



# Safety Codes Council

COUNCIL ORDER NO. 2024-01

BEFORE THE ADMINISTRATIVE TRIBUNAL OF THE BUILDING SUB-COUNCIL

(the "Tribunal")

ON MARCH 25, 2024

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

**AND IN THE MATTER OF** an order issued by the City of Calgary (the "Respondent") to Jason [REDACTED] (the "Appellant") at [REDACTED] in Calgary (the "Property") on November 28, 2023 (the "Order");

**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 subject of appeal is REVOKED.

**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:
    - (a) Jason [REDACTED] the Appellant and owner of the Property;
    - (b) Dale [REDACTED] resident of the Property;
    - (c) Leon [REDACTED] neighbour of the Appellant;
    - (d) Layne [REDACTED] neighbour of the Appellant;
  - b. Appearing for the Respondent, the Tribunal heard from:
    - (a) Jean [REDACTED] Safety Codes Officer for the Respondent;
    - (b) Nicole Maynard, Legal Counsel for the Respondent;
  - c. Facilitating the hearing on behalf of the Safety Codes Council:
    - (a) Jordyn Dryden, Corporate Counsel and Coordinator of Appeals;
  - d. Attending as observers for the hearing:

(a) Melissa [REDACTED], Corporate Governance and Appeals Paralegal.

3. The Coordinator of Appeals then introduced the Chair of the Tribunal, Corey Klimchuk (the “Chair”), and turned the hearing over to them.
4. The Chair called the hearing to order and introduced the other Tribunal members: Keith Jansen and Ingo Viehweger.
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 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>
1	Notice of Appeal	December 22, 2023
2	Order	November 28, 2023
3	Stay of Order Decision	January 16, 2024
4	Notification of Hearing Email	February 13, 2024
5	Appellant’s Appeal Brief	March 5, 2024
6	Respondent’s Appeal Brief	March 11, 2024
7	Appellant’s Additional Documents	March 19, 2024

**Issue:**

8. This appeal concerns whether the basement of the Property is a secondary suite and therefore requires upgrades and permits to make the suite legal.

**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 Property is a single dwelling home. The Appellant and the Appellant’s roommate share the entirety of the Property. The Appellant does not agree with the Respondent’s characterization of the Property having a secondary suite and specifically does not want a secondary suite.
10. The Appellant disputes that there is a private entrance, as there is only one rear entrance to the house. This door leads directly into the kitchen and to the stairs to the basement. There is no door to the basement to make it a separate suite. The Appellant also states that the

basement has a toilet, but not a bathroom, and that even if the bathroom were finished that basements can have bathrooms without being considered suites.

11. The Respondent has described this as a cooking facility and used it as support for determining that a secondary suite exists on the Property. The Appellant also specifically disagrees that the basement setup is sufficient to be considered a cooking facility.
12. The Appellant submits that the Respondent is incorrect in characterizing the basement as a secondary suite and as such the Order should be revoked.

### Respondent

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

13. It is the Respondent's position that the basement of the Property effectively operates as a secondary suite and as such the secondary suite requirements must be present. The Respondent's position is that most of the elements of a secondary suite are present and that having access to the upper floor does not detract from the basement operating as a suite.
14. The Respondent emphasized that the discretion awarded to the SCO meant that the SCO could determine and declare what a space is being used for. The Respondent made it clear that using their discretion led them to declare the basement as a secondary suite despite the Appellant's assertions that the basement was not being used as such and their desire to not have a secondary suite.
15. The Respondent's position is that the basement of the Property has almost all the requirements for a legal secondary suite and as such the Order should be upheld.

### **Summary of the Evidence Provided on Behalf of the Appellant:**

#### Written Submissions on behalf of the Appellant:

16. The Order issued states that the Property has a constructed secondary suite in the basement that does not have permits. The Safety Codes Officer (the "SCO") provided the reasons supporting their conclusion that there was a secondary suite in an email dated December 4, 2023, which states:
  - a. That the Appellant stated to the SCO that he was renting the upper floor of the property to an individual;
  - b. That the Appellant stated to the SCO that he was living in the basement;
  - c. That there was a "toilet room" in the basement;
  - d. That there were "cooking facilities (toaster oven)" in the basement;
  - e. That there is a separate entrance from the side yard into the basement;
  - f. That the basement is accessible from the outside without passing through the main dwelling unit;

