



# Safety Codes Council

## **COUNCIL ORDER No. 0015452**

**BEFORE THE BUILDING SUB-COUNCIL**

**On September 28, 2015**

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

**AND IN THE MATTER OF** the Order dated June 5, 2015 issued by an Accredited Municipality (the Respondent) against a Home Owner. (the Appellant).

**UPON REVIEWING** the Order **AND UPON HEARING** from the Appellant and the Respondent;  
**THIS COUNCIL ORDERS THAT** the Order dated June 5, 2015 is **VARIED**.

**FROM:**

Vacate the dwelling located on the property by no later than July 05, 2015,

- To ensure no person re-occupies the dwelling located on the property until such time as the site has been deemed safe, and
- Provide a plan to this office prepared by a Professional Engineer to make the building and the site safe, and obtain all necessary permits to do so on later than August 01, 2015.

**TO:**

- i. The owner must engage a professional engineer to advise on the appropriate methods of monitoring: a) the slope, to record soil movements and groundwater levels that might be affected by the on-going movements on the slope located south of the house, and b) the structures on the property.
- ii. Before December 1, 2015 the owner must implement the monitoring measures recommended by the engineer.
- iii. Quarterly from and after the date of this Order, the owner must provide the Respondent with a copy of the engineer's report, on the monitoring of the slope conditions and condition of the structures, including an assessment of the safety of the house and its occupants.
- iv. The owner must isolate the backyard by means of a protective barrier, being a strongly constructed fence of not less than 1.8 meters high, to restrict access other than by authorized personnel for monitoring.

## **Introduction and Issues:**

1. This appeal concerns a house located on a lot at the top of a river bank. The Respondent determined the site and building were unsafe for on-going occupation due to the condition of the bank. The Order followed. The Appellant disagreed. Section 50 of the *Safety Codes Act* permits the owner to appeal the order of the safety codes officer.
2. The issues on appeal are:
  - a) Does an unsafe condition exist on this property?
  - b) If so, what steps are required to address the unsafe condition?

## **Appearances, Preliminary, Evidentiary or Procedural Matters:**

3. Appearing for the Appellant, the Appeal Panel heard from the home owner of the dwelling in question, and from his neighbor.
4. Appearing for the Respondent, the Appeal Panel heard from the Building Safety Codes Officer, and the accredited municipalities legal counsel.
5. At the start of the hearing, the Appellant and Respondent confirmed there were no objections to any members of the hearing panel, and that the Safety Codes Council (Council) in general and the Appeal Panel in particular had jurisdiction to hear and decide the appeal.

## **The Record:**

6. The Appeal Panel received the following documents before the hearing:
  - a) Copy of Order dated June 5, 2015 (pages 1 to 5)
  - b) Notice of Appeal and Request received June 16, 2015 (pages 6 to 12)
  - c) Acknowledgement Letter dated June 25, 2015 (page 13)
  - d) Request for Stay of Order Pending Appeal dated June 11, 2015 (pages 14 to 23)
  - e) Stay of Order Letter dated June 25, 2015 (page 24)
  - f) Appeal Hearing Brief Preparation Guide (page 25)
  - g) Written Notification of Appeal Hearing (pages 26 & 27)
  - h) Brief of the Appellant (pages 28 to 201).
7. The Appellant also provided the following document at the hearing:
  - i) An engineering companies Interim Report #2 dated September 14, 2015.
8. The Appellants and Respondent confirmed that there were no objections to any of the written material submitted to the Appeal Panel before or at the hearing.

## **Position of the Parties**

### *Appellant*

9. From the Appellants' submissions and testimony, we summarize the Appellants' position as follows:

The conditions on the site is currently safe for the structures and the occupants. The house is safe and shows no signs of movement or stress. A previously installed retaining wall did not fail but it did sink with the surrounding land. The public land on the bank and some of the land on the private property has fallen but the rate has slowed in the last few months. While the Appellant has been trying to work with the Respondent on a resolution to the soil slippage, the parties have been unable to reach a resolution. The Appellant retained an engineer to monitor and report on the soil slippage and is receiving regular reports from the engineer. The Appellant felt an order to vacate within 30 days was not reasonable. The Appellant requested the Appeal Panel to revoke the Order.

