



Safety Codes Council

COUNCIL ORDER NO. 2020-04

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE FIRE & BUILDING SUB-COUNCIL

(the "Tribunal")

ON NOVEMBER 9, 2020

IN THE MATTER OF the *Safety Codes Act*, Revised Statutes of Alberta 2000, Chapter S-1 (the "Act");

AND IN THE MATTER OF the Order dated [REDACTED] (the "Order"), issued pursuant to *Section 49 of the Act* and the *National Fire Code - 2019 Alberta Edition (the "NFC (AE))* by [REDACTED], a Safety Codes Officer (the "SCO") on behalf of [REDACTED] (the "Respondent") against [REDACTED] (the "Appellant") relating to a property located at [REDACTED] (the "subject property");
and

UPON REVIEWING AND CONSIDERING the evidence named in **The Record** and the submissions of the Appellant and Respondent; and **UPON HEARING** the testimony of witnesses at the virtual hearing;

IT IS HEREBY ORDERED THAT the Order is **REVOKED**.

Without restricting the generality of the foregoing, an excerpt from the Order that has been revoked is reproduced below:

I therefore believe, on reasonable and probable grounds, that the property is in contravention of the Safety Codes Act (hereinafter referred to as "the Act") as follows:

- I. Protection has not been provided for adjacent buildings and facilities that would be exposed to fire originating from buildings, parts of buildings, facilities and associated areas undergoing construction, alteration or demolition operations.*

Reference: National Fire Code - 2019 Alberta Edition, Division B, Sentence 5.6.1.2.(1)

AND

I therefore, believe, on reasonable and probable grounds, that the construction, operation, maintenance, use or condition of the property is such that there is a danger of serious injury or damage to a person or property.

Therefore, you are ordered to:

- I. During construction, provide protection for adjacent buildings in accordance with National Fire Code - 2019 Alberta Edition, Division B, Sentence 5.6.1.2.(1).

Appearances, Preliminary, Evidentiary, or Procedural Matters:

1. The hearing for this matter was conducted by virtual means.
2. At the commencement of the hearing, the Coordinator of Appeals confirmed the subject of the appeal as the Order, and confirmed the names of those in attendance:
 - a) Appearing for the Appellant, the Tribunal heard from [REDACTED].
 - b) Appearing for the Respondent, the Tribunal heard from [REDACTED], [REDACTED], and [REDACTED].
 - c) Facilitating the hearing on behalf of the Safety Codes Council: [REDACTED] (Coordinator of Appeals and Co-Facilitator), and [REDACTED] (Co-Facilitator).
 - d) Attending as Technical Advisor for the hearing: [REDACTED] and [REDACTED].
 - e) Attending as observers for the hearing: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].
3. The Coordinator of Appeals then introduced the Chair of the Tribunal (the "Chair"), [REDACTED] and turned the hearing over to her.
4. The Chair called the hearing to Order and introduced the other Tribunal members: [REDACTED], [REDACTED], [REDACTED], and [REDACTED].
5. The Appellant and Respondent confirmed there were no objections to any members of the Tribunal, and that the Safety Codes Council in general and the Tribunal in particular had jurisdiction to hear and decide the appeal. The Tribunal also confirmed they had jurisdiction to hear and decide this appeal.
6. The Chair then explained the process of the hearing, and advised of the list of the written material before the Tribunal, consisting of the documents listed below in **The Record** (see paragraph 10). The Appellant and Respondent confirmed that there were no objections to any of the material submitted to the Tribunal.
7. The Appellant submitted one piece of new evidence. The Respondent was provided an opportunity to review the new evidence by email and objected to the submission of it to the Tribunal on the basis of its relevance, being from June 2010 and superseded by an updated guideline, as well as, its late submission. The Appellant was then asked to state

their reasons for why the Tribunal should accept the new evidence, and stated that the document spoke to the intent and interpretation of the provincial fire code, at that time. The Tribunal convened in-camera to consider both arguments and decided to accept the additional evidence as it may provide insight on the Respondent's interpretation of the fire code. The new evidence was marked as "**Exhibit 2 Appellant**" and was distributed, by email, to the parties, the Tribunal, the Co-Facilitators, and the Technical Advisors, and one copy retained for **The Record**.

