



Safety Codes Council

COUNCIL ORDER NO. 2021-04A

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE PLUMBING AND PRIVATE SEWAGE SUB-COUNCIL

(the "Tribunal")

ON JANUARY 25, 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 Order dated August 17, 2021 in the private sewage discipline (the "Order"), issued pursuant to *Section 49 of the Act* and the *Alberta Private Sewage Systems Standard of Practice 2015 (the "SOP")* by [REDACTED], a Safety Codes Officer (the "SCO") on behalf of [REDACTED] (the "Respondent") against [REDACTED] (the "Appellants") relating to a property located at [REDACTED] (the "subject property"); and

UPON REVIEWING AND CONSIDERING the evidence named in **The Record** and the written 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 **VARIED**.

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

FROM

Action to be taken; You are hereby ordered to do the following:
time limit

- (1) Immediately cease all operations of the diner until the building is deemed compliant with all relevant codes and standards and occupancy has been granted by a [REDACTED] Safety Codes Officer in the building and relevant related disciplines.
- (2) Not reoccupy or recommence any operations, except as required to bring the facility into compliance with this Order and the Code, until all contraventions identified in this Order have been remedied to the satisfaction of [REDACTED].

TO

Action to be taken; You are hereby ordered to do the following:
time limit

- (1) Immediately cease all operations of the diner until the building is deemed compliant with all relevant codes and standards and occupancy has been granted by a [REDACTED] Safety Codes Officer in the building and relevant related disciplines.
- (2) Not reoccupy or recommence any operations, except as required to bring the facility into compliance with this Order and the Code, until all contraventions identified in this Order have been remedied to the satisfaction of [REDACTED].
- (3) Obtain the necessary permit from the authority having jurisdiction to alter the existing septic tank or remove and replace with a holding tank.
- (4) Retain a professional to review and correct the deficiencies noted in the Order.
- (5) Meet all requirements of the issued permit so that it is closed compliant.
- (6) Submit receipts from a septage hauler, until such time that the authority having jurisdiction deems this unnecessary.

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] (Legal Representative, [REDACTED]), [REDACTED] (Property Owner), [REDACTED] (Property Owner), and [REDACTED] (Private Sewage Installer).
 - b) Appearing for the Respondent, the Tribunal heard from [REDACTED] (Legal Representative, [REDACTED]), [REDACTED] (Safety Codes Officer, [REDACTED]), and [REDACTED] (Manager [REDACTED]).
 - c) Facilitating the hearing on behalf of the Safety Codes Council: [REDACTED] (Coordinator of Appeals), [REDACTED] (Co-Facilitator), and [REDACTED] (Co-Facilitator).
 - d) Attending as Technical Advisor for the hearing: [REDACTED] (Private Sewage Technical Advisor, Alberta Municipal Affairs).
 - e) Attending as observers for the hearing: [REDACTED] ([REDACTED] Alberta Municipal Affairs) and [REDACTED] (Safety Codes Council).
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] and

- ██████████.
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).
 7. The Appellant submitted one piece of new evidence containing documentation for a development permit and communication between the Appellants and ██████████. The Respondent had previously seen this evidence and did not object to the submission of it to the Tribunal. The new evidence was marked as “**Exhibit 2 Appellant**” and was distributed, by email, to the Tribunal, the Co-Facilitators, and the Technical Advisors, and one copy retained for **The Record**.
 8. The Council 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 iii in **The Record**).
 9. There were several objections during the course of the hearing relating to the line of questioning. On any objection the Tribunal heard the grounds for objection by the objecting party and sought a response from the other party. The Tribunal then convened in-camera to consider the objection. Upon reconvening the hearing the Tribunal advised of its decision on the objection. In essence the Tribunal’s decisions favoured relevance and ensuring the evidence being given was connected to the Order being appealed.

