



## **BUILDING CODE COMMISSION**

**IN THE MATTER OF** Subsection 24(1) of the *Building Code Act*, S.O. 1992, c. 23, as amended.

**AND IN THE MATTER OF** Articles 9.10.14.4. and 9.10.15.4. and Sentences 11.3.1.1(1), 11.3.1.2.(1) and 11.3.3.1 (1) and Compliance Alternative C172 of Division B of Regulation 332/12, as amended, (the “Building Code”).

**AND IN THE MATTER OF** an application by Gregory Weekes, Director, Weekes Engineering Inc. for the resolution of a dispute with Alan Shaw, Chief Building Official to determine whether the proposal to renovate the southside second floor window of a three storey residential building, which was renovated and made smaller without a permit, and is now being renovated to the original size of the opening, provides sufficiency of compliance with Articles 9.10.14.4, 9.10.15.4, Sentences, 11.3.1.1.(1), 11.3.1.2.(1) and 11.3.3.1.(1) and Compliance Alternative C172 of Division B of the Building Code at 26 Garfield Avenue North, Hamilton, Ontario.

<b>APPLICANT</b>	Donald Gregory Weekes Weekes Engineering Inc. Hamilton, Ontario
<b>RESPONDENT</b>	Alan Shaw Chief Building Official City of Hamilton Hamilton, Ontario
<b>PANEL</b>	Matthew Graham, Chair Designate Elektra Vrachas Michael Gooch
<b>PLACE</b>	via video conference
<b>DATE OF HEARING</b>	October 17, 2023
<b>DATE OF RULING</b>	October 17, 2023
<b>APPEARANCES</b>	Donald Gregory Weekes Weekes Engineering Inc Hamilton, Ontario <b>The Applicant</b>

Jorge Caetano  
Manager, Plan Examination  
City of Hamilton  
Hamilton, Ontario  
**Designate for Respondent**

Elaine Cheng  
Plans Examiner  
City of Hamilton  
Hamilton, Ontario  
**Designate for Respondent**

## RULING

### 1. Particulars of Dispute

The Applicant applied for a building permit to renovate an existing residential building at 26 Garfield Avenue North, Hamilton, Ontario.

The subject building is an existing three-storey residential dwelling with a building area of 56 m<sup>2</sup>.

The dispute between the two parties centers on whether the proposal to renovate the southside second floor window of a three-storey residential building, which was renovated and made smaller without a permit, and is now being renovated to the original size of the opening, provides sufficiency of compliance with Sentences 11.3.1.1.(1), 11.3.1.2.(1), 11.3.3.1.(1), Articles 9.10.14.4., 9.10.15.4., and Compliance Alternative C172 of Division B of the Building Code.

Although initially realised as being matters in dispute, Sentence 11.1.2.2.(1) of Division B and Sentence 1.1.2.6.(1) of Division A of the Building Code were removed from the dispute during the hearing through agreement of the parties.

### 2. Provisions of the Building Code in Dispute

#### 9.10.14.4. Openings in Exposing Building Face

(1) Except as provided in Sentences (3) to (7) and Sentence 9.10.14.6.(1), the maximum aggregate area of *unprotected openings* in an *exposing building face* shall,

- (a) conform to Table 9.10.14.4.,
- (b) conform to Subsection 3.2.3., or
- (c) where the limiting distance is not less than 1.2 m, be equal to or less than,
  - (i) the *limiting distance* squared, for *residential occupancies, business and personal services occupancies and low hazard industrial occupancies*, and
  - (ii) half the *limiting distance* squared, for *mercantile occupancies and medium hazard industrial occupancies*.

(2) Except as provided in Sentence 9.10.14.6.(1), openings in a wall having a *limiting distance* of less than 1.2 m shall be protected by *closures*, of other than wired glass or glass block, whose *fire protection rating* is in conformance with the *fire-resistance rating* required for the wall.

(3) The maximum aggregate area of *unprotected openings* shall be not more than twice the area determined according to Sentence (1) where the *unprotected openings* are glazed with,

- (a) wired glass in steel frames as described in Article 9.10.13.5., or
- (b) glass blocks, as described in Article 9.10.13.7.

(4) Where the *building* is *sprinklered*, the maximum aggregate area of *unprotected openings* shall be not more than twice the area determined according to Sentence (1) provided all rooms, including closets and bathrooms, that are adjacent to the *exposing building face* and that have *unprotected openings* are *sprinklered*, notwithstanding any exemptions in the sprinkler standards referenced in Article 3.2.5.13.

