



SAFETY CODES COUNCIL

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COUNCIL ORDER No. 0015434

**BEFORE THE BUILDING TECHNICAL COUNCIL
On September 26, 2013**

IN THE MATTER OF the Safety Codes Act, Revised Statutes of Alberta 2000, Chapter S-1.

AND IN THE MATTER OF two Orders issued by an Accredited Municipality (Respondent), against a Property Management Company (Appellant), dated April 30, 2012 (Order One) and May 8, 2013 (Order Two), respectively.

UPON REVIEWING the Orders **AND UPON HEARING** the Appellant and the Respondent; **THIS COUNCIL ORDERS THAT** Orders One and Two are **VARIED**.

Order One

From:

1. FORTHWITH take all necessary action to immediately ensure that no person or property is exposed to any undue risk; pursuant to Sentences 2.2.14.1.(1) and 2.2.14.1.(2) of Division C of the Alberta Building Code 2006 and Sentence 8.1.2.2.(1) of Division B of the Alberta Building Code; and
2. FORTHWITH correct the unsafe condition by providing an acceptable means of protection for all of the openings that are not in compliance with Subsection 9.7.1. of Division B of the Alberta Building Code 2006. These means are to be accepted by the Authority having jurisdiction (Safety Codes Officer – Building); and
3. To obtain a valid and subsisting Building Permit for any remedial work necessary to permanently correct the unsafe condition of the aforesaid building by no later than 16:00 hours on the 14th day of June 2012, pursuant to Article 2.2.9.1. of Division C of the Alberta Building Code 2006; and
4. Upon completion of the prescribed remedial work under the valid and subsisting building permit, you are to notify the Authority Having Jurisdiction (Safety Codes Officer – Safety Response Unit) and arrange for an inspection to confirm that the remedial work has been completed. Such notification for inspection is required pursuant to Sentence 2.2.12.5(1) of Division C of the Alberta Building Code 2006.

To:

1. FORTHWITH take all necessary action to temporarily correct the unsafe condition; pursuant to Sentence 2.2.14.1.(1) of Division C of the Alberta Building Code 2006; and
2. FORTHWITH correct the unsafe condition by providing an acceptable means of protection for all of the window openings that are not in compliance with Subsection 9.7.1. of Division B of the Alberta Building Code 2006. These means are to be accepted by the Authority having jurisdiction (Safety Codes Officer – Building); and
3. Upon completion of the prescribed remedial work under the valid and subsisting building permit, you are to notify the Authority Having Jurisdiction (Safety Codes Officer – Safety Response Unit) and arrange for an inspection to confirm that the remedial work has been completed. Such notification for inspection is required pursuant to Sentence 2.2.12.5(1) of Division C of the Alberta Building Code 2006.

Order Two

From:

1. Obtain a valid and subsisting Building Permit for such work pursuant to Article 2.2.9.1. of Division C of the Alberta Building Code 2006; and to obtain the valid and subsisting Building Permit for the replacement of the windows for the aforesaid building, in accordance with the requirements of Article 2.2.9.1. of Division C of the Alberta Building Code 2006 by no later than 16:00 hours on the 14th day of June 2013

To:

1. Obtain a valid and subsisting Building Permit for such work pursuant to Article 2.2.9.1. of Division C of the Alberta Building Code 2006; and to obtain the valid and subsisting Building Permit for the replacement of the windows for the aforesaid building, in accordance with the requirements of Article 2.2.9.1. of Division C of the Alberta Building Code 2006 by no later than 16:00 hours on the 18th day of November 2013

Issue:

1. The Appeal concerns a building described as a 6 storey, 32 unit residential condominium.
2. Both Orders concern the replacement of windows carried out on the exterior of the building.
3. The issues on appeal are:
 - (a) Are the new windows compliant with the Alberta Building Code 2006?
 - (b) Is a permit required for the replacement of the windows?
 - (c) Does an unsafe condition exist?

Preliminary or Procedural Matters:

4. Appearing for the Appellant, the Appeal Panel heard from two representative of the property management company, and from a representative of a window and door company.