- g. That the basement suite was built before March 12, 2018.
17. The Order requires that the Appellant undergo construction to make the basement compliant as a secondary suite.
  18. The Appellant provided video footage of the Property. This video shows the kitchen that leads to a small landing or mudroom before the back door and a staircase that leads to a finished basement. In the basement, the video shows a recreational room with couch, an empty wet bar with a sink, a fireplace, storage shelves, an elliptical and a fridge. Off the recreational room is a large laundry room with additional storage and the furnace room nestled within. On the other side of the recreational room there is a short hallway that leads to a bedroom. Finally, also in the hallway off the recreational room is an unfinished room with a toilet.
  19. The Appellant provided photos of the basement as well. The photos show a bare wet bar counter with a sink, a couch placed in front of the fireplace and an elliptical in the main rec room area. On the other side of that room is a storage area with two storage shelves with general storage items on it, including what appears to be a carpet cleaner and a cooler. Beside the shelves there is further storage which includes a pet carrier, boxes, two fans, an easel, a scooter, stools, chairs and a rug.

Evidence on behalf of Jason [REDACTED]

20. Jason [REDACTED] ("Jason") has a health condition and disability that has prevented him from working. This condition has resulted in him using his savings for living, and as such he decided to get a roommate to help with the cost of owning the Property.
21. Jason's roommate, Dale [REDACTED] ("Dale"), moved into the Property in spring 2022. Dale's bedroom is on the upper floor and Jason's room is in the basement. However, they both share the entirety of the Property, including the living room and kitchen on the upper floor, and the laundry and exercise equipment in the basement. There are no private areas that would constitute a suite.
22. Jason stated that he informed the SCO multiple times that this is not a suite but that he and Dale share the entire Property. Specifically, Jason does not want the Property to be developed as a suite. Jason stated that he wants the Property to be safe but that he wants it to be safe as a single dwelling property, not as a property with a secondary suite.
23. Jason expressed frustration with the system and the answers he had been receiving from the City as he does not understand what components are making the Respondent believe that the Property has a secondary suite. He has asked what he needs to do for his property to not be considered as having a secondary suite.
24. Jason did admit to the Tribunal that he had listened to information about how to get a secondary suite in his property because he was curious about the value of building one. However, after receiving the information he decided it did not make sense for him to do.
25. Jason's brother was the previous owner of the Property. During this time, there was a flood in the basement. Jason's brother had not fixed the bathroom before Jason purchased the property. Jason does not have the ability to complete the bathroom renovation, therefore it

remains unfinished. Jason agrees that without knowing this history it looks like the bathroom is under construction. However, no construction is actually being done.

- 26.** Jason agrees that there is a toaster oven in the basement. It is unplugged and is stored in the basement storage area. Jason disagrees that an unplugged toaster oven is enough to be considered a cooking facility for the purposes of creating a secondary suite.
- 27.** Jason also recognizes that there is a sink in the basement. The basement was originally constructed with a wet bar and so there is a sink that he uses to fill his water bottle sometimes. Jason disputes that the presence of a sink constitutes a kitchen or cooking facility.
- 28.** In response to a question from the Tribunal, Jason informed the Tribunal that in 1990 a permit was obtained by the owner at that time to construct a door buildout in the back entry.

Evidence on behalf of Dale [REDACTED]

- 29.** Dale informed the Tribunal that she does live with Jason in the Property. The two are roommates and they share the cost of the Property. In her view there is no suite in the Property as they both live in the home and share the entirety of the Property.
- 30.** Contrary to what the SCO recorded, Dale says there is a back door to the Property but it is not a separate entrance. Both Jason and Dale use the back door. She also uses the basement regularly to do laundry, to work out, for storage, among other uses.

Evidence on behalf of Leon [REDACTED]

- 31.** Leon [REDACTED] ("Leon") lives at the property across the street from the Property and has lived there for approximately 30 years. Leon has known both Jason and Dale for some time and knew them both before Dale moved into the Property.
- 32.** Leon told the Tribunal that he has been in the Property on numerous occasions. In an answer to the Tribunal's question, he responded that the bathroom in the basement has been in disrepair since Jason's brother owned the property, which was about twelve years ago. He informed the Tribunal that the toilet works but there is not a shower nor any other amenities in the bathroom.
- 33.** Leon also informed the Tribunal that there was no stove in the basement. He stated that there was not even a microwave in the basement, let alone a stove.

