



# PERSPECTIVES

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## **Code Upgrades and “Grandfathering”: Lessons Learned When Insulation Replacement Leads to Collapse**

Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

*Disclaimer: This article is not intended to offer any policy interpretation and/or legal opinion. The author's objective is to shed light on common code upgrade disputes and challenges.*

## INTRODUCTION

Should an old cottage be upgraded to the current code by a new owner? When can a building component be “grandfathered”? Who should pay for the code upgrades following a property loss claim? These are common questions regarding upgrading a building to the current codes and standards prior to a renovation project, before purchasing an old cottage, or after a property loss claim. The recent pandemic has boosted the appetite of owners wishing to renovate their seasonal properties and facilities which raises questions regarding where the code upgrade is applicable.

## WHEN AND WHERE CODE UPGRADES OCCUR

Codes, bylaws, and ordinances may mandate code upgrades to the existing buildings for various reasons, such as higher standards of safety, energy preservation, illegal construction, or alteration in zoning laws. However, when a property loss occurs, the common expectation might be that the insurer will pay for all required upgrades to the roof, wiring, or plumbing components. Even if the policy covers the code upgrades, it may be challenging to determine the extent and applications of the code upgrades in reconstruction.

### Ontario Building Code

Ontario Building Code, like other jurisdictions, includes two parts pertaining to the existing buildings which outline “Change of Use” and “Renovation” requirements.

In a nutshell, the *Change of Use* section states that if the occupancy of the building is changed, a code upgrade to the entire building is required. Examples of change in occupancy may be splitting one residence into two or using a warehouse as an exhibition place. Therefore, an old cottage, although lawfully remaining non-compliant to the current code, won't require a code upgrade by a new owner if it remains a

cottage. This is called “grandfathering” a building.

The *Renovation* section of the code applies to partial alteration of the building components which have been in existence for at least five years. In general, this means that only the renovated portions of the building should be upgraded to the current code, assuming that the renovation is not “Substantial.” For instance, in a kitchen renovation project, code upgrades will be limited to the kitchen’s “building systems” e.g., plumbing, framing, electrical, etc. Similarly, after a property loss, only the damaged components of the building will need code upgrades, although there are some exceptions to these general rules.

## RENOVATION UPGRADE REQUIREMENTS AND EXTENT OF UPGRADES

There are two gray areas with regard to code upgrades in renovation or remedial projects that may lead to legal disputes. First, sometimes the renovation necessitates upgrading an undamaged or unaffected portion of the building—for example, construction of a new wall on a pre-existing defective foundation wall when the capacity of the foundation wall is questionable. The building code draws a line for these circumstances and states that the “Performance Level” of the building after the renovation should not be less than the existing building. This statement is often interpreted such that if the existing elements withstand the current applied loads, they can be *grandfathered* (i.e., the history of trouble-free performance of the existing components proves similar functionality in the future). Hence, no code upgrade or replacement would be warranted. This is not necessarily a true interpretation of the code.

In a recent case in Ontario, a commercial building collapsed immediately following a roof renovation. The building was 30 years old and consisted of a long span, steel-frame structure with no interior columns. The roof renovation project entailed replacement of the metal decking, roof insulation, and the roof purlins with “like kind” material. The weight difference between the new and old roof was about 1% of the total dead loads, which was negligible; as such, no structural analysis was conducted, and the steel frames were deemed adequate following the code provisions. In fact, the building

was *grandfathered*, and only the new components were upgraded to the current code. In the first snow season after the renovation, the building collapsed in a heavy snowfall. The snow load did not exceed the historical heavy snowfalls of that region, which the structure had safely endured in its 30-year life span. Many scenarios were assessed by the forensic experts, and the renovation project appeared to be the culprit. Investigations revealed that the original structure was not properly designed for the unbalanced snow loads; however, the heat loss through the roof had resulted in melting and sliding of snow that could have reduced the ice and snow load by 30% over a long cold season. In fact, the poor insulation was the lifesaver up until the replacement with the new insulation. The *grandfathered* building collapsed while the building code did not explicitly mandate any structural upgrade.

The second gray area is the extent of code upgrades. From an engineering perspective, the affected components of a building after the loss should be built to the current code regardless of the policy wordings. However, this area becomes a matter of dispute when the policy only covers the cost of replacement with “like kind and quality” and the reconstruction of the same building system is non-compliant or unsafe. In such cases, the replacement may cost significantly more than the original system or the actual cash value; this is often considered as “*betterment*”.

In *Carter v. Intact* (2016), the Court of Appeal stated that “replacement cost” plus “code upgrades” fall under the same category when the remedial work is conducted; however, cash value is applicable when the insured decides not to replace the building with like kind and quality. The interpretation of the court of like kind replacement was not a point-by-point resemblance but an overall consistency between the old and new building system.

The extent of code upgrades can be more convoluted when the policy entails a code upgrade limit or exclusion. In this case, the insured has agreed to take the risk of additional cost of code upgrades beyond the policy limits. However, the definition of code upgrade can be challenged by insureds. In a residential flood, multiple buildings in a neighbourhood were to be reconstructed due to substantial structural damage. The engineering firm retained by the insureds recommended a modification to the site grading, elevation of the buildings, and alterations to the original design in order to minimize the risk of similar flood damage in the future. The insurer deemed the changes as *betterment* and insisted on *grandfathering*

the original site geometry in compliance with the code upgrade limit of the policy. The insureds raised the safety concern on the basis that if the houses were built with “like kind,” the residents would be exposed to risks of structural damage, knowing that similar events were likely in the future. Parties finally agreed to follow most of the engineering recommendations beyond the code upgrade limit.

## CONCLUSION

Grandfathering and code upgrades to building systems are often the subject of disputes. A cookie cutter approach in responding to such claims may be unproportionate since policy interpretation and legal arguments may not be completely consistent with the engineering fundamentals. These cases require precise multi-faceted strategies to avoid unnecessary legal costs.

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