8. The Respondent submitted one piece of new evidence. Upon giving the Appellant an opportunity to review the new evidence by email and confirming the Appellant did not have any objections, the Tribunal accepted the new evidence. The new evidence was marked as "**Exhibit 2 Respondent**" and was distributed by email to the parties, the Tribunal, the Co-Facilitators, and the Technical Advisors and one copy retained for **The Record**.
9. During the hearing, the Chair advised that the Council had determined that the SCO had the necessary designation of powers in place at the time of issuing the Order, pursuant to section 32 of the Act (Item VI in **The Record**).

The Record:

10. The Tribunal considered, or had available for reference, the following documentation:

<u>Item</u>	<u>Description</u>	<u>Date</u>
i.	██████████ Order	July 7, 2020
ii.	Notice of Appeal from ██████████	August 14, 2020
iii.	Correspondence on Service Confirmation	-
iv.	Council's Acknowledgment Letter	August 18, 2020
v.	Council's Notification of Hearing Letter	September 22, 2020
vi.	Correspondence on Designation of Powers Verification	August 14, 2020
vii.	Correspondence on Serving Parties' Briefs	October 19, 2019
viii.	EXHIBIT 1 APPELLANT - Appellant's Brief Submission	-
ix.	EXHIBIT 1 RESPONDENT - Respondent's Brief Submission	-
x.	EXHIBIT 2 APPELLANT - ██████████ Small Building Fire Safety Plan Guideline	June 2010
xi.	EXHIBIT 2 RESPONDENT - ██████████ ██████████ Accreditation	December 13, 2019

Issue:

11. This Appeal concerns the issuance of the Order and the possible contravention of the Act, including a provision within Division B of the *NFC (AE)* referenced in the Order, with respect to providing protection to adjacent buildings and facilities that would be exposed to fire originating from buildings, parts of buildings, facilities and associated areas undergoing construction, alteration or demolition operations.

Positions of the Parties:

Appellant

From the Appellant's submissions and testimony, the Appellant's position is summarized as follows:

12. It is the position of the Appellant that the Order was complied with, as the Appellant provided the necessary fire protection to the adjacent property during the construction of the subject property.

Respondent

From the Respondent's submissions and testimony, the Respondent's position is summarized as follows:

13. It is the position of the Respondent that the Order should be confirmed as the Appellant was not compliant with adjacent property protection requirements while the subject property was being constructed.

Summary of the Oral Evidence Provided On Behalf of the Appellant:

Evidence provided on behalf of [REDACTED]

14. [REDACTED] stated on the outset that there was never an intention on his part to not comply with safety codes. He was under the assumption and or understanding that the Appellant had complied with the *NFC (AE)* during construction of the subject property.
15. Referencing page 57 of **EXHIBIT 1 RESPONDENT**, [REDACTED] stated that on submission of the initial building permit application for the subject property, there was indication of where the intumescent sheathing would be placed. Given the pie shaped lot, and fact that there was only an adjacent property to the right of the subject property, the intumescent sheathing would only be on the left-side of the subject property 'if required' and on some of the right-side (also referred to as the north-side). He pointed to pages 76, 96 and 97 of **EXHIBIT 1 RESPONDENT** to show where the intumescent sheathing was installed on the subject property.
16. [REDACTED] was aware that the Respondent has an updated Fire Safety Plan guideline (the "guideline"), from the one provided as **EXHIBIT 2 APPELLANT**, that requires all properties use intumescent sheathing during construction, regardless of distance, age of

construction, occupancy, etc. However, given that the building permit was approved and clearly indicated where the Appellant was proposing to use the intumescent sheathing, he assumed compliance.