Evidence on behalf of Layne [REDACTED]

- 34.** Layne [REDACTED] ("Layne") lives in the same neighbourhood as Jason, approximately half a block away from the Property. He has lived in the neighbourhood for approximately 10 years.
- 35.** Layne informed the Tribunal that he has been in the Property many times, and as recently as two weeks before the hearing, and that he would affirm everything that had already been said. There is no secondary suite, the Property is used as a single dwelling by both Jason and Dale.
- 36.** Layne also stated that Jason's health condition can sometimes result in him sharing too much information and he may have expressed curiosity about turning the basement into a suite at one point, however it is not his intention to create a suite.

## **Summary of the Evidence Provided on Behalf of the Respondent:**

### Written Submissions made on behalf of the Respondent:

- 37.** The Respondent began investigating the Property after receiving a complaint regarding a suspected secondary suite. The complaint stated that there was a rental ad posted for the top floor of the property.
- 38.** The Respondent file indicates an inspection was started for the Property on March 24, 2022, requiring one of the following actions be taken by the Appellant:
  - a. Obtain the required building permit to legalize the existing secondary suite; or
  - b. a written letter be sent to the Respondent that an existing secondary suite has been removed or does not exist.
- 39.** The next entry in the Respondent file for the Property is April 21, 2023, which states that the investigating officer was unable to gain entry into the Property, that follow up would occur on May 29, 2023, and that the secondary suite inspection observation was that no construction was noted on site.
- 40.** The next entry in the Respondent file for the Property is May 16, 2023, which states that Jason said that there is a bedroom in the basement, that no egress windows were at the basement level, and that Jason did not grant access to the property.
- 41.** The Respondent file for the Property then lists July 13, 2023, as the next inspection visit. The notes state there was no answer at the Property and that no physical signs of construction were noted.
- 42.** On October 2, 2023, the Respondent file indicates that the Respondent contacted Jason and made him aware that there were numerous complaints regarding a secondary suite at the Property.
- 43.** The Respondent's written submissions to the Tribunal state that on this date of October 2, 2023, that access was requested by the SCO to the Property to assess the as-built condition of the spaces "in relation to existing secondary suite requirements".
- 44.** On October 4, 2023, the Respondent file states that the lower level of the Property was "being used as a single bedroom, existing secondary suite by the owner while the upper floor is rented out a 3 bedroom living space." The notes state that the windows in the lower floor suite do not meet egress requirements, that it is unclear if the smoke alarm presence in the bedroom and the carbon monoxide detector in the furnace room are attached to permanent power. It also notes that the north side bedroom windows on the upper floor do not meet egress and that the three bedrooms on the upper floor do not have smoke or carbon monoxide detectors. It was then ordered that the homeowner obtain a building permit for an existing secondary suite, an electrical permit, and "potentially a development permit".
- 45.** The Respondent's written submissions to the Tribunal state that on October 4, 2023, the SCO made their way through the upper floor kitchen area and through a door that opens into a stairwell and the east-entry door, which would allow a complete separate access to the lower floor area. The submissions state that in inspecting the basement a sink area, fridge, freezer

and a toaster oven were present. The submissions then state observing a washroom area still under construction and a bedroom, which did not meet egress requirements.

- 46.** The Respondent's written submissions then state that on October 3, 2023, the Appellant informed the Respondent that he had installed electrical services throughout the house and was completing various other work around the house when he was able, given his medical and financial issues.

Evidence on behalf of Jean [REDACTED]

- 47.** Jean [REDACTED] ("Jean") is a SCO with the Respondent and has been for eight years. Jean emphasized to the Tribunal that he has the authority and discretion to assess and accept a building and to issue orders to correct deficiencies, and specifically emphasized that the City of Calgary advisory for secondary suites directs the users to appropriately note the discretion of the SCO.
- 48.** Jean told the Tribunal that he used his discretion on October 4, 2023, to determine that there was a secondary suite and as such the conditions were unsafe.
- 49.** Jean informed the Tribunal that the following factors support his finding of a secondary suite:
- a. There is a door separating the kitchen from the basement;
  - b. There is a bedroom in the basement;
  - c. There was a toaster oven on the shelf in the basement, although he could not see if it was plugged in;
  - d. There was a microwave on the floor of the garage;
  - e. There is a toilet and a sink;
  - f. A shower was in progress; and
  - g. There is a living area.
- 50.** The Tribunal then heard that because of these factors the basement was effectively being used as a secondary suite, and therefore the requirements of a secondary suite needed to be present. Namely, the following deficiencies were noted:
- a. The bedroom windows in the basement bedroom do not meet the egress requirements;
  - b. Secondary suites are required to be protected by 12.7mm smoke tight barriers and have a self-closing door. The smoke separation is not present between the furnace and laundry rooms;
  - c. No permit has been issued for construction work in the basement bathroom.
- 51.** Jean also noted that interconnected smoke alarms and carbon monoxide alarms are required but their presence had not been verified.
- 52.** In response to a question from the Appellant, Jean stated that cooking facilities, as required for a secondary suite, are not limited to a full kitchen but includes anything that allows food preparation including a hot plate and that sanitary facilities means a toilet and a sink, it does not need to include a shower. He then clarified that all the requirements for an existing secondary suite have been met except the smoke separation. Jean then stated that he, as the

