



Safety Codes Council

COUNCIL ORDER NO. 2023-02

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE BUILDING SUB-COUNCIL

(the "Tribunal")

ON APRIL 6, 2023

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

AND IN THE MATTER OF the refusal to issue a building permit to [REDACTED] ("Appellant") by the City of Calgary ("Respondent") for [REDACTED] ("the Building") (referred to as the "Refusal");

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

IT IS HEREBY ORDERED THAT the Refusal is confirmed.

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 as the Refusal and confirmed the names of those in attendance:
 - a. Appearing for the Appellant, the Tribunal heard from: [REDACTED].
 - b. Appearing for the Respondent, the Tribunal heard from: [REDACTED].
 - c. Facilitating the hearing on behalf of the Safety Codes Council: [REDACTED].
 - d. Attending as Technical Advisor for the hearing: [REDACTED].
 - 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 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 7). The Appellant and Respondent confirmed that there were no objections to any of the material submitted to the Tribunal.

The Record:

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

<u>Item</u>	<u>Description</u>	<u>Date</u>
i.	Notice of Appeal	February 13, 2023
ii.	Safety Codes Council Appeal Acknowledgement Letter	February 15, 2023
iii.	Safety Codes Council’s Notification of Hearing Letter	March 6, 2023
iv.	Exhibit 1 Appellant – Appellant’s Appeal Brief	-
v.	Exhibit 1 Respondent – Respondent’s Appeal Brief	-

Issue:

8. This appeal concerns the issuance of the Refusal with respect to a building permit with the project scope of an eligible existing secondary suite.

Positions of the Parties:

Appellant

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

9. It is the Appellant’s position that the Refusal should be revoked, as it is accurate that the Building contains a secondary suite that is eligible to only meet the minimum lifesaving requirements in the National Building Code- 2019 Alberta Edition.

Respondent

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

10. It is the Respondent’s position that the Refusal should be confirmed, as it is inaccurate that the Building contains a secondary suite that is eligible to only meet the minimum lifesaving requirements in the National Building Code- 2019 Alberta Edition.

Summary of the Evidence Provided On Behalf of the Appellant:

11. In 2007, the Appellant purchased the Building.

12. In 2011, a kitchen was installed in the basement, which included a countertop, shelves, sink, window, fridge, and a portable cooking utensil. There was no ventilation specific to the kitchen. No permits were obtained for the alteration to the Building.
13. On April 9, 2020, the Appellant submitted a building permit application for a new secondary suite where the scope of work was listed as kitchen development and wall demolition. Building permit [REDACTED] was issued.
14. In 2020, building work was undertaken in the basement, such as a wall demolition, installation of a gas stove, and sprinklers, under the building permit and trade permits.
15. In October 2020, the Appellant contacted the Respondent and requested that building permit [REDACTED] be cancelled, so a new building permit application for an existing secondary suite for the Building could be submitted. The scope of the existing building permit was amended to reflect the Appellant might have an existing secondary suite.
16. In February 2021, following the final inspection, the Appellant was advised by the Respondent that the Building had outstanding deficiencies related to the National Building Code- 2019 Alberta Edition.
17. In March 2021, the Appellant was advised by the Respondent that the Building did not have an existing secondary suite prior to March 12, 2018, due to the lack of a kitchen with a cooking facility at that time, and the application will be treated as a new secondary suite. The appellant indicated that a portable cooking utensil is a cooking facility.
18. On April 13, 2021, the building permit application [REDACTED] was cancelled in response to the Appellant's request. The Appellant cancelled the permit application due to frustration about the Building's basement not being considered an existing secondary suite based on the documentation they provided, and financial considerations. As part of the cancellation, the Appellant signed a declaration on March 23, 2021 indicating they decided not to use the basement as a secondary suite and no parts of the basement shall be used as a sleeping area until all safety requirements, after alleged intimidation by the Respondent. This was not a commitment not to proceed in the future with applying for a new building permit for an existing secondary suite.
19. On January 3, 2023, a new building permit application, [REDACTED], for an existing secondary suite was submitted by the Appellant.
20. On January 6, 2023, the Respondent indicated that the Building could not be considered an existing secondary suite and requested an application for a new secondary suite.
21. On January 6, 2023, the Appellant obtained statutory declarations from four individuals indicating they stayed in the basement of the Building rent-free during the period of December 2010 to July 2011 or July 2012 to July 2013 and that it had a fully developed basement with a kitchen. This information was not provided to the Respondent.
22. On February 13, 2023, the building permit application, [REDACTED] for an existing secondary suite was refused because the Building does not meet the criteria for an eligible existing secondary suite.

