City of Burnaby

Item	01
Meeting	2009 June 1

COUNCIL REPORT

TO: CITY MANAGER **DATE:** 2009 May 07

FROM: CITY SOLICITOR

SUBJECT: **LOCAL GOVERNMENT LIABILITY IN BUILDING REGULATION**

PURPOSE: To Provide Council with Information on the Ongoing Problems Facing the City in Litigation Arising out of Building Construction Regulation

RECOMMENDATION:

1. **THAT** Council receive this report for its information.

REPORT

Council is aware that the City has over the last decade become increasingly involved as a defendant in civil legal actions relating to building construction.

This litigation typically involves buildings that have suffered damage from an alleged defect or defects in the design or construction of the building.

The City, like other municipalities in British Columbia, regulates the construction of buildings within its boundaries under its Building Bylaw. Standards of construction in B.C. are governed by the B.C. Building Code for all municipalities other than the City of Vancouver. The B.C. Building Code is mandated by the Province through a Provincial regulation. The Building Bylaw establishes the processes and procedures by which the City administers the Building Code. The Bylaw requires that the builder obtain a building permit from the City prior to commencing construction and occupancy approval prior to the occupancy of the completed building. As part of the regulatory process the Building Department carries out both a plan review prior to permit issuance and site inspections at a limited number of stages of construction as specified in the Bylaw.

For construction of buildings other than single family residences, the plan checker reviews the building plans for limited life safety related items. The plan checker is not an architect or engineer and relies on the registered professionals to ensure that the building design meets Building Code requirements. In this regard, the plan checker ensures that design drawings bear the registered professional's seal and relies on this and the letters of assurance from the registered professionals for all matters other than the limited life safety items.

The building inspection process can best be described as a spot audit process. The building inspector performs the limited inspections mandated by the Bylaw which, again, focus on life safety issues. The registered professionals are responsible for the review of construction to ensure that the building meets the design and complies with the Building Code, and they must provide the City with letters of assurance that they have carried out that review. The City building inspector is not on site at all times (the inspector's presence is in fact very limited) and, again, the inspector is not an architect or engineer.

It should also be borne in mind that the Building Code establishes minimum standards for construction and that many Building Code requirements for complex structures are design or performance based, in that they set a construction goal and leave it to the registered professional to achieve that goal in the design. Building Department staff are not qualified, and should not be expected, to second guess the registered professional on such matters.

The most common type of construction problem giving rise to legal actions against the City in recent years is that commonly known as the "leaky condo". This typically involves a multi-family residential development constructed in the late 1980's or early 1990's that has suffered water ingress damage resulting from the failure of the building envelope to shed water (wind-driven rain in particular) and prevent its entry into the wall assembly.

The leaky condo problem is not, of course, confined to Burnaby, but has occurred in communities throughout the Lower Mainland and Vancouver Island.

By Order in Council on April 17, 1998, the Province appointed a Commission of Inquiry under former Premier Dave Barrett to investigate and report on the leaky condo crisis. The Commission held 29 public hearings and received more than 730 written submissions. It reviewed current legislation, considered a number of public and private reports, and considered approaches taken in other jurisdictions.

The Commission reported its findings in June 1998, and in its report made 82 recommendations.

In the opening part of its report, the Commission stated:

> *"In addition to economic and climatic conditions, process and building science issues have led to a disintegration in the quality of construction. The building process has been undertaken in a largely unregulated, residential construction industry, driven to the lowest common denominator by ruthless, unstructured competition."*

The Commission found that, aside from climatic factors, the two major factors that had led to the problem were:

1. The Residential Building Process

   - lack of developer and contractor responsibility – often facilitated through protective corporate structures
   - lack of skills, training and qualifications for construction trade workers
   - architects unable to maintain professional responsibility in translating designs into quality structures
   - inability of municipalities to effectively monitor building quality
   - lack of information from the builder to the strata council on building maintenance
   - inadequate home warranty program

2. Building Science

   - poorly interpreted building code
   - application of building designs and use of new building materials without an understanding of how they would perform in the coastal climate
   - lack of conventional wisdom among all parties involved in the process regarding the requirements for effective building

