



Safety Codes Council

COUNCIL ORDER NO. 2021-09

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE BUILDING SUB-COUNCIL

(the "Tribunal")

ON MARCH 24, 2022

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

AND IN THE MATTER OF the suspension of a permit in the building discipline to [REDACTED] (the "Contractor"), as well as, [REDACTED] (the "Property Owner") (collectively referred to as the "Appellants") for [REDACTED] (the "Subject Property"), Permit Numbers [REDACTED] and [REDACTED], on November 24, 2021 by Safety Codes Officer [REDACTED] (the "SCO") for the [REDACTED] (the "Respondent") (referred to as the "Suspension");

UPON REVIEWING AND CONSIDERING the evidence named in **The Record**, including written submissions of the Appellant and Respondent (the "Parties"); and **UPON HEARING** the testimony of the parties at the virtual hearing;

IT IS HEREBY ORDERED THAT the Suspension is VARIED.

Without restricting the generality of the foregoing, the excerpt from the Suspension that is being varied is reproduced below:

FROM

THEREFORE, YOU ARE HEREBY NOTIFIED THAT THE FOLLOWING HOUSE BUILDING PERMITS HAVE BEEN SUSPENDED:

- Job: [REDACTED]
 - Description: to construct a Single Detached House with an Unenclosed Front Porch, covered balcony, rooftop deck with hot tub, fireplace, and Basement development (NOT to be used as an additional Dwelling) (2 Bed, 1 Bath, Gym, Theatre, Laundry, Storage, NO Kitchen or Wet Bar).
- Job: [REDACTED]
 - Description: To construct a Garden Suite with balcony.

THE REINSTATEMENT OF THE PERMIT IS PENDING THE REVIEW AND APPROVAL OF THE FOLLOWING:

1. Consent to access and complete remedial work on the adjacent properties located at [REDACTED].
2. Submission of a review of the current site conditions between the existing retaining walls and the adjacent properties at [REDACTED], prior to backfill, as per recommendations in the Geotechnical Report issued on July 28, 2021 by [REDACTED].
3. Completion of the backfill and restoration operations in accordance with the latest geotechnical report reviewed by the Authority Having Jurisdiction.
4. Submission of a testing/inspection summary of the backfill operations upon completion of the work as confirmed in the Geotechnical Report issued on July 28, 2021 by [REDACTED].
5. Submission of a professional land survey that includes the elevations of the two corners of the building foundations on [REDACTED] as per the recommendation in the [REDACTED] Structural Report issued on June 28, 2021.
6. Submission of a cold weather protection plan for building foundation on [REDACTED] that has been reviewed and approved by the Structural Engineer of record.
7. Obtain the required permits for the design and installation for cold weather protection of the building foundation.

TO

THEREFORE, YOU ARE HEREBY NOTIFIED THAT THE FOLLOWING HOUSE BUILDING PERMIT HAS BEEN SUSPENDED:

- Job: [REDACTED]
 - Description: to construct a Single Detached House with an Unenclosed Front Porch, covered balcony, rooftop deck with hot tub, fireplace, and Basement development (NOT to be used as an additional Dwelling) (2 Bed, 1 Bath, Gym, Theatre, Laundry, Storage, NO Kitchen or Wet Bar).

THE REINSTATEMENT OF THE PERMIT IS SUBJECT TO:

1. Completion of backfill on adjacent properties [REDACTED], or in the alternative submission of a plan in agreement with the owners of adjacent properties [REDACTED] to complete backfill of [REDACTED].
2. Submission of a review of the current site conditions between the existing retaining walls and the adjacent properties at [REDACTED], prior to backfill, as per recommendations in the Geotechnical Report issued on July 28, 2021 by [REDACTED].
3. Submission of a letter of commitment from a Geotechnical Engineer to oversee the backfill

operations on [REDACTED].

4. If required prior to winter, submission of a cold weather protection plan for building foundation on [REDACTED] that has been reviewed and approved by a Structural Engineer.
5. Obtaining the required permits for the design and installation for cold weather protection of the building foundation if required prior to winter.

