MUNICIPAL INSURANCE ASSOCIATION OF BRITISH COLUMBIA

BUILDING BYLAW PROJECT

JULY, 2002

Prepared by Thomas W. Barnes
Barnes Twining & Short
Suite 500 – 1122 Mainland Street
Vancouver, B.C. V6B 5L1
Telephone: (604) 682-6118
Fax: (604) 682-6131

Contents

Introduction

The goal of the *Building Bylaw Project* is to provide MIA members with core building bylaw wordings that can be adopted with minimal modifications. This will standardize the risk undertaken by local governments when they undertake the regulation of construction within their jurisdiction. The core provisions incorporate expressions of legislative intent. They also adopt language setting out the scope of the building official's duty of care and the standard of care in light of the current edition of the *B.C. Building Code* and the jurisprudence.

The project proceeded the following manner:

1. A detailed review of background materials was conducted. This included the *B.C. Building Code*, *Local Government Act*, current building bylaws and the jurisprudence.

2. Core bylaw provisions and background materials were drafted.

3. The draft material was distributed to the local governments participating in the project for discussion and feedback.

4. The finalized material and wordings were incorporated into a package for distribution to the MIA membership.

5. The draft report was distributed, and comments solicited from all MIA members and various professional and government organizations involved in the regulation of construction in British Columbia.

Although a building bylaw creates the duty of care imposed on building inspectors, it is enacted within a legislative framework and administered in a regulatory environment, both of which are created by the Provincial government. Consequently, the project began with a review of the *Local Government Act* to identify the statutory purposes for which building bylaws must be passed and the jurisdictional limits of the powers conferred. Similarly, the *B.C. Building Code* must be adhered to in the administration of a building bylaw. It was reviewed to determine the role it contemplates for building inspectors.

Local governments take varying approaches to the regulation of construction. This is the result of varying local needs as well as the individual local government's resources, policy direction and internal organization. These different perspectives were identified so that they could be accommodated with appropriate core wordings. In large part this was done by reviewing over twenty building bylaws currently in force in communities of varying sizes and geographic locations.

Finally, the case law was reviewed to determine how the courts have responded to various bylaw wordings in the past.

The final package includes the core wordings and background material. It does not include the various forms and schedules that must be incorporated into a complete building bylaw, as these must be tailored to the individual local government's policies and practices.

Background

Background

Building bylaws are at the centre of B.C. local government's greatest exposure to liability risks. Past and current building bylaw wordings have resulted in local governments assuming responsibilities they are not capable of meeting, financial liabilities that threaten their means to fund, and tasks they do not have the staff to perform. Our goal is to develop core building bylaw provisions that reflect the policy decisions made by local governments, restrict the associated responsibilities to matters that are attainable and the consequent liabilities to risks that are foreseeable, fundable and controllable.

Prior to preparing or considering any potential bylaw provisions, the parameters of the process have to be set. This requires familiarity with:

- The relevant provisions of the *Local Government Act*.
- The *British Columbia Building Code*.
- The case law interpreting and applying building bylaw provisions.
- The policy considerations council decides to implement.
- The practical limitations on local government staff's ability to administer and enforce both the bylaw and the ***Building Code***.

The *Local Government Act*

It is axiomatic that, as a creature of statute, a local government's jurisdiction to do anything must be based upon statutory authority. The authority to regulate construction is found in Division 2 of Part 21 of the *Local Government Act* commencing with section 694. There are additional provisions in other parts of the *Act* that have an impact on aspects of this activity, which will be dealt with in more detail later. For present purposes the relevant provisions are set out in section 694 (1), which states:

> *...a council may, for the health, safety and protection of persons and property, by bylaw, do one or more of the following:*
>
> *(a) regulate the construction, alteration, repair or demolition of buildings and structures;*
>
> *(d) require that, before occupancy of a building ... an occupancy permit be obtained;*
>
> *(e) prescribe conditions generally governing the issue and validity of permits, inspections of works, buildings and structures.*

The exercise of these powers lies at the heart of every building bylaw. There are a number of other powers that a local government may choose to exercise set out in the balance of section 694. Each of these ancillary matters may be the subject of additional policy decisions a council chooses to make, but they will not be addressed in the Core Bylaw Provisions provided below.

In summary, a local government's core jurisdiction is to:

- Regulate construction.
- Require occupancy permits, if it chooses.
- Prescribe conditions governing the issue and validity of permits and inspections.

These seemingly wide powers are considerably constrained by section 692 of the *Act*, which provides:

> *(1) The minister may make regulations as follows:*
>
> *(a) establishing a Provincial building code for British Columbia governing standards for the construction and demolition of buildings;*
>
> *(f) providing for the administration of the building code...*
>
> *(2) The building code and other regulations under subsection (1) apply to all municipalities and to regional districts or parts of them not inside a municipality, and has the same force and effect as a validly enacted bylaw of the municipality.*
>
> *(3) A provision of a municipal bylaw that purports to deal with matters regulated under this section, and that is inconsistent with the code or other regulations, is of no force and effect and is deemed to be repealed.*

The effect of these provisions is that the *British Columbia Building Code* is in force in all municipalities and regional districts, regardless of whether they choose to exercise the powers conferred on them by section 694. They also mean that any building bylaw cannot provide for the administration of the ***Building Code*** or the regulation of construction in a manner that is inconsistent with the ***Building Code***. As a result the powers conferred by section 694 and the provisions of the ***Building Code*** constitute the fundamental parameters of adopting a building bylaw.

The *British Columbia Building Code*

The ***Building Code*** is, not surprisingly, an extremely complex and lengthy document. The initial reaction of a layperson is to attempt to avoid it completely and leave it to those who must work with it to become familiar with it. However, it would be a fundamental mistake for a member of a local government council to give in to this temptation. The ***Building Code*** is in the unusual position of constituting a bylaw that has been imposed upon all local governments by an outside agency. Furthermore, as we have seen, it takes precedence over any building bylaw a council chooses to adopt. Consequently, a preliminary step council members must take before considering a building bylaw is to attain a general understanding of the ***Building Code's*** scope and format.

The current edition of the ***Building Code*** spans nine parts and four appendices. These cover, in turn:

Part 1	Scope and Definitions
Part 2	General Requirements
Part 3	Fire Protection, Occupant Safety and Accessibility
Part 4	Structural Design
Part 5	Environmental Separation
Part 6	Heating, Ventilating and Air-Conditioning
Part 7	Plumbing Services
Part 8	Safety Measures at Construction and Demolition Sites
Part 9	Housing and Small Buildings
Appendix A	Explanatory Material
Appendix B	Fire Safety in High Buildings
Appendix C	Climatic Information for Building Design
Appendix D	Fire Performance Ratings
Appendix P	Explanatory Material for Part 7, Plumbing

The adoption of core building bylaw provisions calls for particular consideration of Parts 1, and 2 as well as Appendix A of the ***Building Code.***

Part 1

Part 1 commences with a requirement that the ***Building Code*** be administered in conformance with regulations adopted pursuant to section 692 of the *Local Government Act*. This confirms a constraint on any building bylaw or related policy that may be adopted. Section 1.1.2.1 sets out the ***Building Code's*** application. As we have seen, a local government has the jurisdiction to address in its building bylaw any or all of the matters set out in section 694 (1) of the *Local Government Act*.

A comparison of these two provisions readily demonstrates that they do not work well together at all. For example section 694 (1) (i) gives council authority to "regulate the construction of buildings in respect of precautions against fire" and section 694 (1) (g) gives council the authority to "regulate the seating arrangements and capacity of churches, theatres, halls and other places of public amusement or resort". Yet both of these subjects are dealt with in considerable detail in Part 3 of the ***Building Code***. Clearly a building bylaw cannot purport to establish regulations that are inconsistent with the terms of the ***Building Code***, because they would be deemed repealed by section 692 (3) of the *Local Government Act*. As a result, any attempt to exercise the powers conferred by section 694 (1) can only be made after a careful review of relevant ***Building Code*** provisions.

It is for this reason that our efforts are confined to addressing the core aspects of a building bylaw. The exercise of any ancillary powers will require policy decisions based on a detailed analysis of the local government's objectives and the underlying basic ***Building Code*** requirements.

Section 1.1.2.4 is also worth noting. It is entitled "Responsibility of Owner" and states:

> *Neither the granting of a building permit nor the approval of the relevant drawings and specifications nor inspections made by the authority having jurisdiction shall in any way relieve the owner of such building from full responsibility for carrying out the work or having the work carried out in full accordance with the requirements of the British Columbia Building Code.*

There are two points to be made with respect to this section. First, one might assume that since the owner is charged with **full** responsibility for compliance with the ***Building Code*** that there would be no responsibility left over to be borne by the "authority having jurisdiction" (which is the local government for our purposes). Surprisingly, the Courts have not concurred. As we shall see, despite such terms, the Courts have held local governments liable **to the owner** for costs associated with rectifying ***Building Code*** deficiencies.

The second point to note is that many building bylaws include terms substantially the same as section 1.1.2.4. At best this is unnecessary duplication. This would be cumbersome, but harmless, if it was just a matter of redundancy. Unfortunately, there is room for considerable mischief if the bylaw wording does not precisely track the

Building Code. A court would feel compelled to assume that the local government meant to attached some different meaning to its bylaw by using different words. As the bylaw cannot derogate from the ***Building Code***, the likely conclusion will be that the local government meant to assume wider responsibilities than the ***Building Code*** contemplated.

Section 1.1.3.2 should also be reviewed because it sets out definitions for many words and terms used in the ***Building Code.*** The ones most pertinent to the core building bylaw provisions are:

> ***Assembly occupancy*** *means the* ***occupancy*** *or the use of a* ***building****, or part thereof, by a gathering of persons for civic, political, travel, religious, social, educational, recreational or like purposes, or for the consumption of food or drink.*
>
> ***Authority having jurisdiction*** *means the governmental body responsible for the enforcement of any part of this Code or the official or agency designated by that body to exercise such a function...*
>
> ***Building*** *means any structure used or intended for supporting or sheltering any use or* ***occupancy****.*
>
> ***Building area*** *means the greatest horizontal area of a* ***building*** *above grade within the outside surface of exterior walls or within the outside surface of exterior walls and the centre line of firewalls.*
>
> ***Building height*** *(in storeys) means the number of storeys contained between the roof and the floor of the first storey.*
>
> ***Business and personal services occupancy*** *means the* ***occupancy*** *or use of a* ***building*** *or part thereof for the transaction of business or the rendering or receiving of professional or personal services.*
>
> ***Care or detention occupancy*** *means the* ***occupancy*** *or use of a* ***building*** *or part thereof by persons who require special care or treatment because of cognitive or physical limitations or by person who are restrained from, or are incapable of, self preservation because of security measures not under their control.*
>
> ***Constructor*** *means a person who contracts with an* ***owner*** *or his authorized agent to undertake a project, and includes an owner who contracts with more than one person for the work on a project or undertakes the work on a project or any part thereof.*

Coordinating registered professional *means a* ***registered professional*** *retained pursuant to Clause 2.6.2.1. (1) (a) to coordinate all design work and* ***field reviews*** *of the* ***registered professionals*** *required for the project.*

Designer *means the person responsible for the design.*

Field review *means a review of the work*

a) at a project site of a development to which a ***building*** *permit relates, and*

b) where applicable, at fabrication locations where building components are fabricated for use at the project site

that a ***registered professional*** *in his or her professional discretion considers necessary to ascertain whether the work substantially complies in all material respects with the plans and supporting documents prepared by the* ***registered professional*** *for which the permit is issued.*

High hazard industrial occupancy *means an* ***industrial occupancy*** *containing sufficient quantities of highly combustible and flammable or explosive materials which, because of their inherent characteristics, constitute a special fire hazard.*

Industrial occupancy *means the* ***occupancy*** *or use of a* ***building*** *or part thereof for the assembling, fabricating, manufacturing, processing, repairing or storing of goods and materials.*

Low hazard industrial occupancy *means an* ***industrial occupancy*** *in which the combustible content is not more than 50kg/m2 or 1 200 MJ/m2 of floor area.*

Major occupancy *means the principal* ***occupancy*** *for which a* ***building*** *or part thereof is used or intended to be used, and shall be deemed to include the subsidiary* ***occupancies*** *which are an integral part of the principal* ***occupancy.***

Mercantile occupancy *means the* ***occupancy*** *or use of a* ***building*** *or part thereof for the displaying or selling of retail good, wares or merchandise.*

Medium hazard industrial occupancy *means an* ***industrial occupancy*** *in which the combustible content is more than 50 kg/m^2 or 1 200 MJ/m^2 of floor area and not classified as* ***high hazard industrial occupancy.***

Occupancy *means the use or intended use of a* ***building*** *or part thereof for the shelter or support of persons, animals or property.*

> ***Owner*** *means any person, firm or corporation controlling the property under consideration during that period of application of Sentence 1.1.2.1.(1) of this Code.*
>
> ***Registered Professional*** *means*
> - *a) a person who is registered or licenced to practise as and architect under the Architects Act, or*
> - *b) a person who is registered or licensed to practise as a professional engineer under the Engineers and Geoscientists Act.*
>
> ***Residential occupancy*** *means the occupancy or use of a* ***building*** *or part thereof by persons for whom sleeping accommodation is provided but who are not harboured or detained to receive medical care or treatment or are not involuntarily detained.*

It is quite appropriate for a bylaw to contain its own definitions. Moreover, there is nothing legally wrong with a local government using different definitions in its building bylaw for the same words and terms as are defined in the ***Building Code***. This must be done, however, with extreme trepidation, since the ***Building Code*** has the force of a bylaw and will govern where it is inconsistent with the building bylaw. Confusion and unenforcibility could easily be the result.

All of the words and terms noted above are employed in the core bylaw wordings using their ***Building Code*** meanings. As a result, it is not necessary to include them in the definition section of the building bylaw, except by general reference. If subsequent editions of the ***Building Code*** change the definitions, there will be no need to update the bylaw definitions. In this way potential future conflicts between the bylaw and the ***Building Code*** are avoided.

Part 2

In practice it is common for buildings to be referred to as either "Part 3" or "Part 9" buildings. This is intended to differentiate between simple and more complex structures. This is a fundamental distinction that results in profoundly different treatment by the ***Building Code***. This crucial differentiation should also be made in the building bylaw. The magnitude of liability risk increases exponentially when a local government attempts to apply the same regulatory system to both types of construction.

The basis for the distinction between these two types of construction is found in Part 2. Farm buildings are excluded from the ***Building Code*** entirely because they are covered by the *National Farm Building Code of Canada*. Section 2.1.1.1. states that Parts 1, 2, 7 and 8 apply to all buildings. Parts 3, 4, 5 and 6 apply to complex buildings and Part 9 applies to standard buildings. Unfortunately, the ***Building Code*** does not affix a label to the two types of buildings for which it creates separate regulatory schemes. As a result the generic terms "Part 3" and "Part 9" buildings have come into use. The core bylaw

provisions refer to them as "complex" and "standard" buildings respectively. These terms are defined by using the definitions set in sections 2.1.2 and 2.1.3:

> ***Complex building*** *means:*
>
> *a)* *all* ***buildings*** *used* ***for major occupancies*** *classified as*
>
> *(i)* ***assembly occupancies,***
>
> *(ii)* ***care or detention occupancies,***
>
> *(iii)* ***high hazard industrial occupancies,*** *and*
>
> *b)* *all* ***buildings*** *exceeding 600 square meters in* ***building area*** *or exceeding three storeys in* ***building height*** *used for* ***major occupancies*** *classified as*
>
> *(i)* ***residential occupancies,***
>
> *(ii)* ***business and personal services occupancies,***
>
> *(iii)* ***mercantile occupancies,***
>
> *(iv)* ***medium and low hazard industrial occupancies.***
>
> ***Standard buildings*** *means* ***buildings*** *of three storeys or less in* ***building height,*** *having a* ***building area*** *not exceeding 600 square meters and used for* ***major occupancies*** *classified as*
>
> *a)* ***residential occupancies,***
>
> *b)* ***business and personal services occupancies,***
>
> *c)* ***mercantile occupancies,*** *or*
>
> *d)* ***medium and low hazard industrial occupancies.***

Sections 2.3 and 2.6 of Part 2 are also of critical importance with respect to the formulation of a building bylaw. Municipal liability arising out of building regulation is almost always the result of either design review or site inspection services. The theory driving such claims is that the local government's prime role is to "enforce" the ***Building Code***. Whenever construction defects are encountered that constitute ***Building Code*** deficiencies, so goes the theory, the ***Building Code*** was not "enforced". The irresistible conclusion that follows is that the local government must have failed to meet its obligation to enforce the ***Building Code***. It is maintained that either the design ought not to have been accepted or that construction inadequacies ought to have been detected

during the course of inspections. As we shall see the Courts and others increasingly apply this theory.