17. There was discussion regarding adjacent property protection and requirement of having control over both sides. [REDACTED] stated that the property to the left of the subject property was completed and the wall was protected and property to the right of the subject property was under the Appellant's control and would be constructed using the required sheathing.
18. [REDACTED] suggested that a distance of 8 metres should be sufficient to provide adequate protection and not require the intumescent sheathing, when there are 100% unprotected openings. The 8 metre distance would be from structure to structure and not based on property line, as the codes tend to reference for spatial separation. He provided that this approach has been accepted in other jurisdictions.
19. Table 9.10.15.4 (the "table") in the *National Building Code - 2019 Alberta Edition* (the "Building Code") was referenced as rationale for proposing the 8 metre distance. However, it was noted that the table specifically speaks to spatial separation for finished construction, not buildings under construction.
20. [REDACTED] expressed frustration with the process, as a builder, as this issue has been ongoing for the subject property since April 2020, and he has had similar issues with other construction projects within the [REDACTED] and other jurisdictions. It has been challenging to deal with different interpretations in other authorities having jurisdiction ("AHJ").
21. There were attempts to resolve the issue with the Respondent, specifically with the SCO involving discussions around the interpretation of the *NFC (AE)* and an agreement could not be reached. It was [REDACTED] understanding that requesting the Order was a means to receive an interpretation from the Administrative Tribunal through the appeal of the Order.
22. [REDACTED] submitted that at the time the Order was issued, the property had drywall installed to the interior walls and ceilings.
23. [REDACTED] stated he did not propose an alternative solution at any time, as there was no variation to the code being sought, but rather an interpretation.
24. Overall, the Appellant is seeking clarity on a provincial level as there are different interpretations of this particular provision in the *NFC (AE)*.

Summary of the Oral Evidence Provided On Behalf of the Respondent:

Evidence provided on behalf of [REDACTED]

25. [REDACTED] submitted that the Appellant disagrees with the Respondent's interpretation of adjacent property protection requirements and carried out construction on the subject property disregarding the Respondent's position and guidelines on the matter.

26. While the subject property was being constructed it did constitute a fire risk, as the spatial separation provided by the Appellant was not sufficient in the eyes of the *NFC (AE)* and or the AHJ.
27. The Appellant is seeking clarity on adjacent property protection requirements of the *NFC (AE)*; however, the Respondent, as the AHJ, has made it clear through the guideline what would be considered acceptable. The Respondent is entitled to provide guidelines of acceptable solutions that will meet the *NFC (AE)*.
28. The Appellant simply stating that a certain amount of distance is sufficient to comply with adjacent property protection, without any cogent evidence, analysis or expertise on point, is not valid.
29. The Order is valid and there were grounds to issue it as the subject property had no adjacent fire protection at inspections prior to the Order. A fair path to compliance was provided to the Appellant.
30. The date of the Order is administrative and what should be emphasized is the factual situation and risk that existed at the property based on the May 27, 2020 inspection.

Evidence provided on behalf of [REDACTED]

31. [REDACTED] is a certified Fire Safety Codes Officer with [REDACTED], a role he has been in for four and a half years. This role entails conducting inspections of buildings at various stages of construction, as well as, construction site fire safety. He conducted the inspections at the subject property and was the one to draft and issue the Order.
32. [REDACTED] spoke to the Respondent's perspective and the evolution of code requirements, including a specific working group assembled in 2007 to draft code requirements to mitigate effects of high intensity residential fires. He also referenced the 2011 meeting minutes of the Alberta Fire Safety Officials Association (AFSOA), pages 158 to 162 **EXHIBIT 1 RESPONDENT**, which was convened to ensure consistency across municipalities with respect to adjacent property protection requirements. At this meeting the version of the table in the Alberta Building Code, at the time, was looked at and it was determined that the Table applies only to a building at completion of construction. He offered that the Respondent's decision out of the meeting was that the appropriate distance was upwards of 40 metres, excluding the front and rear of a home.
33. [REDACTED] stated that while the guideline does not set out a specific distance, the general position is that where there is an adjacent property, those constructing are required to protect that adjacent property from fire spread. To achieve this, intumescent sheathing is prescribed. The guideline is featured on the Respondent's website, as well as, provided during the permitting process.
34. [REDACTED] relied on the objective and functional statements in the *NFC (AE)* associated with Sentence 5.6.1.2(1):