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 Suspension, and confirmed the names of those in attendance:
 - i. Appearing for the Appellant, the Tribunal heard from [REDACTED] (Legal Representative), [REDACTED], [REDACTED], [REDACTED], [REDACTED].
 - ii. Appearing for the Respondent, the Tribunal heard from [REDACTED] (Legal Representative) and [REDACTED] (Safety Codes Officer).
 - iii. Facilitating the hearing on behalf of the Safety Codes Council: [REDACTED] (Coordinator of Appeals and Co-Facilitator), [REDACTED] (Co-Facilitator) and [REDACTED] (Co-Facilitator).
 - iv. Attending as Technical Advisor for the hearing: [REDACTED] (Building Technical Advisor, Alberta Municipal Affairs).
 - v. Attending as observers for the hearing: [REDACTED]
[REDACTED]
[REDACTED]
3. The Coordinator of Appeals then introduced the Chair of the Tribunal (the “Chair”), [REDACTED] and turned the hearing over to him.
4. The Chair called the hearing to Order and introduced the other Tribunal members: [REDACTED]
[REDACTED]
5. Legal Representatives for both Parties 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 8). The Legal Representatives for both Parties confirmed that there were no objections to any of the material submitted to the Tribunal.
7. The Appellant’s Legal Representative submitted two pieces of new evidence: Inspection Report by [REDACTED] dated March 21, 2022 and Structural Evaluation Report by [REDACTED] dated March 23, 2022. The Chair inquired whether the Respondent had

previously seen both reports. The Respondent’s Legal Representative had received copies of both reports prior to the commencement of the hearing. The Respondent’s Legal Representative objected to the submission of both reports to the Tribunal given the timeliness of their receipt, not having an opportunity to conduct a fulsome review, relevance to the Suspension given they are four-months after the fact and the Tribunal potentially subrogating their delegation in using the Reports to determine compliance with the conditions of the Suspension. The Chair then gave an opportunity to the Appellant to provide a response. The Appellant’s Legal Representative advised that the reports were prepared in response to a request from the Respondent for structural assessments of the neighbouring properties and their lateness evidences the ongoing issue with obtaining the necessary consents from the neighbouring properties to perform any kind of work. Lastly, the reports have relevance in determining whether construction can safely resume, and they provide structural assessments of the neighbouring properties.

The Tribunal convened in-camera to consider both arguments and decided to accept both pieces of new evidence as the reports had relevance to the safety concerns around the Suspension and weight to this new evidence would only be given depending on evidence provided and that which is presented during the hearing. The new pieces of evidence were marked as “**Exhibit 3 Appellant**” and “**Exhibit 4 Appellant**” and were distributed to the Tribunal, the Co-Facilitators, and the Technical Advisor, with one copy retained for **The Record**.

The Record:

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

<u>Item</u>	<u>Description</u>	<u>Date</u>
i.	Notice of Appeal	December 23, 2021
ii.	Council’s Acknowledgment Letter	January 4, 2021
iii.	Stay Application Response	January 5, 2022
iv.	Stay Application Additional Submissions	January 18, 2022
v.	Council’s Stay Letter	January 19, 2022
vi.	Council’s Notification of Hearing Letter	January 26, 2022
vii.	Exhibit 1 Appellant – Appellant’s Appeal Brief	-
viii.	Exhibit 1 Respondent – Respondent’s Appeal Brief	-
ix.	Exhibit 2 Appellant – Appellant’s Supplementary Brief	-
x.	Exhibit 2 Respondent – Respondent’s Supplementary Brief	-
xi.	Exhibit 3 Appellant – Inspection Report by [REDACTED]	March 21, 2022
xii.	Exhibit 4 Appellant – Structural Evaluation Report by [REDACTED]	March 23, 2022

Issue:

9. This appeal concerned whether there was a contravention of the *Act*, more specifically the *National Building Code – 2019 Alberta Edition* (the “Building Code”) on the Subject Property, to warrant the Suspension, as well as, whether certain conditions for reinstatement of the permit should have been included in the Suspension.

Positions of the Parties:

Appellant

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

10. The Suspension is revoked to allow construction to proceed at the Subject Property, as the Appellant has satisfied the conditions of the Suspensions within their control and have evidence that construction can proceed safely.

Respondent

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

11. The Suspension is varied to correct an administrative error on the Suspension only and is otherwise confirmed as the SCO had reasonable and probable grounds to suspend the permit as the *Act* and conditions of the permit were being contravened.