Summary of the Evidence Provided On Behalf of the Respondent:

23. On January 3, 2023, a new building permit application, [REDACTED], for an existing secondary suite

was submitted by the Appellant.

24. On January 6, 2023, the Respondent indicated that the Building could not be considered an eligible existing secondary suite and requested an application for a new secondary suite.
25. On February 13, 2023, the building permit application, [REDACTED] for an existing secondary suite was refused because the Building does not meet the criteria for an eligible existing secondary suite. The Refusal was informed by information in the application and previous permits and related documents.
26. The National Building Code – 2019 Alberta Edition indicates in Division B, Article 1.1.1.2:
 - 1) This Article applies to a *building* that has been legally built, occupied and used before 01 April 2019.
 - 2) If a *building* is altered, rehabilitated, refurbished, renovated or repaired, the level of life safety and *building* performance shall not be decreased.
 - 3) Except as specified in Part 10 of Division B, the *authority having jurisdiction* shall accept any construction or condition that lawfully existed in Alberta before 01 April 2019 if the construction or condition does not constitute an *unsafe condition*.
 - 4) A change in *occupancy* or *alteration* of any *building* constructed before 01 April 2019 shall be permitted if the level of safety and building performance proposed are acceptable to the *authority having jurisdiction*.
 - 5) For a *building* constructed before 01 April 2019, the *authority having jurisdiction* may accept an alternative or a proposal that achieves the appropriate level of safety for the specific activity for which the *building* is to be used.
 - 6) The *authority having jurisdiction* may accept existing construction not in complete compliance with this Code, in which case it may be accepted, subject to conditions.
27. As an authority having jurisdiction, the Respondent, under the authority of article 1.1.1.2. of the National Building Code – 2019 Alberta Edition implemented a secondary suite program in June 2018 to help homeowners legalize existing illegal secondary suites. In the program, buildings with an eligible secondary suite prior to March 12, 2018, are accepted as existing construction not in complete compliance with the National Building Code – 2019 Alberta Edition, and subject to conditions such as the existing secondary suite meeting certain eligibility criteria and minimum lifesaving requirements in the National Building Code – 2019 Alberta Edition are met. Relaxations to the National Building Code – 2019 Alberta Edition include reduced requirements for sound rating, egress, smoke sealing, and mechanical room doors.
28. The Respondent criteria for an eligible existing secondary suite requires all the following conditions to be met: (1) The self-contained dwelling unit prior to March 12, 2018 that has a sleeping area or bedroom, bathroom, kitchen with a cooking facility that is not portable, living area, private entrance to the suite, that is separate from the main entry of the building; (2) no fundamental changes have been made to the suite since March 12, 2018 which include changes to layouts; and (3) owner signs a declaration that it was used as a secondary suite prior to March 12, 2018.
29. Prior to March 12, 2018, the Building did not contain all the elements of a self-contained dwelling unit

in the basement. It did not contain a kitchen with a non-portable cooking facility. There were also fundamental changes to the Building's basement since March 12, 2018, namely the demolition of a wall and building of a kitchen under the building permit [REDACTED].