The design for both complex and standard structures must comply with the provisions of section 2.3.1 and 2.3.2 in order to "meet the ***Building Code***". This includes the following provisions (emphasis added):

> *2.3.1.1.*
>
> *Sufficient information **shall** be provided to show that the proposed work **will conform** to this Code and **whether** or not it will **affect** the adjacent property.*
>
> *2.3.1.2.*
>
> *Plans **shall** ... indicate the nature and extent of the work or proposed occupancy **in sufficient detail to establish** that, when completed, the work and the proposed occupancy **will conform** to this Code.*

It is important to digest the sweeping nature of these requirements and to compare them to the responsibilities imposed on ***owners***, ***designers*** and ***constructors***. There is no question that it is appropriate for the ***Building Code*** to require complete conformance with its own provisions. It is a completely different matter to expect these to constitute an appropriate level of regulatory review. It is challenging enough for a local government to marshal the resources sufficient to review the designs for standard buildings. It is completely unrealistic to expect those resources can be used to "ensure" the design of complex structures "conform" the ***Building Code*** in all respects.

This is amply illustrated by reviewing sections 2.3.4, 2.3.5 and 2.3.6, which set out the requirements for the structural, heating, ventilating and air-conditioning and plumbing designs of complex buildings. For example, the structural requirements include the following (emphasis added):

> *2.3.4.6.*
>
> *1) Foundation drawings submitted with the application to build or excavate **shall** be provided to indicate*
>
> *a) the type and condition of the soil or rock, as well as the groundwater conditions, **as determined** by the subsurface investigation,*
>
> *b) the allowable bearing pressures on the soil or rock, the allowable loads when applicable and the design loads applied to foundation units, and*

c) *the earth pressures and other loads applied to the supporting structures of supported excavations.*

2) ***When required**, evidence that **justifies** the information on the drawings **shall** be submitted with the application to excavate or build.*

The regulatory review of such designs carries with it two severe liability risks. The first is that the design drawings may not include all the technical information required. Claimants and the courts often see "acceptance" of a submitted design as the regulator's endorsement that it is correct. Disclaimers made at the time of the design review are rarely effective because the claimant is almost always a subsequent owner of the property who was not present when the disclaimer was made.

The second risk arises from the final paragraph. A similar condition applies to the structural design. Note that it does not read "when required by the authority having jurisdiction". It simply says, "when required". It is very common for claimants to allege the design problem would have been detected had "justifying evidence" been required. Since it was not, the allegation continues, the building official must have been negligent. This is an argument that courts have been receptive to.

Sections 290, 695 and 699 of the *Local Government Act* provide the means for local governments to address these design review liability risks. They will be dealt with in more detail in the context of the policy issues to be considered in the process of enacting a building bylaw.

Section 2.6 of the ***Building Code*** plays an integral role in managing the municipal liability risks created by the performance of design review and site inspection services. This section establishes a mandatory scheme of professional design and review of construction. Its application, however, is limited to complex buildings.

The system requires that an ***owner***, prior to obtaining a building permit, retain a ***coordinating registered professional*** to coordinate all design work and ***field reviews*** of the ***registered professionals*** required for the project. The ***owner*** must also provide letters of assurance in specified forms to the ***authority having jurisdiction***. Additional letters of assurance must be provided before an occupancy permit may be issued. These letters are in a form mandated by the ***Building Code*** and form schedules to it. Consequently, they are most often referred to a "Schedule A", "Schedule B-1" etc. It is difficult to over-emphasize the importance of these schedules because they constitute the backbone of the mandatory system regulating the involvement of design professionals in the construction of complex buildings in British Columbia. It is fundamentally important that municipal policy-makers have some familiarity with them.

Schedule A Confirmation of Commitment of Owner and Coordinating Registered Professional

This letter is to be provided jointly by the ***owner*** and ***coordinating registered professional***. It provides, in part (emphasis added):

> *The **coordinating registered professional** shall coordinate the design work and **field reviews** of the **registered professionals** required for the project in order **to ascertain that the design will substantially comply** with the B.C. Building Code and other applicable enactments respecting safety and that **the construction of the project will substantially comply** with the B.C. Building Code and other applicable enactments respecting safety...*
>
> *The **owner** and **coordinating registered professional** have read Section 2.6 of the British Columbia Building Code.*

The key point to note is that the obligations undertaken are jointly those of the ***owner*** and ***coordinating registered professional***. It is also important to note that the standard of professional certification, with respect to both design and ***field review***, is to "ascertain substantial compliance" with the ***Building Code***.

Schedule B-1 Assurance of Professional Design and Commitment for Field Review

This letter is provided by each of the ***registered professionals*** required for a project. The ***designer*** responsible executes a separate Schedule B-1 for each professional discipline involved on the project. By providing the letter of assurance the ***registered professional*** certifies his or her aspect of the design and undertakes to carry out ***field reviews*** in the following terms:

> *The undersigned hereby gives assurance that the design of the (professional discipline inserted) components of the plans and supporting documents prepared by this **registered professional** in support of the application for the building permit as outlined in the attached Schedule B-2 substantially comply with the B.C. Building Code and other applicable enactments respecting safety except for construction safety aspects.*
>
> *The undersigned hereby undertakes to be responsible for **field reviews** of the above referenced components during construction...*

Schedule B-2 Summary of Design and Field Review Requirements.

This is a form that simply lists various disciplines and components of the construction. The ***registered professional*** indicates those for which he or she is responsible and affixes it to his or her Schedule B-1.

At the end of the project, the ***coordinating registered professional*** provides a Schedule C-A confirming that he or she fulfilled the obligations he or she undertook in providing the Schedule A. Each of the ***registered professionals***, in turn, provides a Schedule C-B, which confirms he or she has fulfilled the obligations for ***field review*** he or she undertook to carry with the provision of the Schedules B-1 and B-2.

As can be seen, the process is relatively straightforward. The various ***designers*** all certify that their work substantially complies with the ***Building Code***. Each undertakes to conduct ***field reviews*** of the construction of those aspects of the project that he or she designed to ascertain that it substantially complies with the ***Building Code***. Upon completion, each certifies that he or she had fulfilled the obligations they undertook to carry out. Finally, there is one ***registered professional*** who assumes the responsibility to coordinate the work of the others to ensure there are no gaps in the services provided.

At this point it is appropriate to consider the role envisioned for the local government in this process, for this is the role the building bylaw must provide for. Appendix A of the ***Building Code*** states (emphasis added):

> *The British Columbia Building Code is a set of minimum requirements contained within its own text or that of referenced documents. The owner during construction has overall responsibility for assuring the building conforms to code requirements. The process of assessing conformity to the requirements during construction is the responsibility of the registered professionals (Part 3 buildings) and the designer/builder (Part 9 buildings).* ***The authority having jurisdiction has a responsibility to monitor the process to assure a reasonable level of code conformance for public safety, accessibility and health.***

With respect to professional design and ***field review***, it states:

> *...Schedules A, B-1, B-2, C-A and C-B ... are intended to put on paper the responsibilities of the various key players in a construction project. The Letters of Assurance do not add any new responsibilities to the professionals,* ***nor do they relieve the authorities having jurisdiction from their responsibilities.***

Other Statutes

There are a number of other statutes, and associated regulations, that directly or indirectly, relate to the provision of building regulation services. These touch on a wide variety of matters such as fire access and flood protection.

Three statutes in particular deal with matters affecting the administration of the ***Building Code*** and building bylaws. The *Homeowner Protection Act* imposes conditions on the issuing of building permits for certain types of residential construction. The *Engineers and Geoscientists Act* and the *Architects Act* stipulate

when professional engineers and architects must be retained with respect to the design and construction of buildings and other structures.

Compliance with these statutory requirements should be part of the operational policies and procedures employed in the regulation of construction by local government.

Case Law Review

Case Law Review

Claims arising out of deficient workmanship, materials and the use of improper building methods constitute a significant portion of all construction litigation. Primary responsibility for these problems ought to reside with the parties who carried out the work, supplied the material or directed the adoption of the inappropriate building techniques. Design professionals and municipal building inspectors who conduct intermittent inspections of the work are frequently held to a secondary responsibility, on the theory their inspections ought to have turned up the deficiencies giving rise to the claim. In cases that proceed through trial, the inspecting authority is usually apportioned liability in the order of 20% - 30%. Yet, more often than not, at the end of the day, the design professional or local government winds up paying 100% of the damages. This is due to a combination of the passage of time, some inherent shortcomings of the construction industry and the operation of the *Negligence Act*.

Owners, whether an individual putting an addition on a private residence or a developer constructing a multi-unit condominium, often have little interest or motivation to expend more than the minimum resources required to meet whatever standards apply to their particular project. Developers often incorporate a new company for each project. The low bid system tends to award work to the contractor who is willing to run the greatest risk and cut the most corners. This is a major reason why construction companies enter and leave the industry with astonishing frequency. The focus on doing the minimum required means all too often that the periodic inspections of the design professional or building inspector are the primary quality control measures implemented on a given project. In these circumstances, it is not surprising that producing a high quality, low maintenance building is neither a priority, nor, all too frequently, a result.

Add to this the fact that it is often many years before serious construction deficiencies become known and it is not surprising that the builder and developer are no longer in the picture when the claim is made. Many claims against municipal authorities arise from construction that took place decades previously. In these situations, it is rare for design professionals still to be in existence. Even if a builder or developer is found to be joined as a party, there is a good chance it will have either no insurance or insufficient assets to cover its liability. As a result, it falls upon the secondary players in the construction to foot the bill.

Local Governments' Duty of Care

It is axiomatic that, being a creature of statute, a local government has no rights or duties that are not founded in the statute. As such, a building inspector's duty of care arises from "private" rather than "public" law. The municipal by-law that creates the scheme of building regulation in place at the time of construction establishes the rights, powers and obligations of the building inspector. Wilson J. in the landmark case of *Kamloops v. Nielsen* [1984] 2 SCR 2 described the process by which the duty arises in the following terms:

> *It seems to me that, applying the principle in Anns, it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city's building inspector a duty to enforce the provisions of the by-law. This would be Lord Wilberforce's "operational" duty. Is the city not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have had him in contemplation?*

Thus, any evaluation of a building inspector's duties must commence with a review of the relevant by-law. This was made clear by La Forest J. in *Manolakos v. Vernon* [1989] 2 SCR 1259:

> *... the city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty is, of course, subject to such limitations as may arise from statutes bearing on the powers of the building inspector.*

A more recent application of this principal is found in *Mullholland v. Zwietering and Powell River*, unreported SCBC Powell River Registry S627, October 26, 1998. In that case the Plaintiffs alleged the local government was responsible for the damages arising out of the fact the driveway to their new house had been constructed too steeply. The local government argued that its building bylaw did not apply to driveways and, consequently, it had no obligation to inspect or approve the driveway. Burnyeat J. agreed, saying:

> *There was nothing in this bylaw which dealt with the grades of driveways or the grades of roads within subdivisions. In the absence of such provision, there was no duty imposed on municipal employees to check the grades of roads or driveways or the access between the two. As well, it is clear that the bylaw relates only to "buildings." There is nothing in the bylaw which would suggest that the bylaw in any way dealt with what might surround a building on a lot, including such things as sidewalks, driveways, etc.*
>
> *...The common law right to build a building on a lot and to develop that lot cannot be taken away or affected by a statute or a bylaw unless the bylaw is expressed in clear language. ...In the absence of a provision which would regulate the grades of driveways on private property ...the municipality could not regulate the driveway of the plaintiffs.*

> *At the same time, in the absence of a provision requiring the building inspector to inspect anything other than "the building" – its "erection, construction, maintenance, moving, demolition and safety" – the plaintiffs could not look to the municipality because the building inspector failed to inspect and draw to the attention of the plaintiffs the grade of their driveway. There was no obligation imposed by bylaw 989 requiring the building inspector to check to see whether this driveway was in accordance with the desires of the plaintiffs.*

Conversely, the dangers of having a wide statutory duty were illustrated in *Cook v. Bowen Island Realty* (1997) 39 BCLR (3d) 12. The Plaintiffs' claim arose out of a poorly designed private water system, which had been constructed without the benefit of the necessary permits or inspections. Owen-Flood J. held the regulatory authorities responsible, saying:

> *The Ministry and North Shore Health take the position that since there was no formal application made to them to construct a waterworks system they had no responsibility with respect to such a system. I am satisfied that their position is unsound. They had a duty to enforce the Act and the regulations. That duty is not contingent upon an application being made but, rather, is contingent upon knowledge of a potential violation. If it were otherwise, an inspector could simply shirk his duties by allowing the application process to be bypassed.*
>
> *...The public health officials at bar had express duties with respect to the enforcement of the Act and the regulations. They did not have any discretion as to whether or not to enforce the relevant provisions of the Act or the Ministry's policy. I find they were aware that a waterworks system was installed in respect of Lots 3 and 4. That being so, they had an obligation to comply with the Act and with the Ministry's policy. It follows that they cannot escape liability by relying upon their own inaction with respect to such enforcement.*

This line of reasoning is applicable to situations where the building bylaw contains a provision that states the building inspector "shall enforce" the terms of the bylaw or ***Building Code***. In such circumstances a building inspector is in a very difficult position when he or she learns of work that has been undertaken without a permit or a proper inspection. According to the *Cook* case, he or she would be under a duty to take steps to determine whether the work meets the appropriate standards.

The Supreme Court of Canada held in *Ingles v. Tutkaluk Construction*, 2000 SC 12, that when a building inspector is undertaking an inspection after work has commenced that he or she should be "wary" about approving work that is no longer visible. In such circumstances it is not sufficient to simply do the best visual inspection possible and rely on the assurance of the builder that the provisions of the ***Building Code*** were met. It would probably be acceptable to rely on the detailed opinion of a Professional Engineer

or architect. Alternatively, resort must be taken to other avenues available in the bylaw. Typically these will include the requirement to uncover completed work or undertake independent testing.

If an adequate inspection cannot be carried out and the work is not certified by a Professional Engineer or architect, then the measures available pursuant to Sections 694 (3) (withholding the occupancy permit), 698 (council resolution requiring a building or structure be brought up to standard) or 700 (registering a notice against title) should be considered. Obviously, in today's legal environment, a local government would well advised to decline to take one of these steps only after very careful consideration.