Summary of the Evidence Provided on Behalf of the Appellant:

Submissions made on behalf of [REDACTED]

12. The contravention of the *Act* is acknowledged by the Appellant and numerous attempts have been made to resolve the issue.
13. Construction at the Subject Property has essentially been suspended for the last twelve months and the Appellants are seeking to resume construction under the imposition of such conditions deemed appropriate to safeguard adjoining properties.
14. The *Act* provides a remedy for situations such as these, which is the issuance of orders to property owners, which would compel them to cooperate in a remedy. The *Act* does not assign fault, but rather focuses on the elimination of an unsafe condition. Where a party is directed to complete work they should be in a position to promptly be able to do such work and not face any obstacles.
15. Given that the conditions imposed engaged more than one party in the repair the unsafe condition at the property has continued.
16. The Suspension refers to the events of October 6, 2021; at which time seven conditions from the Stop Work Order dated June 30, 2021 (the “June 30th Order”) (Pages 258 to 265 of **The Record, Exhibit 1 Respondent**) had been satisfied. Consent remained outstanding; however, construction of a retaining wall within the boundaries of the Subject Property was approved and completed by November 3,

2021. On November 19, 2021, Legal Counsel for ██████████ requested approval to continue with construction as winter was approaching. The response was the issuance of the Suspension.

17. The first condition in the Suspension is consent to access and complete remedial work on the adjacent properties. This consent is preventing safety concerns from being resolved as it was clearly not attainable within the past five months from Orders issued in June to November. The SCO perpetuated the issue by continuing to impose this condition and delegating authority and unfettered discretion over an unsafe condition to the neighbouring property owners.
18. There was a desire to complete backfill prior to extreme winter conditions so Legal Counsel for ██████████ obtained the December 15, 2021 ██████████ Report (Pages 310 – 312 of **The Record, Exhibit 1 Respondent**) and presented it to the Respondent. This report provided an option of removing as much slough as safely possible given the frozen ground condition with a possibility of long term settlement contrary to the recommendation in the June 29, 2021 ██████████ Report (Pages 245 – 247 of **The Record, Exhibit 1 Respondent**) which recommended that all slough be removed prior to backfill. Approval was received from the Respondent to proceed with backfill based on the December 15, 2021 ██████████ Report and consent was urgently sought from the neighbouring property owners.
19. On December 23, 2021 a response was received for the property owners at ██████████ (Page 53 – 54 of **The Record, Exhibit 1 Appellant**) not accepting the revised backfill procedure and demanding all sloughed material be removed prior to backfill. A similar response was received from the property owners at ██████████ on December 30, 2021 (Pages 56 – 58 of **The Record, Exhibit 1 Appellant**). Accordingly, the neighbouring property owners put themselves in a worse position by not taking the protection that backfill would have afforded providing lateral support and drainage over a risk of minor settlement.
20. The central issue stems from the conditions in the June 30th Order and Suspension to obtain the neighbouring property owners consents to backfill and then complete the backfill. Consent has now been secured from the neighbouring property owners in accordance with the March 2, 2022 ██████████ Report (Pages 85-87 of **The Record, Exhibit 2 Appellant**) and so the only remaining item from the Suspension is the completion of the backfill.

Evidence provided on behalf on ██████████

21. ██████████ is the owner of ██████████ and was engaged by the Property Owner to build a custom home at the Subject Property.
22. ██████████ was contracted by ██████████ to complete the excavation and footings at the Subject Property.
23. Methods to prevent harm to the adjacent properties were employed; the damage that occurred was not foreseen.
24. There has always been a willingness to work with the neighbouring property owners and complete the required remediation to return what has been damaged to its original or better condition. There have been multiple estimates for remediation and coordination of quick turnarounds with contractors, approximately three days depending on weather, to complete the work. The original estimated cost of remediation was approximately \$8,000; with ██████████ most recent

recommendations, the estimate is between \$14,000 - \$17,000.

25. In November 2021, the state of the construction was that the basement was backfilled and capped with the main floor, but the basement slab had not yet been poured. There were also two structural retaining walls in place on the east and west sides of the Subject Property.
26. The current condition of the Subject Property remains the same, as construction has been halted. If the permit were reinstated and construction was able to proceed at the Subject Property the assembly of the home on site would be the next step as it is a modular build. This would require a crane, zoom boom, and the use of other small machinery, such as nail guns and compressors on the site. The crane would be parked on the front street and the zoom boom would be used to move material around the site.
27. None of the conditions in the March 2, 2022, [REDACTED] would be problematic to the proposed construction process. [REDACTED] is familiar with the terms of consent that have recently been provided by the neighbouring property owners and those do not pose an issue to proceed with construction.
28. There is a minimum distance between the edge of excavation and the exterior wall of the home on the east side and a bit of a greater distance on the west side. It was acknowledged that the excavation at the Subject Property was deeper than the foundations of the neighbouring properties; however, this was not determined to be a concern. No concerns were raised by the architects and engineers involved or the Respondent during the permitting process with respect to the excavation.

