



Safety Codes Council

COUNCIL ORDER NO. 2021-02

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE BUILDING SUB-COUNCIL

(the “Tribunal”)

ON SEPTEMBER 14, 2021

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 April 30, 2021 (the “Order”), issued pursuant to *Section 49 of the Act* and the *National Building Code – 2019 Alberta Edition (the “NBC (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 representatives for the Appellant and Respondent; and **UPON HEARING** the testimony of witnesses at the hearing;

IT IS HEREBY ORDERED THAT the Order is VARIED, with respect to substituting the action to be taken set out as Alternative “A” and Alternative “B” on pages 2 to 4 of the Order, with the following actions:

1. Immediately secure the site around the subject property with fencing in accordance with Division B Article 8.2.1.3 of the *NBC (AE)*.
2. At any time, the appellant has the option to provide the Authority Having Jurisdiction with a signed and stamped report from a Professional Structural Engineer verifying there is no unsafe condition, as defined in *NBC (AE)*, at the subject property. If this is provided, the building must be secured using either of the options noted within Division B Article 8.2.1.5.
3. Maintain a secure site in accordance within Division B Article 8.2.1.5. until such time that the subject property is rehabilitated or demolished in accordance with *NBC (AE)*, subject to the appropriate permits.

Appearances, Preliminary, Evidentiary, or Procedural Matters:

1. The hearing for this matter was conducted in-person at the Safety Codes Council’s office.

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] (Legal Counsel) and [REDACTED] (Legal Counsel and Director of the Appellant).
 - b) Appearing for the Respondent, the Tribunal heard from [REDACTED] (Legal Counsel) and [REDACTED] (Safety Codes Officer, [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] (Building Technical Advisor, Alberta Municipal Affairs).
 - e) Attending as observers for the hearing: [REDACTED].
3. The Coordinator of Appeals then introduced the Chair of the Tribunal (the “Chair”), [REDACTED] and turned the hearing over to them.
4. The Chair called the hearing to Order and introduced the other Tribunal members: [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 9). 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 and did not object to the submission of it to the Tribunal. The Tribunal accepted the additional evidence and it was marked as “**Exhibit 2 Appellant**” and was distributed to the parties, the Tribunal, the Co-Facilitators, and the Technical Advisor, and one copy retained for **The Record**.
8. 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 X in **The Record**).

The Record:

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

<u>Item</u>	<u>Description</u>	<u>Date</u>
i.	Notice of Appeal, including the [REDACTED] Order	April 30, 2021
ii.	Council’s Acknowledgment Letter	June 2, 2021

iii.	Request for Stay of Order	June 3, 2021
iv.	Stay Letter	June 3, 2021
v.	Council's Notification of Hearing Letter	June 21, 2021
vi.	Letter from [REDACTED]	July 14, 2021
vii.	Council's Letter to [REDACTED]	July 15, 2021
viii.	Council's Updated Hearing Details Letter	August 6, 2021
ix.	Email Correspondence re Brief Submission Date	August 6, 2021
x.	Designation of Powers Verification	August 10, 2021
xi.	EXHIBIT 1 APPELLANT – Appellant's Appeal Brief	-
xii.	EXHIBIT 2 RESPONDENT – Respondent's Appeal Brief	-
xiii.	EXHIBIT 2 APPELLANT – Timeline	-

Issue:

10. This Appeal concerns the issuance of the Order and the possible contravention of the Act, including a provision within the NBC (AE), with respect to whether or not an unsafe condition exists at the subject property.

Positions of the Parties:

Appellant

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

11. It is the position of the Appellant that the Order should be revoked given the lapse in time for issuing the Order, as well as the lack of specifically identified and evidenced safety concerns at the subject property.

Respondent

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

12. It is the position of the Respondent that the Order should be confirmed as an unsafe condition exists at the subject property.

