

TO: UBCM Members
FROM: UBCM Executive
DATE: September 5, 2007
RE: **ENFORCEMENT OF THE BC BUILDING
CODE AND RELATED ISSUES**

POLICY PAPER

#2

2007 CONVENTION

1. DECISION REQUEST

To review the general changes that the province is suggesting to the enforcement of the BC Building Code and consider the direction local government should adopt at this time.

2. BACKGROUND

The Building Code applies province-wide, however, the enforcement of the Code is discretionary. The provincial government may establish a building code and local governments may regulate buildings. Local governments must decide if they want to enforce the Code and how to enforce the Code

The Building and Safety Policy Branch which is part of the Office of Housing and Construction Standards in the Ministry of Forests has consulted with over 300 people – owners, developers, designers, builders and trades, local governments, the insurance sector and consumers – about the enforcement of the BC Building Code as part of its Modernization Strategy.

The Building and Safety Policy Branch during discussions with stakeholders heard about the following problems:

- existing defects in buildings – some buildings with significant defects;
- shortage of skilled labour;
- lack of or limited code enforcement – some jurisdictions have cut back or discontinued plan review and building inspection and some rural areas have no regime for regulating construction;
- lack of consistency and predictability – plan review and inspection can be very different from one jurisdiction to another; and
- lack of coordination – building officials, fire officials, safety officers and warranty company inspectors may be poorly coordinated.

The Branch also heard about increased pressures on local governments related to:

- capacity – some local governments just do not have the staff and/or resources to enforce the code effectively, especially with the increasing complexity of design and technology of large buildings;
- liability – some local governments may withdraw from code enforcement to reduce their chances of being sued if claims are made for building defects.

3. CURRENT STATUS

The Building and Safety Standards Branch released a consultation document entitled “Testing the Proposed Future State” on March 29, 2007 and outlined the four key shifts that are required to create a more effective system. The four shifts are:

- Shift 1: Clearly defined authorities and accountabilities for the oversight of building construction.
- Shift 2: A responsive, timely framework and effective tools for decision making.
- Shift 3: Predictable, consistent oversight processes.
- Shift 4: Managing the distribution of liability and risk effectively.

Under this proposal the Branch is proposing province-wide enforcement of the Building Code – review of building design and inspection of buildings under construction to assess code compliance.

Local governments under this proposal would have a choice of whether or not to enforce the Code. As part of this initiative, the branch has suggested that local government would have the ability to delegate the duty to administer the Building Code to a third party or to opt out of enforcement of the Code.

The Branch is proposing that local governments or an alternative third party, such as the BC Safety Authority or a private-sector agency would be required to provide oversight of high-risk areas of building design and construction. Oversight (review of design and construction to ensure Building Code compliance) would be targeted at specified high risk areas, at a minimum. These could include:

- high-risk aspects of construction/building types (e.g. Part 3 residential building envelope; Part 9 residential foundations);
- specific situations or areas (e.g. public buildings in unincorporated areas);
- participants in building projects with a known history of non-compliance or no record of compliance.

In the paper, the Branch has suggested that professional associations may be given the authority to designate specialists and that a province-wide “Certified Professional” (CP) program might be established.

To facilitate the process the Branch has indicated that it intends to provide binding province-wide interpretations of the Building Code and provide bulletins to assist in interpretations; a panel of industry experts would be established to provide non-binding interpretations – guidance and advice to local governments and industry; expand the scope and application of Letters of Assurance; and provide greater oversight in the use of alternative solutions and the level of inspection.

In the document it states that “the province will not review joint and several liability at this time”, but it highlights the fact that the Ministry of Attorney General is consulting on a proposal to reduce the Ultimate Limitation Period (ULP) from 30 to 10 years. This shift assumes the possibility of a reduced ULP in the near future.

The Branch indicates that its consultations with system participants on proposals for non-prescriptive measures, incentives and mandatory insurance has revealed a lack of consensus on an effective approach to mitigate the liability imbalance in the construction sector.