Evidence provided on behalf of [REDACTED]

29. [REDACTED] graduated from the University of Alberta in 2007 with a Bachelor of Applied Science and has been consulting with [REDACTED] for 15 years, but in the industry for 17 years. He specializes in geotechnical engineering.
30. Multiple reports were prepared for this situation, dated May 14, 2021, June 28, 2021, June 29, 2021, July 28, 2021, December 15, 2021, and March 2, 2022; the majority of which required an on-site inspection by himself or technical staff that he oversaw.
31. The December 15, 2021, [REDACTED] Report was to expedite backfill procedures prior to significant cold weather and winter conditions. The recommendation was to use washed rock backfill and clay cap, noting that minor settlement may occur. The neighbouring property owners did not accept this.
32. The potential settlement may have been approximately a couple of centimetres but this would have depended on the depth of fill.
33. The March 2, 2022, [REDACTED] Report was based on discussion between the engaged geotechnical engineers for all three properties; there was no site visit. It constituted a professional agreement for backfill procedures using fillcrete, which has less settlement potential.
34. There are limitations on using fillcrete when there is cold weather, specifically when the ambient air temperature is below zero and subgrade soils are frozen. Therefore, backfill can now only occur when the existing subgrade soils are frost-free.
35. The main requirements on site to safely proceed with construction are to limit access to the side yards

and not have heavy equipment travelling on the existing excavation; these should be kept at least 5 metres from the foundation walls. Until backfill is in place any loading of material should be completed from the front of the Subject Property. [REDACTED] has confirmed compliance with these requirements.

36. Once backfill is in place it will be safe for the zoom boom to travel on the Subject Property.
37. With respect to the change in the requirement between the July 28, 2021, [REDACTED] Report and December 15, 2021 [REDACTED] Report, for all sloughed material to be removed from the site, it is not practical to remove all material as this could undermine the existing foundations and jeopardize the neighbouring structures. There was also a risk of settlement with the proposed use of washed rock for backfill and backfill occurring during the winter months.
38. An agreement would be reached with the other engaged geotechnical engineers on site following a field inspection for what level of excavation is required prior to completing backfill in accordance with the March 2, 2022, [REDACTED] Report.
39. There is no reason to believe the existing foundations were undermined during the excavation and there are no concerns regarding the stability of the backfill that was previously done.
40. Prevention strategies would have been to provide shoring, such as screw piles with flanges or driven piles with wood lagging.

Evidence provided on behalf of [REDACTED]

41. [REDACTED] possesses a diploma in Architectural Technology from NAIT and a degree in Civil Engineering, with a speciality in structural engineering, from the University of Alberta. They have been consulting in Edmonton for 27 years as a Structural Engineer.
42. [REDACTED] was first engaged to design the retaining walls in September 2021.
43. On March 23, 2022, [REDACTED] conducted a visual assessment of the Subject Property and neighbouring property at [REDACTED], with consent of the owners.
44. [REDACTED] did not conduct a visual inspection of the neighbouring property at [REDACTED], but opined that the conditions are similar for both neighbouring properties.
45. With respect to the Subject Property, the site consists of a basement with floor cap. It was tarped over but [REDACTED] did look under the tarp and observed that there were no signs of structural distress to the existing basement foundation.
46. With respect to the neighbouring property at [REDACTED], there is significant sloughing of side yard resulting in what looked to be the collapse of the sidewalk and side patio. Wood blocking was in place to support one corner of the patio. For the exterior of the house there is a small section of concrete wall, approximately 2 feet deep and 3 feet long, that has sloughed off; however, it was covered with rigid insulation so the actual concrete could not be inspected for issues. Otherwise, there were no signs of structural distress to the exterior. Upon inspection of the interior of the house, no signs of structural distress or movement were visible; there were no cracks or window and door issues. The sloughed area did not extend as far back as the detached garage, however a visual inspection of the exterior of the detached garage was done and there were no signs of structural distress. The owners of [REDACTED] had

requested no photos be taken during this inspection. Additionally, no measurements were taken as he had been advised a survey was being done.