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

Submissions and evidence provided on behalf of [REDACTED] (Legal Counsel and Director of the Appellant)

13. [REDACTED] is one of the current owners of the subject property.

14. The subject property was a family business; however, a fire in December 2017 at the subject property resulted in damage and the subject property is now subject of insurance litigation.
15. The subject property is located on a corner lot; one side facing [REDACTED] with an excess of 20 feet between the building and road, and another side is about 10 feet distance from the [REDACTED]. The two other sides face internally to the parking lot.
16. Previously, the registered office for the Appellant was in the care of another law firm and communications were going through [REDACTED] late father and former Counsel.
17. [REDACTED] questions whether the Order was issued due to safety concerns or other influence from a separate municipal department, namely, the [REDACTED], given the almost three-year delay in following up on the 2017 fire damage, as well as, its connection to the upcoming municipal election.
18. No reasons were presented in the Order about what the unsafe condition at the subject property was, nor is there any evidence suggesting there is a safety concern. The subject property has been in the same condition since the 2017 fire and just because a fire occurred does not conclude a safety concern exists.
19. The current condition of the subject property is depicted in the photographs at pages 33 to 35 of **The Record**, and show the windows and doors of the subject property are boarded up with wood. [REDACTED] further confirmed the photographs at pages 85 to 87 of **The Record** also depict the subject property in its current state, minus the fact that the exposed drain pipe (page 87 of **The Record**) has been cut down. The subject property has been subjected to vandalism and graffiti and [REDACTED] did advise that nothing has been done to repair the hole in the roof to date.
20. [REDACTED] stated that individuals have previously been able to enter the subject property by breaking the windows, but since boarding them up no one has accessed the subject property. Given the business is not in operation, there is no reason for the public to attend the site.
21. The Appellant ascertains that the Order does not address the reasons for why the Order was issued and accordingly, there is no awareness of what the safety concerns or safety code issues are with the subject property. [REDACTED] expressed concern over the consequences of a safety codes order being issued against the subject property and further advised that eventually the subject property would be demolished.

Submissions provided on behalf of [REDACTED] (Legal Counsel)

22. [REDACTED] provided that Section 49 of the Act requires reasonable and probable grounds to issue an order. In this case, The Order appears to have been prompted by another city department, as there was no new evidence as to the condition of the subject property at the time of issuing the Order given that the SCO 's site visit was nine months prior and the other site visit was three months prior to issuing the Order.
23. The Order is based on potential safety concerns but there is no evidence on actual concerns and how the condition of the subject property affects safety for the public. Referring to case law, [REDACTED] stated the legal principle that the persons need to be able to know the case against them, and asserted that in this instance this has not occurred.

24. The subject property, at the time the Order was issued and to present day, has been boarded up. It cannot be accessed unless there is forcible and unauthorized entry into the subject property.
25. There is no active business occurring at the subject property, nor is it a construction site.
26. Furthermore, there is no evidence from the Respondent that supports there is a safety concern and it is the Respondent's responsibility to prove this.
27. There are new explanations on safety concerns being introduced today, namely the asbestos and roof uplift issues and these at no point until the hearing were conveyed to the Appellant.
28. [REDACTED] also questioned the involvement of the [REDACTED] in a safety codes matter, as evidenced on pages 58, 63 and 64 of **The Record**.
29. [REDACTED] asserted that by operation of section 68.1 of the *Act*, this prosecution is out of time, as it has been more than three years since the fire at the subject property occurred and the Respondent conducted a fire investigation at that time.

