

**TO:** CITY MANAGER

1997 JANUARY 06

**FROM:** DIRECTOR PLANNING & BUILDING

**SUBJECT:** LIABILITY CLAIMS

**PURPOSE:** To provide Council with information regarding the status of initiatives to reduce the City's potential exposure to construction-related liability claims.

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**RECOMMENDATION:**

- 1) **THAT** Council receive this report for information purposes.

## **REPORT**

### **1.0 BACKGROUND**

This report was prepared at the request of Council arising from consideration of a recent claim pertaining to the failure of a post tension structure to perform as designed. While the City maintained its position of assuming no responsibility for either the structural design or inspection of structural elements, it was named as a co-defendant in the suit.

#### ***Role of the City:***

Local Government provides Plan review and Inspection services to achieve a satisfactory general level of compliance with a variety of bylaws, including Building, Electrical, Zoning and Plumbing and Gas. These services are not intended to assure individual owners or occupants of compliance of a specific building. The onus for constructing and maintaining buildings and structures in a safe condition rests with property owners and designers/contractors. Without duplicating the extensive effort required to design a building and provide supervision throughout its construction, Local Government cannot ensure the level of compliance expected of an owner and the professional team. It would not be cost effective to do so. Indeed, to the extent that industry comes to rely on Local Government checks and inspections, overall safety standards may be compromised if owner/professional attention to safety is reduced. There is no alternative to involvement and commitment by the owner and the professional consultants.

Local Government Plan review and Inspection services will identify many potential safety hazards which they will require to be corrected in the interest of public health and safety.

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These services provide procedures which devote attention to areas where the expertise and experience of building officials suggests there may be higher than normal or acceptable risk. This is a cost effective form of control which has contributed to the relatively high level of safety in the built environment. It covers many more aspects of design and construction activity than structural design. In addition, the B.C. Building Code now requires the use of Letters of Assurance to ensure that proper professional involvement is provided in both design and supervision of construction.

Local Government is the only participant in the building safety system which may be considered an independent third party having the protection of the public with respect to health and life safety as its sole interest. It is therefore desirable to maintain and enhance these services, rather than reduce the role of local government. Accordingly in 1992, RAAC recommended:

- a) the present role of Local Government in providing "quality control" procedures and seeking an overall level of compliance be maintained;
- b) legislative changes be put in place, where required, to ensure that Local Governments checking plans or conducting inspections on behalf of the community do not assume liability to individual owners and contractors as a result of these procedures.

***Bill 71:***

The adoption of Bill 71 and subsequent amendments to Section 755.4 of the Municipal Act provided local governments an opportunity to reduce liability resulting from Plan Checking, however, this did not address the corresponding and equally important liability which accrues from inspections. For this reason and the 1990 Court decision in *Dha v. Ozdoba and Richmond*, which indicated this was partial protection at best, few local governments have utilized this legislation. Through UBCM, the Local Government and the Building Officials' Association have been actively pursuing further amendments to resolve this issue. While a further submission was made by RAAC in 1993 recommending expansion of Sections 734 and 755.4 to include inspections, this issue remains outstanding. It has, however, been identified as a critical element in Phase 1 of the current Safety Systems Review which involves defining the roles and responsibilities of the participants.

***History of Construction Liability:***

Claims against Local Government for failing to authorize, control, inspect, limit and restrict construction, thereby owing a duty of care to owners and subsequent purchasers of buildings, were largely unknown 15 years ago. The majority of these claims today relate to an alleged failure by the Building Inspector in the field to discover, during the construction process, breaches of the standards set out in the Building Code. Claims are also made for failure to discover engineered or non-engineered design defects at the building plan approval stage and failure to detect potential geotechnical problems particular to a site.

***The Problems:***

The principal legal problem lies with the issue of recovery from Local Government in tort for economic losses arising from the failure of buildings to perform to the minimum requirements outlined in the B.C. Building Code.

Today, there is a prevailing misconception that there exists a warranty of construction by local Governments without regard to the date of the construction, involvement of design professionals or compliance of the owner and contractor with the standards set out in the B.C. Building Code and City bylaws. The law regarding joint and several liability further magnifies the transfer of negligence from individuals responsible for standards compliance to the Government agency responsible for monitoring compliance.