47. [REDACTED] had reviewed the March 2, 2022, [REDACTED] Report prior to authoring his own (**The Record, Exhibit 4 Appellant**) where he expanded on keeping material and equipment 5 metres from the edges of the excavation rather than the periphery of the existing foundation wall. This was to err on the side of caution and stay away from all edges to prevent further sloughing of the soil.
48. [REDACTED] had reviewed the March 21, 2022, [REDACTED] Report (**The Record, Exhibit 3 Appellant**) and confirmed that it was consistent with what he observed at his inspection but looked more specifically at [REDACTED]. That report details the measurement program undertaken over the past year at that property and notes some minor movement of 1-2mm of the east wall of the garage. The sloughing did extend farther back on that property than on [REDACTED]. Concerns for [REDACTED] can be mitigated by following the precautions noted in his report specifically to keep heavy equipment 5 metres from the edge of excavation and use the front of the Subject Property as an optimal place to work from until backfill has been completed.
49. The greatest risk to the buildings has been and continues to be the lack of backfill. An important aspect is to prevent the wetting and drying of the soils adjacent to the neighbouring properties to prevent potential swelling and shrinking which may result in movement of the structures.
50. There are no concerns with the basement of the Subject Property being backfilled even though the basement slab has not been poured, as there is good soil coverage that should provide enough lateral stability to the base of the wall.
51. There was also no reason to believe there had been undermining of the foundations of the neighbouring properties; there was about 3 feet of soil cover over the foundation for [REDACTED] and he would suggest there is more on the side of [REDACTED].

Summary of the Evidence Provided on Behalf of the Respondent:

Submissions made on behalf of [REDACTED]

52. The Tribunal's jurisdiction is with respect to the notice of suspension for the permit and not to set new conditions, assess whether the conditions have been complied with or deal with the Stop Work Order. The Tribunal can confirm, revoke, or vary the terms, if the variance provides equivalent or greater safety performance.
53. The issue at hand is whether the Suspension was reasonable at the time it was issued, back in November 2021. **Exhibit 3 Appellant** and **Exhibit 4 Appellant** were not available to the SCO for consideration when the Suspension was issued and given that they deal with the safety of adjacent properties these reports require a more fulsome review by the Respondent prior to any action being taken.
54. The Suspension includes reference to two other permit numbers in separate places, which are not subject to a suspension; the permit that is subject to a suspension is the one for the house construction, which is Permit [REDACTED].
55. There has been damage to the adjacent properties caused by the Appellant. They are responsible for

the cost of conducting the remediation work.

56. There has been limited documentary evidence to support other damages, such as delays in construction, and even so should costs to the Appellant be considered for their breach of the *Act* and whether the Suspension should be upheld.
57. The issuance of notices of permit suspension and orders are both discretionary and within the authority of a safety codes officer under the *Act*; however, notices and orders have different enforcement abilities. Under section 49, a safety codes officer may issue an Order and sections 55 and 56 deal with how an order is enforced. Only section 46 deals with permit suspensions and there is nothing regarding enforcement. Accordingly, the Stop Work Order (Pages 334-342 of **Exhibit 1 Respondent**) featured an alternative clause for the city to retain an engineer, but this could not be carried forward as there is not ability under the *Act* when a notice of suspension is issued for it to be enforced by the Respondent.
58. On the issue of consent, with respect to Condition 1 of the Suspension, this is a requirement under the law, *Trespass to Premises Act*, RSA 2000 c T-7. If this condition is removed from the Suspension, consent is still required to access the neighbouring properties. Furthermore, section 55-57 of the *Act* are informative to consent being required, in that there is a mechanism for when an owner refuses to allow entry, which is a court application for compliance.
59. The SCO's decision to issue the Suspension and stipulate reinstatement conditions was reasonable given the damage caused to the neighbouring properties during construction. Adjacent property protection is paramount to the Building Code as evidenced in a previous decision of the Safety Codes Council (Pages 104-112 of **The Record, Exhibit 2 Respondent**) and the onus was on the Contractor to ensure this.

Evidence provided on behalf of [REDACTED]