In relation to the roles of the various parties involved in the construction of these buildings, the Commission stated:

> *"It is the Architect's responsibility to ensure that the project's design and construction substantially conform to the relevant building codes. It is the municipal inspector's responsibility to ensure the code has not been violated. However, municipal officials approve plans for permit purposes and undertake minimal on-site inspections. Inspections do not cover building envelope design, but deal with foundations, sheathing, framing, insulation, and a final inspection for occupancy."*
>
> *"If it is not the municipality's role to ensure the quality of construction, then whose is it, and what is the responsibility of the municipality's inspection department? The ultimate responsibility for the quality of construction must rest with the developer/builder. The developer can then contract that responsibility to the professional architect or engineer."*

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> *"It is the provincial government's role to establish codes and standards, while it is the developer's role to ensure that construction complies with standards. The registered professional (architect or engineer) has the responsibility of designing the building and ensuring field reviews are undertaken during construction. The role of the building official is to monitor the process."*

The Commission found, however, that the general perception of the public as to the role and responsibilities of the municipal building inspector was quite different:

> *"It should be noted, however, that regardless of what the role of municipalities has become, there has been an expectation on the part of the consumer and the development industry that code compliance was being enforced by municipal inspectors. Municipal inspectors were being regarded as the interpreters of the code."*
>
> *"It is apparent from the numerous statements and comments made to the Commission by frustrated and angry condo owners, that the role of local government, with respect to building inspection and plan checking, is widely misunderstood."*

Unfortunately, the latter observation continues to reflect the situation. There is a general misunderstanding that prevails in the community that municipal building officials play a much greater role in the building process than they actually do, and that the issuance of an occupancy permit is in some sense not only a warranty by the municipality that the building complies in all respects with the Building Code, but confirmation that it is well built. As noted by the Barrett Commission, the role of the municipal building official is that of a monitor only. Building standards are the responsibility of the Province. The responsibility to ensure that the building design complies with Building Code requirements is that of the design professional and the responsibility to ensure that the building construction complies with the Building Code requirements and design is that of the developer and the registered professionals.

Perhaps the most important of the Barrett Commission's recommendations that was instituted by the Province was the enactment of the *Homeowner Protection Act.* This legislation established:

1. a licensing system for residential builders

2. statutory warranties of quality and habitability applicable to new residential construction

3. a requirement for mandatory third party warranty policies on new residential construction

4. the creation of the Homeowner Protection Office to administer the licensing of residential builders and the third party warranty system, and to carry out research and education in the field of the B.C. residential construction industry.

While it is expected that this legislation will go a long way toward improving residential construction, the legislation was not retroactive and has no effect on pre-1998 residential construction, and in particular the multi-family residential developments constructed in the 1980's and early 1990's. These continue to be the main source of litigation involving municipalities.

While there was some sense of optimism among municipalities and their legal advisors at the time of the Barrett Commission Report that municipalities and their building departments would not generally be held responsible in the litigation that was beginning to flow from the crisis, and that municipalities would not be looked to share in the repair costs, the reality has been otherwise.

The first, and to date only, leaky condo lawsuit that has gone to trial in B.C. is that of *The Owners Strata Plan NW3341 v. Canlan Icesports et al*, a 2001 decision of the B.C. Supreme Court (now commonly referred to as the "Delta decision"). In that case the City of Delta was found contributorily negligent to the extent of 20% for the negligent design and construction of the building, but due to the principle of joint and several liability ended up, staff understand, paying the bulk of the reported $3 million judgment for repair costs

A review of the facts in the Delta decision do indicate that the building department arguably made some operational errors, such as accepting design drawings that did not bear an architect's seal and were not in fact prepared by a professional architect. Some comfort has since been taken that, where the municipality did rely on architectural drawings, did obtain the letters of assurance of the registered professionals as required by the Building Code or (prior to the 1992 Building Code) by Building Department policy, and did perform the inspections mandated by its own building bylaw, its actions would be distinguishable from those considered in the Delta case, and the municipality would not be held liable.