The Record:

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

| <u>Item</u> | <u>Description</u> | <u>Date</u> | <u>Pages</u> |
|-------------|--|--------------------|--------------|
| i. | Notices of Appeal | September 21, 2021 | 2-16 |
| ii. | Council’s Acknowledgment Letter | September 22, 2021 | 17-20 |
| iii. | Council’s Designation of Powers Verification | September 22, 2021 | 21 |
| iv. | Respondent’s Letter re Representation | September 27, 2021 | 22 |
| v. | Respondent’s Letter re Hearing date availability | October 12, 2021 | 23-24 |
| vi. | Appellant’s Letter re Stay of orders request | October 14, 2021 | 25-26 |
| vii. | Respondent’s Letter re Response to stay request | October 21, 2021 | 27-105 |
| viii. | Council’s Letter re Stay not granted | October 28, 2021 | 106 |
| ix. | Council’s Notification of Hearing Letter | November 4, 2021 | 107-109 |
| x. | Council’s Revised Notification of Hearing Letter | November 5, 2021 | 110-112 |
| xi. | Respondent’s Letter re Confirmation of attendance | November 26, 2021 | 113 |
| xii. | Appellant’s Letter re Confirmation of attendance and | December 17, 2021 | 114 |

| | | | |
|-------|---|-------------------|---------|
| | witnesses | | |
| xiii. | Respondent's Letter re Witnesses | December 17, 2021 | 115 |
| xiv. | EXHIBIT 1 APPELLANT – Appellant's Appeal Brief | - | 116-141 |
| xv. | EXHIBIT 1 RESPONDENT – Respondent's Appeal Brief | - | 142-232 |
| xvi. | EXHIBIT 2 APPELLANT – Development Permit and Communications (15 pages) | - | - |

Issue:

11. This Appeal concerns the issuance of the Order and the possible contravention of the Act, including the SOP, with respect to the use of a septic tank with buried open discharge on the subject property.

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 should be revoked or in the alternative, varied as the Appellant is willing to convert the existing septic tank into a holding tank and meet the requirements of the SOP.

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 has not complied with the Order and is not following the legislated process of obtaining a permit to complete the necessary work at the subject property.

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

Submissions provided on behalf of [REDACTED]

14. The diner has been operating pursuant to an approved cottage industry development permit from 2017 (the "2017 Development Permit") issued by the Respondent (pages 2-11 of **Exhibit 2 Appellant**).
15. The Appellants had contracted [REDACTED] in 2015 to install a private sewage system at the subject property for use by the diner. [REDACTED] was responsible for obtaining the necessary permit and performing the work under the permit. The permit for the installation of a holding tank was issued on May 1, 2015 (the "2015 Permit")(Page 127 of **The Record**) and [REDACTED] completed the installation.
16. [REDACTED] was contracted by the Respondent, at that time, to do the safety code

inspection and the Inspection Report dated May 15, 2015 (Page 128 of **The Record**) indicates no deficiencies or further site inspections required. Accordingly, the tank was considered approved by the Appellants. The Appellants relied on the contractor and Respondents inspection and were not aware of any issues with the tank until the Order was issued.

17. The Appellants carried on the business of the diner using the private sewage system that was installed by [REDACTED]. They emptied it when it was full and had the well water tested regularly.
18. At no time were any changes made to the private sewage system that was installed.
19. The Appellant's are willing to rectify the issue with the tank and, through consultation with a Private Sewage Installer, wish to undertake the necessary procedure to convert the septic tank into a holding tank which will be approximately equivalent to or better than the safety standards.
20. The Appellants have acted in good faith and enjoyed a positive relationship with the Respondents up until 2021. The Appellants find an adversarial stance has been taken against them to prevent the carrying on of their business.
21. The Respondent's have not acted in good faith and refuse to attend the property to complete inspections when the Appellants are working to remedy the deficiencies.

Evidence provided on behalf of [REDACTED]