60. [REDACTED] is a Building Safety Codes Officer with the Respondent and is currently Supervisor of the Compliance Team with the Safety Codes Division.
61. The Building Permit for the Subject Property was approved on April 15, 2021 (Page 23-25 of **Exhibit 1 Respondent**) and includes conditions such as compliance with the Building Code, the *Act*, and related regulations.
62. Site Inspections of the Subject Property were conducted on February 3, 2021 (Pages 100-111 of **Exhibit 1 Respondent**), March 2, 2021 (Pages 112-115 of **Exhibit 1 Respondent**), March 16, 2021 (Pages 118-126 of **Exhibit 1 Respondent**), April 22, 2021 (Pages 138-142 of **Exhibit 1 Respondent**), May 7, 2021 (Pages 146-147 of **Exhibit 1 Respondent**), May 10, 2021 (Pages 148-150 of **Exhibit 1 Respondent**), May 11, 2021 (Pages 151-153 of **Exhibit 1 Respondent**), May 14, 2021 (Pages 158-167 of **Exhibit 1 Respondent**), June 22, 2021 (Pages 225-232) of **Exhibit 1 Respondent**), August 17, 2021 (Pages 274-277 of **Exhibit 1 Respondent**), October 22, 2021 (Pages 286-290 of **Exhibit 1 Respondent**), and November 3, 2021 (Pages 291-300 of **Exhibit 1 Respondent**).
63. At the March 2, 2021, inspection, the Contractor, had installed four layers of lego blocks for shoring between the excavation and both neighbouring properties. The SCO advised the Contractor that the installed shoring system required an engineer's review. In response, the Contractor provided the SCO

with a letter from the Registered Professional of Record, ██████████ (Pages 116-117 of **Exhibit 1 Respondent**); however, their letter did not confirm whether the engineer attended on-site or feature calculations or data to confirm that the shoring blocks system was sufficient.

64. At the March 16, 2021, inspection, it was confirmed the bank failed along Property ██████████ during further excavation at the Subject Property as the shoring system had to be removed and reinstalled due to a surveyor error. This resulted in exposed foundation of Property ██████████, as well as, damage to the landscaping, concrete patio, sidewalk and fence. The Contractor was given a verbal stop work order and this was followed by the March 16, 2021, Order (Pages 127-130 of **Exhibit 1 Respondent**).
65. The March 16, 2021, Order required an engineer's review of the site conditions and shoring system, as well as, recommendation on remedial actions to stabilize the bank and facilitate a remedy with the owners of Property ██████████. A letter from ██████████ (Pages 132-133 of **Exhibit 1 Respondent**) was received advising that the wall was stable and safe and spray cement could hold the dirt if the earth continued to cave; however, no data was included in the letter as support. A letter was also received from ██████████ (Pages 134-135 of **Exhibit 1 Respondent**), which laid out the remediation plan for the damages to Property ██████████. The March 16, 2021, Order was deemed complied with by the SCO on March 19, 2021 (Page 136 of **Exhibit 1 Respondent**).
66. At the April 22, 2021, inspection, further movement of the retaining wall and sloughing was evident along Property ██████████. ██████████, provided two more letters on April 26 and May 5, 2021 (Pages 143-145 of **Exhibit 1 Respondent**) regarding no movement of the retaining wall; however, it was evident they had not conducted the site visit themselves and so the letters were deemed insufficient.
67. ██████████ was engaged by the Respondent to conduct a geotechnical assessment of the Subject Property. The Geotechnical Assessment Report dated May 14, 2021 (Pages 168-220 of **Exhibit 1 Respondent**) was based on a site inspection on May 7, 2021. ██████████ commented that this type of comprehensive report is sought to address all variables on site and information available at the time. In this report, it was highlighted that the excavation ranged between 12 – 13 feet deep and that it was imperative to remove all loose soil behind the lego block walls prior to backfilling. There was also a recommendation for a detailed plan for backfilling, which supports requirements in the Suspension.
68. ██████████ requested monitoring and inspection letters of assurance from the geotechnical and structural engineers involved, specifically to be on site during the work and monitor and confirm the work was done properly given the issues that had occurred thus far on site. In response, the backfill procedures were prepared by ██████████ on May 14, 2021 (Pages 221-224 of **Exhibit 1 Respondent**); however, did not include confirmation of monitoring. On June 22, 2021, ██████████ was advised by the Contractor that backfill would take place that day; ██████████ attended on site and gave a verbal stop work order, as approval of the backfill procedures was still pending.
69. The June 23, 2021, Order (Pages 232-239 of **Exhibit 1 Respondent**) followed and included requirements of monitoring and confirmation from the involved engineers. A meeting was held on June 28, 2021, between the Contractor and representatives for the Respondent for options on how to proceed with the backfill. At this time, an agreement could not be reached with the neighbouring property owners so it was agreed that backfill could occur in two phases: at the Subject Property and then for the side yards with the neighbouring properties.