The overall intent of the Modernization Strategy appears to be to clarify the regulation of building construction to result in:

1. Increased Public Safety
 - required inspection of public buildings under construction in rural areas (i.e. resorts and lodges etc.) and of high risk areas of buildings generally.
2. Certainty in Code Enforcement and Delivery of Building Inspection Services
 - province-wide enforcement of the Building Code by local governments or other third parties, such as the BC Safety Authority or a private-sector agency.
3. Clarity and Guidance on Application of the Code
 - provincial authority to provide interpretation bulletins on the meaning of the Building Code that are legally binding.

UBCM has assisted the Branch in undertaking a number of consultation sessions and it has attended the consultation sessions with local government in Nanaimo, Burnaby, Prince George, Kelowna, Terrace and Creston to discuss the proposed changes in the BC Building Code. The Branch also held consultations in Taylor and did a video conference with the Queen Charlotte Islands to get their input into the process.

Some of the key concerns raised by local governments at these consultation sessions were:

- liability – need to address joint and several, need to narrow the ‘duty of care’ local government has when currently inspecting buildings;
- need to ensure competency of builders;
- lack of capacity – technical expertise;
- lack of resources – staff, cost to expand building inspection role;
- financial cost to local residents in small communities/rural areas to use the BC Safety Authority or private agency to provide mandatory ‘building inspection’ for public buildings and high-risk areas.

4. POLICY DISCUSSION

The Modernization Strategy provides an opportunity to produce a better understanding of the roles and responsibilities of those involved in the building process, including local government.

The Province is concerned that there is currently a gap in the provision of building inspection services in some areas of the province. There may be public buildings constructed that do not meet BC Building Code standards and this means that mistakes that impact public safety could go undetected. The ultimate goal is to ensure increased public safety.

In its discussion paper the Branch outlines in a general way its objectives, but it does not clearly outline the problem it is attempting to solve and has provided no detailed analysis of the issues that need to be addressed.

In the consultation sessions the Branch suggested that changes to Building Code enforcement would be introduced over a 2 to 3 year period, legislative changes in 2008 and regulatory changes in the following years. The Branch has not outlined the nature of the legislative changes it is looking at or what legislation would need to be changed to meet its objectives. The lack of information makes it impossible to assess the full impact of the proposed changes on local government.

The Municipal Insurance Association (MIA) in its review of the Modernization Strategy notes that *"it does not address such elements as competency, education, certification of builders/trades, insurance and joint and several liability"* and *"its recommendations are very limited and while they may lead to improvements for local government and industry, the recommendations do not address many of the elements which give rise to litigation and exposure to substantial damage awards for local governments."*

There are a number of key issues that will need to be addressed and more detailed information provided by the Branch on what it intends to do.

Consistency

The Building and Safety Policy Branch has indicated that it wants the Building Code to be applied consistently across the province, particularly as it relates to 'public buildings' and 'high risk buildings'. It has proposed that at some point a multi-stakeholder group be established to help determine the areas of high risk and how code enforcement would be implemented throughout the province.

However, the Branch has been somewhat vague as to exactly what buildings might be captured in its net, particularly as it relates to 'high risk buildings'. The lack of detailed information has made it difficult to determine the full affect of this change on local government. For example, local governments in many cases do not currently inspect the 'building envelope' and may not have the technical expertise to implement this measure. As the MIA noted in its review the requirement that "high-risk" aspects of design and construction be inspected *"could be very problematic for local governments as many will not have the staff resources or expertise to carry out the mandatory services to the required standard. Indeed, it is an open question as to whether it is even possible to conduct inspections of some high risk areas in a way that will ensure Building Code compliance."*

The underlying intent of the Modernization strategy remains somewhat unclear as it relates to local government autonomy in providing the building inspection function. The branch has not defined the degree of oversight or consistency it sees as necessary across the province. It could as the MIA has suggested in its review mean *"The choice of whether to be involved in enforcement of the Building Code compliance will remain with local governments, however the proposals will include a marked reduction in local government autonomy. Local governments that chose to carry out the regulation of construction will no longer have the discretion as to the type and manner of regulatory services they choose to perform, particularly in the case of "high risk" aspects of design and construction."*

The Branch has suggested that in looking at changes to the Building Code it is responding to requests from the development and construction industry for a consistent approach:

- greater consistency in the application of the Building Code across local government;
- increased consistency / flexibility in the application of alternative measures.

