, the proposed ordinance references the ability to impose 'reduced' fines but there is no further designation or uniformity to that in application.
 6. The proposed ordinance as written lends itself to selective enforcement and abuse by third parties. The ordinance needs to be revised to set forth whether inspections are 'complaint' based or whether there will be a 'set schedule' of inspections for all property owners—residential and commercial. There should also be a 'reasonable advance notice' provision as it relates to these inspections. As written, this ordinance would allow the relevant inspector discretion to engage in surprise inspections and selective enforcement as to who they may choose to fine and who they don't. The wording of the ordinance is framed with the word 'may' as it relates to a fine. There is too much discretion afforded to a potential

inspector to impose or not impose fines in an arbitrary and capricious manner. Moreover, such an ordinance will arm residential and commercial tenants with retaliatory measures to abuse the process by intentionally damaging property, notifying a relevant inspector resulting in an administrative fine being imposed upon a property owner without due process and not as the true responsible party.

7. The 'description section' of the proposed ordinance is overly vague. Although the offense categories are tied to other City or State statutes and ordinances there is the opportunity for an inspector to impose multiple fines for the same violation as the description of the violation can fall into multiple categories. For example, an alleged violation of 'exterior standards' may also qualify for a 'building violation.' There needs to be a 'definitions' section to the proposed ordinance to avoid vagueness and arbitrariness in its application.

CONCLUSION

In light of the foregoing, the Petitioners respectfully request that the proposed Ordinance be rejected in its current form.

Respectfully submitted,
PETITIONERS BY THEIR COUNSEL,

Peter J. Nicosia, Esquire

Further Recommended changes by Alderman Ben Clemons to o-16-003

“Chapter 74

ADMINISTRATIVE ENFORCEMENT OF ORDINANCES

§ 74-1. Warning and Citation authority.

City departments or officials charged with the responsibility for enforcing the ordinances and codes of the city are hereby authorized to issue warnings and citations for any violation of the ordinances or codes that they are responsible for enforcing. The enforcement authority provided hereby is provided for in RSA 31:39-c and is in addition to the authority for ordinance and code enforcement that currently exists. A warning as defined in section 74-2a must first be issued before a citation may be issued for any violation.

§ 74-2. Warnings and Citations defined.

74-2a: Warnings

A warning is a written and/or printed notice describing a specific violation of a city ordinance or code which is served on the person responsible for the violation. A warning shall be served in the manner described in this chapter, and shall contain the following information:

- A. A clear and concise description of the violation.
- B. The location of the violation and the date and time on which it was observed.
- C. The name and address of the person responsible for the violation.
- D. Establishes a reasonable time frame by which said violation must be remediated to avoid a citation
- E. Notification that failure to remediate the violation within the established time frame will result in the issuance of a citation
- F. The signature and printed name and department of the individual issuing the warning.

74-2b: Citations

A citation is a written and/or printed notice describing a specific violation of a city ordinance or code which is served on the person responsible for the violation. Each day on which a violation exists or occurs is a separate offense, and a citation may be issued for each offense. A citation shall be served in the manner described in this chapter, and shall contain the following information:

- A. A clear and concise description of the violation.
- B. The location of the violation and the date and time on which it was observed.

- C. The name and address of the person responsible for the violation.
- D. The penalty for the violation as provided for in this chapter.
- E. A statement or table describing the penalties for future occurrences of the same violation.
- F. A statement as to whether the citation is being issued for a first, second, or subsequent offense.
- G. The name and address of the office to which the payment of the penalty may be made.
- H. The time period during which a reduced penalty may be paid in full satisfaction of the citation.
- I. Notification that failure to pay the penalty may result in court action.
- J. The signature and printed name and department of the individual issuing the citation.

§ 74-3. Service of a warning or citation.

A. Any warning or citation shall be served by the official issuing it in any one of the following ways:

(1) In hand to the person responsible for the violation; or

(2) By certified, registered or U.S. Postal Service first class mail, to the last known address of the person responsible for the violation, or as listed with the NH Division of Motor Vehicles.

B. The official serving the warning or citation shall maintain a record of the date, time, and manner of service of the warning or citation including the post office receipt if service was accomplished by registered or certified mail.