



Safety Codes Council

COUNCIL ORDER No. 0015477

BEFORE THE GAS SUB-COUNCIL

On September 25, 2017

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

AND IN THE MATTER OF the Order Pursuant to Section 49 of the *Safety Codes Act*, issued June 8, 2017 by an Accredited Municipality (Respondent) against Property Owners (Appellants).

UPON REVIEWING the Issued Order **AND UPON HEARING** the Appellant and the Respondent; **THIS COUNCIL ORDERS THAT** the Order is **VARIED**.

FROM:

1. Forthwith expose the combustible framing around the fireplace indicated in the above schedule and take action to ensure that no person or property is exposed to undue risk because of the aforesaid construction pursuant to Subsection 4.1.3 of the B 149. 1-15 Natural Gas and Propane Installation Code, and
2. Have the inspection called in to complete permit as per Declaration of the Contractor's Gas Permit Application, by no later than 16:00 hours on the 21st day of July, 2017.

TO:

1. Expose the combustible framing around the fireplace that is the subject of this Order and take action to ensure that no person or property is exposed to undue risk because of the aforesaid construction pursuant to Subsection 4.1.3 of the B 149. 1-10 Natural Gas and Propane Installation Code, and
2. Have the inspection called in to complete the permit, no later than the 20th day of July, 2018, and
3. Ensure the appliance shall not be used until such work and inspection has been completed.

Issue:

1. The Appeal concerns the installation of a vented gas fireplace in a residence at the Accredited Municipality.

Appearances, Preliminary, Evidentiary, or Procedural Matters:

2. Appearing for the Appellant, the Appeal Panel heard from Property Owners.
3. Appearing for the Respondent, the Appeal Panel heard from representatives from the Accredited Municipality.
4. Attending as observers were individuals from the Accredited Municipality.
5. An individual from the Alberta Municipal Affairs attended as Technical Advisor to the Panel.
6. At the commencement of the hearing, the Appellant and Respondent confirmed there were no objections to any members of the Appeal Panel, and that the Safety Codes Council (Council) in general and the Appeal Panel in particular had jurisdiction to hear and decide the appeal.
7. The Appeal Panel Chair (the “Chair”) then explained the process to be followed in hearing this appeal, and read out a list of the written material before the Appeal Panel, consisting of the documents listed below in The Record, paragraph 8 as items 1. to 8. The Appellant and Respondent confirmed that there were no objections to any of the written material submitted to the Appeal Panel prior to the hearing.

The Record:

8. The Appeal Panel considered, or had available for reference, the following documentation:
 1. Notice of Appeal
 2. Request for a Stay of the Order
 3. Acknowledgment Letter dated July 12, 2017
 4. Stay of Order Letter dated August 18, 2017
 5. Appeal Hearing Brief Preparation Guide
 6. Appeal Hearing Brief submission from the Appellant
 7. Appeal Hearing Brief submission from the Respondent
 8. Exhibit 1 - Appellant, being a photograph of the fireplace as it is today

Provisions of the Safety Codes Act:

9. The *Safety Codes Act* (S-1, RSA 2000), as amended provides, *inter alia*:

Interpretation

- 1 (1) In this Act,

- (h) “contractor” means a person or organization that does or undertakes to do, either for the person’s or organization’s own use or benefit or for that of another, whether or not for the purposes of gain, any process or activity to which this Act applies;
- (v) “owner” includes a lessee, a person in charge, a person who has care and control and a person who holds out that the person has the powers and authority of ownership or who for the time being exercises the powers and authority of ownership;

Part 1 Responsibilities

Owners, care and control

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.

Contractor’s duties

8 A contractor who undertakes construction, operation or maintenance of or builds or installs any thing to which this Act applies shall ensure that this Act is complied with.

Part 7

General

Bylaws

66(1) Except as provided in this section, a bylaw of a municipality that purports to regulate a matter that is regulated by this Act is inoperative.

(3) Notwithstanding subsection (1), an accredited municipality may make bylaws

- (a) respecting fees for anything issued or any material or service provided pursuant to this Act, and
- (b) respecting the carrying out of its powers and duties as an accredited municipality.

Provisions of the Alberta Building Code 2014 provides, *inter alia*:

Division C 2.2.13.4 Availability of Documents

- 1) The *owner* shall ensure that the plans and specifications on which the issue of the *permit* was based are available at the *project* site during working hours for inspection by the *authority having jurisdiction*.