Again it is unclear exactly what the Branch is referring to when discussing consistency of application – consistency of outcomes or process. The issue is further complicated by the fact that the need for or desire for consistency can vary depending on the circumstances. UBCM would offer these observations:

- consistency should not be the general rule - as an objective it should be discussed in specific contexts - consistent interpretation of the Code is much different than consistent building permit application processes;
- we do have a consistent province-wide Code;
- greater consistency in some areas is however not compatible with the local government delivery model since it implies provincial regulation (if voluntary compliance fails) and that is not compatible with the local autonomy now provided. For example, consistency in terms of building permit applications and plan reviews would certainly affect the way local governments structure their operations;
- we should focus on consistency in terms of outcomes of building regulation (e.g. buildings are safe; don't leak) than consistency in terms of the process to achieve these outcomes;
- consistency could lead to more regulation and hence less flexibility for industry. For example, a provincially delivered building regulation system is potentially more compatible with higher levels of consistency in "processing" than a local government system but it is less able to adjust to local situations;
- consistency doesn't mean it's the best approach - it could be the wrong approach - and in that case local government can't be held accountable for the outcomes - those imposing the consistent approach must accept accountability;
- consistency can lead to a more rigid process and may stifle innovation;
- consistency is defined as "conforming with previous practice" - not best practices or the correct practices.

UBCM would suggest that there is a need to ensure consistent interpretation of the Code on a province wide basis and that the focus should be on the outcome of the building regulation, namely the construction of safe buildings and not on the consistent implementation of a province wide building permit application process. The solution to this issue would appear to be increased education and assistance to local government in providing consistent interpretation of the Code on a province wide basis.

Alternative Solutions

In the case of the use of alternative solutions, currently local governments have sole decision-making authority. A mechanism for independent review exists now as local governments can ask for a "peer review" of alternative solutions and the City of Vancouver has an internal appeal process. The UBCM would make the following observations:

- the Branch has not collected much data on the experience of smaller communities with alternative solutions – i.e. scope of the issue;
- a major deterrent to accepting alternatives for local governments is liability;
- alternative solutions cannot easily be transferred (e.g. rubber stamped) since circumstances vary;
- alternative solutions are not relaxations;
- alternative solutions cannot be a substitute for building code change – if a solution becomes generic, the Building Code should eventually change to reflect the new standard;
- with the new performance based code coming into effect December 15, 2007, we have little experience with whether more or fewer alternative solutions will be accepted.

It is not clear that there is a problem in this area or exactly what the nature of the problem might be, particularly given the introduction of a new performance based code. The issue of increased acceptance of some alternative solutions might be addressed through more information on what might be considered acceptable practices.

Capacity and Resources

In its proposal the Branch has recognized that some local governments may not have the technical capacity and/or staffing resources to implement a building inspection process. It has proposed that local government have the option to either delegate the building inspection function to another local government, the BC Safety Authority or a private-sector agency or to opt-out of providing the service in which case the Province would assign the responsibility for building inspection to the BC Safety Authority or a private sector agency. It is not totally clear how the building inspection function would link up with zoning, development permits and other decision-making processes (i.e. building and occupancy permits etc.) within a local government that had delegated and/or opted out of the function.

There remain a number of lingering issues around this proposal. It remains unclear, whether or not the BC Safety Authority is interested in undertaking the building inspection function or that it has the capacity to undertake this kind of initiative. The BC Safety Authority has not formally indicated what its views are on the issue of undertaking building inspections. If the BC Safety Authority did not perform the function, it is not clear how the private sector agency would be established. Private sector models for building inspection have been created in a number of other jurisdictions with mixed results (i.e Alberta, Ontario, Australia, United States etc.).

The costs to the developer/contractor of using the BC Safety Authority or a private sector agency to undertake the building inspection function have not been identified.

One of the underlying challenges in this process will be to ensure that there are enough trained building inspectors to implement any new measures that may be introduced. There is currently a shortage of building inspectors to meet existing inspection requirements.