30. At the time of original construction of the Building in approximately 2000, the Building had a developed basement with two furnaces and two water heaters, but was not approved with a secondary suite.
31. On April 9, 2020, the Appellant submitted a building permit application for a new secondary suite [REDACTED], where the scope of work described by the Appellant was "wall demolition, kitchen development" and floors plans submitted included the Appellant's notation for "proposed kitchen". No indication was made at the time that the suite was existing.
32. From April 9, 2020 to June 20, 2020, multiple trade permits applications were made for work indicating development of kitchen, namely: Electrical Permit [REDACTED] – Scope: "Installation of smoke detector and all kitchen required receptacle"; Plumbing Permit [REDACTED] – Scope: "Fire sprinkler system and 1 sink"; Gas Permit [REDACTED] – Scope: "Run gas to basement kitchen range". All trade permit work was successfully completed and inspections were conducted virtually.
33. On May 11, 2020, building permit [REDACTED] was issued for a new secondary suite.
34. On May 28, 2020, a framing inspection was conducted virtually with multiple deficiencies noted, including items that indicate work in the kitchen was ongoing and not pre-existing, as kitchen exhaust piping was not installed.
35. On August 17, 2020, a building final inspection was conducted virtually and deemed not acceptable due to deficiencies.
36. On October 14, 2020, Appellant was informed by the Respondent by email that rather than cancelling the permit as the Appellant requested so they could submit a new application for the Building to be considered for an eligible existing secondary suite, the application scope could be amended. The Respondent requested additional information on when the suite was constructed and also clarified to the Appellant that "there are differences in Alberta Building Code regulations that will need to be adhered to depending on whether the suite can be considered existing or not. If the suite is not found to be existing, the building permit will need to reflect that it is a new suite." The Appellant responded by email that "The basement was fully developed when the main building was built. This includes a separate furnace. We added the kitchen in 2011, and a portable cooking utensil since people that stayed are staying temporarily."
37. On October 21, 2022, the Appellant sent in amended documents removing the notation of the wall to be demolished and the "proposed" notation for the kitchen. The Respondents updated the application scope to an existing secondary suite.
38. On February 22, 2021, the second building final inspection was conducted in-person and work was deemed not acceptable due to outstanding deficiencies, including lack of a smoke tight barrier for the mechanical room, inability to assess clearances for piping, and an inability to assess junction boxes or valves with access panels.
39. On March 4, 2021, the Respondent advised the Appellant that they could not support the development as an eligible existing secondary suite, given that building permit [REDACTED] was

issued that completed the demolition of an existing wall and creation of a kitchen.

40. On March 23, 2021, the Appellant requested the cancellation of building permit [REDACTED], and provided a signed declaration dated March 23, 2021 stating they had decided not to use the basement as a secondary suite and no parts of this basement shall be used as a sleeping area until all safety requirements are met. By signing this declaration, the Respondent considers any future applications to be for a new secondary suite.
41. On April 13, 2021, building permit [REDACTED] was cancelled.
42. The Respondent is available to review and issue a building permit for a new secondary suite in the Building, should the Appellant choose to submit an application.

Technical Advisor – Questions & Answers:

43. 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.
44. 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:

45. Q: How does the National Building Code – 2019 Alberta Edition define secondary suite?

A: Article 1.4.1.2 of the National Building Code – 2019 Alberta Edition has the following definition:

Secondary suite means a self-contained *dwelling unit* located in a *building* or portion of a *building* of only *residential occupancy* that contains only one other *dwelling unit* and common spaces, and where both *dwelling units* constitute a single real estate entity.

46. Q: How does the National Building Code – 2019 Alberta Edition define kitchen?

A: It is not defined. Article 1.4.1.1 of the National Building Code – 2019 Alberta Edition indicates that words and phrases that are not defined that if they are not defined in the Safety Codes Act and its Regulations the meanings commonly assigned to them in the context in which they are used, taking into account the specialized use of terms by the various trades and professions to which the terminology applies. For words not defined, reference should be made to the Oxford University Press 2004, "Canadian Oxford Dictionary, 2nd Edition". The Canadian Oxford Dictionary, 2nd Edition defines kitchen as:

kitch·en *noun* **1 a** a room or area where food is prepared and cooked.

b kitchen appliances, fixtures. etc., esp. as sold together.

47. Q: Does the National Building Code – 2019 Alberta Edition have any definitions related to cooking facility, appliances, utensils, cooking tops?

A: Article 1.4.1.2 of the National Building Code – 2019 Alberta Edition has the following definition:

Cooktop means a cooking surface having one or more burners or heating elements.

48. Q: How does the National Building Code – 2019 Alberta Edition define alteration?

A: Article 1.4.1.2 of the National Building Code – 2019 Alberta Edition has the following definition:

Alteration means a change or extension to any matter or thing or to any *occupancy* regulated by this Code.

Occupancy means the use or intended use of a *building* or part thereof for the shelter or support of persons, animals or property.