Provisions of the Natural Gas and Propane Installation Code B149.1-10:

10. The Natural Gas and Propane Installation Code provides, *inter alia*:

3 Definitions

Installer — any individual, firm, corporation, or company that either directly or through a representative is engaged in the installation, replacement, repair, or servicing of gas piping, venting systems, appliances, components, accessories, or equipment, and whose representative is either experienced or trained, or both, in such work and has complied with the requirements of the authority having jurisdiction.

4 General

4.1 Application

4.1.3

An **appliance, accessory, component, equipment**, or any other item shall be installed in accordance with the manufacturer's **certified** instructions and this Code.

4.1.4

Where a conflict exists between the manufacturer's **certified** installation instructions and this code, the requirements of this Code shall prevail unless otherwise **approved**.

4.2 Approval of appliances, accessories, components, equipment, and material

4.2.1 An **appliance, accessory, component, equipment**, or material used in an installation shall be of a type and rating **approved** for the specific purpose for which it is employed.

4.2.2 When deviation from or postponement of these requirements is necessary, permission in writing shall be obtained from the **authority having jurisdiction** before the work proceeds, and this permission shall apply only to the particular installation for which it is given.

4.3 Responsibilities of the Installer

4.3.1 Before leaving installations, **installers** shall ensure that the **appliance, accessory, component, equipment**, or piping and tubing they installed complies with the Code requirements, and the person initially activating the **appliance** shall ensure that the **appliance** is in safe working order.

4.3.3

The **installer** shall ensure that the manufacturer's instructions supplied with the **appliance** are left with the user.

Position of the Parties

Appellants

From the Appellants' submissions and testimony, and in response to questions posed by the Panel, the Appellants' position may be summarized as follows:

- 11.** An original Order was issued sometime prior to the Order under appeal. On administrative review by the Technical Administrator (Gas Discipline), that original Order was revoked as it contained errors, and a second Order, the Order under appeal was issued. The subsequent Order referenced the same Order Number (2017-0029) and after discussion the Panel concluded the subsequent Order was valid.
- 12.** Contrary to the content of the Order, the construction on the premises was not a renovation but rather a new construction. The Panel advised the Appellant that the Safety Codes Act considers new construction, renovations and alterations in the same manner.
- 13.** The permit in respect of the new construction was approved on December 8, 2014 by a Safety Codes Officer ('SCO') and the construction was completed on June 23, 2015. The wall encompassing the gas fireplace has long since been closed and finished.
- 14.** Most concerning, is the fact that the SCO admitted he had made a mistake which led to his issuance of the Order.
- 15.** The SCO originally inspected the installation and asked the Appellants to make changes to the fireplace framing. They relied on his representations and made the changes in accordance with his directions. When the SCO was advised the changes had been made, he advised the Appellant he did not want to come back to the premises to inspect the changes and instead asked the Appellant to submit photographs of the work.
- 16.** Upon receipt of these photographs, the SCO accepted that the changes to the fireplace framing were as he had directed and the permit was approved and closed. The Appellant then proceeded with and completed construction on the premises.
- 17.** More than 22 months later the SCO admitted to the Appellant's agent that upon deleting some of the content of his cell phone he came across the photographs that had been submitted originally, and he decided to change his mind and that the work he had directed them to do, on which direction the Appellant had relied, was wrong and needed to be repaired. As a result of his error, the SCO issued the Order that is the subject of this appeal.
- 18.** Notwithstanding that the SCO admitted that he was wrong in his initial review of the work and the subsequent approval of the permit, and that the Appellant relied on his representations in this regard, the SCO advised the Appellant's agent that

the Appellant would have to pay for the remediation required, an amount estimated to be well in excess of \$3,000. A photograph of the finished fireplace, as it is today was submitted into evidence (Exhibit 1 - Appellant).