Competency

A number of local governments raised the need to ensure the competency of the building trades and it was suggested that if this was improved it would reduce the

number and frequency of inspections that are currently undertaken. It was pointed out by a local government that *“presently, only a few of the building trades, electrical, gas and plumbing that are involved in the construction of a building, are required to have trade qualifications, licencing and bonding. It would be beneficial for all involved in the construction industry if this trade qualification, licencing and bonding was expanded to also include the other sub-trades on a building project, such as framers, stucco, window and waterproofing installers, to name a few. Experience has shown that this is an excellent method to ensure the trades responsible for the work share in the responsibility to correct problems related to their workmanship.”*

There is a need to ensure an ongoing partnership between the development industry, local government and the Province. Competent building trades reduce the amount of oversight that is required on a construction site and ensure that safe buildings are constructed in accordance with the requirements of the Building Code. It is important that each partner understand the role that they play in the process and the responsibility they have in making the process work.

Liability

A number of local governments during the consultations noted that local governments have been withdrawing from Building Code enforcement because they face a liability burden disproportionate to their actual responsibility for defective buildings. As one local government described the problem:

Under joint and several liability, any one defendant found responsible for even a small degree of fault can be called upon by the successful plaintiff to pay 100% of the damages. In a typical defective building case, such as a leaky condo, defendants would include the architect, the builder, the consultants and the subcontractors and the municipality. All of the private sector defendants are capable of insulating themselves from judgements through numbered companies, minimal insurance, bankruptcy etc. whereas the municipality has essentially unlimited deep pockets and exists in perpetuity. If a court finds that negligent municipal inspections were responsible for 5% of the damages, the municipality can be called upon to pay 100% of the damages if the other defendants have no ability to pay.

It is the unfairness of the principle of joint and several liability in defective building cases which has been driving municipalities away from building code enforcement . . .

During the consultations some local governments suggested that if local governments are going to be required to inspect and approve the design and construction of buildings and, in particular the design and construction of high risk areas of buildings such as building envelopes, then it should be insulated from liability for those actions. Furthermore, if local governments are to consider and approve alternative solutions to building construction than that outlined by the Building Code, then it should be insulated from liability for those actions.

The MIA in its review of the strategy pointed out *“that local governments must have immunity from liability for issuing permits based on the work of others, whether that work is delegated by a local government or is done at the direction of the Province”* and that the current strategy when utilizing third party review mechanisms *“provides a means for local*

government to reduce their exposure to liability for failures arising from construction but it does not eliminate that exposure.”

During the consultation sessions the Branch indicated that it recognizes the need to address the issue of joint and several liability and will make this recommendation to the Minister when it reports back. It pointed out that it cannot make any promises that the Province will take any action on the matter.

In the consultation sessions the Branch also suggested that it might be willing to look at ways of limiting local government liability in some areas, such as plan review in regional districts and in cases where local government rely on professional advice when approving development.

UBCM has long advocated the reform of joint and several liability. The failure to acknowledge this concern was generally seen as a shortcoming in the process. In response to a discussion paper in 2002 on Civil Liability by the Attorney General UBCM made the following recommendations related to the principle behind liability and the issue of joint and several liability:

A Fundamental Principle

That civil liability reforms should be guided by the fundamental principle that individuals and organizations should be responsible for the consequences of their actions, not for the actions of others; and their liability should be commensurate with their degree of responsibility.

Joint and Several Liability

That the concept of joint and several liability for property damage and economic loss is inappropriate in a modern society and should be abolished.

That joint and several liability be replaced by a system of pure several or proportionate liability (such as now exists in cases of contributory liability) under which defendants are responsible only to the degree to which they contributed to the loss.