Duty to Owner/Builders

Even after *Kamloops v. Nielsen* it was not clear what obligations a local government owed to an owner/builder. This was particularly an issue in situations where the building by-law purported to place on the owner the obligation of ensuring the construction was designed and carried out in complete compliance with the by-law and applicable ***Building Code***. In the case of an owner carrying out the construction directly, any deficiencies would be the result of his or her own negligence. It was widely believed a building inspector had no duty to save a person in that position from the consequences of his or her own acts. In the case where a contractor or design professional was retained, it was argued the owner/builder was relying on his or her agents to carry out the work properly and, consequently, the building inspector would owe no duty. Subsequent cases have shown these beliefs to be ill founded.

The first was *Manolakos*. There the owner hired a contractor to build a retaining wall. The local government issued a building permit and undertook to inspect reinforcing steel prior to concrete being poured. The contractor completed construction without calling for the required inspection. The owner also failed to request the local government inspect the construction. The wall failed and the owner brought a claim against the local government. When the case reached the Supreme Court of Canada, the court recognized there was a distinction to be drawn between the reliance of third parties on a municipal building inspector and the reliance of an owner/builder. Third parties have no say in the actual construction of a building that proves defective. Owner/builders are in a position to ensure that the building is built in accordance with the relevant regulations. Cory J. held that in the circumstances the owner ought not to rely on the local government but should ensure, through his contractors, that the building complies with the by-law.

This view was rejected by La Forest J. who said (emphasis added):

> *I am unable to accept this position. As a preliminary matter, it is not clear to me how owner builders, unless possessed of a high degree of technical knowledge, are supposed to see to it that their contractors comply with the technical aspect of building by-laws. Doubtless owner builders can choose their contractors, and it is incumbent on them to hire reputable tradesmen. But I fail to see how, having done that, they are in a position to ensure that*

> *construction actually proceeds according to standard. Owner builders can hardly be expected to serve as their own inspectors.* ***It can, I think, safely be assumed that the great majority of those who engage building contractors to undertake a project must rely on the disinterested expertise of a building inspector to ensure that it is properly done.*** *In that respect, owner builders are in a position similar to third parties who may be affected by the construction. Like them,* ***they are, in my respectful opinion, entitled to rely on the municipality to properly inspect construction to see that it conforms to the standards set out in the municipality's building by-laws.***

He did allow that the duty could be negatived in the narrowest of circumstances, such as:

> *... instances where an owner builder determines to flout the building by-law, or is completely indifferent to the responsibilities that the bylaw places on him.*

His Lordship took the view that the scope of the building inspector's duty is, in part, defined by the "reasonable expectations" of the person who is relying on him.

The manner in which the reasonable expectations of the claimant can be used to define a building inspector's duty imposed by a by-law was illustrated in *Dha v. Ozdoba* (1990) 39 CLR 248. In that case the owner/builder's professional engineer prepared deficient foundation plans that were accepted by the municipal building inspector in the course of issuing a building permit. It was the local government's policy to treat residential construction in the claimant's area as falling within Part 4 of the ***Building Code*** insofar as foundations were concerned. This required, among other things, that a professional engineer design the foundations, that a site-specific geotechnical investigation be undertaken and that certain information be included on the design drawings. The building inspector noted only that the design had been prepared and sealed by a professional engineer. He did not look to see if the required investigation had been conducted or if the requisite information was included. It was not. As a consequence of these omissions the foundation failed and the claimant incurred significant damages.

In discussing the claimant's reliance on the local government Finch J. (as he then was) concluded:

> *His reliance was at most a reasonable expectation, viewed objectively, arising by operation of law. Whether such reliance may be inferred in the circumstances and whether such a duty exists are matters which I will consider later in these reasons when I address the defendant municipality's liability.*

As is to be expected, the Court's analysis of the local government's duty commenced with a review of its building by-law. As is commonly the case, the by-law in question contained a provision that read:

> *The owner of a building shall not be relieved from full responsibility for carrying out the construction or having construction carried out in accordance with the requirements of this By-law or the Building Code by the granting of a permit nor the approval of the drawings and specifications nor inspections made by the Building Inspector.*

It could be argued, and no doubt was, that by placing "full" responsibility on the owner for compliance with the by-law and ***Building Code***, the by-law left no responsibility for the local government. This was not the case. The Court held the local government liable, saying:

> *... neither the language of the by-law, the disclaimer stamp nor the building permit is sufficient to relieve the defendant municipality of any common law duty it would otherwise have owed. The by-law and the derivative documents speak only of the obligations of the owner for having the construction carried out in compliance with the building by-law or building code. The by-law does not address the obligations of the defendant municipality under either the by-law or the building code.*
>
> *... the defendant municipality's by-law empowered the building inspector to refuse a building permit where foundation conditions are not satisfactory. ...(The building inspector was) under a duty not to approve plans which clearly did not conform to the building by-law or the building code, or where it was readily apparent that the plans contained insufficient information upon which to decide whether they conformed to the building by-law or building code.*
>
> *... The plaintiffs had a reasonable expectation in law that the defendant would not approve plans that were either clearly inadequate or which contained no information upon which their adequacy could be judged.*

These two cases make it clear that the engagement of either a builder or design professional will not obviate a local government's duty to an owner/builder.

The limits of a local government's duty to an owner/builder were explored in a more recent case, *Hospitality Investments v. Lord Building Construction* [1996] SCR 606. In that case, Lord contracted with Hospitality to build a motel. The local government issued a building permit. The construction proved to be spectacularly deficient and Hospitality was faced with significant remedial costs. It sued Lord for breach of contract and negligence and the local government for failure to enforce the building standards under the by-law.

One of Hospitality's principals, Mr. Burley, who had no design or construction experience, prepared a floor plan and presented it to the local government when applying for the building permit. He advised the local government that an architect had been

retained. When the local government requested a cross section of the walls, Mr. Burley created one that did not comply with the matters he had been asked to address and that bore no relationship to the proposed construction. The building permit was issued. Hospitality, in an effort to reduce costs, decided not to retain an architect and proceeded with construction. No inspections of any kind were called for or conducted.

The trial judge, (1993) 143 NBR (2d) 258, reviewed the applicable law and decided Hospitality came within the narrow exception outlined by La Forest J. in *Manolakos*. He held:

> *It is clearly in my opinion a case where Mr. Burley misled representatives of the Town of St. Andrews where it suited his purposes in order to obtain the necessary building permit. In the face of this behaviour I do find that the plaintiff has excluded itself from the scope of the municipality's duty of care with respect to enforcement of its building by-law.*

This decision was overturned by the New Brunswick Court of Appeal, (1995) 166 NBR (2d) 241, but restored by the Supreme Court of Canada.

In *Ingles* the Supreme Court of Canada took great care to ensure the result in *Hospitality Investments* was limited to very narrow circumstances. In *Ingles* the plaintiffs retained a contractor to carry out renovations to their home. They knew a Building Permit was required to ensure that inspections of the renovations would take place. Nonetheless, when their contractor suggested it would be quicker to start work without the permit, they agreed. By the time a permit was obtained critical underpinning work had been completed and covered up. The building inspector carried out the best visual inspection he could and, accepting the contractor's assurances that the work had been properly done, gave his approval. As noted above, the courts had no difficulty finding this standard of inspection to have been negligent.

The defendant city argued the plaintiffs were at least indifferent to their responsibility to obtain a permit and comply with the bylaw and ***Building Code***. Thus, they could not have been relying on the city to carry out inspections and fell within the exception outlined by La Forest J. in *Manolakos*. The trial judge disagreed and held the city liable, although he found the plaintiffs were contributorily negligent. The Ontario Court of Appeal overturned the trial decision, but the Supreme Court of Canada restored it.

In reasons delivered by Bastarache J., the Court made it clear that traditional common law concepts by which the actions of a plaintiff could negative a duty of care owed by a defendant, were no longer part of the Canadian tort system. This is true of the traditional doctrines of *ex turpi causa no oritur actio* and *volenti non fit injuria* as well as contributory negligence. At common law all served to completely bar a plaintiff's claim. Now they have been replaced by statutory schemes of contributory negligence. The Court said:

> *The contributory negligence bar, where a plaintiff was denied any means of recovery once he or she was seen to have contributed to his or her own loss, is no longer a part of our system of tort law. It has been replaced by statutory schemes which apportion liability between negligent defendants and contributorily negligent plaintiffs.*
>
> *...In light of this Court's approach to the contributory negligence bar, a municipality cannot avail itself of the defence set out in Rothfield v. Manolakos, ... simply because a plaintiff acted negligently. To allow the municipality to do so would amount to a reintroduction of the contributory negligence bar into the sphere of municipal inspection. It would be inconsistent with the modern goal of tort law of encouraging care and vigilance to absolve a municipality of all liability for a negligent inspection simply because its inspectors were contacted late.*

The *Manolakos* exceptions were strictly confined:

> *The concept of "flouting", therefor, must denote conduct which extends far beyond mere negligence on the part of an owner-builder. The word suggests that the owner-builder in fact mocks the inspection scheme. ...Similarly, an owner-builder who never contacted an inspector to conduct an inspection would show a lack of respect for the inspection scheme and certainly no reliance on it.*

Reliance on Design Professionals

It is clear from *Dha* that local government authorities are entitled to rely on the designs, certifications and inspections carried out by design professionals. If these are negligently performed, the local government is entitled to indemnification from the design professionals. This is of limited comfort to local government authorities because neither architects nor professional engineers are compelled to carry professional liability insurance. A high percentage of practitioners in both professions carry very low insurance limits or no insurance at all.

The engineer in *Dha* attempted to claim indemnification from the local government. The court rejected this contention out of hand:

> *In effect, the defendant (engineer) alleges that the defendant municipality is responsible for failing to save him from the consequences of his own negligence. It would be contrary to authority and common sense to hold that a professional advisor who was negligent should be indemnified by a third party who received and acted upon the professional's advice...*

Other Notable Decisions

***Pawella v. Winnipeg** [1984] 6 WWR 133 (Man.Q.B.)*

The Plaintiffs' home had been built too close to an unstable riverbank. Erosion was now threatening the house. The Court looked at *Anns* and *Kamloops*:

> *We must look to the governing statute to determine the existence and scope of any private law duty of care owed by the authority.*

The building bylaw imposed a duty of the inspector to enforce its provisions and clearly contemplated inspections during the course of construction. It did not provide for a regular scheme of inspections. No information was available as to the frequency, nature and extent of inspections.

The Court found that if the local government had known in 1959 (when the house was built) that the lot was not suitable for its intended purpose it was under a duty to either prohibit the construction or, at least, communicate its knowledge. There was no evidence of specific knowledge on the part of the local government. There was some evidence of general concern about the time that the house was built. It fell short of establishing that the property was unsuitable for constructing a dwelling.

It was noted that there were no problems for 13 years and subsequent activity had occurred that might have been a contributing cause.

The court would have apportioned liability 25% against the local government had it found negligence.

There would have been a finding of contributory negligence against the Plaintiffs:

> *I also feel there was some obligation on the Pawellas when purchasing the property, particularly since it was property on a river bank, to adequately inspect the property before completing the purchase. Likewise I feel the Pawellas might have been able to arrest the problem if they had followed the advice of their engineers in 1975. The actions they took appear to have made the problem worse.*

***Hartnett v. Wailea Construction** (1989) 3 RPR (2d) 311. 43 MPLR 298. 33 CLR 244 (SCBC)*

The local government authorities required the developer to obtain a soils report for the lands in respect of a subdivision application. The subsequent report recommended special care in the foundation construction of any future buildings due to the fact that, beneath a superficial surface cover, there existed uncompacted landfill of several feet. The Plaintiffs were the ultimate purchasers of a lot. They only became aware of the report

after commencing construction. They sought to recover the addition construction costs from the city.

There was no evidence that the city had ever received a copy of the report. Prior to completing the purchase of the lot the plaintiffs had sought information about the property from the local government. They were not advised of the planning department's requirement for a soils report. The Court held the city was negligent in failing to disclose this information. The Court also held that the issue of soils conditions ought to have been raised when the plaintiffs applied for the building permit:

> *Given that one of the purposes of a plan checker is to ensure that building code requirements are met, the failure, on the evidence, of the checker to ascertain what information the municipality had relating to the subsurface conditions of the lot was an inexcusable dereliction of duty towards both the employer and the plaintiffs. While the duty may not go beyond information in its possession, when that warning information is there, as it was in the form of the planning department memorandum of August 15, 1985, the municipality is bound to satisfy itself of the steps which have been taken to meet the "undisturbed soil, rock or compacted granular fill" condition. Had it done so it must then have refused the building permit until the subsurface conditions met the code requirements, or attached conditions to the permit that was issued.*

This case is a good example of the requirement for building regulators to familiarize themselves with all the information in City Hall, particularly within the planning department, that may be pertinent to proposed construction.

Woolridge v. Stack *(1993) 107 Nfld. & PEIR 280, 336 APR 280 (Nfl. S.C.)*

> *The Town was required to adopt by-laws by the Municipalities Act and in this regard adopted the National Building Code and Administrative Requirements. However, other than requiring the builder to conform to the Code and request the items outlined on page 6 of this judgement (a location plan, plan of the home, location of the septic tank and Department of Health approval and requirement that the Building Code requirements be met), the Town took a passive role. Agreed the Code and Administrative Regulations gave the Town power to regulate, inspect and control but the Town, for "economic reason, adopted a policy of minimum action. ...*
>
> *The evidence in this case shows that the Council debated and indeed struggled with the role it should take on enforcement. As a small municipality with only a few employees it didn't have the resources or manpower to enforce and administer the by-laws. They therefore, made a conscious and reasonable policy decision to play a passive role. ...*

> *I conclude the policy decision here was bona fide and the Town acting with reasonable care cannot be held liable.*

Hilton Canada v. Magil Construction *(1998) 47 MPLR (2d) 182 (Ont. C.J., G.D.)*

This case canvasses the "policy" aspect of building regulation. It is similar to *Dha*, which was not considered. The local government maintained that it had a policy of performing nothing more than a cursory check of plans of buildings covered by Part 4 of the ***Building Code***. It merely confirmed that they were signed and sealed by a Professional Engineer. Similarly, in such cases it relied on the engineer to make site visits and to certify that the construction was in conformity with the design.

The interesting aspect of this case is that the city established the existence of the policy as a matter of practice, despite the fact it was not reduced to writing and was not adopted by a council resolution. The court concluded:

> *The evidence demonstrated a long-standing policy of the City whereby city officials provided a cursory examination only with respect to Part 4 Code structural aspects of a proposed building; and concentrated their efforts and energy on Part 3 aspects, being the use and occupancy provisions. The plaintiff questioned the propriety and efficacy of this policy decision. The policy itself was not reduced to writing nor was it discussed in detail at meetings or through correspondence between the various department officials.*
>
> *According to Dinzey, the policy was in force when he was hired by the City in 1972. It was "standard policy" passed on by the chief and other officials through the years.*

In the face of conflicting evidence, the court found that the design deficiencies were not readily apparent upon the face of the drawings.