22. [REDACTED] has owned the subject property since 1997 which he believes consist of 120 acres instead of the 160 acres noted on the Land Title Certificate (Page 161 of **The Record**).
23. Due to an illness and subsequently losing his job, the Appellants embarked on the business of the greenhouse on the subject property in 2013.
24. In 2015, [REDACTED] called [REDACTED] and requested the installation of a sewage disposal system on the subject property for use by the diner business. The contractor looked after everything, dealing with the permit and installation work themselves.
25. [REDACTED] was not on the premises when the installation occurred in 2015, or during the inspection from [REDACTED].
26. There were no concerns about the subject property until [REDACTED] involvement in 2021.
27. A septic service has come to clean and haul the solid from the tank on numerous occasions and any effluent would have been pumped out through the pipe into the field or cleaned and hauled away by the septic service.
28. Currently, there is regular ground cover over the tank and the discharge line's location is unknown to [REDACTED]. The only way to determine the exact location would be to dig and currently the ground is frozen over. [REDACTED] did not recall indicating to the SCO during the June 23, 2021 inspection that the discharge line went into a buried pit with gravel, as noted in the Inspection Report (Page 169 of **The Record**).
29. The distance from the tank to the well is over 200 feet and the size or capacity of the tank is

unknown.

30. ██████████ contacted ██████████, a private company, who examined the area around the tank and dug up some of the ground. They were not able to identify where the discharge lines ended, but did indicate there was no contamination. Options were discussed with them and a suggestion was made to install a complete new system. Subsequently, ██████████ contacted ██████████, a Private Sewage Installer, who advised capping the system as the best option.
31. Capping of the tank would require pulling out the pump, which has already been done by ██████████ ██████████, and capping the pipe. This can be done come spring time, once the ground thaws.

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

32. ██████████ was present when the tank installation occurred in 2015; however, did not have any interactions with ██████████ and when ██████████ came to do the inspection she was working in the diner.
33. No statements were made to her with respect to the quality of work.

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

34. ██████████ is a Private Sewage Installer, certificate number ██████████, which he has held for 12-15 years.
35. He has experience installing both holding tanks and septic tanks for residential use.
36. ██████████ had an opportunity to look at the tank, which is connected to the diner and noted it was a septic tank with a pump and not a holding tank. The disposal system could not be verified as the ground was leveled and covered with grass and there was no indication of the pipes direction.
37. The difference between the tanks is that a septic tank has two compartments, working and a pump-out. The working compartment is bigger and is what the raw sewage goes into. As it gets full a tube passes it through to the pump-out chamber which features a pump or siphon to discharge treated effluent out into a disposal field or mound. A holding tank is one big chamber with no division or pump. The effluent comes into the tank and a level alarm goes off indicating the need to empty it out. There is no onsite treatment.
38. The intent is to bring the current septic tank into compliance as a holding tank so the pump would need to be removed and line capped.
39. The use of the building would determine the size of the tank required and there is a difference between commercial and residential. Minimum size is 400 gallons for a holding tank. Different sizes of the tank are dependant on use and capacity and there is a chart in the *SOP* for commercial sizing.
40. ██████████ believed the tank at the subject property was greater than 400 gallons but could not confirm the exact size, as he was not present for installation.
41. It is ██████████ professional opinion that once the pump is removed and capping has been completed in the spring, the septic tank could be used as a two chamber holding tank and would meet the requirements of the *SOP*. Capping can be done on either the inside or the outside of the

tank.

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

Submissions provided on behalf of [REDACTED]

42. The Respondent is an accredited municipality and is tasked with the administration of the Act.
43. The Appellants are local business owners, running a business that includes greenhouses and a diner; however, they have proceeded with work on the subject property without approval and authorization from the Respondent, as is required.
44. There are significant safety concerns to the public, as the diner is a public place where people come to eat. There are two [REDACTED] Orders (Pages 196-201 of **The Record**) on the subject property which further evidence the public health concerns.
45. The Respondent has not acted in bad faith, they are just requiring compliance with the legislation and adherence to the statutory process. It is not the Respondent's responsibility to advise property owners; it is an owner's responsibility to seek professional assistance.
46. The SCO inspected the subject property in 2021 and found breaches of two codes.
47. The Appellants have not applied for permits to undertake the work to remedy the breaches outlined in the Orders. The required process is outlined in the Permit Regulation, which requires a person to make an application to authorize the scope of work. Once a permit is issued a person can undertake the work on that permit, which may set out conditions. A safety codes officer would then inspect the completed work, possibly even multiple times during the construction or installation as things may get covered up.
48. A site map of the subject property (Page 165 of **The Record**) shows there are a number of buildings on the land.
49. Sometime between 2013 and 2015 a diner was built on the subject property and was in operation even though the 2017 Development Permit was not yet in place. Regardless, safety code permits were required in all disciplines and the 2017 Development Permit is not that.
50. There is no dispute a permit was issued to the Appellants for the installation of a holding tank; however, at some point the holding tank was changed into a septic tank as currently, there is a septic tank in the ground at the subject property, and this is not what the 2015 Permit was for. There is no permit for a septic tank at the subject property.
51. It is acknowledged the Appellants are trying to obtain experts; however, [REDACTED] does not have expertise in commercial tanks and here we have a tank that serves a business.
52. The information from [REDACTED] is that the discharge line for the septic tank is too close to the well. This is a safety concern as the well serves the diner which serves the public. The safety concern is also echoed in the fact that a stay was denied (Page 106 of **The Record**).
53. There has been no collusion with [REDACTED], and any allegation of this is inappropriate. [REDACTED] and [REDACTED] are two regulators who may speak to each other on matters of public health.