### *Respondent*

10. From the Safety Codes Officer's submissions and testimony, we summarize the Respondent's position as follows:

There is an unsafe condition present at the site. The safety codes officer saw a significant deterioration at the site between site visits. The engineer reported the bank and slope have sunk and will continue to move. While the failure is not imminent, the unknown nature of the continued soil movement means the site and building are unsafe. The Appellant has failed to provide a plan to make the site safe and has not applied for any permits to complete the work to make the site safe. The Respondent asked the Appeal Panel to uphold the Order, or in the alternative, if the Order is varied, to include ongoing mandatory monitoring and reporting.

## **Reasons for Decision (Findings of Fact, Law and Reasons):**

11. There are two issues in this appeal. The reasons deal with each issue separately, first with the question of an unsafe condition and then with the matter of actions to address the condition.
  - a) **Does an unsafe condition exist on this property?**
12. For the following reasons, the Hearing Appeal Panel finds that an unsafe condition exists on this property.
13. The *Safety Codes Act* (S-1, RSA 2000) applies to the occupancy and maintenance of buildings. A building is defined to include a structure or any part of a building or structure. The Act obliges owners to meet the requirements of the Act and regulation, including completing processes or activities in a safe manner. Section 5 states:

5. *The owner of any thing, process or activity to which this Act applies shall ensure that it meets the requirements of this Act, that the thing is maintained as required by the regulations and that when the process or activity is undertaken it is done in a safe manner.*

14. The Appellant's own evidence confirms the Appellant is the owner of the property which includes the house and land.
15. Under section 49 of the *Safety Codes Act*, the safety codes officer may issue an order if the officer believes on reasonable and probable grounds that the Act has been contravened or the condition of a thing to which the Act applies creates a danger of serious injury or damage to a person or property. The safety codes officer relied on the *Alberta Building Code 2006*.
16. The *Alberta Building Code 2006* did not permit an owner to cause, allow or maintain an unsafe condition. It required the owner of a building to take all necessary action to correct an unsafe condition. Finally it defined an unsafe condition to be one that could endanger the life, limb or health of any person authorized or expected to be on or about the premises. The relevant sections read:

*Division A Article 1.4.1.2 Unsafe condition means "any condition that, in the opinion of the authority having jurisdiction, could endanger the life, limb or health of any person authorized or expected to be on or about the premises."*

*Division C Article 2.2.11.1(1) No person*

*b) being responsible for the use, occupancy, relocation, construction, alteration, demolition of, or addition to a building shall cause, allow or maintain an unsafe condition.*

*Division C Article 2.2.14.1 Correcting an Unsafe Condition*

*1) If a building is in an unsafe condition, the owner shall forthwith take all necessary action to correct the condition.*

*2) The authority having jurisdiction may order the owner of any building to correct any unsafe condition.*

*3) If immediate measures must be taken to avoid an imminent danger of fire or risk of accident, the authority having jurisdiction may take any action deemed necessary to reduce the danger of fire or risk of accident, without notice, and at the expense of the owner.*

17. In this case the safety codes officer said the *Safety Codes Act* (including the *Alberta Building Code*) had been contravened and the use and condition of the property was such that there was danger of serious injury or damage to a person or property. The stated reasons for the Order were: "The inspection on May 12, 2015 revealed a significant deterioration since the April 30, 2014 inspection at the property." The order to vacate was part of the approach to address the unsafe condition.
18. The Appellant sought and received a Stay of the Order, subject to conditions the Appellant retain an engineer to monitor and report on the affected area, and isolate the backyard by protective barrier.