After reviewing the law, the court concluded that the city owed the plaintiff a duty of care and went on to consider whether the "policy defence" had been established. It decided:

> *A review of the evidence in this case demonstrates that the decision to conduct a cursory review of structural plans was in place prior to 1972 and passed along by example and word of mouth within the building department. Since that time, moreover, it was based upon a consideration of social, political and/or economic factors. This was evident from the testimony of experienced public officials called to give evidence on behalf of the City. City officials relied upon the stamp and seal of a certified professional engineer with respect to the structural design aspects of proposed building plans. To do otherwise would be extremely costly and time consuming and, as noted by Cowan, "would pretty well bring the department to a stand still"...*

> *The plaintiff questions the enforceability of the policy on the basis of vagueness and alleged inconsistency with the applicable legislation. At first glance, such a policy may appear to be unclear or contradictory in its purpose or application. That is because it is unwritten and passed on in an informal manner. Indeed, Guatto was unsure of exactly what other building inspectors did with respect to it.*
>
> *Taken as a whole, however, the evidence given with respect to the policy itself and its implementation was remarkably clear and inherently consistent. The rationale for the policy was described in crucial detail in different words and by using different examples by different witnesses who played different roles at different times in the process. Yet, they all told the same story. There was nothing unclear or undefinable about it. The policy emanated as practical matter for cogent and compelling reasons involving a balancing of various interests. Factors related to personnel and finance, including the effect of delay, budgetary and staffing issues were duly considered. Once formulated, the policy was applied and it has not been changed over time.*

***Cumiford v. Powell River** [2001] BCSC 960*

The root cause of the problem in this case was an owner/builder who undertook construction in complete disregard of his obligations to comply with the ***Building Code*** and the building bylaw. This case is noteworthy for two reasons, the first is that the Court applied the *Ingles* decision in holding that the local government was liable because it resorted to none of the enforcement alternatives set out in its bylaw, despite clear evidence that the house was constructed in flagrant disregard to the ***Building Code***.

The real significance of the decision, however, arises from the measure of damages awarded. The plaintiff argued that the ***Building Code*** deficiencies were so pervasive that the only reasonable outcome was to award her damages in an amount sufficient to permit her to tear down the premises and construct a new house. The Court accepted the local government's position that it was only liable for the cost of rectifying deficiencies that arose out of health and safety matters. It did so in the following terms:

> *Although counsel for Cumiford argued that the building inspectors had a duty to post and enforce stop work orders upon learning of any building code violation, I do not agree that the scope of duty is as broad as suggested. Not all violations will result in known or foreseeable harm. The municipality correctly asserted, in my view, that the scope of the duty of care owed in the present circumstances is confined to deficiencies that may affect the health and safety of the future occupants.*

> *...I am satisfied that the foundation and framing problems that were identified throughout the original house, as well as the addition, were of a type to place at risk the health and safety of occupants of the house.*
>
> *...Although numerous, the other deficiencies were relatively minor and did not seriously impact on health or safety. As a result, the scope of the duty of care did not extend to enforcing compliance with the builder. To hold otherwise would place the municipality in the position of an insurer and go far beyond the test for determining the scope of the duty set out earlier.*

***The "Delta" Decision** [2001] BCSC 1214*

This is a case arising out of the "leaky condo" crises confronted in many parts of the Province. The project was designed and constructed under the 1985 ***Building Code***. The building bylaw specifically provided for the "administration **and enforcement**" of the ***Building Code***. Delta did not require a design professional to design or conduct inspections of the project nor did it conduct its own inspection of the critical aspects of the project.

The Court was critical of Delta in three basic areas. First, once it had made the policy decision to enforce the ***Building Code***, it was not appropriate for the Building Inspection Department, at the operational level, to decide to only actively enforce parts of the ***Building Code***. Second, the inspector had the authority under its bylaw to require a design professional prepare the design of the building and undertake field reviews of the construction. He chose not to do so in this case, despite the fact the *Architects Act* stipulated an architect be retained on a project of the magnitude in question. Finally, only the minimal inspections referred to in its bylaw were carried out, even though the building inspector was aware no other professional inspections were being undertaken. The Court found that the nature and extent of the defects present in the construction would have been apparent upon a reasonable inspection.

With respect to the last issue, it is helpful to consider the wording of sections 17 and 18 of the bylaw in order to understand the Court's decision. Section 17 stated that the owner must obtain inspections "*to determine compliance with the provisions of this By-law and the Provincial code*" after certain stages of construction. The final inspection was to be conducted "*after the building is complete ... but before occupancy*". Section 18 stated that no occupancy permit could be issued until the building met all the requirements of the ***Building Code***. On a close reading, it was evident that these provisions required the building inspector to satisfy himself that construction complied with **all aspects** of **the *Building Code***, even though he was to do so after certain specific stages of construction.

The most significant passage of the decision with respect to design review and inspections is found at paragraph 85:

> *... the legislative scheme allows that the District can largely avoid the costs of enforcement and supplement its resources through reliance on professional certification. ... professional design and supervision are*

> *standards which should have been adopted in construction of the project. Professional involvement is no absolute guarantee of a well-constructed building as the structural failures in these buildings will attest, but it is a method that is provided for use by a municipality in supplementing a lack of expertise and resources in satisfying its responsibility under the Provincial Code.*

***Parsons v. Richmond** 2001 BCSC 1819*

This case represents the successful application of the principles identified in the *Hilton Canada* and *Delta* cases. Unfortunately, neither of those decisions was cited.

When the plaintiffs applied to the City for a building permit for the construction of a house, the city staff determined that the property in question was in an area known for difficult soils conditions. The City had a policy of requiring foundation designs to be undertaken pursuant to Part 4 of the ***Building Code*** in such circumstances. This meant the plaintiff's had to arrange for a geotechnical engineer to undertake a soils investigation, provide a report and prepare the foundation design. All of which was done.

When the report was received the building official conducted a very limited examination of it. He noted that the report bore the signature and seal of a professional engineer, that it described the soil conditions encountered and made recommendations for site preparation and the foundation design and construction. Satisfied that the appropriate issues had been addressed, he issued the building permit.

The house suffered settlement damage after it was completed and the plaintiffs brought action against the City. They claimed the soils report was defective and that the City should have discovered this. The Court did not agree, holding:

> *A decision not to inspect or to reduce the number of inspections may be an unassailable policy decision... Similarly, a decision to delegate a certain inquiry to an outside professional, and to examine his report only for the limited purpose of determining that he has that he has addressed the issue, is a policy decision a municipal government is free to make.*

General Principles

The following general principles can be extracted from the case law:

- The policy decision to regulate construction creates the duty of care. The decision for the local government is whether to regulate **not** whether to create a duty of care.

- The municipal by-law that creates the scheme of building regulation in place at the time of construction establishes the rights, powers and obligations of the

building inspector. In other words, the local government itself establishes the critical rules that will govern the liability claim.

- The Courts assess the standard of care based on a combination of the following:
    - The wording of the building bylaw.
    - The "reasonable expectations" of the owner.
    - The evidence of professional engineers.
- Local governments must be very wary when imposing an obligation to enforce either the bylaw or the ***Building Code***. This brings into play two things that may be completely divorced from their building official's training and day to day activities:
    - Potential responsibility for **any** bylaw or ***Building Code*** deficiency encountered at **any** time on **any** construction by **anyone**.
    - An obligation to perform a policing function to investigate and discover bylaw and ***Building Code*** violations and to take steps to enforce the bylaw or ***Building Code*** when violations are discovered.
- The fact that one or more design professionals are involved doesn't mean the building regulator's obligations are at an end. There is still a need to make sure the professionals have done what they should.
- Local governments must be more prudent in making their policy decisions in the building regulation sphere. The *Local Government Act* provides that, once adopted, the ***Building Code*** has the same force and effect as a municipal bylaw. The *Delta* case demonstrates that the Courts will treat it as such, and assume council gave it the same careful consideration it gives all bylaws. This means that general intentions regarding compliance and enforcement will be broadly construed as policy decisions, which cannot be altered at the operational level. Consequently, local governments must carry out this policy analysis at a more detailed level than they have done in the past.
- Barring some stricter standard imposed by its own bylaw, a local government is acting reasonably in regulating complex buildings by ensuring the appropriate design professionals are retained on a project and undertake field reviews sufficient to establish general compliance with the ***Building Code***. There is an obvious increase in the risk of liability when a bylaw purports to require more of regulatory staff or when staff takes it upon themselves to do more.

- Bylaws cannot be loosely drafted. Provisions that include references to "compliance with the ***Building Code*** in all respects" are going to impose a duty on the local government to **ensure** this is so.

Policy Considerations

Policy Considerations

The core bylaw provisions contemplate the local government adopting the policies outlined below.

To regulate the construction, alteration, repairs or demolition of buildings and structures for the health, safety and protection of persons and property.

This is the fundament policy decision a local government must make in order to exercise its jurisdiction to regulate construction pursuant to the authority set out in section 694 (1) of the *Local Government Act*. The object of the policy, and its limitations are set out in the "Purpose of Bylaw" section of the Core Bylaw Provisions. This section adopts the role envisioned by the ***Building Code*** for the ***authority having jurisdiction*** to "monitor the process" and explains that inspections are of a limited and interim spot checking nature. In addition, the section specifies certain objects it does not intend to attain, such as:

- The protection of ***owners*** and ***constructors*** from economic loss.
- The assumption by the local government of any responsibility for ensuring the compliance of the ***owner***, ***constructors***, or ***designers*** with the ***Building Code***.
- The provision to any person of a warranty of design or workmanship with respect to any ***building*** or structure to which the bylaw applies.
- The provision to any person of a warranty or assurance that construction undertaken pursuant to a building permit is free from defects.

Building officials are appointed to administer the bylaw and are authorized to enforce it.

It is clear from the case law review that the concept of enforcement has led to the involuntary imposition of duties on ***building officials*** time and time again. This is particularly the case where the ***Building Code*** is concerned. Once a court finds a ***building official*** has a duty to enforce the ***Building Code***, the subsequent discovery of deviations from the ***Building Code*** becomes evidence that the duty to enforce was breached.

This creates a serious dilemma for local governments and their ***building officials***. On the one hand they want to accomplish the following objects:

- Compel ***owners***, ***constructors*** and ***designers*** to comply with the ***Building Code*** and similar enactments.
- Provide ***building officials*** with the means to monitor the construction process, the means to ascertain whether deficiencies that imperil health and safety

matters exist and the authority to compel compliance when such deficiencies are encountered.

- Appropriately penalize bylaw infractions.

On the other hand, local governments do not want:

- To be burdened by obligations they do not have the financial or staff resources to meet. It is doubtful that any building regulation system could provide the high level of quality control "assumed" by the Supreme Court of Canada in the *Manolakos* case.

- To be forced into the position of a warrantor or insurer of design or construction practices.

- To be the sole agency responsible for funding losses incurred by property owners for damages resulting from poor construction.

As a general rule local governments have no duty to enforce their bylaws in any particular case. The courts consider enforcement to be a policy matter to be undertaken at the discretion of the local government. Normally, a decision whether to enforce a bylaw provision will not be reviewed by a court unless it was made in a discriminatory fashion or in bad faith. As we have seen, this deferential approach is readily abandoned in the case of building bylaws. The courts will interpret the most general terms as the affirmation of a policy to enforce the bylaw or ***Building Code***. Once this has been found, other discretionary steps are invariably found to be "operational" and subject to review.

One approach has been to remove any references to a "duty to enforce" from building bylaws, and cloak the ***building official's*** authority with as much discretion as possible. This has been effective to a limited degree. It is not uncommon for a court to view the exercise of the ***building official's*** discretion as an "operational" matter, hence subject to a liability finding. Consequently, local governments must simply accept that in order to attain the primary goals of construction regulation, they are going to face a substantial liability risk arising out of their enforcement activities.

The core building bylaw provisions deal with this in a number of ways. First, they are drafted in recognition of the fact that the ***Building Code*** already applies to all construction within the local government's jurisdiction, as if it were a bylaw. The ***Building Code*** itself compels ***owners***, ***designers*** and ***constructors*** to comply with its terms in every respect. Consequently, the local government's primary objective is obtained without the adoption of a building bylaw. It would be redundant for the building bylaw to address this subject. Moreover, if the bylaw were to include a provision that requires construction to comply with the ***Building Code***, then any breach of the ***Building Code*** would be a breach of the bylaw. If that were the case, then any obligation to enforce the bylaw would also be an obligation to enforce the ***Building Code***.

The building bylaw is meant to establish a system for the **monitoring** of the scheme implemented by the ***Building Code***. The authority of the ***building official*** is focused on administering and enforcing the bylaw's monitoring system, not the ***Building Code***. In this way, it is centered on an objective that ought to be attainable with the local government's financial and staff resources.

Some current building bylaws formally designate the local government or one of its officials as the ***authority having jurisdiction***. The core bylaw provisions deliberately avoid taking this step because of the ***Building Code*** states that the ***authority having jurisdiction*** is the "government body responsible for the enforcement of any part" of the ***Building Code***. This notion is completely contrary to the policy of simply endowing the ***building official*** with the authority to enforce the bylaw.

The case law is clear that the ***building official's*** duty arises from the policies expressed in the bylaw. Consequently, there is a very strong argument to be made that the ***Building Code*** itself cannot be the source of any duty. This wording of the ***Building Code*** is another example of lack of coordination between the drafting of the ***Building Code***; the jurisdiction bestowed by the *Local Government Act* and the legitimate policy considerations behind valid building bylaws. Since a local government can only control the wording of its building bylaw, its best course of action is to avoid getting drawn into to the unfortunate wording of the ***Building Code***.

To adopt a system for monitoring Building Code compliance, which includes the following elements:

- ***Complex and standard structures are subjected to fundamentally different regulatory regimes.***
- ***The owner's responsibility to ensure compliance with both the Building Code and the bylaw is emphasized by requiring the owner (not a "representative" thereof) to apply for the building permit and provide a statement acknowledging his or her responsibilities related to the project.***
- ***The responsibility of complex building's design compliance with the Building Code is left completely with the registered professionals, in accordance with section 290 of the Local Government Act.***
- ***Registered professionals are required to provide proof of professional liability insurance at the time their professional assurance is submitted to the building officials.***
- ***The registered professionals as part of their field reviews conduct all inspections of the construction of complex structures.***

- ***Registered professionals are required to certify the design of standard structures in some circumstances, or when deemed necessary by the building official, as provided for by section 695 of the Local Government Act.***

- ***The foundation design of standard structures must be carried out in accordance with Part 4 of the Building Code, or upon completion of a geotechnical investigation pursuant to section 699 of the Local Government Act, unless the owner establishes that neither of these steps is necessary.***

- ***The bylaw specifies the aspects of construction that relate to health, safety and the protection of persons and property.***

- ***The inspections of the construction of standard buildings conducted by building officials are confined to reviewing the specified health, safety and protection of persons and property aspects.***

- ***Occupancy permits are issued only to certify that the conditions required to fulfill the monitoring system have been completed.***

The core bylaw provisions draw the same distinction between complex and standard structures as the ***Building Code*** does. The ***Building Code*** requires ***registered professionals*** to be responsible for the design of complex ***buildings*** and inspection of their construction. Local governments have no option but to implement this system. As we have seen, the ***Building Code*** contemplates that the local government will ***monitor this process***. Reviewing the designs and collecting the letters of assurance does this. Most local government's ***building officials*** have gone a step further and conducted the same onsite inspections as would have been conducted for standard structures covered by Part 9 of the ***Building Code***.

The core bylaw provisions put a stop to this practice. The reason for this is that experience has shown the periodic site inspections are not sufficient to perform the quality control functions claimants and the courts seem to expect. Nonetheless, they are sufficient to expose the local government to liability for all construction deficiencies that constitute ***Building Code*** violations. Conversely, the ***registered professionals*** who prepare the design are in the best position to understand how the designs must be implemented in order to function as intended. They are required to conduct such tests and carry out such site inspections as are required to assess conformity to the design and the ***Building Code***. This will invariably entail more frequent site visits than those conducted by ***building officials***, and the ***field reviews*** will be conducted by inspectors with more specialized expertise than ***building officials***.