5. Appearing for the Respondent, the Appeal Panel heard from two Building Safety Codes Officer's and legal counsel, all from the accredited municipality.
6. At the commencement of the hearing, the Appellant and the Respondent each confirmed their agreement that there were no objections to any members of the hearing panel, and the Safety Codes Council and the hearing panel had jurisdiction to hear and decide the appeal.
7. The Appeal Panel Chair read out a list of the written material before the panel, and the Appellant and the Respondent each confirmed that there were no objections to any of the written material submitted to the panel prior to the hearing.
8. At the beginning of the Appellant's presentation, the Appellant provided two new documents for submission into the record. The Respondent's legal counsel objected to the Appellant's proposed submissions because the documents referenced earlier proceedings in contravention with the instructions provided to the parties by the Coordinator of Appeals in the Written Notification of Appeal Hearing dated July 15, 2013 and in the Reminder Notification of Appeal Hearing dated August 23, 2013.
9. The Appeal Panel Chair adjourned the hearing to consider the objection. Upon reconvening the Appeal Panel Chair ruled the documents inadmissible and stated that they would not be accepted into the record and that the Coordinator of Appeals had removed the submissions from the Appeal Panel. The Appeal Panel Chair further indicated that the Appeal Panel was confident it could continue with the proceedings and would not be influenced by the Appellant's at-table submissions. The Appellant and Respondent each confirmed their agreement that there was no objection to the Appeal Panel continuing to hear and to decide the appeal.
10. During the Appellant's presentation, the Respondent's legal counsel raised a concern that the Appellant referred to information from a Safety Codes Officer that had been excluded by the Chair's ruling as it referenced previous proceedings on this matter. The Chair was not asked to make a formal ruling on the concern expressed and the Appellant moved onto other matters of topic in his presentation.
11. During the Appellant's presentation, the Appellant proposed submitting a further document into evidence. After the document was shown to the Respondent's Legal Counsel, and she indicated that there was no objection, the Appeal Panel Chair accepted into the Record the document provided by the Appellant and this was marked as

Exhibit 1 – Appellant. The document is an email dated September 26, 2013 on the subject of fire retarding properties only and does not contain reference to previous proceedings.

The Record:

12. The Appeal Panel considered, or had available for reference, the following documentation:

- a) Exhibit #1 Appellant – an e-mail dated September 26 about Fire retarding properties;
- b) Brief Submission of the Appellant
- c) Brief Submission of the Respondent
- d) Reminder Notification of Appeal Hearing dated August 23, 2013
- e) Written notification of The Appeal Hearing dated July 15, 2013
- f) Appeal Hearing Brief Preparation Guide
- g) Stay Letter dated June 11, 2013
- h) Request to stay an order dated May 24, 2012 (2013)
- i) Acknowledgement Letter dated June 3, 2013
- j) Notice of Agreement to hear both orders dated May 30, 2013
- k) Copy of Notice of Appeal, without attachments, dated May 24, 2012 (2013)
- l) Stay Letter dated June 4, 2012
- m) A copy of the Order dated April 30, 2012
- n) A copy of the Order dated May 8, 2013

Provisions of the Safety Codes Act:

13. Subsection 52 (2) (a) of the Safety Codes Act provides:

Council considers appeal

52(2) The Council may by order

- (a) Confirm, revoke or vary an order, suspension or cancellation appealed to it and as a term of its order may issue a written variance with respect to any thing, process or activity related to the subject-matter of the order if in its opinion the variance provides approximately equivalent or greater safety performance with respect to persons and property as that provided for by this Act

Provisions of the Safety Codes Act Permit Regulation:

14. Section 6 of the Permit Regulation provides, in part:

Building Discipline

Building permit

6(1) A permit in the building discipline is required for the following if the Alberta Building Code applies to it:

- (a) the construction of a building, including the renovation or addition to a building;

6(3) Despite subsection (1), a permit is not required for the following:

- (a) subject to subsection (3.1), construction, including a renovation or an addition, that does not exceed \$5000 in prevailing market value if matters affecting health or safety are not at risk;

Provisions of the Alberta Building Code 2006 (ABC 2006):

15. The applicable and current code is the Alberta Building Code 2006 (ABC 2006).
16. The ABC 2006 and Appendix A to Division B thereto provides, *inter alia*:

Division A

Part 1 Compliance

1.1.1.1. Application of this Code

1. This Code applies to any one or more of the following
 - l) the installation, replacement, or *alteration* of materials regulated by this Code,

Division B

Part 9 Housing and Small Buildings

9.7. Windows and Skylights

9.7.1. General

9.7.1.5. Height of Window Sills above Floors or Ground

(see Appendix A)

1. Except as provided in Sentence (2), openable windows in *buildings of residential occupancy* shall be protected by
 - a) a *guard*, in accordance with Section 9.8., or
 - b) a mechanism capable of controlling the free swinging or sliding of the openable part of the window so as to limit any clear unobstructed opening to not more than 100 mm measured either vertically or horizontally where the other dimension is greater than 380 mm.
2. Windows need not be protected according to Sentence (1) where
 - a) the window serves a *dwelling unit* that is not located above another *suite*,
 - b) the only opening greater than 100 mm by 380 mm is a horizontal opening at the top of the window,
 - c) the window sill is located more than 450 mm above the finished floor on
 - d) one side of the window, or
 - e) the window is located in a room or space with the finished floor described in Clause (c) located less than 1800 mm above the floor or ground on the other side of the window.