(5) The maximum aggregate area of *unprotected openings* in an *exposing building face* of a *storage garage* need not comply with Sentence (1) where,

- (a) all *storeys* are constructed as *open-air storeys*, and
- (b) the *storage garage* has a *limiting distance* of not less than 3 m.

- (6) The maximum aggregate area of *unprotected openings* in an *exposing building face* of a *storey* that faces a *street* and is the same level as the *street* need not comply with Sentence (1) where the *limiting distance* is not less than 9 m.
- (7) The limits on the area of *unprotected openings* need not apply to the *exposing building face* of a detached garage or accessory *building* facing a *house*, where,
- (a) the detached garage or accessory *building* serves the *house* or an individual *dwelling unit* in the house,
  - (b) the detached garage or accessory *building* is located on the same property as the *house*, and
  - (c) the *house* is the only *major occupancy* on the property.

**Table 9.10.14.4.**  
**Maximum Aggregate Area of Unprotected Openings in Exterior Walls**  
 Forming Part of Sentence 9.10.14.4.(1)

Occupancy Classification of Building	Maximum Total Area of Exposing Building Face, m <sup>2</sup>	Maximum Aggregate Area of <i>Unprotected Openings</i> , % of <i>Exposing Building Face Area</i>													
		<i>Limiting Distance, m</i>													
		Less than 1.2	1.2	1.5	2	2.5	3	4	6	8	10	12	16	20	25
<i>Residential, business and personal services, and low-hazard industrial</i>	10	0	8	12	21	33	55	96	100	—	—	—	—	—	—
	15	0	8	10	17	25	37	67	100	—	—	—	—	—	—
	20	0	8	10	15	21	30	53	100	—	—	—	—	—	—
	25	0	8	9	13	19	26	45	100	—	—	—	—	—	—
	30	0	7	9	12	17	23	39	88	100	—	—	—	—	—
	40	0	7	8	11	15	20	32	69	100	—	—	—	—	—
	50	0	7	8	10	14	18	28	57	100	—	—	—	—	—
	100	0	7	8	9	11	13	18	34	56	84	100	—	—	—
	Over 100	0	7	7	8	9	10	12	19	28	40	55	92	100	—
<i>Mercantile and medium-hazard industrial</i>	10	0	4	6	10	17	25	48	100	—	—	—	—	—	—
	15	0	4	5	8	13	18	34	82	100	—	—	—	—	—
	20	0	4	5	7	11	15	27	63	100	—	—	—	—	—
	25	0	4	5	7	9	13	22	51	94	100	—	—	—	—
	30	0	4	4	6	9	12	20	44	80	100	—	—	—	—
	40	0	4	4	6	8	10	16	34	61	97	100	—	—	—
	50	0	4	4	5	7	9	14	29	50	79	100	—	—	—
	100	0	4	4	4	5	6	9	17	28	42	60	100	—	—
	Over 100	0	4	4	4	4	5	6	10	14	20	27	46	70	100
Column 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16

#### 9.10.15.4. Glazed Openings in Exposing Building Face

(1) Except as provided in Sentences (3) to (5), the maximum area of glazed openings in an *exposing building face* shall,

- (a) conform to Table 9.10.15.4.,
- (b) conform to Subsection 3.2.3. as if the glazed openings were *unprotected openings*, or
- (c) where the *limiting distance* is not less than 1.2 m, be equal to or less than the *limiting distance* squared.

**Table 9.10.15.4.**  
**Maximum Area of Glazed Openings in Exterior Walls of Houses**  
 Forming Part of Sentences 9.10.15.4.(1) and (2)

Maximum Total Area of <i>Exposing Building</i> Face, m <sup>2</sup>	Maximum Aggregate Area of Glazed Openings, % of <i>Exposing Building Face Area</i>													
	<i>Limiting Distance</i> , m													
	Less than 1.2	1.2	1.5	2	2.5	3	4	6	8	10	12	16	20	25
10	0	8	12	21	33	55	96	100	—	—	—	—	—	—
15	0	8	10	17	25	37	67	100	—	—	—	—	—	—
20	0	8	10	15	21	30	53	100	—	—	—	—	—	—
25	0	8	9	13	19	26	45	100	—	—	—	—	—	—
30	0	7	9	12	17	23	39	88	100	—	—	—	—	—
40	0	7	8	11	15	20	32	69	100	—	—	—	—	—
50	0	7	8	10	14	18	28	57	100	—	—	—	—	—
100	0	7	8	9	11	13	18	34	56	84	100	—	—	—
Over 100	0	7	7	8	9	10	12	19	28	40	55	92	100	—
Column 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15

(2) Where the limits on the area of glazed openings are determined for individual portions of the exterior wall, as described in Subclause 9.10.15.2.(1)(b)(iii), the maximum aggregate area of glazed openings for any portion shall not exceed the values in the row of Table 9.10.15.4. for the total area of the entire *exposing building face limiting distance* of the individual portion. (See Appendix A.)