The major problem encountered with this system is that ***registered professionals*** may be uninsured or under insured. In such situations, their clients and other members of the public who rely in professional certification are left without effective recourse. This gap can be readily filled when ***building officials*** have undertaken site inspections. As seen

above, the courts have found them partially liable. This, in turn, opens local governments up to joint and several liability, which results in them paying the unpaid portion of damages awarded against the defaulting ***registered professional***.

The ***Building Code*** requires both local governments and the public to rely on ***registered professionals.*** Given this, one of the policy considerations adopted by the core bylaw provisions is to impose a condition requiring professional liability insurance upon the ***registered professional*** at the time their assurance is provided for the issuance of building and occupancy certificates. This is in the best interests of both local governments and the public, who have no choice but to rely on the ***registered professionals.*** Some local governments for several years have implemented this policy.

Engaging the protection afforded local governments by section 290 of the *Local Government Act* will not affect the plan checking and design review services currently performed by building officials. The section simply provides:

> *(1) If a municipality issues a building permit for a development that does not comply with the Provincial building code or another applicable enactment respecting safety, the municipality must not be held liable, directly or vicariously, for any damage, loss or expense caused or contributed to by an error, omission or other neglect in relation to its approval of the plans submitted with the application for the building permit if*
>
> *(a) a person representing himself or herself as a professional engineer or architect registered as such under Provincial legislation certified, as on behalf of the applicant for the permit, that the plans or the aspects of the plans to which the non-compliance relates complied with the current building code or other applicable enactment to which the non-compliance relates, and*
>
> *(b) the municipality, in issuing the building permit, indicated in writing to the applicant for the permit that it relied on the certification referred to in paragraph (a).*
>
> ...
>
> *(3) If a municipality makes an indication in accordance with subsection (1) (b), the municipality must reduce the fee for the building permit to reflect the costs of work that would otherwise be done by a building inspector to determine whether the plans or the aspects of the plans that were certified to comply do in fact comply with the Provincial building code and other applicable enactments respecting safety.*

As can be seen, there are two conditions that must be met in order for a local government to avail itself of the protection afforded by this section. First, it must indicate its reliance on the professional certification to the permit applicant in writing. Second, it must reduce its building permit fee to account for the cost of its plan review service. It is important to note, however, that this does not mean that it must abstain from checking plans or reviewing the design documents in any way.

One of the reasons for requiring ***owners***, rather than their agents, to apply for building permits directly is to enable the local government to provide the mandated written notification of reliance to the ***owner***. In addition, there are two other reasons for this policy. The first is to ensure the ***owner*** is made aware of his or her overall responsibility for assuring that the ***building*** conforms to the ***Building Code*** and bylaw. The second purpose behind this policy is to ensure that the ***owner*** is aware of the role the local government will be playing in the project. This will prevent a claimant or court from drawing upon the "reasonable expectations" of ***owners*** in the way that led to liability being imposed on the local government in cases such as *Manolakos*, *Dha* and *Ingles*.

The core bylaw provisions also draw upon the authority provided by section 695 of the *Local Government Act* to require a ***registered professional*** to prepare and certify the design in circumstances where Part 9 of the ***Building Code*** would otherwise apply. This section provides:

> *A council may, by bylaw, do one or both of the following:*
>
> *(a) require applicants for building permits, in circumstances as specified in the bylaw that relate to*
>
> *(i) site conditions,*
>
> *(ii) the size or complexity of developments, or*
>
> *(iii) aspects of developments,*
>
> *to provide the municipality with a certification by a professional engineer or architect that the plans submitted with the application for the permit, or specified aspects of those plans, comply with the then current Provincial building code and other applicable enactments respecting safety;*
>
> *(b) authorize building inspectors for the municipality to require applicants for building permits to provide the municipality with a certification referred to in paragraph (a) if a building inspector considers that this is warranted by*
>
> *(i) the site conditions,*

(ii) the size or complexity of the developments, or

(iii) an aspect of the development to which the permit relates.

This requirement is imposed on projects that involve the construction of more than two ***buildings***, which in the aggregate total more than 1,000 m^2 or contain four or more dwelling units. The ***building official*** is also given the discretion to impose this requirement should he or she deem it appropriate in other situations.

The most frequent problem encountered with the design and construction of standard structures relates to footings and foundations being built on unsuitable soil. This has led to hundreds of claims being brought against local governments. British Columbia presents ***constructors*** and ***building officials*** with many geotechnical challenges. The volume and severity of the claims graphically illustrate the vulnerability of the predominant past practice of trying to identify these challenges during an onsite inspection. This system has worked to the severe detriment of ***owners***, subsequent purchasers and local governments. This vulnerability is rooted in the assumption that sites are presumed to be suitable for conventional footings and foundations unless evidence is encountered to conclude otherwise. The core bylaw provisions are based on a policy of making the opposite presumption. The core bylaw provisions presume that the site requires engineered foundations unless the ***owner*** establishes that this step is unnecessary.

Some local governments have already implemented similar policies. They require foundations to be investigated, designed and constructed in compliance with Part 4 of the ***Building Code*** when the project is located in designated areas. Others have a policy of requiring an engineering report pursuant to section 699 of the *Local Government Act* in similar circumstances. The core bylaw provisions simply widen the application of these policies.

Neither the ***Building Code*** nor the *Local Government Act* provides any assistance in determining what the "health and safety" aspects of construction are. The *Cumiford* case aptly illustrates the importance of clarifying what is meant by this term. It would seem to follow that the inspections conducted by ***building officials*** should relate to the aspects of construction that the local government has deemed important enough to regulate. The *Delta* case demonstrates the difficulties both the local government and the courts encounter when the specified inspections do not appear to be part of a coherent regulatory philosophy.

Although the *Local Government Act* specifically provides authority for requiring occupancy permits, some local governments have stopped issuing them because of liability fears. Conversely, others have made the requirement into a multi-stage process, which calls for one or more "provisional occupancy" permits to be issued on an interim basis. The result is a very uneven practice across British Columbia.

The core bylaw provisions adopt an occupancy permit process, but do not do so in the sweeping terms used by many existing building bylaws. These often state that the occupancy permit "shall not be issued until the construction fully complies with the ***Building Code*** and all other applicable bylaws and enactments". This is readily interpreted by both claimants and the courts to mean that the occupancy permit constitutes a warranty of compliance. If ***Building Code***, or similar deficiencies, are subsequently encountered, that is taken as almost conclusive evidence that the occupancy permit was improperly issued.

The practice of issuing provisional occupancy permits is fraught with different difficulties. Although the procedure varies widely across the Province, they are almost always used in situations where the project is "substantially complete" but the developer has not fulfilled all that was required. These unmet requirements can vary from the completion of landscaping to the provision of final letters of assurance. Regardless of the circumstances, they enable a developer to collect its money from purchasers before meeting its obligations. This has often resulted in the local government being drawn into disputes over the rectification of deficiencies or, worse still, being held responsible for permitting the occupation of sub-standard, unsafe construction.

Core Bylaw Provisions

Core Bylaw Provisions

WHEREAS section 694 (1) of the *Local Government Act* authorizes the **********, for the health, safety and protection of persons and property to regulate the construction, alteration, repair, or demolition of buildings and structures by bylaw;

AND WHEREAS the Province of British Columbia has adopted a building code to govern standards in respect of the construction, alteration, repair and demolition of buildings in municipalities and regional districts in the Province;

AND WHEREAS it is deemed necessary to provide for the administration of the building code;

NOW THEREFORE THE COUNCIL OF **********, in open meeting assembled, enacts as follows:

1. Title

1. This bylaw may be cited for all purposes as the "********** of ********** Building Bylaw No. ********".

2. Definitions

2. In this bylaw:

The following words and terms have the meanings set out in Section 1.1.3.2 of the British Columbia Building Code 1998: ***assembly occupancy***, ***building***, ***building area***, ***building height***, ***business and personal services occupancy***, ***care or detention occupancy***, ***constructor***, ***coordinating registered professional***, ***designer***, ***field review***, ***high hazard industrial occupancy***, ***industrial occupancy***, ***low hazard industrial occupancy***, ***major occupancy***, ***mercantile occupancy***, ***medium hazard industrial occupancy***, ***occupancy***, ***owner***, ***registered professional***, and ***residential occupancy***.

Building Code means the *British Columbia Building Code 1998* as adopted by the Minister pursuant to section 692 (1) of the *Local Government Act*, as amended or re-enacted from time to time.

Building Official includes Building Inspectors, Plan Checkers and Plumbing Inspectors designated by the *********.

Complex Building means:

(a) all ***buildings*** use for ***major occupancies*** classified as

(i) ***assembly occupancies***,

(ii) ***care or detention occupancies***,

(iii) ***high hazard industrial occupancies***, and

(b) all ***buildings*** exceeding 600 square meters in ***building area*** or exceeding three storeys in ***building height*** used for ***major occupancies*** classified as

(i) ***residential occupancies***,

(ii) ***business and personal services occupancies***,

(iii) ***mercantile occupancies***,

(iv) ***medium and low hazard industrial occupancies***.

Health and safety aspects of the work means design and construction regulated by Part 3, Part 4, and sections 9.4, 9.8, 9.9, 9.10, 9.12, 9.14, 9.15, 9.17, 9.18, 9.20, 9.21, 9.22, 9.23, 9.24, 9.31, 9.32, and 9.34 of Part 9 of the ***Building Code***.

Standard building means a ***building*** of three storeys or less in ***building height***, having a ***building area*** not exceeding 600 square meters and used for ***major occupancies*** classified as

(a) ***residential occupancies***,

(b) ***business and personal services occupancies***,

(c) ***mercantile occupancies***, or

(d) ***medium and low hazard industrial occupancies***.

Structure means a construction or portion thereof of any kind, whether fixed to, supported by or sunk into land or water, but specifically excludes landscaping, fences, paving and retaining structures less than 1.5 meters in height.

3. Purpose of Bylaw

3.1 The bylaw, shall, notwithstanding any other provision herein, be interpreted in accordance with this section

3.2 This bylaw has been enacted for the purpose of regulating construction within the ********** in the general public interest. The activities undertaken by or on behalf of the ********** pursuant to this bylaw are for the sole purpose of providing a limited and interim spot checking function for reason of health, safety

and the protection of persons and property. It is not contemplated nor intended, nor does the purpose of this bylaw extend

3.2.1 to the protection of ***owners***, owner/builders or ***constructors*** from economic loss;

3.2.2 to the assumption by the ********* or any ***building official*** of any responsibility for ensuring the compliance by any ***owner***, his or her representatives or any employees, ***constructors*** or ***designers*** retained by him or her, with the ***Building Code***, the requirements of this bylaw or other applicable enactments respecting safety;

3.2.3 to providing any person a warranty of design or workmanship with respect to any ***building*** or ***structure*** for which a building permit or occupancy permit is issued under this bylaw;

3.2.4 to providing a warranty or assurance that construction undertaken pursuant to building permits issued by the ********* is free from latent, or any defects.

4. Permit Conditions

4.1 A permit is required whenever work regulated under this bylaw is to be undertaken.

4.2 Neither the issuance of a permit under this bylaw nor the acceptance or review of plans, drawings or supporting documents, nor any inspections made by or on behalf of the ********** shall in any way relieve the ***owner*** or his or her representatives from full and sole responsibility to perform the work in strict accordance with this bylaw, the ***Building Code*** and or other applicable enactments respecting safety.

4.3 It shall be the full and sole responsibility of the ***owner*** (and where the ***owner*** is acting through a representative, the representative) to carry out the work in respect of which the permit was issued in compliance with the ***Building Code*** and this bylaw or other applicable enactments respecting safety.

4.4 Neither the issuance of a permit under this bylaw nor the acceptance or review of plans, drawings or specifications or supporting documents, nor any inspections made by or on behalf of the ********** constitute in any way a representation, warranty, assurance or statement that the ***Building Code***, this bylaw or other applicable enactments respecting safety have been complied with.

4.5 No person shall rely upon any permit as establishing compliance with this bylaw or assume or conclude that this bylaw has been administered or enforced according to its terms. The person to whom the building permit is issued and his or her representatives are responsible for making such determination.

5. Scope and Exemptions

5.1 This bylaw applies to the design, construction and ***occupancy*** of new ***buildings*** and ***structures***, and the alteration, reconstruction, demolition, removal, relocation and ***occupancy*** of existing ***buildings*** and ***structures***.

5.2 This bylaw does not apply to ***buildings*** or ***structures*** exempted by Part 1 of the ***Building Code*** except as expressly provided herein, nor to retaining ***structures*** less than 1.5 meters in height.

6. Prohibitions

6.1 No person shall commence or continue any construction, alteration, reconstruction, demolition, removal, relocation or change the ***occupancy*** of any ***building*** or ***structure***, including excavation or other work related to construction unless a ***building official*** has issued a valid and subsisting permit for the work.

6.2 No person shall occupy or use any ***building*** or ***structure*** unless a valid and subsisting occupancy permit has been issued by a ***building official*** for the ***building*** or ***structure***, or contrary to the terms of any permit issued or any notice given by a ***building official***.

6.3 No person shall knowingly submit false or misleading information to a ***building official*** in relation to any permit application or construction undertaken pursuant to this bylaw.

6.4 No person shall, unless authorized in writing by a ***building official***, reverse, alter, deface, cover, remove or in any way tamper with any notice, permit or certificate posted upon or affixed to a ***building*** or ***structure*** pursuant to this bylaw.

6.5 No person shall do any work that is substantially at variance with the accepted design or plans of a ***building***, ***structure*** or other works for which a permit has been issued, unless that variance has been accepted in writing by a ***building official***.

6.6 No person shall obstruct the entry of a ***building official*** or other authorized official of the ********** on property in the administration of this bylaw.

7. Building Officials

7.1 Each ***building official*** may:

7.1.1 administer this bylaw;

7.1.2 keep records of permit applications, permits, notices and orders issued, inspections and tests made, and shall retain copies of all documents related to the administration of this bylaw or microfilm copies of such documents.

7.1.3 establish, if requested to do so, whether the methods or types of construction and types of materials used in the construction of a ***building*** or ***structure*** for which a permit is sought under this bylaw substantially conform to the requirements of the ***Building Code***.

7.2 A ***building official***:

7.2.1 may enter any land, ***building***, ***structure***, or premises at any reasonable time for the purpose of ascertaining that the terms of this bylaw are being observed;

7.2.2 where any residence is occupied, shall obtain the consent of the occupant or provide written notice to the occupant 24 hours in advance of entry; and

7.2.3 shall carry proper credentials confirming his or her status as a ***building official***.

7.3 A ***building official*** may order the correction of any work that is being or has been done in contravention of this bylaw.

8. Applications

8.1 Every person shall apply for and obtain:

8.1.1 a building permit before constructing, repairing or altering a ***building*** or ***structure***;

8.1.2 a moving permit before moving a ***building*** or ***structure***;

8.1.3 a demolition permit before demolishing a ***building*** or ***structure***;

8.1.4 a fireplace and chimney permit prior to the construction of a masonry fireplace or the installation of a wood burning appliance

or chimney unless the works are encompassed by a valid building permit.

8.2 An application for a moving permit shall be made in the form attached as Form "A" to this bylaw.

8.3 An application for a demolition permit shall be made in the form attached as Form "C" to this bylaw.

8.4 An application for a fireplace and chimney permit shall be made in the form attached as Form "E" to this bylaw.

8.5 All plans submitted with permit applications shall bear the name and address of the ***designer*** of the ***building*** or ***structure***.

8.6 Each ***building*** or ***structure*** to be constructed on a site requires a separate building permit and shall be assessed a separate building permit fee based on the value of that ***building*** or ***structure*** as determined in accordance with Schedule A to this bylaw.