19. This Panel had to determine if an unsafe condition existed, which was the same decision facing the safety codes officer. We therefore examined the information the safety codes officer had at the time compared to the evidence at the hearing.
20. The evidence from the Respondent is that one safety codes officer visited the site twice approximately one year apart (April 30, 2014 and May 12, 2015). The officer completed a visual inspection of the bank and slope and concluded a significant deterioration occurred during the year. We were informed the officer took pictures at the site and consulted the Respondent's own engineering staff before making the Order. However, the Respondent did not quantify the observations for us or explain what 'significant' meant. We were not provided the pictures, any details of the observations made, any measurements, or any details of the opinion or advice of the engineer consulted.
21. At the hearing, the Appellant provided detail engineering reports, pictures, measurements and details in testimony. The Appellant's evidence was uncontradicted.
22. The history of this site reveals the following.
  - The house was built in 1966 and a retaining wall was installed on the bank sometime later. The house is occupied.
  - Movements and instabilities in the bank slope and top of the bank were evident from the 1950s, well before the house was built in 1966. The deterioration of the slope has slowly continued over decades.
  - Part of the ground on both public and private land has sunk. The unstable crest of the slope deteriorated past the public lands on the bank and beyond the property line of the lot. These activities occurred in the 1970's. The owner attempted to stabilize the slope by constructing non-engineered patches on the bank along the back yard of the lot.
  - In 2013 a crack appeared along the top of the bank and the back of the yard. Part of the ground sunk and was moving towards the creek below. The Appellant notified the Respondent and hired an engineer to inspect and report on remedial actions.
  - In June 2014 the retaining structures and tie-back piles were settling and moving in tandem, however the house was on safe ground. There was no imminent risk of serious injury or loss of life to support a non-occupancy order. The owner was given four options for slope repair but also cautioned that the slope instability conditions were at a critical stage. The owner did not pursue further repairs.
23. The Appeal Panel relies on the uncontradicted evidence from the Appellant about the 2015 condition of the site. The slope and retaining structures continue to sink, but the ground the buildings are located on has not moved. Since June 2015, as directed in the Stay Order, the Appellant's engineer has been monitoring the slope and yard, to record soil movements and groundwater levels that might be affected by the on-going movements on the slope south of the house. From June to September the distance from the closest point of the house to the slide back scarp has decreased from 5.5 metres to 5 metres.

24. We adopt the engineering opinions and find the deterioration of the land will eventually impact the structures on the land, from the retaining structures to the house, because the proximity of the soil has a bearing on the foundation and stability of the house and retaining structures. There remains no risk to the house or the occupants, if the monitoring and restrictive measures continue. The house can still be occupied with conditions.
25. We find the deterioration of the slope and land on the private property fits within the definition of unsafe condition because it is a condition that could endanger the life, limb or health of any person authorized or expected to be on or about the premises. It is not imminent but it is most likely to occur at a future date. No one can predict how quickly the slope will deteriorate further or how quickly the house will be impacted. We accept the house is currently safe for occupants. However, the landslide scarps and open ground cracks represent an immediate risk to the safety of persons using the yard.
26. We therefore concur with the opinion of the safety codes officer that an unsafe condition exists on this property. We turn now to the appropriate steps to address the unsafe condition.

**b) If an unsafe condition exists, what steps are required to address the unsafe condition?**

27. Section 52 of the *Safety Codes Act* enables the Council to confirm, revoke or vary an order and to set out terms and conditions of any variance. Sections 52(2) reads:

*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.*

28. The Appeal Panel finds this is an appropriate case to vary the order and to provide terms and conditions with the varied order. We are satisfied that the varied order will provide approximately equal or greater safety performance for the persons and property.
29. On June 30, 2014 the Respondent obtained a report from two of its internal engineers. The engineers found the information and methodology used by the Appellant's engineer to be consistent with their own methodology and information. The Respondent's engineers found, as we have, that an unsafe condition existed in the form of the landslide scarps and open ground cracks. However, the engineers did not find the situation to warrant a non-occupancy order. Rather they recommended fencing and monitoring. They also acknowledged that the Appellant's engineer was saying the implementation of the four recommended options for repairs were no longer feasible. The evidence does not show significant change in the conditions at the site since 2014.