authority having jurisdiction, has the ability to declare what a space is being used for.

53. In response to the Appellant asking what he could do to make it so the Property would not have a secondary suite Jean answered that there is nothing that could be removed that would make the property not have a secondary suite because he has the discretion to make this decision about the property.
54. The Appellant asked what the requirements are for smoke detectors in a single dwelling house, to which Jean responded that this question is irrelevant because the requirements are the requirements for secondary suites.
55. The Tribunal asked how Jean defined a secondary suite, to which the response was that it is a suite used or intended to be used by one or more persons that contains cooking, living, and sanitary facilities. The Tribunal then asked if there was anything other than the toaster oven on the shelf and the microwave in the garage that indicated that food prep or cooking was being done in the basement area. Jean replied that the toaster oven was on the shelf and that as he moved through the garage area it appeared other things existed that could be used. He stated that he saw matching cabinetry which indicate that he was intending for cooking facilities to be present and then stated that the City does not require a full kitchen to be put in suites but looks at if the ability is there.
56. The Tribunal then asked if there was a permit for the existing configuration of the basement, to which the response was that there was no permit on record for the buildout but even if a permit did exist it would not change that the doorway now exists and is being used as part of a suite.
57. The Tribunal asked if the relationship between Jason and Dale as roommates had any influence on the SCO finding that this was a secondary suite, to which the answer was that it did not have any influence on this finding.

#### **Findings of Fact:**

The Tribunal makes the following findings:

58. The Tribunal finds that the basement of the Property is not a secondary suite.
59. The Tribunal agrees with the Respondent that the basement can be accessed from the outside without crossing through the upper level of the Property. The Tribunal disagrees that this is indicative of a secondary suite. Rather, the stairs to the basement being next to the back door of a home is a common layout for many homes and does not necessarily mean the property has been separated into a main dwelling and a suite. The home was built before 1990. The year the home was built has not been presented to the Tribunal, but testimony that a permit for the back door buildout was obtained in approximately 1990 was provided by the Appellant. No evidence has been provided to the Tribunal to support the notion that the basement was built at a time after the original construction, therefore it is a reasonable inference to make that the placement of the stairs is the original layout of the Property. The property was not originally developed with a suite, and therefore the conclusion must be that the layout of the basement and the back door was approved under the building code edition at the time as a single-family dwelling.

60. The Tribunal also agrees with the Respondent that, upon first instance, the unfinished bathroom appears as an ongoing construction project. However, when presented with additional information, including the Respondent's notes on April 21, 2023, and July 13, 2023, that no construction signs were observed, and testimony from Jason and Leon that the unfinished bathroom is the result of a flood at least 12 years ago and that no construction is ongoing, the original conclusion must be discarded. The Tribunal found Jason and Leon to be credible witnesses, there was no evidence provided to refute their testimony, and the Respondent's notes corroborate their statements. The Tribunal therefore finds that no construction is ongoing. A permit for the construction of the bathroom is not needed, as no work is being done. The toilet alone is also not a sufficient sanitary facility to fulfill the secondary suite requirements.
61. The Tribunal agrees with the Appellant that a toaster oven, unplugged and on a storage shelf on the opposite side of the room, stored with multiple non-kitchen-based items, is not sufficient to be considered a cooking facility.
62. Furthermore, the Tribunal finds that the presence of a microwave stored in the garage is not sufficient to determine that a cooking facility exists in the basement.