70. Therefore, the June 30, 2021 Order (Pages 258-266 of **Exhibit 1 Respondent**) was issued to amend the June 23rd Order and reflect the agreement with the Contractor.
71. Furthermore, a Structural Report from [REDACTED] was received on June 30, 2021 (Pages 251-257 of **Exhibit 1 Respondent**). The photos show the soil pulling away from the existing foundations, overall sloughing, and leaning of the lego block wall. This report specifically states there is insufficient evidence to determine whether there has been movement of the adjacent foundations and this is why the Respondent requested additional surveying.
72. None of the Orders issued against the Subject Property were appealed.
73. The Site Inspection Report by [REDACTED] dated July 28, 2021 (Pages 269-273 of **Exhibit 1 Respondent**) provided an inspection summary of the completion of phase one of the backfill at the Subject Property. Washed rock was used as backfill and this was considered acceptable with no geotechnical concerns.
74. On August 19, 2021, the Appellant submitted a Lot Grading Plan for the Subject Property which showed elevated corners of the adjacent properties from what was on the permit application. Drawings for an engineered retaining wall were eventually also submitted. The Lot Grading Plan was approved on October 4, 2021 (Pages 278-282 of **Exhibit 1 Respondent**).
75. The Respondent sought and received confirmation that work would be restricted to the Subject Property site and there would not be need to access the adjacent properties (Pages 283-285 of **Exhibit 1 Respondent**). The Respondent then allowed for the construction of the retaining wall, which was completed by November 3, 2021.
76. The Suspension was issued because there was a breach of the *Act*, as well as, the ongoing issues with achieving compliance on the Subject Property. There was and remains concern for the stability of the adjacent foundations if construction were to proceed. An unsafe condition has been created on the adjacent properties and this requires remediation to ensure safety of the occupants on the adjacent properties.
77. The excavation at the Subject Property is significantly deeper than the neighbouring properties existing basements so there is a concern regarding the stability of the adjacent foundations and so verification was sought by engineers to monitor from a geotechnical and structural perspective. This information was never forthcoming from the Appellants and there was confusion over who would be responsible for the monitoring. This is the one conditions from the June 30th Order that remains outstanding to date.
78. The Respondent has submitted a complaint to the Association of Professional Engineers and Geoscientists with respect to [REDACTED] involvement with this matter, as there were concerns with respect to the stamped drawings.

Technical Advisor – Questions & Answers:

79. [REDACTED] was the Building 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. The Tribunal deliberated on the questions for the Technical Advisor in camera. All parties including the Technical Advisor and observers reconvened in

the virtual hearing room and the Chair posed the Tribunal's questions to the Technical Advisor and received the following responses:

80. Q: *Is there anything in the Act or Building Code that speaks to consent to go on neighbouring properties or giving notice?*

A: Nothing in the Act or Building Code that requires one property owner to give or get consent from another owner. For notice not sure what that relates to.

81. Q: *What is the difference between a building and property?*

A: The Building Code defines building as any structure used or intended for supporting or sheltering any use or occupancy. Property is not defined in either the Act or Building Code, so refer to an appropriate dictionary where it is defined as something owned, tangible or intangible. This would be all encompassing from sidewalks to cars on the property.

82. Q: *Can you clarify whether site work such as grading and backfill are covered by the Act or Building Code?*

A: Yes they are covered. Part 9.12 deals with excavation, backfill, and grading for a Part 9 building.

83. Q: *Does a safety codes officer have authority to issue orders to neighbouring properties for things out of their control? For instance, the neighbouring property has a failure of proper grading so could a safety codes officer issue an order or do they have another mechanism to deal with that?*

A: The Act, section 49 provides the authority having jurisdiction the ability to write an Order for any kind of condition. The Building Code allows authorities having jurisdiction to issue orders under Division C, 2.2.15.1. for correcting an unsafe condition. An authority having jurisdiction may order the owner of a building to correct any unsafe conditions. Both the Act and Building Code define owner as a person with care and control.

Findings of Fact:

The Tribunal makes the following findings:

84. The Appellants, as the constructor and owner, were responsible for safety during construction, specifically that work undertaken did not damage or create a hazard to adjacent properties in accordance with the Division C, Articles 2.2.14.1(2) and 2.2.14.2.(2) of the Building Code.

85. The Subject Property at or around November 2021 was under construction with retaining walls in place along the east and west property lines and backfill poured up to the main floor.

86. Both adjacent properties, [REDACTED], were damaged from the excavation activity that took place at the Subject Property on or about March 16, 2021 (Pages 118-126 of **Exhibit 1 Respondent**). The damage includes sloughing of the yards, exposed foundation, and collapsed sidewalk, patio, and fence. Ongoing damage and further settlement have resulted given there has been an open excavation at the site for approximately one year.