The following clauses of article 1.1.1.1 of the National Building Code – 2019 Alberta Edition suggest that the code would apply to a secondary suite:

- 1) This Code applies to any one or more of the following:...
- d) the change in *occupancy* of any *building*,
- e) an *alteration* to any building,

Findings of Fact:

The Tribunal makes the following findings:

49. On January 3, 2023, a new building permit application, [REDACTED], for an existing secondary suite was submitted by the Appellant.
50. The Permit Regulation (AR 204/2007) indicates when a permit issuer may refuse to issue a permit. The selection of the regulation relevant to this hearing is section 26(b). The relevant excerpt is reproduced below:
 - 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
 - (b) incorrect or insufficient information is submitted with respect to the permit or the undertaking to be governed by the permit,
51. On February 13, 2023, the building permit application, [REDACTED] for an existing secondary suite was refused due to incorrect information because Respondent indicated the Building does not meet the criteria for an eligible existing secondary suite.
52. As an authority having jurisdiction, the Respondent, under the authority of article 1.1.1.2. of the National Safety Code – 2019 Alberta Edition may accept existing construction for buildings legally built, occupied, and used before April 1, 2019 that is not in complete compliance with this code and make them subject to conditions.
53. The Respondent's conditions for secondary suites not legally built in legally built buildings are that: (1) the self-contained dwelling unit had prior to March 12, 2018 a sleeping area or bedroom, bathroom, kitchen with a cooking facility that is not portable, living area, private entrance to the suite, that is separate from the main entry of the building; (2) no fundamental alterations have been made to the suite since March 12, 2018; and (3) owner signs a declaration that it was used as a secondary suite prior to March 12, 2018. In addition, the Respondent may require minor alterations to adhere with minimum lifesaving requirements in the National Building Code – 2019 Alberta Edition.

54. At the time of original construction, in approximately 2000, the Building was not designed or built with a secondary suite and did not have a kitchen in the basement.
55. In approximately 2011, a kitchen was installed in the basement, which included a countertop, shelves, sink, window, fridge, and a portable cooking utensil. There was no ventilation specific to the kitchen. No permits were obtained for the alteration to the Building.
56. On April 9, 2020, the Appellant submitted a building permit application for a new secondary suite, BP2020-4227 and altered the Building's basement, including the demolition of a wall.
57. On October 21, 2020, the [REDACTED] building permit application's scope was amended from a new secondary suite to an existing secondary suite at the request of the Appellant. No determination was made at the time by the Respondent whether the Building had an eligible existing secondary suite.
58. On February 22, 2021, the Building's final inspection indicated there were outstanding deficiencies.
59. On March 4, 2021, the Respondent advised that the Building did not meet the Respondent's criteria of an eligible existing secondary suite because it did not contain a kitchen with a non-portable cooking facility prior to March 12, 2018 and there had been fundamental alterations since March 12, 2018.
60. On April 13, 2021, at the Appellant's request, building permit [REDACTED] was cancelled. The cancellation paperwork included a declaration signed on March 23, 2021 by the Appellant stating they have decided not to use the basement as a secondary suite and no parts of this basement shall be used as a sleeping area until all safety requirements are met.
61. On January 3, 2023, a new building permit application, [REDACTED], for an existing secondary suite was submitted by the Appellant.
62. On January 6, 2023, the Respondent indicated that the Building could not be considered an eligible existing secondary suite and requested an application for a new secondary suite. It could not be considered an eligible secondary suite because it did not contain a kitchen with a non-portable cooking facility prior to March 12, 2018 and there had been fundamental alterations since March 12, 2018 based on the [REDACTED] building permit application inspections and successfully complete trade permits.

Reasons for Decision:

63. 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

- (b) confirm a refusal or direct that a designation, certificate or permit be issued and direct inclusion of terms and conditions in the designation, certificate or permit.

64. The Refusal was issued pursuant to subsections 44(3) of the *Act* and subsection 26(b) of the Permit Regulation; the relevant experts are reproduced below:

44(3) If a safety codes officer or other person designated by an Administrator refuses to issue a permit, the safety codes officer or other person designated by an Administrator shall serve the

applicant with a written notice of the refusal.

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

(b) incorrect or insufficient information is submitted with respect to the permit or the undertaking to be governed by the permit,

65. The Tribunal finds, based on the evidence before it that incorrect or insufficient information was submitted respecting the permit, namely that the Building had an eligible existing secondary suite; accordingly, the permit refusal is confirmed.

66. As many satisfactory alterations have been made to the Building's basement under previous permits issued in 2020 ([REDACTED] and associated trades permits) related to a secondary suite, the tribunal encourages the Appellant to work with the Respondent to obtain a building permit and complete the remaining work for a new secondary suite. The tribunal encourages the Respondent to take into consideration the Appellant's efforts to achieve compliance and to provide guidance in structuring the final building permit, including providing alternative solutions as applicable, to complete the project.

Signed at the City of Calgary)
in the Province of Alberta)
this 25th day of May, 2023)

[REDACTED]
Chair, Building Sub-Council
Administrative Tribunal