#### 11.1.2.1. Extension, Material Alteration or Repair

(1) Where an existing *building* is subject to extension, material alteration or repair,

- (a) the proposed *construction* shall comply with Section 11.3., and
- (b) the *performance level* of the *building* shall be evaluated and compensating *construction* shall be undertaken in accordance with Section 11.4.

The intent of this provision is to advise code users on what Sections of Part 11 are applicable to an existing building subject to an extension, material alteration or repair.

#### 11.3.1.1. Material Alteration or Repair of a Building System

(1) Where an existing *building system* is materially altered or repaired, the *performance level* of the *building* after the material alteration or repair shall be at least equal to the *performance level* of the *building* prior to the material alteration or repair. (See Appendix A.)

#### 11.3.1.2. New Building Systems and Extension of Existing Building Systems

(1) Except as provided in Article 11.3.3.1. and Section 11.5., the design and *construction* of a new *building system* or the extension of an existing *building system*, shall comply with all other Parts.

**11.3.3.1. Basic Renovation (See Appendix A.)**

(1) Except as provided in Sentence (2) and Article 11.3.3.2., *construction* may be carried out to maintain the existing *performance level* of all or part of an existing *building*, by the reuse, relocation or extension of the same or similar materials or components, to retain the existing character, structural uniqueness, heritage value, or aesthetic appearance of all or part of the *building*, if the *construction* will not adversely affect the early warning and evacuation systems, *fire separations* or the structural adequacy or will not create an unhealthy environment in the *building*.

11.5.1.1. Compliance Alternatives

...

(2) A *compliance alternative* shown in Table 11.5.1.1.A., 11.5.1.1.B., 11.5.1.1.C., 11.5.1.1.D/E. or 11.5.1.1.F. may be substituted for a requirement contained in Part 9 or 12 without satisfying the *chief building official* that compliance with the requirement is impracticable.

**Table 11.5.1.1.C.  
Compliance Alternatives for Residential Occupancies  
Forming Part of Article 11.5.1.1.**

C172	9.10.14.4.; 9.10.15.4.	<p>Existing windows.</p> <p>(a) Existing windows in walls may be relocated to another part of the wall, provided the existing opening is blocked up to provide the same fire rating for the wall, and the projection of the new opening, at a right angle to the property line onto another <i>building</i>, lies no closer than 300 mm from a window in such other <i>building</i>, where the “opposite” window is less than 2 400 mm from the opposite new opening, and</p> <p>(b) except relocation of units, to be restricted to the same <i>fire compartment</i> and shall conform to the requirements of Article 3.2.3.14. or 9.10.12.3. where applicable, or</p> <p>(c) where a <i>building</i> does not satisfy the requirements of Subsection 3.2.3. for the amount of openings facing a yard or space that does not have sufficient <i>limiting distance</i>, such existing openings are allowed to be relocated provided:</p> <ul style="list-style-type: none"> <li>(i) such openings are not increased in size and they are protected with wired glass in steel frames conforming to Sentence 3.1.8.14.(2), or</li> <li>(ii) the <i>building</i> is <i>sprinklered</i>.</li> </ul>
------	------------------------	---

**3. Applicant’s Position**

The Agent for the Applicant (the “Agent”) explained that the single family dwelling is currently undergoing a renovation and the dispute centres on the south side, second floor window, which is proposed to be enlarged by returning it to its original size, as can be seen by the original brick opening. The Agent stated that the construction date of the original window opening that the previous owners illegally installed is not exactly known but is estimated in or before 2007, based on Google Maps (street view) records. The original bricked window opening is 3 ft wide x 4 ft - 6 inches high and the current window opening is 4 ft wide x 2 ft high. The Agent further indicated that the illegally created window opening that will have a portion filled in, is smaller than the original window size by approximately 10%.

The Agent submitted that the illegal window was also incorrectly installed and there are several violations related to structural soundness, waterproofing and insulation.