**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, revoke or vary an order... 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.
64. The Respondent has made frequent references and placed particular emphasis on their discretion as an SCO to not only assess a situation but to determine how a property is being used. The Respondent routinely in their submissions and testimony referred to the discretion awarded to them under the *Act* when asked a question or when the notion of the basement not being a secondary suite was challenged.
65. The discretion that the Respondent asserts is not unfettered or unchecked. Section 49 of the *Act* allows for a SCO to issue an order if the SCO "*believes, on reasonable and probable grounds*" [emphasis added] that the *Act* is contravened or if a thing, process or activity to which the *Act* applies poses danger of serious injury or damage to a person or property. Reasonable and probable grounds is a standard in which it is probable that a certain situation exists. Belief in the mere possibility that something could exist is insufficient. Probability requires that it is more likely than not that the situation exists.
66. In this case, the use of the SCO's discretion has gone beyond reasonable because the conclusion reached does not make sense on a balance of probabilities. Having a bedroom in a basement is not sufficient to indicate a secondary suite. The presence of the use of a bedroom in the

basement does not, on its own, indicate the existence of a secondary suite. There needs to be more evidence that a basement is actually being used as a suite to support this characterization.

- 67.** Given that the home was built with this layout prior to 1990, it is unreasonable for a SCO to decide that the original layout of a single-family dwelling is now a secondary suite when nothing about the property has changed. The Building Code states at note A-1.1.1.2 that the Building Code is not intended to be used to enforce the “retrospective application of new requirements to existing buildings.” The Building Code is not intended to force property owners into making substantial upgrades if the property was built to compliance with the Building Code in force at the time of construction. The Appellant is not undertaking a new development or construction that would require a permit and upgrades to meet the current Building Code Standards.
- 68.** The Respondent provided evidence that there was an unplugged toaster oven on a shelf and a microwave in the garage. Again, this is not sufficient evidence that the space is being used for cooking or food preparation. Basements are often used for storage. It is not unthinkable or even unusual for a rarely-used appliance to be stored in a basement. No evidence was provided by the Respondent of actual food preparation by the Appellant. The Tribunal disagrees that the presence of an unplugged toaster oven on a storage shelving unit, and a microwave stored in a garage are evidence of food preparation equating to a cooking facility in a secondary suite.
- 69.** The presence of a microwave in the garage is even less likely to be indicative of food preparation in the basement. The garage is not the same basement area. Storing a microwave in a garage is again not unthinkable or unusual. That is not a reasonable leap or inference to make without actual evidence that it is being used as such.
- 70.** The SCO also indicates that there is a toilet and a sink, and therefore there is a sanitary area in the basement which is required in a secondary suite. Again, a sanitary area may be required for a secondary suite, but its presence is not exclusive to a secondary suite. The presence of a toilet is not sufficient to determine that a secondary suite exists. Additionally, the SCO characterized the sanitary area as being comprised of a toilet and a sink, however the toilet and the sink are not in the same area of the basement. The sink is part of the wet bar. The toilet is on its own and therefore is not even a sufficient sanitary facility. This is not a reasonable inference.
- 71.** Finally, accessing the laundry facilities requires crossing through the recreational room, or what would be the ‘living area’ of a secondary suite. While a property with a secondary suite can have shared laundry facilities, those laundry facilities must be accessible to both the primary and secondary dwellers without crossing into the main living area of either dwelling. This is not the case. Again, this is an indication that there is shared living of the entire dwelling, not a secondary suite.
- 72.** The Respondent is correct that secondary suites are required to have a bedroom, a cooking facility, a sanitary facility, and an entrance. But these features are not exclusive to secondary suites. A finished basement can have a bedroom. A finished basement can have a bathroom. Depending on the layout of the home, a finished basement can be accessed from an exterior door without crossing through the upper floor of the dwelling.
- 73.** Is it possible that a home with a basement bedroom could be used as a secondary suite? Yes. Is it likely that a secondary suite exists when there is no shower, no functional bathroom sink and

no food preparation facilities (beyond that of an unplugged toaster oven on a storage shelf)? The Tribunal finds that no, it is not probable. Probability, not possibility, is the standard for “reasonable and probable”, which is the standard set in the Act.

- 74.** Discretion is not all encompassing. It does not mean that power is unchecked, absolute, and unquestionable. Discretion is the ability to make reasonable decisions and assessments within the confines of general legal principles. It is a recognition that an SCO is entering into different situations daily and need to be able to use their reasonable judgement in assessing a situation that may not check every box that would be present in a standard build.
- 75.** The Tribunal finds that the Respondent has not shown that the property is being used as a secondary suite. The Order is revoked.

Signed at the City of Edmonton     )  
in the Province of Alberta         )  
this 22<sup>nd</sup> day of May, 2024         )



Corey Klimchuk  
Chair, Building Sub-Council  
Administrative Tribunal