87. Based on the evidence presented the Tribunal does not have any reason to believe any structural damage to the adjacent buildings has occurred with the exception of the patio slab on grade.

88. There was non-compliance with the Act, specifically the Building Code, as adjacent property

protection was not afforded during the undertaking of construction at the Subject Property; therefore, the SCO had reasonable and probable grounds to issue a permit suspension.

- 89.** The Suspension includes incorrect references to Permits [REDACTED] (Page 7 of The Record) and [REDACTED] (Page 12 of The Record) and is only meant to deal with the permit to construct the home, Permit [REDACTED].
- 90.** Several conditions for the reinstatement of the permit, listed in the Suspension are impractical or unreasonable:
- i. Condition 1 – The suspension of a permit is not required to ensure issues of trespass do not occur, as having a permit does not authorize non-compliance with any other enactment, pursuant to section 43(4) of the *Act*.
 - ii. Conditions 1, 3 and 4 – These conditions require work to be done at the Subject Property, which is not possible given that the Suspension prohibits any work from being undertaken.
 - iii. Conditions 4 and 5 – A safety codes officer cannot give permission to access other properties.
 - iv. Condition 6 – This project requires the involvement of multiple engineers with different scopes and so there is no ascertainable structural engineer of record; in addition the structural engineer previously involved appears to not have been involved in the project at or around the time the Suspension was issued.

Reasons for Decision:

- 91.** On an appeal such as this, the powers of the Tribunal are set out in subsection 52(2) of the *Act*, the relevant excerpt is reproduced below:

52(2) The Council may by order

(a) confirm, revoke or vary an order, suspension or cancellation appealed to it...

- 92.** The Suspension was issued pursuant to section 46 of the *Act* and section 26 of the Permit Regulation:

46 (1) A safety codes officer may suspend or cancel a permit if the safety codes officer, on reasonable and probable grounds, is of the opinion that the permit holder does not comply with this Act when acting pursuant to the permit or that the thing, process, or activity does not comply with this Act.

26 Without restricting the generality of section 46 of the Act, a permit issuer may refuse to issue a permit and, without restricting the generality of section 44 of the Act, a safety codes officer may suspend or cancel a permit that has been issued if ...

(c) in the opinion of the permit issuer, the undertaking for which the permit would be or has been issued would or does contravene the Act or another enactment, ...

(e) there is a contravention of any condition under which the permit was issued, ...

- 93.** The Tribunal finds based on the evidence before it that the SCO had reasonable and probable grounds to believe the *Act* was contravened and the construction on the Subject Property did not comply with the *Act* given that damage occurred to both adjacent properties.

- 94. The Suspension does not include reference to the safety concern of unsafe conditions created on the adjacent properties. Regardless, if there are concerns regarding the buildings at [REDACTED] [REDACTED] being in an unsafe condition, only the owners of those buildings can be ordered to correct an unsafe condition pursuant to Division C, Article 2.2.15.1. of the Building Code.
- 95. Some of conditions for reinstatement of the permit were either not necessary for safety or not possible to achieve; therefore, those conditions were varied to better enable the reinstatement of the permit as overall safety of the site is achieved with the completion of construction.
- 96. In the interim, the authorized backfilling of all three properties would remedy the new concerns around unsafe conditions and prevent any further settlement.
- 97. Based on submissions at the hearing, there is alleged consent from both adjacent property owners to proceed with backfill procedures as outlined in the March 2, 2022, [REDACTED]; accordingly, the Appellants should be in a position to readily complete the required backfilling. The Tribunal believes that it would be possible to backfill the adjacent properties without also backfilling the Subject Property through the addition of more retaining walls, but that this would not be a practical or economical approach given the status of the subject project.
- 98. The new requirement to provide a letter of commitment from a Geotechnical Engineer is to ensure monitoring of the backfill operations given the depth of the excavation at the Subject Property. Based on review of plans submitted in The Record, the elevation differences between the footings mean that the chances of undermining foundations is minimal and this was supported by the evidence during the hearing; however, requiring the letter of commitment ensures this will be actively monitored.
- 99. A cold weather protection plan for building foundation may no longer be required, but for winter months it would have been.

Signed at the City of Red Deer)
in the Province of Alberta)
this 11th day of May, 2022)

[REDACTED]
Chair, Building Sub-Council Administrative Tribunal