The Agent submitted that it is the Respondent’s position that reinstating the window to the original size, will result in an ‘increase’ in the size of the current window and therefore, Part 11, Compliance Alternative C172 does not apply.

The Agent argued that an illegal renovation cannot be deemed as ‘existing’ as it has not been legally established. The Agent submitted that to accept an illegal renovation as existing, is to confirm the illegal works. The Agent argued that one should not be able to illegally renovate and then use the ‘existing’ illegal work as a baseline for a future building permit application.

The Agent submitted that that the original construction of the brick opening should be considered ‘existing’, and the proposed construction is simply undoing what was illegally done previously. The Agent maintained that the original brick opening size, is not in dispute by any party.

#### **4. Respondent’s Position**

The Designate for the Respondent (the “Designate”) indicated that the main issue in dispute is that the existing illegally installed window resulted in a reduction of the original bricked window size. The Designate submitted that the Applicant wants to replace the illegal ‘existing’ 4 ft wide x 2 ft high window on the south side of the building located on the second floor, with a larger 3 ft wide x 4 ft high window. The Designate concluded that the opening will be increased.

The Designate submitted that the existing south wall of the building is 2 ft – 7 inches (0.8 m) from the side property line. The Designate explained that the Applicant is attempting to use Compliance Alternative C172 by stating that the new window is the same size as the previous window that was bricked up without a building permit.

The Designate stated that since the south wall has a limiting distance that is less than 1.2 m from the side property line, increasing the size of the new window is not permitted unless it is protected with a rated closure in accordance with Sentence 9.10.14.4.(2) of the Building Code. The Designate explained that Compliance Alternative C172 is not applicable in this case because there is no existing window being relocated. Instead, the proposal is to enlarge the existing window.

In response to questions about the word ‘existing’, it was agreed that it is not a defined term in the Building Code. According to the dictionary definition, the window as it is built today would be considered ‘existing’.

The Designate explained that according to Google Maps (streets view), the previous window was bricked up and the existing window has been in place since 2007. The Designate stated that it is the opinion of the City of Hamilton Building Division, that once the window was reduced in size, the window can not be restored to a previous larger size window without having to comply with Article 9.10.14.4. of Division B of the Building Code for unprotected openings.

The Designate submitted that there is no provision in the Ontario Building Code to grandfather a previous window opening that has been blocked up or removed. The Designate stated that once the opening is blocked up or removed any new window opening would then have to comply with the requirements of 9.10.14.4. of Division B of the Building Code.

## **5. Commission Ruling**

It is the decision of the Building Code Commission that the proposal to renovate the southside second floor window of a three storey residential building, which was renovated and made smaller without a permit, and is now being renovated to the original size of opening, does not provide sufficiency of compliance with Articles 9.10.14.4., 9.10.15.4., Sentences 11.3.1.1.(1), 11.3.1.2.(1), and 11.3.3.1.(1), Compliance Alternative C172 of Division B of the building Code at 26 Garfield Avenue North, Hamilton

## **6. Reasons**

- i) The word “existing” is not a defined term in the Building Code. As per the Code, words shall have a meaning commonly assigned to them in the context for which they are used.

It is the Commission’s opinion that the word “existing” means as it existed at the time of the building permit application, in this case.

- ii) The Commission considered Sentence 11.3.3.1.(1) Basic Renovation and 11.3.1.1.(1) Material Alteration or Repair of a Building System and understands that Sentence 11.3.1.2.(1) New Building Systems and Extension of Existing Building Systems and Compliance Alternative C172 were raised as matters in dispute, as they are identified as compliance alternatives to Articles 9.10.14.4. and 9.10.15.4. permitted by Part 11 of Division B of the Building Code.

Compliance Alternative C172 of Table 11.5.1.1.C. of Division B of the building Code states in part:

“Existing windows in a wall may be relocated to another part of the wall, provided the existing opening is blocked up to provide the same fire rating of the wall....”

The Commission heard that the proposed design involves removing the existing window and replacing it with a new window of increased glazed opening in the same wall.

It is the Commission’s opinion that replacing the existing window with a new window with an increased glazed opening does not comply with Sentence 11.3.1.2.(1), and Compliance alternative C172 of Table 11.5.1.1.C.



Dated at the City of Toronto this **17th** day in the month of **October** in the year **2023** for application number **B-2023-13**.



---

Matthew Graham, Chair Designate



---

Elektra Vrachas



---

Michael Gooch