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

Submissions provided on behalf of [REDACTED] (Legal Counsel)

30. The Order may not have spelt out the exact details of what the safety concerns were, but the property owners were put on notice from the previous correspondence sent by the Respondent, as well as, the basic principle that the subject property is a burned out building in deteriorating condition and access to the subject property has been an issue, given that it has not at all times had a fence around it and or been boarded up.
31. Section 49 of the *Act* does not require certainty of an unsafe condition, but rather a reasonable or probable belief, which would be both subjective and objective.
32. The SCO had reasonable and probable grounds to believe there was an unsafe condition at the subject property due to the fact of a fire occurring, and the apparent hole in the roof of the structure.
33. An unsafe condition identified by a safety codes officer creates a contravention of the *Act*, and hence requires an Order to be issued, where the building owner is required to comply with actions requested to achieve compliance.
34. The comment on asbestos does appear to go outside of the realm and was suggested to not be relied on by the Tribunal when rendering a decision. The comment is based on experience and expertise of the SCO, but what should be relied on is the visible condition of the subject property by any passerby.
35. The ask of the Respondent is related to safety of the property owners, as well as, safety of the public.
36. On the matter of the time limit under the *Act*, [REDACTED] referred to section 67 of the *Act* which lists out the offences under the *Act* to which section 68.1 applies and contended this was a regulatory process aimed at compliance and not a punitive prosecution.

Evidence provided on behalf of [REDACTED] (Safety Codes Officer, [REDACTED])

37. [REDACTED] is a Building Safety Codes Officer with the [REDACTED]. She has been with the

██████████ for 17 years, with 9 years as a Building Field Inspector, and 4 years as a Supervisor of the Safety Codes Compliance team.

38. The Safety Codes Compliance branch became involved with the subject property following review of a Fire Report from the Chief of Fire Investigations, along with, multiple complaints about the site of the subject property being unsecured with access through the existing fence.
39. The subject property is located on a corner lot, on a busy street, surrounded by commercial properties.
40. Letters were sent on May 12, 2020 and July 8, 2020 (pages 56 and 57 in **The Record**) by the Respondent requesting more information from the owners or persons in care and control of the subject property on what the plan was for remediation or demolition. No response was received to either letter.
41. ██████████ conducted the July 29, 2020 site inspection, at which time there was a fence around the site; however, it was not fully connected or locked, and so it was probable people were able to get within the proximity of the subject property. The roof was in a state of disrepair and the site was littered with garbage. No Order was issued following this site visit.
42. Another safety codes officer conducted a site inspection on January 20, 2021. During this inspection, it was noted the fence was removed and the roof appeared to be in a similar condition (pages 66 to 72 of **The Record**). The litter around the subject property had been cleaned up.
43. ██████████ drove by the subject property, prior to issuing the Order on April 30, 2021 and the structural condition of the building had not changed since the site inspection on January 20, 2021 and accordingly the Order was issued.
44. Due to ongoing lack of compliance, as well as, a lack of a response from the Appellant, the Order was issued on the grounds that there was no fence, a hole in the roof, evidence of break ins at the site and subject property. Further, there are concerns of asbestos contamination and roof uplift with the right wind conditions. Overall, the subject property was deemed to be in an unsafe condition.
45. ██████████ advised that the first page of the Order under the “Whereas” heading (page 5 of **The Record**) were the reasons for why the Order was being issued: the 2017 fire, inability of fire investigators to conduct a scene examination due to instability of the structure, and the lack of response to the two 2020 letters identifying a safety concern with the subject property.
46. ██████████ acknowledged that the issues of asbestos and wind uplift were points raised during the hearing and did not form part of the reasons for issuing the Order, but these issues speak to the condition of the subject property.
47. The roof uplift issue is something ██████████ is able to comment on given her education and experience. Where a roof is open and there are high winds, there is a potential for the remaining roof to be pulled off. This is a conclusion that can be drawn based on her knowledge of structures and experience inspecting and investigating. No information has been provided by the Appellant to assess whether the roof is structurally secure.
48. Commenting on possible unlawful entry to the subject property, ██████████ emphasised that whether or not the public is supposed to be on the site or not, it does constitute a hazard to the public.