54. The Order was properly issued as there was and remains a breach of the *Act* and regulations herein. The Order should be upheld as the key concern is an unauthorized sewage system on the land. The proposed changes may work; however, the Appellant needs to obtain permits to effect this change.
55. It is acknowledged there is no timeline for compliance in the Order and the Respondent takes no issue with the imposition of a timeline. The Appellants cannot operate their business until all safety code issues are remedied to the satisfaction of the Respondent.

Evidence provided on behalf of [REDACTED]

56. [REDACTED] is the Manager of [REDACTED] with the Respondent. Her role is to oversee all aspects of safety code work.
57. Prior to summer 2021 there were concerns with the subject property not being in compliance; however, [REDACTED] brought specific issues to the Respondent's attention.
58. A joint inspection was scheduled and safety codes officers attended the site. Multiple orders were issued as a result which were vetted by Legal Counsel.
59. A meeting was held on July 22, 2021 between the Appellants, Supervisor, [REDACTED] and [REDACTED]. Another person from the Respondent also attended to take minutes. At the meeting the Appellants were given a copy of all orders on the subject property and discussion occurred about next steps. It was made clear that professionals should be engaged given the extent and number of issues. The Appellants were also advised that permits were required prior to any work being done.
60. The permit requirement has been relayed to the Appellants a few times, even through Legal Counsel.
61. The only permit in the Respondent's records for private sewage is the 2015 Permit.
62. The 2017 Development Permit is different from the required safety code permits in the various disciplines.

Evidence provided on behalf of [REDACTED]

63. On June 23, 2021 a joint site inspection was conducted. Two manholes were seen above ground, as depicted in the pictures (Pages 171-174 of **The Record**). This led to the realization a septic tank was on the site instead of a holding tank per the 2015 Permit.
64. From his training as a safety codes officer they are instructed to make notes on only what is seen on inspection. With respect to the 2015 Inspection Report (page 128 of **The Record**) there is no mention of a septic tank or discharge line, and there is specific reference to a holding tank. This suggests that the tank was changed following the inspection to a septic tank with a discharge line.
65. In conversation with [REDACTED] during the inspection it was confirmed as a septic tank and he indicated that the discharge line went into a gravel pit approximately 39 feet from the well.
66. The septic tank can be converted into a holding tank but needs to be an appropriate size to

accommodate use by the diner. The *SOP* requires for developments other than single family dwellings for the storage capacity to be suitable for the intended service.

67. Altering this system requires a permit to ensure there is no discharge of effluent into non-compliant system. To date no permit has been applied for and he understands the Appellant is in the process of getting ██████████ to make the changes.
68. A holding tank is one compartment where raw sewage goes directly into and a vacuum truck comes and pumps away for disposal or treatment. A septic tank has two compartments where there is some breakdown of material. Multiple systems are acceptable; however, what is currently at the subject property is not acceptable.
69. There are cost differences to be considered, as well as, capacity considerations. Capacity of a holding tank would dictate how often a vacuum truck would need to come haul.
70. A septic system can discharge into a field, mound, or open discharge system. None of these are present at the subject property. The discharge line is into a pit with gravel in close proximity to the well, which could contaminate the ground water and go back to the well.
71. The permit will set out the land location, property owner, contractor information, and scope of work. The Appellants need to make an application for the proposed system; a safety codes officer will then review and may place conditions on the permit. Once approved the work can occur and be inspected. It is up to the contractor or owner to call for an inspection. Closed compliant means there are no issues at the time of inspection.
72. The Respondent would want the discharge line removed from the ground to alleviate concerns and ensure no reconnection.