UBCM has also advocated an alternative position of a 10 year ultimate limitation period and mandatory insurance. Our rationale is that with a defined term the insurance industry should be able to price the risk of a 10 year term. The Ministry of Attorney General has undertaken consultations and is currently looking at whether to reduce the Ultimate Limitation Period (ULP) from 30 to 10 years. In response to a discussion paper in 2002 on Civil Liability by the Ministry of Attorney General the UBCM made the following recommendations related to the Ultimate Limitation Period:

Ultimate Limitation Period

That UBCM support the BC Law Institute July 2002 report on "The Ultimate Limitation Period: Updating the *Limitation Act*". In particular:

- i) that the 30 year ultimate limitation period of general application be reduced to 10 years;
- ii) that the *Limitation Act* provide a special ultimate limitation period of 30

years applicable to cases of fraud, fraudulent breach of trust or willful concealment of facts material to the claim;

iii) that the provisions of the *Limitation Act* which provide a special ultimate limitation period of 6 years for medical practitioners, hospitals and hospital employees, be repealed; and

iv) that the *Limitation Act* be amended to provide that the commencement of the running of time under the ultimate limitation period is from the date an act or omission that constitutes a breach of duty occurs, where the plaintiff's action is based on breach of duty, whether that duty arises under a contract, statute or the general law.

UBCM in response to a Green Paper review of the Limitation Act undertaken by the Ministry of Attorney General in 2007 made the following recommendations:

- reiterated UBCMs long standing support for the reduction of the Ultimate Limitation Period to 10 years; and
- supported a basic two year limitation period.

5. CONCLUSION

While there has been considerable work and consultation on changes to the Building Code regulatory system, the point has not been reached to move forward in all of the areas identified in the strategy. After much preparation the Branch released a discussion paper in spring 2007 and followed that with a significant effort to consult with local governments.

UBCM heard that local government supported measures that increased building safety. There were as well other aspects of the discussion paper that local government supported, such as:

- consistent interpretation of the Building Code on a province-wide basis to ensure the construction of safe buildings;
- more information to develop a better understanding of the roles and responsibilities of all the parties involved in the building process;
- provision of binding province-wide interpretations of the Building Code;
- provision of bulletins to assist in interpretations;
- expansion of the scope and application of Letters of Assurance; and
- increased use of specialists and professional associations in matters such as Alternative Solutions.

Local governments were concerned about the imposition of a mandated enforcement system. If there was a move to a mandated function there was interest in exploring the option of delegating the function to the BC Safety Authority or a third party but these options needed more work to properly understand them. There also needed to be further work on other related issues, such as:

- legislative definition of roles and responsibilities;
- training of trades for competencies.

However, throughout the discussions participants observed that the root cause of many of the problems could be traced back to the joint and several liability situation. It was repeatedly suggested that tackling the liability situation would solve many of these

problems and not tackling it would always leave local government with a continuing fear of the consequences of their involvement in the system.

The following recommendations, which need to be implemented, are presented in two parts:

- i) a limited number of strategic actions that can and should be made now to provide for more effective implementation of the Building Code;
- ii) reiteration of the long-standing UBCM position on liability which is needed to address the fundamental issue faced by local government when enforcing the Building Code and is needed to provide for more effective enforcement of the Building Code.

6. RECOMMENDATIONS

Part 1 - Strategic Actions

UBCM request the provincial government to expand the existing statutory immunities for plan reviews by professionals to include reliance on professional specialists (engineers and architects) on a range of other matters such as Alternative Solutions or issuing occupancy permits and to provide statutory immunity to local governments when relying on the advice of professionals in these areas.

UBCM request the provincial government to provide authoritative Code interpretations and mandate the Building Code Appeal Board to make authoritative rulings and to provide statutory immunity to local governments when relying on these rulings.

UBCM support the Building and Safety Policy Branch in undertaking further policy work to improve the building regulatory system before advancing final recommendations, while maintaining existing local government jurisdiction.

Part 2 - Fundamental Balancing of Roles and Responsibilities as determined by Liabilities

That civil liability reforms should be guided by the fundamental principle that individuals and organizations should be responsible for the consequences of their actions, not for the actions of others; and their liability should be commensurate with their degree of responsibility.

That the concept of joint and several liability for property damage and economic loss is inappropriate in a modern society and should be abolished.

That joint and several liability be replaced by a system of pure several or proportionate liability (such as now exists in cases of contributory liability) under which defendants are responsible only to the degree to which they contributed to the loss.

That the 30 year ultimate limitation period of general application be reduced to 10 years.

That a basic two year limitation period be implemented.

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