Objective Statement

OP3.1 Protection of Adjacent Buildings or Facilities From Fire - An objective of this Code is to limit the probability, that as a result of

- a) activities related to the construction, use or demolition of the building or facility,
- b) the condition of specific elements of the building or facility,
- c) the design or construction of specific elements of the facility related to certain hazards, or
- d) inadequate built-in protection measures for the current or intended use of the building,

adjacent building or facilities will be exposed to an unacceptable risk of damage due to fire. The risks of damage to adjacent buildings and facilities due to fire addressed in this Code are those caused by fire or explosion impacting areas beyond the building or facility of origin.

Functional Statement

The objectives of this Code are achieved by measures, such as those described in the acceptable solutions in Division B, that are intended to allow the building or facility or its elements to perform the following functions:

F02 To limit the severity and effects of fire or explosions.

F02 To retard the effects of fire on areas beyond its points of origin.

- 35.** The issued building permit, dated January 28, 2020, was referenced at page 49 of **EXHIBIT 1 RESPONDENT** and it was indicated that the second page of the building permit states that it is subject to all notations on stamped plans. The plans reviewed by the Building Safety Codes Officers must be adhered to and the guideline is included, as a stamped document. The insertion of the guideline, demonstrated what was required.
- 36.** [REDACTED] also spoke to the plot plan for the subject property at page 52 of **EXHIBIT 1 RESPONDENT**. It was described as a pie-shaped lot, where at the rear of the subject property there was 5.3 metres of distance to the adjacent property line; however, towards the front there was 0.82 metres due to overhang of the subject property roof.
- 37.** [REDACTED] received an email from a Building Safety Codes Officer that adjacent property protection was not completed as per the requirements on the right-side of the home, as evidenced in the photographs on page 14 of **EXHIBIT 1 RESPONDENT**.
- 38.** A site visit was carried out on April 28, 2020, where [REDACTED] noted that the sheathing was only partially installed on the north-side of the wall, specifically across the length of the attached garage, with a small portion by the front entry and approximately 8 feet across the second storey. He also noted that the foundation was in place for the building north of the subject property.
- 39.** After determining the guideline had not been adhered to, [REDACTED] issued a field notice, page 15 of **EXHIBIT 1 RESPONDENT**, which outlined four options to correct the deficiencies:

install fire-rated exterior sheathing on all side walls, that meets CAN/ULC S102 requirements or have the north exterior side wall sprayed with BarrierTEK or install CAN/ULC S102 compliant exterior gypsum board over top the non-compliant sheathing or provide 24-hour fire watch on the property until interior of the building is completed with gypsum board. This field notice was provided to the Site Superintendent.