49. A site inspection was completed in August 2021, and the corresponding photographs still evidence dangerous conditions on site (pages 85 to 87 of **The Record**).
50. Given the current condition of there being a lack of any kind of secure fencing there is public access to the proximity of the subject property. Securing the subject property would only be an intermediate solution, as the actual damage to the building needs to be addressed.
51. No evidence has been provided by the Appellant to determine that the subject property is structurally safe.
52. The focus of the Order is to either bring the subject property back to an operational state, that is repairing it to a safe condition, or demolishing it.

Technical Advisor – Questions & Answers:

53. [REDACTED] was the Technical Advisor 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.
54. The Tribunal deliberated on the questions for the Technical Advisor in camera. Upon the reconvening of the hearing, the Chair posed the Tribunal's questions to the Technical Advisors and received the following responses:
55. *Q: Please read section 49(1) and (3) from the Act.*

A: (1) A safety codes officer may issue an order if the safety codes officer believes, on reasonable and probable ground, 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.

(3) An order (a) shall set out what a person is required to do or to stop doing in respect of the thing, process or activity and a reasonable time within which it must be done or stopped; (b) may direct a method of work, construction, manufacturing, operation, maintenance, use or relocation that must be followed; (c) may direct that the use of the thing, process or activity be stopped in whole or in part in accordance with the order; (d) may direct that a design be altered; (e) may direct that an altered design be submitted to an Administrator for review or for registration; (f) may direct compliance with this Act, a permit, a certificate or a variance; (g) shall meet the requirements of the regulations on format and contents.

56. *Q: Please read section 67(4) from the Act.*

A: A person who (a) contravenes this Act, (b) contravenes a condition in a permit, certificate or variance, (c) contravenes an order, or (d) fails to carry out any action required in an order to be taken within the time specified in it, is guilty of an offence.

57. *Q: What does Section 8 of Division B Article 8.1.1.1.(2) of the NBC (AE) say?*

A: This part applies to fire safety and the protection of the public during the construction, alteration or demolition of every building, including any incomplete or abandoned building.

58. Q: What does Section 8 of Division B Article 8.2.1.3. of *NBC (AE)* say?

A: Pertains to Fencing, Boarding or Barricades. Sentence 1 – when a construction of demolition activity may constitute a hazard to the public and is located 2 m or more from a public way, a strongly constructed fence, boarding, or barricade not less than 1.8 m high shall be erected between the site and the public way or open side of a construction site. Sentence 2 – Barricades shall have a reasonably smooth surface facing the public way and shall be without openings, except those required for access. Sentence 3 – Access openings through barricades shall be equipped with gates that shall be a) kept closed and locked when the site is unattended and b) maintained in place until completion of the construction or demolition activity.

59. Q: What does Section 8 of Division B Article 8.2.1.5. of *NBC (AE)* say relating to Work Shut Down?

A: When work on a construction site is suspended or ceases so that it will not be occupied during normal working hours, the hazardous part of the construction site shall be protected by a) covering all windows, doors and other openings located within 3 m of the ground which may give access to the building with a securely fastened barricade, or b) a fence or barricade constructed according to the requirement of Article 8.2.1.3.

60. Q: Please read Division C Article 2.2.15.1. of *NBC (AE)* correcting an unsafe condition.

A: Sentence 1 – If a building is in an unsafe condition, the owner shall forthwith take all necessary action to correct the condition. Sentence 2 – The authority having jurisdiction may order the owner of any building to correct any unsafe condition. Sentence 3 – If immediate measures must be taken to avoid imminent danger or fire or risk of accident, the authority having jurisdiction may take any action deemed necessary to reduce the danger or fire or risk of the accident, without notice, and at the expense of the owner.

61. Q: Is there any time limitation in the *NBC (AE)* about determining a problem and issuing an Order related to the problem?

A: No.

62. Q: Does the *NBC (AE)* define an unsafe condition?

A: The definition is in 1.4.1.2. Defined Terms. 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.

Findings of Fact:

The Tribunal makes the following findings:

63. A fire occurred in 2017, which damaged the subject property, rendering it no longer in use or occupied as a restaurant business.