- 19.** Also submitted into evidence are the Inspection Sign-Off Report, the Development Inspector's Report, and the Residential Permission to Occupy Permit confirming no unsafe code conditions had been identified. The installation of the fireplace in question was approved to the satisfaction of the Accredited Municipality and the permit was closed. Both the interim and final inspections reported no deficiencies.
- 20.** The Appellant drew the Panel's attention to an e-mail from a Fireplace Depot (page 180 of the Respondent submission), and the statement that while they installed the fireplace in question, "all clearances required during framing, were in the hands of the builder..."
- 21.** The Appellant did not disagree that if a deficiency were discovered during a renovation, it would have to be remediated, but this was an installation in place and approved following his original submission of photographs, sent to the Safety Codes Officer at his request. These photographs are contained in the Respondent submission, pages 173-175.
- 22.** The Appellant believes there must be some consideration of the costs to be incurred, given the nearly two year passage of time after permit closure. The Appellant advised that changes could have been requested even at the final stage before the permit was signed off, and asked the Panel if it was reasonable for the Safety Codes Officer to ask that it be done at the owner's expense, nearly two years later. The Panel advised the Appellant that the Act allows this.
- 23.** The Appellant has contacted his insurer to make them aware of this matter.
- 24.** The Appellant believes he has met his responsibility as an owner under the Safety Codes Act. The installation was inspected, approved and the file closed. Only much later was the matter reopened. They have done their best throughout the process, and to be given only one month to comply is unreasonable.
- 25.** The Appellant believes that he should at least be given more time to correct the problem and that some other party should pay part of the cost. In the meantime he assured the Panel the fireplace is and would remain turned off.

Respondent

From the Respondent's submissions and testimony, and in response to questions posed by the Panel, the Respondent's position may be summarized as follows:

- 26.** The Respondent's representative acknowledged that the Appeal Panel could only deal with the contents of the Order, and not determine whether the Safety Codes Officer and the Accredited Municipality had acted in good faith. The Respondent's representative also acknowledged, the Appeal Panel could not determine

responsibility for the cost of correcting the fireplace framing issue.

- 27.** The SCO provided the Panel Members with background to this issue, leading up to his decision to issue an Order. He acknowledged being new to the profession when he was assigned the fireplace in question.
- 28.** The contractor, the Fireplace Depot booked a pre-board inspection for December 8, 2014, including an inspection for the fireplace in question. A model P52DFNI was installed on the main floor but the Installation Manual was not on-site for inspection, as required by the Alberta Building Code.
- 29.** The SCO said he felt he had two options at that point, the first of which was to cancel the inspection and require the contractor to pay the fee for a re-inspection at a later date when the manual was on site.
- 30.** Instead it was agreed the Safety Codes Officer would try to look up the manual on his iPad, which option was agreed to by the contractor.
- 31.** The Panel Members were referred to Tab G, page 168 of the Respondent's submission, showing a screenshot of the "Manuals Installation Instructions" page from the Manufacturer's website and the various links to the manuals for several different models of Residential Single-Sided Gas Fireplaces. Blue arrows have been imposed onto the page to show the proximity of the links for two of the models, P42DFNI and P52DFNI, the latter of the two being the model in question.
- 32.** What neither SCO nor the contractor realized at the time, was that he had pressed the wrong link and downloaded the manual for the P42DFNI model instead of the PF52NI model. There is a 10,000 BTU difference between the two fireplaces and the P42DFNI is a zero clearance. The P52DFNI is a bigger unit.
- 33.** The contractor had incorrectly indicated the fireplace that had been installed was a zero clearance model and the manual that had been downloaded in error described the fireplace as zero clearance to the sides, corners and rear of the unit. Neither the Safety Codes Officer nor the contractor realized the mistake at the time.
- 34.** One deficiency was however noted at the time, that being the need for the already notched studs and drywall at the sides of the fireplace, to be raised up to a minimum of 7 ½ inches above the top of the fireplace. This requirement was the same for both models, P42DFNI and P52DFNI.
- 35.** Since this was the only deficiency identified at the time, the SCO thought it was reasonable to allow the contractor to provide verification of compliance by way of photographs which were received December 16, 2014 and are included under Tab J of the Respondent submission. The Panel Members were asked to note that the photographs show the necessary correction had been made to the single deficiency that had then been identified. On that basis, the SCO advised the contractor the fireplace was acceptable. It is not uncommon to accept verification of compliance with a photograph when dealing with zero clearance fireplaces which at the time this installation was thought to be. The Accredited Municipality's representative confirmed that photographic confirmation of a correction of this

type of deficiency was consistent with the Municipality's Quality Management Plan (QMP).