Division B

Appendix A

A-9.7.1.5. Height of Window Sills above Floors or Ground. The primary intent of the requirement is to minimize the likelihood of small children falling significant heights from open windows. Reflecting reported cases, the requirement applies only to dwelling units and generally those located on the second floor or higher of residential or mixed use

buildings where the windows are essentially free-swinging or free-sliding.

Free-swinging or free-sliding means that a window that has been cracked open can be opened further by simply pushing on the openable part of the window. Care must be taken in selecting windows, as some with special operating hardware can still be opened further by simply pushing on the window.

Casement windows with crank operators would be considered to conform to Clause (1)(b). To provide additional safety, where slightly older children are involved, occupants can easily remove the crank handles from these windows. Awning windows with scissor hardware, however, may not keep the window from swinging open once it is unlatched. Hopper windows would be affected only if an opening is created at the bottom as well as at the top of the window. The requirement will impact primarily on the use of sliding windows which do not incorporate devices in their construction that can be used to limit the openable area of the window.

The 100 mm opening limit is consistent with widths of openings that small children can fall through. It is only invoked, however, where the other dimension of the opening is more than 380 mm. Again, care must be taken in selecting a window. At some position, scissor hardware on an awning window may break up the open area such that there is no unobstructed opening with dimensions greater than 380 mm and 100 mm. At another position, however, though the window is not open much more, the hardware may not adequately break up the opening. The 450 mm height off the floor recognizes that furniture is often placed under windows and small children are often good climbers.

Division C

Part 2 Administrative Provisions

2.2.9. Permits

2.2.9.1. General

1. A *permit* is required for the construction, *alteration*, installation, repair, relocation, demolition, or change in *occupancy* of any *work* to which this Code applies in accordance with regulations made pursuant to the Safety Codes Act.
2. In addition to a *permit* that is required by Sentence (1), other *permits* may be required for the installation of related *building* services.
3. An *owner* shall ensure that all *permits* required in connection with the proposed *work* are obtained before starting the *work* to which they relate.

Position of the Parties

Appellant

17. The Appellant's position is that:

- (a) The two orders were issued based on incorrect assumptions.

- (b) The assumption that the condominium building is altered from its original constructed state, leaving the building in an unsafe condition is incorrect. There has been no alteration from the original constructed state; the windows put in were to match the exact same ones coming out with the same configuration. No alteration, changes, or relocation were made. The new windows are safer than the previous windows as they are equipped with a guard that limits the window opening and the new windows are more energy efficient.
- (c) The assumption that the new windows do not meet code requirements and need to be protected by a guard is incorrect. The new windows are equipped with a guard on the lower rail that can limit the openable area of the windows.
- (d) The assumption that a building permit is required for the replacement of the building's windows is incorrect. Information from the municipality's 311 line and from representatives of the window industry reveal that when there is no change in the shape, opening, or structure of the building, a building permit is not required to replace windows.
- (e) The Appellant also took the position that a permit was not required because the cost for window replacement per unit was less than \$5000 dollars.
- (f) This position was spoken to and formed and was the subject of their filed brief, which the panel indicated that they had read beforehand along with all other pre-filed materials.
- (g) In testimony, the appellant expressed frustration that although it had offered to make permanent the restriction on the opening of the windows it could not get a clear answer from the Respondent that this would not create any issues with egress in the first 3 floors of the building.

Respondent

18. The Respondent's position is that:

- (a) An unsafe condition exists. Replacement of the windows has left the building in an unsafe condition.
- (b) While the work conducted has never been reviewed for compliance with the ABC 2006 it can be determined that the work does not meet code on two points:
 - i. The windows installed are combustible vinyl and do not comply with Article 3.1.5.1., Division B of the ABC 2006.
 - ii. The windows do not provide a permanent means of restricting the openable area to 100 mm as required by Article 9.7.1.5., Division B of ABC 2006. This view is supported by the National Research Council of Canada.
- (c) A building permit is required for the replacement of the windows. The Permit Regulation states that a building permit is required for the construction of a building, including the renovation or addition to a building. A permit is not required for a construction,

renovation or an addition that does not exceed \$5000 in prevailing market if matters affecting health or safety are not at risk. The cost to replace the windows was \$140,000. The market value of the work exceeds \$5000 and matters of health and safety are at risk. There is no allowance to divide the cost between the units. Further, the Appellant owns all of the suites.