1) ***Limitation Period:***

Claims against local governments for building claims more than ten years following the date of issuance of the building permit, are difficult to defend due to a lack of records and/or witnesses. There needs to be some reasonable limitation period.

2) ***Joint & Several Liability:***

Many design professionals in the Province do not carry liability insurance, many developers incorporate small companies to shelter them from claims or simply have no assets to compensate the parties they injure. Governments are an easy target through their building regulation function to acquire the funds necessary to pay injured parties.

Where a separate and distinct action is brought against each of two or more persons, the actions are said to be "several" in that each one is liable alone. If all the persons are joined as defendants in one and the same action, it is called a "joint" action.

A liability is said to be "joint and several" when the creditor may sue one or more of the parties to such liability separately, or all of them together.

In a joint and several action, each defendant is jointly named and liability may be apportioned by the Courts as a percentage, based on the determined level of involvement or responsibility. Where a defendant is found by the Courts to be liable to any degree (i.e. 1%), and the remaining defendants jointly named, are not able to provide compensation as apportioned by the Court, the remaining defendant may be responsible for the entire amount.

3) ***Transferable Warranty of Fitness:***

These claims are primarily responsible for the growth in the numbers of new building inspection claims.

Unfortunately, the inferior quality of materials used by some builders, their lack of experience, their attempts at shortcuts and cost savings and their poor budget skills can lead to an inferior product. For the regulator to discover all the defects and then provide an unlimited warranty that no defects hidden or otherwise are present, results in the Regulatory Authority becoming an insurer of the work and the product it regulates. Although more time and effort is spent on projects involving the less qualified and the less experienced builders, there is an increased probability that the inspector will not find all of the faults.

***Recommendations of the Municipal Insurance Association to the Provincial Government - 1992:***

- 1) That liability of a Local Government arising out of its building regulation services be limited to a reasonable period of time following the provision of those services. The ultimate limitation period should be reduced from 30 years to 10 years from the date that the service is rendered.
- 2) Where the owner/builder of a property has failed to meet the B.C. Building Code Standards and is in breach of the City bylaws, liability of the parties should be several - not joint and several.
- 3) Design professionals in B.C. should be required to maintain insurance adequate to the risk involved.
- 4) Local Government should not be liable for claims involving the use of sub-standard building products unless they have actual knowledge of a defect in the product and have been advised by the agency which monitors and tests products for Standards compliance.
- 5) The advancement of education and certification standards throughout the building industry.

**2.0 PROVINCIAL INITIATIVES**

***Report of the Commissioner Inquiry - Station Square Development:***

In 1988 a report was prepared by Dan J. Closkey which not only outlined the reasons for the Save-on-Foods roof collapse, but offered recommendations to prevent future occurrences. While the primary focus of the report was to identify the problems and recommend solutions to prevent future occurrences, these solutions would also effectively reduce the liability exposure of local governments. The following recommendations were contained in the report:

- 1) *The Provincial Building Code should be amended to require structural design monitoring procedures for Part 4 Buildings.*

One of the leading causes of claims has been structural failures.

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The Association of Professional Engineers and Geoscientists of B.C. (APEGBC) has developed a pilot program with the cooperation of the City of Vancouver to carry out independent structural reviews on selected major projects designed under Part 4 of the Code. This program was recently ratified by the APEGBC Board and is intended to be implemented in the City of Vancouver in 1997 January. While legislative changes will be pursued, it is intended to offer this process to other local governments early in 1997.

- 2) *The Building Code should be amended to incorporate standard Letters of Assurance to be used throughout the Province in connection with buildings governed by Part 4 of the Code.*

Letters of Assurance were developed with the assistance of the Professional Associations and the Building Officials' Association and were adopted as part of the 1992 B.C. Building Code. These letters were developed to ensure that all of the various responsibilities of the professionals were being addressed.

***Options for Renewal:***

In 1993, the Province initiated a study of the issues identified in the Closkey report and a review of the regulatory system with regards to building construction.

A discussion paper titled "Options for Renewal", which outlined a number of important issues relating to the building regulatory system, was issued in 1994 March.