40. [REDACTED] recalled that he discussed with the Site Superintendent that adjacent property protection is required on the entire face of a building until the interior is completed with drywall.
41. [REDACTED] conducted a re-inspection on May 14, 2020 and did not observe any change. The subject property was at framing stage, roof completed with shingles, with no drywall installed in the interior. The home to the north of the subject property was in framing stage.
42. On May 15, 2020 a letter was provided to the Appellant, pages 16 to 20 of **EXHIBIT 1 RESPONDENT**, speaking to the March 2020 STANDATA, pages 30 to 35 of **EXHIBIT 1 RESPONDENT** and informing of how this was interpreted by the [REDACTED] and province. [REDACTED] spoke to the STANDATA and the various adjacent property protection solutions contained within it.
43. [REDACTED] visited the site again on May 27, 2020 and noted no change to the north wall. He issued a second field notice to the Site Superintendent, page 21 of **EXHIBIT 1 RESPONDENT**. On May 28, 2020 he recommended to the Respondent that an Order be issued and this was also requested by [REDACTED].
44. No alternative solution was brought forward by the Appellant. If one was proposed, it would be evaluated by looking at the objective and functional statement (noted in paragraph 34), and would need to be done prior to the permit issuance. The alternative solution must meet or exceed those requirements.
45. With respect to spatial separation alone meeting the requirement, there would need to be evidence from an engineer and or testing to support this. The *NFC (AE)* does not refer to a distance that is acceptable.
46. There would need to be credible and relevant evidence to support a distance of 5 or 8 metres. The table in the *Building Code* speaks to maximum area of unprotected openings as relates to spatial separation. These openings do not have material that burn and therefore cannot provide radiant heat. It is also different because it is based on completed building and not one under construction.
47. [REDACTED] offered the definition of adjacent, as any property nearby, neighbouring or even two lots over. He did not have a specific distance for what constituted nearby, but it would be any property that could be affected by fire.
48. It was confirmed that the Order was based on conditions observed at the May 27, 2020 inspection and at that time the drywall had not been installed to the interior at the subject property. It was also acknowledged by [REDACTED] that compliance for this matter and the Order would be achieved when the subject property was completed with drywall, as it would then be compartmentalized.

49. ██████ stated that the issuance of orders takes time, as they must go through the proper chain of command. There was still merit to issuing this particular Order regardless of the delay from the last inspection, due to the risk that had existed at the subject property, the fact that this was a reoccurring issue, and the Appellant's request to have the Order issued.
50. Issuing a Stop Work Order in the meantime, would likely have posed a greater hazard to the site, as the subject property would have remained in framing stage.
51. ██████ seeks clarity on adjacent property protection, and spoke to clearer direction on this matter by providing an actual distance in the *NFC (AE)*.
52. ██████ also seeks that the Order be upheld, and advised that this is not likely the last time this issue will arise.

Evidence provided on behalf of ██████

53. ██████ is a Senior Fire Protection Engineer with the ██████, with eight years of experience working with fire and building code in Alberta. He is licensed with the Association of Professional Engineers and Geoscientists of Alberta.
54. ██████ has been involved with this particular situation since March 2020, when the initial complaint was received from the Building Safety Codes Officer. He looked at the application of adjacent property protection at the subject property and noted that the prescriptive requirements in the guideline were not being met.
55. Article 5.6.1.2(1) of the *NFC (AE)* exists to ensure fire does not affect more properties. When it was added to the *NFC (AE)* there was leeway on how adjacent property protection could be achieved, however, this was broad and difficult to interpret.
56. Producing the guideline, offered an opportunity for consistency, as it set out prescriptive requirements to meet Article 5.6.1.2(1) and also set performance expectations for those proposing alternative solutions. The guideline was made in consultation with Alberta Municipal Affairs and is reviewed on a frequent basis. The guideline is based on the use of intumescent coating being the prescriptive solution, as it reduces the amount of fire that can spread.
57. Spatial separation is not listed as a solution in the guideline because there is no research on what distance would be required to offer fire protection to the adjacent building. It is likely a large amount of spatial separation would be required and this would need to be determined on a case-by-case basis. Spatial separation is not impossible as an alternative solution when combined with other methods and or materials.
58. The March 2020 STANDATA speaks to cooperation with the AHJ as construction is time sensitive and that where the guideline is not followed an alternative solution should be pursued under the *NFC (AE)*.
59. ██████ emphasized that no alternative solution was proposed by the Appellant.
60. ██████ opined that ██████ argument that spatial separation is adequate where the adjacent property is vacant, lacks the analysis required for alternative solutions. The

complexities of fire dynamics must be taken into account. [REDACTED] referred to Section 2.3 Division C of the *NFC (AE)* regarding the documentation required to be submitted when proposing an alternative solution.