- (d) Both orders issued are valid and should be confirmed. On the second order a building permit is required for replacement of the windows and the opinions of the window companies should not be given weight.
- (e) With respect to any representations given by 311 operators, the 311 operator is not authorized to take binding positions on whether code requirements are met. The 311 call centre is intended for general inquiries. The Authority Having Jurisdiction, the Building Safety Codes Officer, is the one that has the authority to determine that a building permit is required and a safety codes officer advised the Appellant that a building permit was required prior to the Appellant making inquiries to the 311 information line.

Reasons for Decision (Findings of Fact and Law):

The Appeal Panel makes the following findings:

- 19. The parties do not dispute the following facts, and the Appeal Panel finds them to be proven:
 - i) In September 2011, windows were replaced in all 32 units of the 6 storey, 32 unit condominium building owned by the Appellant;
 - ii) No building permit was obtained for this work, and the total cost of the work was \$140,000, before G.S.T;
 - iii) The Respondent measured the window sills in the units at 10 inches or 254 mm. above the finished floor, and the windows as replaced can be opened at least 550mm if the locking mechanism is disengaged. This opening is not located at the top of the window and therefore 9.7.1.5. 2 of Division B of the ABC 2006 does not apply;
 - iv) The windows as replaced include a mechanism that, if engaged, can restrict the window opening to 100 mm, but the device can be easily engaged or disengaged by hand;
 - v) The windows that were replaced did not have such a mechanism;
 - vi) There is no change in the shape, or size of the windows as replaced from those that were replaced, and no structural changes;
 - vii) The Appellant was advised by several window companies and by the municipality's 311 information line that no building permit was required for the replacement of the windows.
- 20. The Appeal Panel's jurisdiction is to hear an appeal of the Respondent's orders and render a decision to confirm, revoke or vary the Respondent's orders, based on its interpretation and application of the ABC 2006 and the *Safety Codes Act*.

21. With respect to the Respondent's position that the windows as replaced and installed are combustible vinyl and do not comply with Article 3.1.5.1, Division B of the ABC 2006, the Appeal Panel finds that this Article is inapplicable in light of Article 3.1.5.4., sentence 5, which states in part: "Combustible window sashes and frames are permitted in a building required to be of non-combustible construction".
22. Nevertheless, an unsafe condition exists. The current device or locking mechanism does not meet the intent of the ABC 2006 Article 9.7.1.5., Division B. Although it is possible to take the view that the device provides a better level of safety than what existed before because it can limit the opening of the window, it is a mechanism that can be engaged or disengaged easily and does not permanently limit the opening of the windows. In interpreting Article 9.7.1.5., Division B, the Appeal Panel is guided by the explanatory notes in Appendix A, Division B for this Article and holds that the primary intent of the requirement is to minimize the likelihood of small children falling significant heights from open windows.
23. A building permit is required for the replacement of the windows. In reaching this conclusion, the Appeal Panel does not find the views of window companies or the 311 operator persuasive, and gives them no weight. Rather the Appeal Panel relies on its review and interpretation of the governing legislation, and section 6 of the Permit Regulation in particular. The Appeal Panel finds that the cost of replacing the windows exceeds \$5000 and pursuant to the Permit Regulation would require a permit. The Appeal Panel rejects the Appellant's argument that the cost of the window replacement is less than \$5000 on a per unit basis, and finds that there is no provision in the legislation that would support the approach suggested by the Appellant. Further, and in any event, the Appeal Panel finds that even if the "per unit approach" was deemed to be a correct approach; matters affecting health or safety are at risk.
24. The Appeal Panel disregards the Appellant's argument that putting permanent restrictions on the opening of the windows could result in non-compliance with Building Code requirements on egress. Egress is not an issue for this appeal. Windows are only required for egress when you have a single-family dwelling. In accordance with Article 3.3.1.3., sentence 8, Division B, of the ABC 2006, a window is not considered a means of egress in a multi-dwelling building.

Dated at Edmonton, Alberta this 15 day of October 2013

Chair, Building Technical Council Appeal Panel