9. Applications for Complex Buildings

9.1 An application for a building permit with respect to a ***complex building*** shall;

9.1.1 be made in the form attached as Form G to this bylaw, signed by the ***owner***, or a signing officer if the ***owner*** is a corporation, and the ***coordinating registered professional***;

9.1.2 be accompanied by the ***owner's*** acknowledgment of responsibility and undertakings made in the form attached as Form I to this bylaw, signed by the ***owner***, or a signing officer if the ***owner*** is a corporation;

9.1.3 include a copy of a title search made within 30 days of the date of the application;

9.1.4 a site plan prepared by a British Columbia Land Surveyor showing:

9.1.4.1 the bearing and dimensions of the parcel taken from the registered subdivision plan;

9.1.4.2 the legal description and civic address of the parcel;

9.1.4.3 the location and dimensions of all statutory rights of way, easements and setback requirements;

9.1.4.4 the location and dimensions of all existing and proposed ***buildings*** or ***structures*** on the parcel;

9.1.4.5 setbacks to the natural boundary of any lake, swamp, pond or watercourse where the **********'s land use regulations establish siting requirements related to flooding;

9.1.4.6 the existing and finished ground levels to an established datum at or adjacent to the site and the geodetic elevation of the underside of the floor system of a ***building*** or ***structure*** where the **********'s land use regulations establish siting requirements related to minimum floor elevation; and

9.1.4.7 the location, dimension and gradient of parking and driveway access;

9.1.4.8 the ***building official*** may waive the requirements for a site plan, in whole or in part, where the permit is sought for the repair or alteration of an existing ***building*** or ***structure***.

9.1.5 floor plans showing the dimensions and uses of all areas: the dimensions and height of crawl and roof spaces; the location, size and swing of doors; the location, size and opening of windows; floor, wall, and ceiling finishes; plumbing fixtures; structural elements; and stair dimensions.

9.1.6 a cross section through the ***building*** or ***structure*** illustrating foundations, drainage, ceiling heights and construction systems;

9.1.7 elevations of all sides of the ***building*** or ***structure*** showing finish details, roof slopes, windows, doors, and finished grade;

9.1.8 cross-sectional details drawn at an appropriate scale and at sufficient locations to illustrate that the ***building*** or ***structure*** substantially conforms to the ***Building Code***;

9.1.9 copies of approvals required under any enactment relating to health or safety, including, without limitation, sewage disposal permits, highway access permits and Ministry of Health approval;

9.1.10 a letter of assurance in the form of Schedule A as referred to in section 2.6 of Part 2 of the ***Building Code***, signed by the ***owner***, or a signing officer of the ***owner*** if the ***owner*** is a corporation, and the ***coordinating registered professional***.

9.1.11 letters of assurance in the form of Schedules B-1 and B-2 as referred to in section 2.6 of Part 2 of the ***Building Code***, each signed by such ***registered professionals*** as the ***building official*** or ***Building Code*** may require to prepare the ***design*** for and conduct ***field reviews*** of the construction of the ***building*** or ***structure***;

9.1.12 two sets of drawings at a suitable scale of the design prepared by each ***registered professional*** and including the information set out in sections 9.1.5 – 9.1.8 of this bylaw;

9.2 In addition to the requirements of section 9.1, the following may be required by a ***building official*** to be submitted with a building permit application for the construction of a ***complex building*** where the complexity of the proposed ***building*** or ***structure*** or siting circumstances warrant:

9.2.1 site servicing drawings, including sufficient detail of off-site services to indicate locations at the property line, prepared and sealed by a ***registered professional***, in accordance with the *********'s subdivision servicing bylaw.

9.2.2 a section through the site showing grades, ***buildings***, ***structures***, parking areas and driveways;

9.2.3 any other information required by the ***building official*** or the ***Building Code*** to establish substantial compliance with this bylaw, the ***Building Code*** and other bylaws and enactments relating to the ***building*** or ***structure***.

10. Applications for *standard buildings*

10.1 An application for a building permit with respect to a ***standard building*** shall;

10.1.1 be made in the form attached as Form "G" to this bylaw, signed by the ***owner***, or a signing officer if the ***owner*** is a corporation;

10.1.2 be accompanied by the ***owner's*** acknowledgment of responsibility and undertakings made in the form attached as Form "I" to this bylaw, signed by the ***owner***, or a signing officer if the ***owner*** is a corporation;

10.1.3 include a copy of a title search made within 30 days of the date of the application;

10.1.4 a site plan prepared by a British Columbia Land Surveyor showing:

10.1.4.1 the bearing and dimensions of the parcel taken from the registered subdivision plan;

10.1.4.2 the legal description and civic address of the parcel;

10.1.4.3 the location and dimensions of all statutory rights of way, easements and setback requirements;

10.1.4.4 the location and dimensions of all existing and proposed ***buildings*** or ***structures*** on the parcel;

10.1.4.5 setbacks to the natural boundary of any lake, swamp, pond or watercourse where the **********'s land use regulations establish siting requirements related to flooding;

10.1.4.6 the existing and finished ground levels to an established datum at or adjacent to the site and the geodetic elevation of the underside of the floor system of a ***building*** or ***structure*** where the **********'s land use regulations establish siting requirements related to minimum floor elevation; and

10.1.4.7 the location, dimension and gradient of parking and driveway access;

10.1.4.8 the ***building official*** may waive the requirements for a site plan, in whole or in part, where the permit is sought for the repair or alteration of an existing ***building*** or ***structure***.

10.1.5 floor plans showing the dimensions and uses of all areas: the dimensions and height of crawl and roof spaces; the location, size and swing of doors; the location, size and opening of windows; floor, wall, and ceiling finishes; plumbing fixtures; structural elements; and stair dimensions.

10.1.6 a cross section through the ***building*** or ***structure*** illustrating foundations, drainage, ceiling heights and construction systems;

10.1.7 elevations of all sides of the ***building*** or ***structure*** showing finish details, roof slopes, windows, doors, and finished grade;

10.1.8 cross-sectional details drawn at an appropriate scale and at sufficient locations to illustrate that the ***building*** or ***structure*** substantially conforms to the ***Building Code***;

10.1.9 copies of approvals required under any enactment relating to health or safety, including, without limitation, sewage disposal permits, highway access permits and Ministry of Health approval;

10.1.10 a foundation design prepared by a ***registered professional*** in accordance with section 4.2 of Part 4 of the ***Building Code***, accompanied by letters of assurance in the form of Schedules B-1 and B-2 as referred to in section 2.6 of Part 2 of the ***Building Code***, signed by the ***registered professional***;

10.1.11 the requirements of section 10.1.10 may be waived by a ***building official*** in circumstances where the ***building official*** has required a professional engineer's report pursuant to section 699 (2) of the *Local Government Act* the building permit is issued in accordance with sections 699 (5) and (6) of the *Local Government Act*.

10.1.12 The requirements of section 10.1.10 may be waived by a ***building official*** if documentation, prepared and sealed by a ***registered professional***, is provided assuring that the foundation design substantially complies with section 9.4.4 of Part 9 the ***Building Code*** and the foundation excavation substantially complies with section 9.12 of Part 9 of the ***Building Code***.

10.1.13 two sets of drawings at a suitable scale of the design including the information set out in sections 10.1.5 – 10.1.8 and 10.1.10 of this bylaw.

10.2 In addition to the requirements of section 10.1, the following may be required by a ***building official*** to be submitted with a building permit application for the construction of a ***standard building*** where the project involves two or more buildings, which in the aggregate total more than 1000 square meters, or two or more buildings that will contain four or more dwelling units, or otherwise where the complexity of the proposed ***building*** or ***structure*** or siting circumstances warrant:

10.2.1 site servicing drawings, including sufficient detail of off-site services to indicate locations at the property line, prepared and sealed by a ***registered professional***, in accordance with the *********'s subdivision servicing bylaw.

10.2.2 a section through the site showing grades, ***buildings***, ***structures***, parking areas and driveways;

10.2.3 a roof plan and roof height calculations;

10.2.4 structural, electrical, mechanical or fire suppression drawings prepared and sealed by a ***registered professional***;

10.2.5 letters of assurance in the form of Schedules B-1 and B-2 as referred to in section 2.6 of Part 2 of the ***Building Code***, signed by the ***registered professional***;

10.2.6 any other information required by the ***building official*** or the ***Building Code*** to establish substantial compliance with this bylaw, the ***Building Code*** and other bylaws and enactments relating to the ***building*** or ***structure***.

11. Professional Plan Certification

11.1 The letters of assurance in the form of Schedules B-1 and B-2 referred in section 2.6 of Part 2 of the ***Building Code*** and provided pursuant to sections 9.1.11, 10.1.10, 10.2.5, and 15.1 of this bylaw are relied upon by the ********* and its ***building officials*** as certification that the design and plans to which the letters of assurance relate comply with the ***Building Code*** and other applicable enactments relating to safety.

11.2 A building permit issued for the construction of a ***complex building***, or for a ***standard building*** for which a ***building official*** required professional design pursuant to section 10.2.4 and letters of assurance pursuant to section 10.2.5 of this bylaw shall be in the form of Form G to this bylaw.

11.3 A building permit issued pursuant to section 11.2 of this bylaw shall include a notice to the ***owner*** that the building permit is issued in reliance upon the certification of the ***registered professionals*** that the design and plans submitted in support of the application for the building permit comply with the ***Building Code*** and other applicable enactments relating to safety.

11.4 When a building permit is issued in accordance with section 11.2 of this bylaw the permit fee shall be reduced by 5% of the fees payable pursuant

to Schedule A to this bylaw, up to a maximum reduction of $500.00 (five hundred dollars).

12. Fees and Charges

12.1 In addition to applicable fees and charges required under other bylaws, a permit fee, calculated in accordance with Schedule A to this bylaw, shall be paid in full prior issuance of any permit under this bylaw.

12.2 An application made for a building permit shall be accompanied by the appropriate plan-processing fee as set out in Schedule A to this bylaw.

12.2.1 The plan-processing fee is non-refundable and shall be credited against the building permit fee when the permit is issued.

12.2.2 An application shall be cancelled and the plan-processing fee forfeited if the building permit has not been issued and the permit fee paid within 180 days of the date of written notification to the ***owner*** that the permit is ready to be issued.

12.2.3 When an application is cancelled the plans and related documents submitted with the application may be destroyed.

12.3 The ***owner*** may obtain a refund of the permit fees set out in Schedule A to this bylaw when a permit is surrendered and cancelled before any construction begins, provided:

12.31. the refund shall not include the plan processing fee paid pursuant to section 12.2 of this bylaw; and

12.32. no refund shall be made where construction has begun or an inspection has been made.

12.4 Where, due to non-compliance with this bylaw, more than two inspections are necessary when one inspection is normally required, for each inspection after the second inspection, a re-inspection charge as set out in Schedule A to this bylaw shall be paid prior to additional inspections being performed.

12.5 For a required permit inspection requested to be done after the hours during which the offices of ********** are normally open, an inspection charge shall be payable based on the time actually spent in making such inspection, including travel time, as set out in Schedule A to this bylaw.

12.6 An inspection charge, as set out in Schedule A to this bylaw, shall be payable in advance for a voluntary inspection to establish compliance of

or to obtain a report on the status of an existing ***building*** or ***structure*** for which a permit is sought under this bylaw.

13. Building Permits

13.1 When:

13.1.1 a completed application including all required supporting documentation has been submitted;

13.1.2 the proposed work set out in the application substantially conforms with the ***Building Code***, this bylaw and all other applicable bylaws and enactments;

13.1.3 the ***owner*** or his or her representative has paid all applicable fees set out in section 12.1 of this bylaw;

13.1.4 the ***owner*** or his or her representative has paid all charges and met all requirements imposed by any other enactment or bylaw;

13.1.5 no enactment, covenant, agreement, or regulation in favour or, or regulation of, ********** authorizes the permit to be withheld;

13.1.6 the ***owner*** has retained a professional engineer or geoscientist if required by the provisions of the *Engineers and Geoscientists Act*;

13.1.7 the ***owner*** has retained an architect if required by the provisions of the *Architects Act*;

a ***building official*** shall issue the permit for which the application is made.

13.2 When the application is in respect of a ***building*** that includes, or will include, a ***residential occupancy***, the building permit must not be issued unless the ***owner*** provides evidence pursuant to section 30 (1) of the *Homeowner Protection Act* that the proposed ***building***:

13.2.1 is covered by home warranty insurance, and

13.2.1 the ***constructor*** is a licensed residential builder.

13.3 Section 13.2 of this bylaw does not apply if the ***owner*** is not required to be licensed and to obtain home warranty insurance in accordance with sections 20 (1) or 30 (1) of the *Homeowner Protection Act*.

13.4 Every permit is issued upon the condition that the permit shall expire and the rights of the ***owner*** under the permit shall terminate if:

13.4.1 the work authorized by the permit is not commenced within 12 months from the date of issuance of the permit; or

13.4.2 work is discontinued for a period of 12 months.

13.5 A ***building official*** may extend the period of time set out under sections 13.4.1 and 13.4.2 where construction has not been commenced or where construction has been discontinued due to adverse weather, strikes, material or labour shortages, or similar hardship beyond the ***owner's*** control.

13.6 A ***building official*** may issue an excavation permit in the form of Form "K" to this bylaw prior to the issuance of a building permit.

13.7 A ***building official*** may issue a building permit for a portion of a ***building*** or ***structure*** before the design, plans and specifications for the entire ***building*** or ***structure*** have been accepted, provided sufficient information has been provided to the ********* to demonstrate to the ***building official*** that the portion authorized to be constructed substantially complies with this and other applicable bylaws and the permit fee applicable to that portion of the ***building*** or ***structure*** has been paid. The issuance of the permit notwithstanding, the requirements of this bylaw apply to the remainder of the ***building*** or ***structure*** as if the permit for the portion of the ***building*** or ***structure*** had not been issued.

13.8 When a site has been excavated under an excavation permit issued pursuant to section 13.6 of this bylaw and a building permit is not subsequently issued or a subsisting building permit has expired in accordance with the requirements of section 13.4, but without the construction of the ***building*** or ***structure*** for which the building permit was issued having commenced, the ***owner*** shall fill in the excavation to restore the original gradients of the site within 60 days of being served notice by the ********* to do so.

14 Disclaimer of Warranty or Representation

14.1 Neither the issuance of a permit under this bylaw, the review and acceptance of the design, drawings, plans or specifications, nor inspections made by a ***building official***, shall constitute a representation or warranty that the ***Building Code*** or the bylaw have been complied with or the ***building*** or ***structure*** meets any standard of materials or workmanship, and no person shall rely on any of those acts as establishing compliance with the ***Building Code*** or this bylaw or any standard of construction.

15 Professional Design and Field Review

15.1 When a ***building official*** considers that the site conditions, size or complexity of a development or an aspect of a development warrant, he or she may require a ***registered professional*** provide design and plan certification and ***field review*** by means of letters of assurance in the form of Schedules B-1, B-2 and C-B referred to in section 2.6 of Part 2 of the ***Building Code.***

15.2 Prior to the issuance of an occupancy permit for a ***complex building***, or ***standard building*** in circumstances where letters of assurance have been required in accordance with sections 10.1.10, 10.2.5 or 15.1 of this bylaw, the ***owner*** shall provide the ********** with letters of assurance in the form of Schedules C-A or C-B, as is appropriate, referred to in section 2.6 of Part 2 of the ***Building Code.***

15.3 When a ***registered professional*** provides letters of assurance in accordance with sections 9.1.11, 10.1.10, 10.2.5, 15.1 or 15.2 of this bylaw, he or she shall also provide proof of professional liability insurance to the ***building official*** in the form of Form "L" to this bylaw.