However, certain comments and findings in the Delta decision have left a degree of uncertainty and concern for municipalities. The court pointed out that the opening preamble to the Delta building bylaw stated that it was "to make provision for the administration and enforcement of the said Building Code" (emphasis added), which was typical of local building bylaws at that time including Burnaby's former building bylaw (but not its current Building Bylaw). The reasons for judgment may suggest that if the stated purpose of the building bylaw is the enforcement of the Building Code, municipalities cannot, by policy, limit plan review and building inspections to certain aspects of Building Code compliance only, and that the municipality is responsible for ensuring complete Building Code compliance for all elements of the structure, including the sufficiency of performance based design elements of the structure (such as the building envelope).

It is open to argument that the mere inclusion of this wording in the preamble of the Bylaw does not preclude the municipality from making a legitimate policy decision to limit the scope of its plan review and building inspections, and to rely in other respects on the assurances of the registered professionals involved in the building design and construction. The Delta decision was not appealed and, to staff's knowledge, no other leaky condo lawsuit has since gone to trial in B.C.. There remains uncertainty in the law of the municipality's responsibilities and liabilities in this area.

In the area of construction litigation municipalities are particularly disadvantaged by two statutory provisions:

1. The application of joint and several liability under section 4 of the *Negligence Act*.

   Under the principle of joint and several liability, a successful plaintiff can recover all or any portion of its damage award against any defendant found contributorily negligent regardless of the proportionate liability of that defendant. So if a municipality is found even 1% contributorily negligent, the plaintiff can recover its entire damage award from the municipality.

2. The 30 year ultimate limitation period under the *Limitation Act*.

   The limitation period for bringing an action in respect of a leaky condo building is 6 years. However, the limitation period does not begin to run until the building owners become aware or ought reasonably to have become aware of the faulty building design/construction. This typically does not occur until the building starts exhibiting water ingress related problems and an engineer is retained to investigate and report on the problem. The leaky condo legal actions in Burnaby typically involve buildings constructed in the late 1980's and early 1990's.

As a result, when legal action is ultimately commenced it is often twenty years since the building was constructed. As the developer typically incorporates a separate company for each project, the development company likely no longer exists or, if it does, is inactive and without assets. Many of the contractors, subcontractors and suppliers may no longer exist to answer for their share of fault. The architect, if still in business, typically has only $500,000 professional insurance.

After the passage of so much time, the municipality is often the only defendant of substance left. As a result the plaintiffs focus their efforts on establishing some degree of negligence, no matter how small, on the municipality.

The Barrett Commission recognized the inequity of the application of joint and several liability to municipalities, and recommended change:

> *"Because of both a perceived and a real obligation on behalf of municipalities to carry out the enforcement of the Building Code, there are a significant number of litigation claims pending, naming the municipality as a defendant. Currently, municipalities are liable on a "joint and several" basis, for inspection activity that has not been properly carried out. This means that, in the absence of a developer (who may be protected by a numbered company, or who has gone bankrupt) and/or an architect or engineer with deep pockets, a municipality could be held financially responsible for all the costs related to a successful judgment. The City of Vancouver Charter was amended in 1995, by the Legislature, to eliminate all liability for inadequate inspection.*
>
> *The Commission finds that the joint and several responsibility for municipalities is onerous. It also finds the discrepancy in treatment among municipalities unacceptable.*
>
> ***Recommendation #18: That the Municipal Act be modified to remove the joint and several liability of a municipality while retaining proportionate liability.***
>
> ***Recommendation #19: That the Vancouver Charter be amended to be compatible with the proportionate liability held by other municipalities.*** *"*

The amendment to the *Vancouver Charter* that the Commission was alluding to is s.294(8), which provides:

> *"S.294(8) The city, or any officer or employee thereof, in inspecting and approving plans or in inspecting buildings, utilities, structures or other things requiring a permit for their construction, has no legal duty, on which a cause of action can be based, to ensure that plans, buildings, utilities, structures or other things so constructed, comply with the by-laws of the city or any other enactment. The city, or any officer or employee thereof is not liable for damages of any nature, including economic loss, sustained by any person as a result of neglect or failure of the city or officer or employee thereof to discover or detect contraventions of the by-laws of the city or other enactment or from the neglect or failure, for any reason or in any manner, to enforce such a by-law or enactment or for any damage from a failure to recommend, or resolve to file a notice in the land title office pursuant to section 336D. "*

This section provides the City of Vancouver with a thorough immunity from liability arising out of its plan checking and building inspection functions in respect of bylaw compliance (the City of Vancouver is not bound to the B.C. Building Code, it has its own building bylaw containing a comprehensive building code).

At its regular meeting of March 23, 2009, Council received and adopted a report recommending submission of a number of resolutions to the UBCM and LMLGA for consideration at this years' conventions.

Among those resolutions was one requesting that the *Local Government Act* be amended to provide all B.C. local governments with statutory immunity similar to that provided to the City of Vancouver under s.294(8) of the *Vancouver Charter*:

> *"**WHEREAS** all local governments, with the exception of the City of Vancouver, face considerable liability risk and are being financially penalized as a result of legislation which does not provide immunity for building permit and inspection processes;*
>
> ***AND WHEREAS** it is unacceptable that all local governments in British Columbia are not offered the same liability protection through provincial legislation:*
>
> ***THEREFORE BE IT RESOLVED** that the UBCM recommend to the Provincial Government that the Local Government Act be amended to include blanket immunity from liability for approving building plans and inspecting buildings, similar to the Vancouver Charter (section 294, sub-section 8).* "

Regarding this proposed resolution it was stated in the report:

> *"Burnaby, in concert with the UBCM and its members, has worked consistently since 1985 to propose various legislative reforms to the Provincial Government as part of a "Liability Action Program." One of the goals of this effort is to protect communities and all taxpayers from financial losses due, not to municipal liability, but to litigation affecting the construction industry. This ongoing effort has included several UBCM resolutions to include a review of joint and several liability as part of the Modernization Strategy. To date, there has been no substantial progress on the part of the Provincial Government to rectify this important matter that is continuing to have a direct and substantial financial impact on local governments and their citizens.*

. . .

The progressive change to this legislation clearly established design professionals as being responsible for code compliance. No municipality should incur liability for its permitting process, which makes design professionals responsible for code compliance; and the inspection process, which serves as an auditing function to promote that compliance. Despite a UBCM resolution in 1996 which called on the Provincial Government to make a similar amendment to the Municipal Act, no action has been taken to ensure that all municipal governments in the province are afforded the same protection as currently in place for the City of Vancouver.

The matter was further delayed by the Provincial Government as it awaited the recommendations of the "Commission of Inquiry into the Quality of Condominium Construction in British Columbia" (Barrett Report), undertaken in 1998 by Commissioner Dave Barrett. In its final report, it was stated that "The Commission finds that the joint and several responsibility for municipalities is onerous. It also finds the discrepancy in treatment among municipalities unacceptable." Among the recommendations of the inquiry were that the Municipal Act be modified to remove joint and several liability while retaining proportionate liability and that the Vancouver Charter be amended to be compatible with the liability held by other municipalities.

The Barrett Report provided the Provincial Government with a wide range of recommendations and actions for implementation. The City of Vancouver adopted a report which objected to the recommendation of the Barrett Report to amend the Vancouver Charter. Instead, the City of Vancouver recommended that the Municipal Act be modified to provide the same liability protection as under the Vancouver Charter to all other municipalities in the Province. To date the Provincial Government has not implemented any actions regarding joint and several liability and further has not provided municipalities with the blanket liability protection, in respect to their permitting and inspection functions, as currently held by the City of Vancouver.

The Modernization Strategy, which was initiated in 2004, is being implemented by the Office of Housing and Construction Standards, to rationalize the regulation of the construction/housing industry. As previously discussed in Section 2.1 of this report, this strategy will not advance the UBCM resolution regarding joint and several liability. Based on the Provincial Government's refusal to advance the UBCM recommendations regarding this issue,

> *Council requested that a further resolution be advanced calling for the protection of local government from any liability arising from their permitting and inspection functions.* "

Fundamentally, there would appear to be no logical basis for providing one B.C. local government with such a critical safeguard without providing it to the others.