- 30.** The Appeal Panel finds the unsafe condition does not warrant an order to vacate the house and property at this time. Although the unsafe condition is serious and warrants attention, the failure of the slope or retaining wall is not imminent. It has been ongoing for decades. The Appellant has been diligent about monitoring and reporting information to the Respondent. The engineer supports continued occupancy of the house. As a result, we find the house can be occupied but monitoring and restrictive measures must continue.
- 31.** We find the Order to vacate on 30 days' notice was unreasonable in the circumstances. By giving thirty days' notice, the Respondent was suggesting the peril was not imminent or immediate. On the other hand, 30 days was less than reasonable time to vacate. Similarly, the Order did not give sufficient time for the Appellant to prepare a plan to make the site safe or sufficient time to obtain the necessary permits to do so. The Order required the Appellant to obtain permits, but the Respondent acknowledged that it would not normally grant permits for work on public property, and the work required here involves both public and private land. The Order contained elements that were almost impossible for the Appellant to meet within the timeframes allowed.
- 32.** When faced with an unsafe condition, the Appeal Panel, like the safety codes officer, can assess whether to direct the owner to make the property safe or to direct the owner to implement actions to protect the safety of those persons on or about the property. Any action to make this property safe is partially dependent on repairs to the public property, and would be very costly. Repairs would take more than sixty days to complete, would require permits from the Respondent, and would likely require approval from or involvement of other levels of government. In June 2014 the Respondent's own engineers acknowledged the difficulty with implementing one of the four repair options. This information was relevant to the 2015 decision of the safety codes officer because the condition on the property did not improve by 2015. The Order to identify and implement a plan for repair in less than 60 days runs contrary to this engineering information.
- 33.** In the face of the extensive steps required to make the property safe, we prefer to direct the owner to implement actions to protect the safety of the persons on or about the property. The impact will be immediate and on-going. These alternative measures will provide both parties with necessary and current information about the safety of the property. Relevant information will assist the Appellant and Respondent when making decisions about repair actions. The alternative measures will protect persons on or about the property.
- 34.** The required actions must involve engagement of a professional engineer to advise on the appropriate methods of monitoring of both the slope, to record soil movements and groundwater levels that might be affected by the on-going movements on the slope located south of the house, and on the condition of the structures. The current monitoring plan does not include monitoring of the house. The movement of slope may eventually impact the structural integrity of the house so monitoring of the structural integrity of the house is important.
- 35.** The Appellant must then implement the recommended monitoring plan on or before December 1, 2015, and maintain it. The Appellant said he was committed to future monitoring.

- 36.** The Appellant also needs to share the engineer’s reports with the Respondent on a quarterly basis. The report must include both the movement of slope and any changes to the condition of the house. The report must also include an assessment of the risk to the safety of the house and its occupants. We find quarterly reporting will be sufficient to capture changes occurring with each season. The first report should be shared ninety days after this decision.
- 37.** Finally, the Appellant must prevent unauthorized persons from accessing the unsafe area. Article 8.2.1.3 of the Alberta Building Code gives guidance about fences. The Appellant must erect a strongly constructed fence of no less than 1.8 meters high to create a protective barrier and isolate the affected area. This will keep persons on or around the property safe by preventing them from accessing the sloughing soil masses.

### **Summary**

- 38.** In summary, the Appeal Panel finds there is an unsafe condition on this property and determines it can be addressed in different ways than stated in the Order. We therefore vary the Order as shown on the front page.

Signed on behalf of the Appeal Panel by its Chair at Edmonton, Alberta this 19<sup>th</sup> day of October 2015

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Chair, Building Sub-Council Appeal Panel