16 Responsibilities of the Owner

16.1 Every ***owner*** shall ensure that all construction complies with the ***Building Code***, this bylaw and other applicable enactments respecting safety.

16.2 Every ***owner*** to whom a permit is issued shall be responsible for the cost of repair of any damage to municipal works that occurs in the course of the work authorized by the permit.

16.3 Every ***owner*** to whom a permit is issued shall, during construction:

16.3.1 post and maintain the permit in a conspicuous place on the property in respect of which the permit was issued;

16.3.2 keep a copy of the accepted designs, plans and specifications on the property; and

16.3.3 post the civic address on the property in a location visible from any adjoining streets.

17 Inspections

17.1 When a ***registered professional*** provides letters of assurance in accordance with sections 9.1.11, 10.1.10, 10.2.5, 15.1 or 15.2 of this bylaw, the ********** will rely solely on ***field reviews*** undertaken by the

registered professional and the letters of assurance submitted pursuant to section 15.2 of this bylaw as assurance that the construction substantially conforms to the design and that the construction substantially complies with the ***Building Code***, this bylaw and other applicable enactments respecting safety.

17.2 Notwithstanding section 17.1 of this bylaw, a ***building official*** may attend the site from time to time during the course of construction to ascertain that the ***field reviews*** are taking place and to monitor the ***field reviews*** undertaken by the ***registered professionals.***

17.3 A ***building official*** may attend periodically at the site of the construction of ***standard buildings*** or ***structures*** to ascertain whether the ***health and safety aspects of the work*** are being carried out in substantial conformance with the those portions of the ***Building Code***, this bylaw and any other applicable enactment concerning safety.

17.4 The owner or his or her representative shall give at least 24 hours notice to the ********* when requesting an inspection and shall obtain an inspection and receive an ***building official's*** acceptance of the following aspects of the work prior to concealing it:

17.4.1 installation of perimeter drain tiles and dampproofing, prior to backfilling;

17.4.2 the preparation of ground, including ground cover, when required, prior to the placing of a concrete slab;

17.4.3 rough in of factory built chimneys and fireplaces and solid fuel burning appliances;

17.4.4 the framing and sheathing;

17.4.5 insulation and vapour barrier;

17.4.6 when the ***building*** or ***structure*** is substantially complete and ready for ***occupancy***, but before ***occupancy*** takes place of the whole or part of the ***building*** or ***structure.***

17.5 No aspect of the work referred in section 17.4 of this bylaw shall be concealed until a ***building official*** has accepted it in writing.

17.6 The requirements of section 17.4 of this bylaw do not apply to any aspect of the work that is the subject of a ***registered professional's*** letter of assurance provided in accordance with sections 9.1.11, 10.1.10, 10.2.5, 15.1 or 15.2 of this bylaw.

18 Occupancy Permits

18.1 No person shall occupy a ***building*** or ***structure*** or part of a ***building*** or ***structure*** until an occupancy permit has been issued in the form of Form "M" to this bylaw.

18.2 An occupancy permit shall not been issued unless:

18.2.1 all letters of assurance have been submitted when required in accordance with sections 9.1.11, 10.1.10, 10.2.5, 15.1 and 15.2 of this bylaw.

18.2.2 all aspects of the work requiring inspection and acceptance pursuant to section 17.4 of this bylaw have both been inspected and accepted or the inspections and acceptance are not required in accordance with section 17.5 of this bylaw.

18.3 A ***building official*** may issue an occupancy permit for part of a ***building*** or ***structure*** when the part of the ***building*** or ***structure*** is self-contained, provided with essential services and the requirements set out in section 18.2 of this bylaw have been met with respect to it.

19 Retaining Structures

19.1 A ***registered professional*** shall undertake the design and conduct ***field reviews*** of the construction of a retaining structure greater than 1.5 meters in height. Sealed copies of the design plan and ***field review*** reports prepared by the ***registered professional*** for all retaining structures greater than 1.5 meters in height shall be submitted to a ***building official*** prior to acceptance of the works.

20 Permits

20.1 A moving permit shall be in the form of Form "B" to this bylaw.

20.2 A demolition permit shall be in the form of Form "D" to this bylaw.

20.3 A fireplace and chimney permit shall be in the form of Form "F" to this bylaw.

20.4 A building permit shall be in the form of Form "J" to this bylaw, unless it is required to be in Form "G" in accordance with section 11.2 of this bylaw.

21 Penalties and Enforcement

21.1 Every person who contravenes any provision of this bylaw commits an offense punishable on summary conviction and shall be liable to a fine of not more than $10,000.00 (Ten Thousand Dollars) or to imprisonment for not more than six months.

21.2 Every person who fails to comply with any order or notice issued by a ***building official***, or who allows a violation of this bylaw to continue, contravenes this bylaw.

21.3 A ***building official*** may order the cessation of any work that is proceeding in contravention of the ***Building Code*** or this bylaw by posting a Stop Work notice in the form of Form "N" to this bylaw.

21.4 The ***owner*** of property on which a Stop Work notice has been posted, and every other person, shall cease all construction work immediately and shall not do any work until all applicable provisions of this bylaw have been substantially complied with and the Stop Work notice has been rescinded in writing by a ***building official***.

21.5 Where a person occupies a ***building*** or ***structure*** or part of a ***building*** or ***structure*** in contravention of section 6.4 of this bylaw a ***building official*** may post a Do Not Occupy notice in the form of Form "O" to this bylaw on the affected part of the ***building*** or ***structure***.

21.6 The ***owner*** of property on which a Do Not Occupy notice has been posted, and every person, shall cease ***occupancy*** of the ***building*** or ***structure*** immediately and shall refrain from further ***occupancy*** until all applicable provisions of the ***Building Code*** and this bylaw have been substantially complied with and the Do Not Occupy notice has been rescinded in writing by a ***building official***.

21.7 Every person who commences work requiring a building permit without first obtaining such a permit shall, if a Stop Work notice is issued and remains outstanding for 30 days, pay an additional charge equal to 25% of the building permit fee prior to obtaining the required building permit.

22 Severability

22.1 The provisions of this bylaw are severable and the invalidity of any part of this bylaw shall not affect the validity of the remainder of this bylaw.

23 Forms and Schedules

23.1 Forms "A" through "O" and Schedule "A" attached to this Bylaw form a part of this bylaw.

Feedback Summary

Feedback Summary

The draft *Building Bylaw Project Report* was widely circulated. It was important to take as many perspectives as we could into account in the preparation of the final draft of the Core Bylaw Provisions. Comments were solicited from all MIABC members as well as professional bodies and government agencies involved in all aspect of construction regulation. We received approximately twenty responses, which varied in detail from a few paragraphs to substantial briefs. We attached considerable weight to these observations and gave serious consideration to each of the points raised. Each submission was reviewed and a detailed response was provided to its author.

Many of the submissions addressed similar issues and it is not practical to set out all of the matters raised and considered for the preparation of the final report. What follows, in summary form, is a cross section of the comments received along with our assessments of them.

General Comments

Can a singular Building Bylaw apply equally to all areas of the province?

No, one uniform bylaw cannot be expected to work in every municipality. Geographic considerations are but one of many reasons for this. The same bylaw may not be suitable for two adjoining municipalities in any given area of the province. This is because a good building bylaw constitutes the legislative implementation of a variety of policy decisions made by local governments. These decisions are reached based on the balancing of economic, resource and political factors that only the local government has a right to weigh.

The purpose of the *Building Bylaw Project* is not to direct local governments in the making of policy decisions. The *Project's* goal is to identify the factors that have to be considered in setting building regulation policies. The Core Bylaw Provisions are drafted in contemplation of the adoption of specific policies. If these policies are not suitable in a given municipality, then the local government would not adopt them and the related Core Bylaw Provisions would not be applicable.

The point we emphasize is that should a local government decide not to adopt one or more of the policies contemplated by the Core Bylaw Provisions, it will be accepting an increased risk of liability. In the case of some policies, the increased risk will be substantial. The question for the local government to determine is whether the good it seeks to accomplish by adopting its policies is sufficient to outweigh the price it will pay in liability claims.

The effect of the Core Bylaw Provisions is to erode the nature of the building inspection function to a point where the service delivery is inadequate. To rely entirely on professionals does not do the public a service, as there are numerous issues with most developments that are missed or detailed incorrectly.

The intent of the Core Bylaw Provisions is to establish municipal building regulatory services on an even basis throughout the Province, working within the legislative scheme and regulatory regime as it currently exists.

The ***Building Code***, *Engineers and Geoscientists Act* and *Architects Act* mandate the essential role played by ***registered professionals***, not the Core Bylaw Provisions. Section 17.1 authorizes municipal ***building officials*** to attend any number of times, at the construction of Part 3 buildings to ascertain that ***field reviews*** are taking place and to monitor the ***field reviews*** undertaken by ***registered professionals***.

As far as ***complex buildings*** are concerned, the ***Building Code*** requires that ***registered professionals*** prepare the design and undertake ***field reviews***. The ***field reviews*** must be sufficient "to ascertain whether the work substantially complies in all material respects" with the design. The Core Bylaw Provisions assume that a policy decision has been made to accept this as an adequate standard of review.

We are not clear of the basis for the concern about quality. It may be due to a perception that it is in the ***designer's*** interest to overlook ***Building Code*** deficiencies in implementation of his design. Alternatively, it may be the result of a concern that the ***registered professional*** would be inclined to accept substandard work in order to ease the regulatory acceptance of his client's project. In either case, the ***registered professional*** would be in breach of his professional obligations and subject to discipline by the appropriate regulating authority.

In terms of the former concern, the fact is the ***Building Code*** requires the ***designer*** to undertake the ***field reviews***. In fact, section A-2.6 states:

> *It is unreasonable to expect the field reviewer to take on the responsibility for Code compliance of the design done by others.*

The ***Building Code*** is based on the assumption that ***registered professionals*** will conduct themselves in keeping with their professional obligations. If this is not perceived as a sound assumption, then there is a major trust issue in the construction industry. We are not in a position to determine whether that is so, nor are we able to assess the magnitude of such an issue if it exists. The legislature has determined, however, that the responsibility for ensuring that professional standards are met is solely within the jurisdiction of the professional associations. It is not the place of local governments to usurp this function. Obviously, if ***building officials***, in the course of monitoring the process, encounter evidence of ***registered professionals*** breaching their professional standards they should take the necessary steps to have the matter dealt with by the appropriate bodies.

The Core Bylaw Provisions assume that the local government has made the policy decision not to conduct inspections where construction is subject to ***field reviews*** undertaken by ***registered professionals***. This issue must be squarely addressed at the time the bylaw is adopted. Obviously, each local government is free to choose whether to

adopt this policy. Should it decide not to do so, it must acknowledge the fact that it is accepting a very high liability risk at the cost of questionable benefits to the ultimate owners and residents of the building.

*The intent of the Core Bylaw Provisions is to shift responsibility for liability away from the local authority and place it primarily on the **owner** and **registered professional**.*

This is correct, although we would also add the ***constructor***. Those parties are responsible for compliance with regulatory requirements. They should be primarily responsible if they do not fulfill their obligations.

*The **Building Code** already requires compliance with the Code on the part of **owner** and builder. It should, therefore, be only necessary to implement a monitoring system that ensures the owner/builder meets his obligations under the Code.*

We certainly take no issue with this statement; in fact, we think it aptly describes the goal of the process we are undertaking.

How far can a municipality take the "economic reasons" policy as a defence for not inspecting?

There is no limit, as long as it is a genuine policy decision the courts will not look behind it. Even if a local government has been able to afford inspections for many years, it remains open to the council to decide they would like to put those economic resources to use elsewhere. There is no legal impediment to this.

*Is it better to state a **building official** "shall enforce" or "may enforce" the provisions of the bylaw?*

We are firmly of the view that "may enforce" is the better term to use. There are two primary reasons for this. First, we have seen a number of examples where claimants and courts have interpreted the "shall enforce" phrase to mean that liability follows every time a ***Building Code*** violation is encountered. It has the effect of turning the building regulator into a building warrantor. It sets a standard that is impossible to achieve. Secondly, the permissive "may enforce" is a more accurate reflection of a local government's bylaw enforcement responsibility. A substantial body of law has been developed on this subject. It is clear that there is no duty on a municipality to enforce the terms of its bylaws in any given circumstance. The courts have long held that this a discretionary matter. As long as such decisions are not made in bad faith or for an improper purpose, a court will not impose liability for the failure to enforce a bylaw.

Is there not a duty of care once a permit is issued?

Clearly there is. This puts a ***building official*** in a difficult spot when a permit is issued and no inspections are requested. If it later develops that the construction proceeded, then the duty to take steps arises. How this duty can be met will depend on the circumstances.

Kamloops v. Nielsen, *Manolakos*, *Ingles* and *Cumiford* are all cases where the courts held the municipality liable because it did not deal with the situation properly.

While I understand the potential liability associated with the "authority having jurisdiction" designation, there are instances where the ***building official*** *will require the decision-making powers granted by the Code to the AHJ. Perhaps a definition could be developed to give those powers to a* ***building official****, without the attendant liability.*

This is an important point. The draft Core Bylaw Provisions attempt to deal with it by granting the ***Building Official*** the authority outlined in section 7.1.3.

The specific language of forms and schedules is crucial and should be uniform across the province.

There is considerable merit to this point, but the drafting of forms and schedules is beyond the scope of our retainer.

It would be preferable to refer to the current ***Building Code*** *enacted by the Province. This would avoid confusion when the* ***Building Code*** *is changed or the document names are changed.*

It would certainly be more convenient if this practice were employed because it would mean that building bylaws would not have to be amended when a new ***Building Code*** comes into force. There are drawbacks to this practice as well. A building bylaw must be designed to work with the ***Building Code***, as it must work with other bylaws. We consider that there is a greater risk of mischief if one piece of legislation is left unchanged when other, interdependent legislation is amended. This is particularly so in a complex area like building regulation. Our concern on this point is heightened by the fact that the next anticipated ***Building Code*** is expected to introduce a number of fundamental changes. If that occurs, local governments ought to re-examine their building regulatory policies and amend their bylaws as they see fit.

Are we able to exempt certain types of construction although the ***Building Code*** *does not exempt them?*

Yes, a municipality can exempt whatever it wants from the operation of its bylaw. Of course, this does not mean that the ***Building Code*** still will not apply to the construction in question. It means the administration of the bylaw will not touch the exempt construction.

There is no section regarding Climatic Data, is this an intentional omission?

Yes. Climatic data is set out in some detail in Part C of the ***Building Code*** and most bylaws do not contain their own climatic data. Accordingly, we did not feel it was a necessary core provision. If there is some reason that the Part C data is inadequate for a municipality's purpose, then it can be augmented in the bylaw.

Include a section on "Moving and Demolition" outlining responsibilities, requirements and procedure.

Although this is an important aspect of a building bylaw, we did not touch on it because the manner with which municipalities deal with it varies considerably across the province. Consequently, we did not feel that it came within the scope of the "core bylaw provisions" we were retained to draft.

Most building bylaws have separate provisions for plumbing permits. There is no mention anywhere in the model bylaw concerning the need for or issuance of plumbing permits.

Although it is common for building bylaws to deal with plumbing permits, it is not universally included. Hence, we did not deem it a matter to be dealt with in the Core Bylaw Provisions.

The Core Bylaw Provisions do not provide an avenue to require Letters of Assurance.

Section 10.2.5 authorizes the ***building official*** to require Letters of Assurance certifying the design. Section 15.2 requires Letters of Assurance covering ***field reviews***. It is recognized that this latter requirement is vulnerable to a court challenge. Nonetheless, the section was included because it was felt sufficient authority is probably contained in section 694 (1) (e). More importantly, section 15.2 was felt to be necessary to protect the public and implement the policy behind the bylaw.