It should be noted that all participants, including regulatory authorities, were involved in the development of this discussion paper. The following is a summary of the issues identified:

- 1) Define through regulations the mandatory roles and responsibilities of everyone involved in the building regulatory system: owners, designers, builders, local government and the Province.
- 2) The liability of Local Government should be commensurate with its practical responsibilities in the building regulatory system. Local government building liability protection should be expanded through legislation.
- 3) All citizens of British Columbia should have an acceptable, equitable and consistent level of building safety. This involves issues of uniform code application throughout the Province and consistency in application and interpretation.
- 4) All participants in the building regulatory system should have an acceptable level of competence in their respective fields. This would require recognized training, education and certification programs for all participants in the building regulatory system.

- 5) The process for approving an increasing number and complexity of building and plumbing products should be clear, efficient and acceptable.
- 6) Existing building legislation and related regulations should be reviewed to ensure that they adequately address current concerns and can accommodate future issues.

It is important to note that all of the issues identified above would assist in reducing the liability exposure of Local Government.

### 3.0 CURRENT STATUS

#### *Safety Systems Review:*

With the assistance of the Building Safety Advisory Council, it was concluded that the first priority should be to clearly define the roles and responsibilities of the various participants. The result of this would be to prepare legislation to recognize the various roles and responsibilities and to outline mandatory qualifications and accountability, commensurate with those responsibilities.

This process was commenced by the Building Safety Advisory Council in 1995 and was initially limited to the building regulatory system. The Terms of Reference were expanded during the process to include a review of Provincial responsibilities, such as aerial tramways, pipelines, elevating devices, high pressure gas, etc.

Unfortunately, this resulted in creating a review process which was confusing and complex, making it very difficult to achieve meaningful results. In fact, this phase of the Safety Systems Review process has experienced several difficulties regarding the process which has been followed and the format and contents of resulting documentation.

Participants in this process have been recently informed that funding for this phase will end in 1997 April, therefore, recommendations must be completed by this date. It is unlikely that the original objectives of this review will be attained by the Spring of 1997, given the convoluted process and additional complexity of including the Provincial responsibilities. A discussion paper and background document was distributed on 1996 November 22 for comment by 1997 January 21. The majority of participants have continued to express concern with both the contents of the papers, in that they contain only a brief and sometimes misleading overview of the work group discussions, given the complexity of the issue, and the number of questions to be addressed. While the results were to be documented and presented to the work groups for development of recommendations, this process has been eliminated. The Province will now prepare the recommendations for review by the Safety Systems Steering Committee.

Based on discussions and information presented, participants in the Safety System Review process concluded that the Province will probably eliminate or drastically reduce its involvement in the safety system through the transfer of responsibilities to either local government or private industry.

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***Elimination of Building Standards Branch:***

Compounding the concerns of those in the building regulatory system is the recent decision to eliminate the Building Standards Branch, which has been the catalyst in achieving an improved level of cooperation, code consistency and building safety in the Province. This decision may also have a serious impact on the proposals developed during the Safety System Review process which were premised, in part, on the existing infrastructure, including the Building Standards Branch.

While the essential technical responsibilities of the Building Standards Branch will be eliminated with the closure of the Branch, the Provincial Government intends to create a new "Corporate Policy Branch" which will include the Director and a staff member of the former Building Standards Branch. The responsibilities which these people will assume and the mandate of this new Branch are unclear at this time other than the fact that only policy-related issues will be dealt with.

Reducing liability is not simply a matter of introducing appropriate legislation; it also requires a concerted and cooperative effort to ensure improved code education, uniformity in application of regulations and qualifications of participants. The Building Standards Branch has always played a leading role in developing and maintaining the framework essential for an effective safety system. It is likely that many of the responsibilities of the branch will have to be assumed by private industry or Local Government. This may result in fragmenting the responsibilities, which will be a major step backwards for building safety, and one which may adversely affect the liability concerns of the Local Government.

At a meeting on 1996 November 15, the Building Safety Advisory Council passed a motion to prepare a response to the Honorable Mr. G. Clark outlining the concerns of those involved in the building safety system, and requesting a meeting to discuss possible opportunities to reconsider the decision. The Deputy Minister, Ms. Suzanne Veit, attended a subsequent meeting of the Building Safety Advisory Council on 1996 December 06.

While Ms. Veit clearly indicated the decision would not be reversed, she better appreciated our concerns and offered to explore possible ways in which to address our concerns within a new framework.

