

Substantial Completion vs. Substantial Performance

What's the Difference? R1



2018 07 This article has been revised to reflect changes in applicable legislation

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A lot of people live with a lot of ambiguity in various forms of communication. Statistically, GenX and GenY are much more comfortable with ambiguity than older groups. While ambiguity may be accepted in casual communication, when administering a contract, it is important to be clear and unambiguous.

It recently cost one firm hours of effort involving the general contractor, the building inspector, the project designer, the design manager and the project architect to resolve an issue with a form letter because one of the parties didn't recognize the difference between Substantial Completion and Substantial Performance.

Substantial Completion

This term originates in the Ontario Building Code as excerpted below:

1.3.3.4. Occupancy Permit — Certain Buildings of Residential Occupancy

(4) The *chief building official* or a person designated by the *chief building official* shall issue a permit authorizing occupation of a *building* described in Sentence (3), where,

(a) the structure of the *building* with respect to the *dwelling unit* to be occupied is substantially complete and ready to be used for its intended purpose,

With common usage, the term has come to be used more broadly as a catch-all for compliance with all the various applicable parameters stated in the building code under Division C, Subsection 1.3.3. It is most commonly encountered where an owner or tenant desires partial occupancy of a building.

For example, the term Substantial Completion is often applied to compliance with:

1.3.3. Occupancy of Buildings

1.3.3.1. Occupancy Permit — General

(1) Except as permitted in Sentence 1.3.3.2.(1), a person may occupy or permit to be occupied any *building* or part of it that has not been fully completed at the date of occupation where the *chief building official* or a person designated by the *chief building official* has issued a permit authorizing occupation of the *building* or part of it prior to its completion in accordance with Sentence (3).

(2) Sentence (1) does not apply in respect of the occupancy of a *building* to which Article 1.3.3.4. or 1.3.3.5. applies.

(3) The *chief building official* or a person designated by the *chief building official* shall issue a permit authorizing occupation of a *building*, where,

- (a) the structure of the *building* or part of it is completed to the roof,
- (b) the enclosing walls of the *building* or part of them are completed to the roof,
- (c) the walls enclosing the space to be occupied are completed, including balcony *guards*,
- (d) all required *fire separations* and *closures* are completed on all *storeys* to be occupied,
- (e) all required *exits* are completed, including all *fire separations*, doors, door hardware, self-closing devices, *guards* and handrails, from the uppermost floor to be occupied down to *grade* level and below if an *exit* connects with lower *storeys*,
- (f) all shafts including *closures* are completed to the floor-ceiling assembly above the *storey* to be occupied and have a temporary *fire separation* at such assembly,
- (g) measures have been taken to prevent access to parts of the *building* and site that are incomplete or still under construction,
- (h) floors, halls, lobbies and required *means of egress* are free of loose materials and other hazards,
- (i) if *service rooms* should be in operation, required *fire separations* and *closures* are completed,
- (j) all *building drains*, *building sewers*, *water systems*, *drainage systems* and *venting systems* are complete and tested as operational for the *storeys* to be occupied,
- (k) required lighting, heating and electrical supply are provided for the *suites*, rooms and common areas to be occupied,
- (l) required lighting in corridors, stairways and *exits* is completed and operational up to and including all *storeys* to be occupied,
- (m) required standpipe, sprinkler and fire alarm systems are complete and operational up to and including all *storeys* to be occupied, together with required pumper connections for such standpipes and sprinklers,
- (n) required fire extinguishers have been installed on all *storeys* to be occupied,
- (o) main garbage rooms, chutes and ancillary services are completed to all *storeys* to be occupied,
- (p) required firefighting access routes have been provided and are accessible, and
- (q) the *sewage system* has been completed and is operational.

The term relates to a state of completion of a project primarily relating to health and life safety provisions and systems. There is no consideration of the dollar value of the work complete.

Substantial Performance

This term originates in the *Construction Lien Act* R.S.O. 1990, Chapter C.30, continues in the *Construction Act*, and is incorporated in the CCDC standard contracts. Substantial Performance is determined on the basis of suitability for the purpose intended and on a sliding percentage for

the value of work complete. With respect to substantial performance, the *Construction Act* differs only in changes to the threshold dollar amounts.

The *Construction Lien Act* states in part:

2. (1) For the purposes of this Act, a contract is substantially performed,
 - (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purpose intended; and
 - (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost not more than,
 - (i) 3 per cent of first \$500,000 of the contract price,
 - (ii) 2 per cent of next \$500,000 of the contract price, and
 - (iii) 1 per cent of the balance of the contract price. R.S.O. 1990, c. C.30, s. 2(2).

The *Construction Act* states in part:

2. (1) For the purposes of this Act, a contract is substantially performed,
 - (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purpose intended; and
 - (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost not more than,
 - (i) 3 per cent of first \$1,000,000 of the contract price,
 - (ii) 2 per cent of next \$1,000,000 of the contract price, and
 - (iii) 1 per cent of the balance of the contract price. R.S.O. 1990, c. C.30, s. 2(1).

The term relates to both a state of completion of a project and the dollar value of the work complete. Although they must be accounted for, there is no special concern or emphasis on health or life safety aspects of the project.

The Differences

Substantial Completion

Building Code only
Health & Life Safety focus
No financial threshold
Required for partial occupancy
Publication not required
Involves Chief Building Official

Substantial Performance

Construction Lien Act or Construction Act
Project as a whole
Sliding financial threshold
Based in part on suitability for occupancy
Publication required
CBO not involved

From the preceding, it can be concluded that it is possible to be Substantially Complete without being Substantially Performed. Indeed, this is a common occurrence, and is desired when the owner or tenant wants to occupy a portion of a partially completed building.

This situation and a lack of understanding of the differences is responsible for the recommended disclaimer in a letter for partial occupancy, that it should not be considered by a lender as a

declaration of Substantial Performance.

It is a much rarer circumstance that a project could be considered Substantially Performed without being Substantially Complete.

There are times when ambiguity serves useful purposes; however, in this case, the clear and consistent usage and application of the terms Substantial Completion and Substantial Performance are important to profitable contract administration.

For additional information, refer to the OAA Practice Tip PT.10 series