61. With reference to the table in the *Building Code*, [REDACTED] submitted that the table refers to a completed building and that the fire load expected for buildings under construction is much higher as is the heat exposure. The table deals with unprotected openings which have glazings and do not burn or emit heat from the surface. The table is not an appropriate technical reference for an alternative solution.
62. [REDACTED] advised that he has not come across a proposal for an alternate solution for single-family homes; however, has seen them in the case of 6-storey buildings. Accordingly, he does not know what a successful alternate solution would look like.
63. The intumescent sheathing applied by the Appellant to the subject property was not sufficient for adjacent property protection, based on experience with adjacent fires in the [REDACTED]. With reference to the 40 metres proposed distance there is some basis for that given experience with [REDACTED] fires. [REDACTED] stated this was a tremendous amount of distance and would likely work for fire protection; however, analysis is required to determine the adequate amount of distance.
64. [REDACTED] stated that the subject property was a fire hazard when it was being constructed.
65. [REDACTED] acknowledged that the danger was reduced as the property was drywalled and when the Order was written a significant danger was not posed. However, the lag in issuing the Order does not negate the fact that a window of risk did exist.
66. [REDACTED] stated that the Order should be upheld, as it provides consistency. A Stop Work Order would not have assisted public safety in this case.

Technical Advisor - Questions & Answers:

67. [REDACTED] and [REDACTED] were the Technical Advisors with Alberta Municipal Affairs present for the hearing. The role of the Technical Advisor is to clarify questions of the Tribunal regarding the interpretation of the relevant codes and any related code issues.
68. The Tribunal deliberated on the questions for the Technical Advisor in camera. All parties including the Technical Advisors and observers reconvened in the virtual hearing room and the Chair posed the Tribunal's questions to the Technical Advisors and received the following responses:
 69. *Q: How is Table 9.10.15.4. of the Building Code interpreted in relation to the fire code?*
A: The Building Code is not interpreted at all in relation to the fire code. It is in relation to construction of building and the intent is that the Table will be met by the time the building is completed or municipality is granting occupancy.
 70. *Q: With regard to Article 2.2.2.1 Division C fire code, is that the only formal channel to request an interpretation from Municipal Affairs?*

A: Yes, that is the only way. However, you can also contact a Technical Advisor or Provincial Fire Administrator informally for an interpretation.

Findings of Fact:

The Tribunal makes the following findings:

- 71.** The Order was based on the findings of a site inspection conducted by the SCO on May 27, 2020.
- 72.** The Order was not issued until July 7, 2020 and by that date, the subject property had drywall installed in the interior, which was acknowledged by the SCO as one of the means to comply with the Order.
- 73.** The Appellant did not have to provide any further protection to adjacent properties to comply with the *NFC (AE)* when the Order was issued.

Reasons for Decision:

- 74.** On an appeal such as this, the powers of the Tribunal are set out in subsection 52(2) of the Act:

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.

- 75.** The Order was said to be issued pursuant to subsection 49(1) of the Act, which reads as follows:

49(1) A safety codes officer may issue an order if the safety codes officer believes, on reasonable and probable grounds, that

- a) this Act is contravened, or
- b) the design construction, manufacture, operation, maintenance, use or relocation of a thing or the condition of a thing, process or activity to which this Act applies is such that there is danger of serious injury or damage to a person or property.

- 76.** The Tribunal finds, based on the evidence before it, that while the SCO may have had reasonable and probable grounds to believe the Act was being contravened following his May 27, 2020 site inspection, on July 7, 2020 there was no contravention of the Act, danger of serious injury or damage to a person or property, in relation to Article 5.6.1.2(1) of the *NFC (AE)*.

77. The Appellant achieved compliance by completing construction, specifically by having drywall installed to the interior at the subject property.
78. The Order should not have been issued as compliance was achieved.
79. On the issue of adjacent property protection requirements, the Tribunal would refer the Appellant to Sentence 2.2.2.1, Division C of the *NFC (AE)* to request a formal interpretation of Sentence 5.6.1.2(1), Division B of the *NFC (AE)* from the Provincial Fire Administrator.

Signed at the City of Edmonton)
in the Province of Alberta)
this 23rd day of November, 2020)


Chair, Fire & Building Sub-Council
Administrative Tribunal