#### **4.0 OTHER INITIATIVES**

***BOABC Act:***

We have been informed that the proposal from the Building Officials' Association of B.C. for recognition as a profession through legislation will continue as a mandate of the proposed new Corporate Policy Branch. Work is still proceeding to have this submitted for the 1997 Spring sitting. This Act will address liability concerns in part, in that it will provide for discipline procedures for its members and result in greater recognition and requirement for education and certification programs. Improving education and qualifications is an essential ingredient in reducing liability claims.

***B.C. Roofing Association:***

This Association has recently requested amendments to the Apprenticeship Act in an effort to improve the quality of roofing. The residential roofer is currently excluded from this trade and therefore does not have access to training and certification. It is proposed that residential roofers be included as a trade, and as such, be regulated under the "Compulsory Trade" section of the Apprenticeship Act. This appears to be in keeping with the direction of the Safety System Review process and the need to make each participant accountable.

**5.0 OTHER REMEDIES AVAILABLE TO MITIGATE LIABILITY**

***1) Section 735 of Municipal Act - Unsafe:***

This section provides the authority for Council to authorize by bylaw:

- a) the demolition, removal or bringing up to a standard specified in the bylaw of a building, structure or thing, in whole or in part, that contravenes a bylaw or Council believes is in an unsafe condition; or
- b) the filling in, covering over or alteration in whole or in part, of an excavation that contravenes a bylaw, or that Council believes is in an unsafe condition.

This section could be used in instances where, for example, a building has been damaged by fire and is left abandoned or unrepaired. It can be used in a situation where a person has ignored existing bylaws and has resisted any attempts to have such building comply with the Building Code. While there may be many other uses, it is apparent that this section allows for the fact of a danger being presented by such a building or structure.

This section presents a quick and reasonably effective remedy in some cases. Once the City has complied with the requirements to establish the remedy, the courts will support the City. *Rosland v. Camozzi*, (BCCA) July 27, 1994.

***2) Section 936 - Nuisance:***

The Council may declare a building, structure, or erection of any kind, or a drain, ditch, watercourse, pond, surface water or other matter or thing, in or about a building or structure, a nuisance, and may direct and order that it be removed, pulled down, filled up or otherwise dealt with.

This section applies to any building, structure or erection of any kind which the Council believes is so dilapidated, unclean or unsafe as to be offensive or a hazard to the community.



3) *Section 751-Injunction:*

If a building is erected, altered or used, or land is altered or used in contravention of the Municipal Act or a bylaw under this Act, the City may commence a court proceeding at its own instance to restrain the contravention.

4) *Section 750.1 - File a Notice:*

Where, during the course of carrying out his/her duties, a Building Inspector:

- a) observes a condition, with respect to land or a building or structure, that he/she considers
  - i) results from the contravention of, or is in contravention of a bylaw or regulation relating to the construction or safety of a building or structure, and
  - ii) as a result of that condition, a building or structure is unsafe or is likely to be usable for its expected purpose during its normal lifetime, or
- b) discovers that anything was done with respect to a building or structure or the construction thereof that required a permit or an inspection under a bylaw, regulation or enactment, and that the permit was not obtained or the inspection not satisfactorily completed,

the Inspector may, in addition to any other action that he/she is authorized or permitted to take, recommend to Council that a resolution be made to file a Notice in the Land Title office.

Subsection (10) of Section 750.1 states that "Neither the Building Inspector nor the City is liable for damage of any kind for the doing of anything, or the failure to do anything under this section that would have, but for this subsection, constituted a breach of duty to any person....."

The potential for liability of the Inspector or the City is limited if the power of this section is properly invoked. Subsection 10 is of great significance since if a Building Inspector acts properly under this section, and along with the City does nothing more than filing the Notice, liability will not arise even if it can be shown that by taking some other step of enforcement the City could have avoided the damages.

This section seems therefore to serve two useful purposes:

- 1) Limiting the liability of the Inspector and the City, and
- 2) Offering a quick and effective means of fulfilling any obligation to act.

**6.0 CONCLUSION:**

The City should continue to utilize the options provided in the Municipal Act to reduce the potential exposure to liability claims. As identified, a number of initiatives have been completed or are underway to deal with other concerns identified in reports by both the Closkey Commission and the Provincial Government with industry participation. However, some of the concerns identified regarding joint and several liability, accountability commensurate with responsibility, qualifications, education, warranty and insurance, remain outstanding and require a concerted effort to bring them to a successful conclusion.



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