- 36.** It was not until approximately March 2016, as the SCO was reviewing and deleting old messages on his work phone that he came across these photographs again. He remembered the job and with his now greater experience and having just recently dealt with the same model fireplace, he realized that the model P52DFNI required a minimum of 2 ½ inches of side clearance to combustible material and minimum 1 inch clearance for the back, as indicated in Tab I, page 171 of his submission.
- 37.** Realizing his mistake, he brought the matter to the attention of his supervisor and senior and it was agreed that if the fireplace had not been installed with the appropriate clearance, there was an unsafe condition that posed a danger of serious injury or damage to a person or property as prescribed in the Safety Codes Act.
- 38.** Contact with the contractor led to some back and forth discussion between the parties regarding whether the appropriate clearances had in fact been accomplished at some point. The contractor asked for time to look into the matter and the owner agreed the fireplace would not be used until the matter was resolved.
- 39.** While the contractor did submit additional photographic evidence to the Safety Codes Officer (see Tab K), it was clear to the Safety Codes Officer that those pictures had been taken before the fireplace was installed because there was no vent or drywall in place.
- 40.** The contractor then forwarded an e-mail (see Tab L), stating the fireplace had been installed as per the manufacturer's instructions but that framing was "in the hands of the builder". The contractor also forwarded a letter from a framing contractor stating, "We believe that the framing and installation of the main floor fireplace to the best of our knowledge is safe and poses no hazardous concerns."
- 41.** It was the Safety Codes Officer's opinion that the phrase "to the best of our knowledge" was not sufficient to assure him the installation had been done as per the manufacturer's requirements, and that all of the evidence available, indicated to him that the framing was never corrected to the manufacturer's requirements. A further extension was granted to the contractor but when no new information was produced, and a follow-up inspection by another Safety Codes Officer confirmed no corrections had been made, the Order was issued.
- 42.** The SCO acknowledged his mistake, saying inexperience was not an excuse and the mistake should not have been made. His only concern at this point is the safety of the residents of the house.

Reasons for Decision (Findings of Fact and Law):

The Appeal Panel makes the following findings:

- 43.** Two Orders were issued in response to the issue before the Appeal Panel, the first of which was revoked. Although the subsequent Order references the same Order Number (2017-0029) as the first (revoked) Order, the Panel believes the subsequent Order is valid.
- 44.** The Safety Codes Act identifies several parties who have responsibility to ensure that activities to which the Act applies are done in compliance with the Act. These include the Owner and any Contractors involved.
- 45.** The installer also has defined responsibilities outlined in the Natural Gas and Propane Installation Code referenced earlier.
- 46.** The letter (email) provided by a Fireplace Depot (Page 180 Exhibit 2) was considered and deemed insufficient to provide assurance that the installation met the requirements of the Gas Code.
- 47.** The letter provided by the framing contractor (Page 181 Exhibit 2) was considered and deemed insufficient to provide assurance that the installation met the requirements of the Gas Code.
- 48.** A past mistake on the part of the authority having jurisdiction does not relieve owners or contractors from fulfilling their responsibilities under the Safety Codes Act, should a noncompliant installation be discovered, even years later, if there is still a danger of serious injury or damage to a person or property as prescribed in the Act.
- 49.** This is an unfortunate situation for the Appellant but the Appeal Panel believes the Safety Codes Officer acted correctly and in the interest of safety, even given the nearly two year time between approving the work and discovering the fireplace was not installed in accordance with the manufacturer's instructions or the Gas Code Regulation.
- 50.** As the Appeal Panel advised the Appellant, there are no provisions in the Safety Codes Act that would allow the Panel to relieve him of some of the costs involved in correcting the problem.
- 51.** Based on the evidence before it, the Appeal Panel is satisfied the fireplace in question has been installed without the proper clearances and that there is therefore, danger of serious injury or damage to a person or property.
- 52.** The Appeal Panel believes the identified problem must be rectified.
- 53.** The Appeal Panel is satisfied the Appellant has acted diligently in the past in an effort to achieve compliance with the Safety Codes Act and applicable Code requirements, and that he does plan on correcting the problem now identified, but would like more time to do so. The Appeal Panel is also satisfied the gas to the fireplace will not be turned on until the matter has been rectified. For those reasons, the appeal Panel has given him until July 20, 2018 to comply.

Signed at the City Edmonton)
in the Province of Alberta)
this 4th Day of October A.D. 2017)

Chair, Gas Sub-Council Appeal Panel