Technical Advisor – Questions & Answers:

73. ██████████ 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.
74. 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 Advisor and received the following responses:
75. ██████████ advised at the outset that the May 2015 Permit would have been in reference to the 2009 Alberta Private Sewage Systems Standard of Practice as that is what was in force at the time.
76. *Q: Can a two-compartment septic tank be used as a holding tank? And if so, what would the size requirement be based on a 25-seat diner?*

A: Yes, conversion is considered in both residential and commercial situations. With residential, there is a minimum size requirement in the *SOP*. For commercial developments the *SOP* does not specify a size but it must be of a storage capacity suitable for the purpose. Accordingly, this would be a choice of the operator based on the business and how often to haul and an operator could try to establish what size would be needed as a holding tank based on the number of

seats. In this case, as there is a two compartment tank converted, as a commercial development the size is not of issue and is more around the economics of flow and frequency of hauling.

77. Q: *Would adding an additional tank in series give additional size load or does it need to be a new single one of the necessary size?*

A: An additional tank can be considered for overall operation of the tank system. The hauling company would have to service all tanks and remove all capacity. This may be impacted by the volume a truck can haul, road bans, and site accessibility.

78. The Appellant's representative posed questions regarding capping of the tank and the discharge line. ██████ advised that on the issue of capping, this would come down to the type of tank that was used and the types of inlet and outlet devices. There may be an ability to install some type of plug but the outlet needs to have the ability to accept a device to cap it off. With respect to the discharge line the SOP is silent on any type of conversion and so this will come down to the position of the authority having jurisdiction.

Findings of Fact:

The Tribunal makes the following findings:

- 79.** A permit was issued for the installation of a holding tank, for use by the diner, on May 1, 2015 and closed compliant following an inspection on May 15, 2015 (Pages 127-128 of **The Record**).
- 80.** During a site inspection on June 23, 2021, the SCO confirmed both with the Appellant and through visual inspection that a septic tank was being used by the diner, with a discharge line to an unknown location on the subject property.
- 81.** The septic tank on the subject project is not permitted under the *Act*, as there is discharge to an unknown location and a holding tank is what was authorized for the site.
- 82.** Converting the septic tank into a holding tank is a modification that requires a permit under the *Act*.
- 83.** While the Respondents have communicated the necessity of obtaining permits to the Appellant this was not set out as a specific requirement in the Order.
- 84.** The Respondent, as the authority having jurisdiction, is able to set requirements on a permit such as removing the discharge line.
- 85.** As a commercial development, the *SOP* does not dictate a required size for the tank; accordingly this is at the discretion of the business owner.

Reasons for Decision:

- 86.** 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.

87. 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.

88. The Tribunal finds, based on the evidence before it, that the SCO had reasonable and probable grounds to believe the *Act* was being contravened as there was a non-compliant septic tank in use at the subject property without a permit.

89. Section 16(1) of the *Permit Regulation* AR 204, 2007 states a permit in the private sewage discipline is required for a private sewage disposal system undertaking. As the Appellant is essentially modifying the design of the current septic tank to turn it into a holding tank a permit is required.

90. The Order is being varied to include the requirement around obtaining permits and engaging a professional as this is what the Respondent is requiring and an Order shall set out what a person is required to do or stop doing in respect to the thing, process, or activity(...) pursuant to section 49(3)(a) of the *Act*.

91. In addition, a requirement is being set for the receipts from the septic service to ensure that the new holding tank is being properly used and this may alleviate the Respondent's concerns around the discharge line being reconnected and used.

Signed at the [REDACTED])
in the Province of Alberta)
this 10th day of February, 2022)

[REDACTED]
Chair, Plumbing & Private Sewage Sub-Council
Administrative Tribunal