In respect of the ultimate limitation period of 30 years, the Ministry of the Attorney General issued a Green Paper in February 2007 entitled "Reforming British Columbia's *Limitation Act*" which, amongst other things, raised the possibility of a reduction in the ultimate limitation period from 30 years to 10 years. The UBCM urged its members to submit a response to the Green Paper in support of this proposal and the City did so. The Province has yet to act on the Green Paper and the public response. There is some indication that the Province may be considering a 10 year limitation period in construction litigation as part of its Modernization Strategy for the building regulatory system.

In staff's view, the reduction of the ultimate limitation period for building construction liability from 30 years to 10 years would operate to significantly reduce municipalities' liability exposure in the area of building construction. The City should continue to support this legislative initiative.

As mentioned previously, only one leaky condo action including a municipality has proceeded to trial in B.C. The costs of litigating one of these actions can be staggering, given the number of parties involved, the complexity of the issues, the volume of documents, the number of lay and expert witnesses, and the number of counsel. With trials expected to stretch over months the legal and related trial costs can ultimately reach well over a million dollars. It should not therefore be surprising that these lawsuits have tended to settle without going to Court.

Discussions with other municipal solicitors and risk managers indicate that the general approach has been to settle these claims if a reasonable settlement contribution can be agreed upon, and avoid the cost, uncertainty and financial risk of proceeding to trial. While there seems to be a common desire to have another one of these lawsuits to go through to trial and on to appeal if necessary, to clarify the law, it appears that no one has yet been prepared to take this risk.

Perhaps the greatest legal inequity that arises in this litigation is that the developer, which owned and directed the construction project through a company incorporated solely for that purpose, and that reaped the profit on the sale of the finished units to the public, is generally not legally compellable to pay for the repair of its defective product.

Instead it is the registered professionals, construction contractor, sub-contractors and material suppliers, and local government that are being looked to. The ability of the design professionals, contractors, sub-contractors and suppliers to make any contribution of substance to a settlement often depends on whether they have insurance, which is increasingly becoming less often the case.

The decrease in available insurance has had the adverse effect of the local government increasingly becoming the plaintiff's prime target in these lawsuits, making it more difficult for the municipality to extract itself from the litigation with little or no contribution to the settlement. As a major (and perhaps only) "deep pocket" defendant in these lawsuits there now seems to be an expectation that the local government will be a major contributor to a settlement regardless of whether there is any evidence of negligence against it. Ability to pay, rather than fault, now seems to be the prime consideration in this litigation.

While the Barrett Commission described the role of the local government in the construction process as monitor only, it now seems that the local government is expected to be a warrantor or insurer of the finished product as well.

It should also be borne in mind that the local government is the only player directly involved in the entire construction process that isn't there to make a profit, it is involved to provide some level of protection to the public through its limited role as monitor. Moreover, the local government is not the one that designs or constructs the building. The worst that can ever be said of it is that in its role as monitor it neglected to identify someone else's error. Strictly from a public policy perspective it is wrong that the local government should be left to shoulder the loss.

The ultimate solution to this problem must be legislative, local governments must be provided with a reasonable level of protection in performing their building regulatory role, and not be faced with shouldering the financial burden when a building suffers water or any other form of damage, whether through poor design or poor workmanship, in aspects of construction for which they rely upon the design professionals or for which they do not inspect.

Ideally, all municipalities would be given the same thorough statutory protection that Vancouver has under s.294(8) of the *Vancouver Charter*. However, even changing municipal liability exposure to several rather than joint and several in building construction or reducing the ultimate limitation period to ten years (or both) would go a long way towards easing this inequitable and onerous burden.

The City should continue to actively lobby the Province to implement these legislative reforms and encourage other B.C. local governments to do so as well.

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Copy to Director Planning
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