64. The subject property in its current state is effectively an incomplete or abandoned building.

65. Letters were sent out by the Respondent dated May 12, 2020 and July 8, 2020 (pages 56 and 57 of **The Record**), mentioning interior damage and a large hole in the roof and questioning the structural integrity of the subject property, as well as it becoming a safety concern if left in its current state.

66. No response to the letters was provided to the Respondent by the property owner or their representatives.
67. The SCO conducted a site inspection on July 29, 2020 (pages 59 to 62 of **The Record**) and another safety codes officer conducted a site inspection on January 20, 2021 (pages 66 to 72 of **The Record**).
68. The Order was issued on April 30, 2021 by the SCO and served to the Appellant on the same day (page 78 of **The Record**).
69. The condition of the subject property at the time of the issuance of the Order is depicted in the January 20, 2021 site inspection photographs (pages 67 to 72 of **The Record**), where there is a large hole in the roof, possible loose debris on the roof, as well as no fence around the subject property. The windows and doors of the subject property have been boarded up by the Appellant to help prevent access into the subject property.
70. The subject property remains in a similar condition to present day (pages 85 to 86 of **The Record**).
71. There is potential access on or about the subject property by the public as there is no secure fence around the subject property.
72. There has been no action to correct the safety concerns at the subject property by the property owners, except for the boarding up of entry points to help limit access into the subject property.
73. The issuance of an order under the *Act*, is not the prosecution of an offence under section 68.1 of the *Act*.

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 given the current state and deteriorating condition of the subject property (including the exposure to the elements since the 2017 fire, the hole in the roof and loose debris on the roof, as well as the lack of fence to secure the site) the SCO

had reasonable and probable grounds to believe the condition of the subject property could endanger the life, limb or health of any person authorized or expected to be on or about the premises.

- 77. It was reasonable for the SCO to believe the *Act* was contravened due the unconfirmed structural integrity of the subject property given the hole in the roof and access to the site. This leads to the existence of an unsafe condition at the subject property.
- 78. While the Appellant contends the Order does not specify what the safety concerns with the subject property were, they were put on notice as to the safety concerns by the two 2020 letters, as well as the fact that there is a building that underwent fire damage in 2017 causing structural damage as there is a hole in the roof.
- 79. An Order is only required to set out what is required to be done or stopped with respect to a thing process of activity (section 49(3)(a) of the *Act*).
- 80. The *Act* provides at section 5 that:
 - 5 The owner of any thing, process or activity to which this Act applies shall ensure that it meets the requirements of the 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.

Accordingly, there is an onus on owners (as defined in the *Act*) to comply with the *NBC(AE)* requirements. Here, nothing has been done to repair the roof of the subject property, and nothing has been provided to demonstrate the structural integrity of the structure.

- 81. The Tribunal considered the purpose and intent of Alberta’s safety codes system, which is largely aimed at ensuring buildings and or structures, whether in use or abandoned, are safe and that the public is protected from any unsafe conditions whether or not they are lawfully permitted to be in or around those buildings or structures.
- 82. The Tribunal’s decision to vary the Order requires securing the site and the subject property for public safety as there is no evidence to suggest the safety risk from a structural collapse would be limited to the building footprint. The decision offers the Appellant opportunity to engage a professional to provide a report on whether or not the subject property is in fact in an unsafe condition and, if no unsafe condition exists, revert to securing the building itself from entry instead of securing the site.
- 83. The subject property is currently involved in litigation (pages 37 to 47 of **The Record**) and the intention is for eventual demolition, as stated by the Appellant; therefore, requiring compliance with Article 8.2.1.5. *NBC (AE)*, until such time that full demolition can occur, will ensure public safety.

Signed at the City of Red Deer)
in the Province of Alberta)
this 21st day of October, 2021)



Chair, Building Sub-Council Administrative Tribunal