The Core Bylaw Provisions do not deal in detail with the regulation of retaining walls, demolitions, excavations and moving.

This is true. The Core Bylaw Provisions are not intended to be a model building bylaw. The purpose of the *Building Bylaw Project* is not to direct local governments in the making of policy decisions. The *Project's* goal is to identify the factors that have to be considered in setting building regulation policies. The Core Bylaw Provisions are drafted in contemplation of the adoption of specific policies. If these policies are not suitable in a given municipality, then the local government will not adopt them and the related Core Bylaw Provisions would not be applicable.

The point we emphasize is that should a local government decide not to adopt one or more of the policies contemplated by the Core Bylaw Provisions, it will be accepting an increased risk of liability. In the case of some policies, the increased risk will be substantial. The question for the local government to determine is whether the good it seeks to accomplish by adopting its policies is sufficient to outweigh the price it will pay in liability claims.

In the context of the *Project*, we did not feel it was appropriate to spell out the details of ancillary matters that were unrelated to the overall risk management exercise underway. For this reason we felt it best to leave the details of such things as retaining wall

regulation, change of occupancy and plumbing inspections to be developed by individual local governments.

Section 2

*The definition in the Core Bylaw Provisions of "**Health and Safety aspects of the work**" appears to be at the same time, too restrictive and too broad.*

This is a fair comment. The best solution is for each local government to develop a definition that is compatible with its policies. The limitation of municipal approvals to health and safety aspects is a critically important aspect of Core Bylaw Provisions. The Court relied on this distinction in the *Cumiford* case to limit the municipality's liability. If it were otherwise, the municipality would have been responsible for all ***Building Code*** deficiencies, and thus placed in the position of a warrantor.

The Core Bylaw Provisions clarify the *Cumiford* limitation by specifying which ***Building Code*** provisions the regulatory process addresses. Individual local governments will have to decide, as a policy matter, whether they wish to adopt all of the provisions identified in the Core Bylaw Provisions. They may added to or subtract from them. The key is that they are identified.

"Safety" encompasses a wide range of requirements that exceed the definitions of the bylaw.

The safety issues to be covered by inspections are matters of policy to be set by each local government based on its own values and resources.

*Defining buildings as "professionally serviced" and "not professionally serviced" would simplify the bylaw. The **Building Code** Part 3/Part 9 distinction should be avoided for a number of reasons.*

This is quite true. Unfortunately, the problem lies with the ***Building Code***, which does not work well with other legislation making up the regulatory environment. The ***Building Code*** stipulates when Letters of Assurance can be required, and sets out their form. The *Engineers and Geoscientists Act* and *Architects Act* both contain provisions requiring the retention of ***registered professionals*** in certain circumstances. Neither *Act* contemplates Letters of Assurance. In addition, the *Local Government Act* provides municipalities jurisdiction to require the retention of architects and professional engineers in some circumstances, it permits municipalities to rely on professional designs and it enables them to require "certification" in certain instances. The form of certification is not specified.

The Core Bylaw Provisions deal with these overlapping and somewhat contradictory statutory requirements in a number of ways. The goal is to standardize the assurances required of ***registered professionals*** to the form of the Letters of Assurance appended to the ***Building Code***. The result is more complex than we would like, but as a subordinate

piece of legislation a building bylaw is compelled to accommodate the competing requirements of superior legislation as best it can.

Section 5

Can a local government exempt more than is noted in section 5 of the Core Bylaw Provisions?

Yes, this is a policy decision that each local government is free to make.

Sections 5, 6 and 8 appear to duplicate the ***Building Code.***

These sections are necessary to confer the local government's jurisdiction on its building officials.

Section 6.1 – What if the municipality wanted to conduct an excavation inspection prior to issuing a permit?

There are two issues raised by this concern. The first is a desire to identify soils conditions before issuing the permit, because the inspection may disclose a need to attach conditions to the permit itself. This would only be a concern with respect to Part 9 buildings, since Part 3 buildings must have their foundations designed and constructed in accordance with Part 4. The Core Bylaw Provisions do not provide for this situation arising with respect to Part 9 buildings because they anticipate that the foundation conditions will be governed by Part 4 of the ***Building Code***, section 699 of the *Local Government Act* or a registered professionals certificate provided in accordance with section 10.1.10.2 of the Core Bylaw Provisions.

The other point to consider is how much activity a municipality wants to permit on a site without a permit. The Core Bylaw Provisions obviously anticipate that regulation will commence at a very early phase.

Section 8

Should there not be a catchall phrase for any other required permit?

This could be considered if the required permits are referred to as a group on other parts of the bylaw. The purpose of section 8 is to set out the permits required by the bylaw, so it is necessary to list them there. Of course, this presupposes that the municipality has decided to require each of the permits referred to. The permits listed are quite common, but there is nothing to prevent a municipality from requiring more or less permits than anticipated by the Core Bylaw Provisions.

Section 9

The information to be submitted with permit applications is too detailed.

The Core Bylaw Provisions were adapted from several building bylaws. We do not consider the requirements to be an integral part of the bylaw. They should be considered and adapted to suit the requirements of each municipality.

*There does not appear to be any requirement in the model bylaw for the **owner** to state the intended use or uses of the **building** or to state the value of the work. This should probably be added.*

This is usually dealt with on the application and building permit. Our intention is that this should remain the case.

*There are practical problems posed by requiring the **owner** to sign the applications in person. Would it be sufficient for one of the **owners**, rather than all, or a lawful agent such as a solicitor to make the application?*

Yes, we anticipated that the details of this would be dealt with at the time the forms are drafted.

*With automation of the building permit application process, it is no longer necessary to sign a building permit application. Is it sufficient that the **owner** signs for the permit at issuance, and at the same time complete the acknowledgements noted in sections 9 and 10 of the Core Bylaw Provisions?*

Yes, that should be enough.

Include a schedule to be distributed to owners, which outlines their responsibilities and clarifies the role and responsibilities of the local authority.

We intended Form "I" would to serve this function. The scope of our retainer does not extend to the preparation of the Forms that would accompany and form part of a full bylaw. These often required consideration of policies and conditions that are very specific to each municipality.

Section 10

The Core Bylaw Provisions call for detailed designs, which are clearly unattainable in the region.

If this were the case, then the policy underlying the design requirements of the Core Bylaw Provisions would not be suitable for the local government. It would be a very poor regulatory scheme that sets requirements that were unattainable. Nevertheless, the provisions of the ***Building Code*** must be adhered to. Care should be taken not to accept work and designs that are clearly deficient. If there were no alternative, then it would seem that the best policy would be one of very low level regulation, and the applicable bylaw should reflect this.

The lack of engineers in the area makes the foundation design requirements impractical in our municipality.

This is a legitimate concern that has led to considerable discussion. Obviously, if the policy behind the bylaw requirement cannot be implemented it should not be adopted.

That still leaves the problem of establishing foundation adequacy. The ***Building Code*** places the responsibility for this squarely on the ***owner***. Despite the fact that the expertise may not be available to shift this responsibility to a professional engineer, it does not follow that it should be shifted to the municipality. In the first place, there is nothing in the ***Building Code*** or the *Local Government Act* that requires the municipality to "step into the breach". Secondly, before the municipality decides to act, it had better satisfy itself that the steps it proposes to take would be effective.

We think that the hundreds of claims arising from the failures of foundations that were approved by ***building officials*** is stark evidence that requiring municipal approval of foundations is an ineffective regulatory practice. These claims span the province and involve all levels of expertise and experience on the part of ***building officials***. The fact that any given ***building official*** or municipality has very few claims is not particularly persuasive since these claims often arise decades after the inspection was approved.

Therefore, in our view, if it is not realistic to require a professional engineer to investigate the foundation conditions, the best practice would be to adopt a policy of not inspecting them at all.

An architect may design the development, but refuse to provide Letters of Assurance regarding conformance to the ***Building Code***.

This is a constraint imposed by the ***Building Code***, which only contemplates the provision of Letters of Assurance for ***complex buildings***. An attempt to require Letters of Assurance in other situations could be challenged because section 692 (3) renders a building bylaw of no force and effect insofar as it is "inconsistent" with the ***Building Code***. Section 695 authorizes a local government to require "certification" of designs in certain circumstances. Section 694 (1) (e) authorizes the setting of conditions governing the issuing of permits and inspection of work. Given these two provisions, a local government is on solid ground if it requires the "certification" of a design to be in the form of a Letter of Assurance. It is far less certain that a local government can require a Letter of Assurance regarding ***field reviews*** of the work.

Some municipalities require some ***field reviews*** by ***registered professionals*** of the construction of ***standard buildings***, but we are not aware of any case where the right to impose this requirement has been considered by a court.

What is the reason section 10.2 involves ***registered professionals*** *where two or more buildings are involved?*

This section is a response to a concern expressed by a number of local governments arising from projects that, while large and complex, fall within the strict definition of part 9 buildings. It draws upon the authority conferred by section 695 of the *Local Government Act* to provide the ***building official*** with the discretion to require professional design.

Section 10.2 is unnecessary because it is covered by part 2 of the ***Building Code.***

This section is required to implement the jurisdiction conferred by section 695 of the *Local Government Act*.

Is the imposition of Part 4 requirements on Part 9 foundations enforceable?

Although it could be challenged, we doubt a court would overturn it. The City of Richmond has adopted this requirement for many years with respect to construction in specified areas. Courts have reviewed it and commented favourably about it on two separate occasions (in the *Dha* and *Parsons* cases).

It may be a waste of money for a ***building official*** *to require a geotechnical survey on all property; it may be better to leave this to his discretion.*

The case of "obvious" foundation conditions can be addressed in a number of ways. Section 10.1.10.2 of the Core Bylaw Provisions permits the waiving of the requirement to comply with either Part 4 of the ***Building Code*** or section 699 of the *Local Government Act*, where documentation is provided by a ***registered professional***. This condition should not be expensive to meet if the situation were clear-cut. If a ***registered professional*** is not willing to give assurances that a foundation and excavation complies with sections 9.4.4 and 9.12 of the ***Building Code*** without a detailed investigation in such a case, then why should a ***building official*** be prepared to do so?

Another option is to undertake a geotechnical assessment of the municipality. This could identify areas were foundations can be safely constructed without engineering assessment, and "red flag" areas where engineering assessment is required.

Section 10.1.10 requires every simple building to have the foundation or soils engineered prior to issuance of a permit. This is a serious cost implication that will affect the ***owner.*** *This may encourage people to build outside regulated areas.*

The concern addressed by the Core Bylaw Provisions is to establish a regulatory scheme that effectively addresses the design and construction of foundations of ***standard buildings***. Cost implications to ***owners***, while a factor to be considered, ought not to dictate the adoption of an ineffective system that has proven to have dramatic cost implications to local government. The Core Bylaw Provisions anticipate that the foundation conditions will be governed by Part 4 of the ***Building Code***, section 699 of the

Local Government Act or a ***registered professional's*** assurance provided in accordance with section 10.1.10.2 of the Core Bylaw Provisions.

Section 11

The concept of placing reliance on professionals is consistent with the requirements of the ***Building Code****, the intent of the Letters of Assurance and the Engineers and Geoscientists Act and the Architects Act. There is, however, a need for an appropriate review process as currently the municipal staff does this review.*

Section 11 implements the procedures required to give effect to section 290 of the *Local Government Act*. It does not contemplate that there will be any reduction in municipal plan review services.

I have difficulty with total reliance for compliance with the ***Building Code*** *on the* ***owner's registered professionals****. The* ***Building Code*** *is subject to a great deal of interpretation and application. Only local government officials can provide a disinterested third party review of the building plans. A* ***registered professional*** *paid by an* ***owner*** *may be biased in favour of interpreting a code requirement in a manner that suits the* ***owner****. It is recommended that* ***building officials*** *continue to complete plans examinations for* ***Building Code*** *compliance for all permit applications, but be reliant of the protection afforded under section 290 of the Local Government Act.*

Section 11.1 of the Core Bylaw Provisions does not mean that the local government will not conduct any design review. The section's wording simply tracks the wording of section 290 (1) (b) of the *Local Government Act*. Moreover, the authority provided by sections 9.2.3 and 10.2.6 of the Core Bylaw Provisions grant the ***building official*** the discretion to require whatever additional design information he deems appropriate to establish ***Building Code*** compliance. To this can be added the authority conferred by section 7.1.3.

Section 11.3 – should be deleted because it contradicts the ***Building Code*** *Letters of Assurance.*

This section is required to implement the provisions of section 290 of the *Local Government Act*. Its language tracks the statutory wording.

Why does section 11.4 limit the fee reduction to $500?

The fee reduction is a statutory requirement imposed by section 290. The amount is something to be decided by each municipality. The $500 maximum is quite common, so we adopted it.

Section 12

The "Fees and Charges" section is too detailed for our municipality.

This is another area where we adopted provisions common to a number of bylaws. Each local government should adopt wording that suits its practice.

Section 13

*This section seems to impose an obligation on the **building official** to issue a building permit upon receipt of a "completed application". My concern would be in finding authority for a **building official** to refuse to issue a permit where the application showed the building to be in contravention of the **Building Code** or another enactment.*

The Core Bylaw Provision wording was adopted in order to avoid problems arising from the common wording that directs a ***building official*** to issue a permit if the design demonstrates conformance with the ***Building Code*** and other enactments in all respects. That provision gave rise to the argument that a permit must not be issued unless such a determination had been made. Thus, if it developed that the design did not conform, then the ***building official*** was wrong to issue the permit.

The section wording requires the permit to be issued upon receipt of a completed application. That includes certification of ***Building Code*** compliance in the form of Schedule B's for ***complex buildings***. If the ***building official*** does not believe the design submitted for a ***standard building*** conforms to the ***Building Code*** or other requirements, he or she is entitled to require additional information to establish compliance pursuant to section 10.2.6. In the absence of such information, the application is not "complete".

The requirements of the Architects Act and Engineers and Geoscientists Act should be met in the course of fulfilling the requirements of a building permit application.

We agree with this concern and have incorporated those requirements into the final draft of the Core Bylaw Provisions. The court was highly critical of the ***building official*** in the *Delta* case because he did not require the retention of an architect in compliance with these statutory provisions.

Section 15

*Section 15 may impair the **registered professionals** insurance coverage.*

Professional liability insurance is a critical component of the Core Bylaw Provisions, as is demonstrated by section 15.3, which requires ***registered professionals*** to provide proof of coverage when providing a Letter of Assurance. Consequently, anything that works to impinge that coverage would run counter to the policies that the Core Bylaw Provisions intend to implement. For this reason, the documentation design professionals are required to provide is in the form of the Letters of Assurance set out in the ***Building Code***. This is the case even in circumstances where part 2.6 of the ***Building Code*** is not operative. The intention of the Core Bylaw Provisions is to track the wording of these Letters of Assurance whenever the role of the ***registered professional*** is referred to.

Municipalities are constrained by the provisions of the *Local Government Act* in adopting a building bylaw. They only have such authority as the *Act* confers upon them. Consequently, when invoking a statutory power the bylaw should track the wording of the *Act*. This can lead to difficulties because the *Act* and the ***Building Code***, despite both being creatures of the Provincial Government, do not always work well together. Section 15.1 of the Core Bylaw Provisions is a case in point.

Since the Act only authorizes the municipality to require "certification", there is little choice but to employ that phrase in the bylaw. We changed the phrase "supported by" to "by means of". This should be sufficient to clarify the intention of the Core Bylaw Provisions to keep the design professionals' representations in the approved format.

Why are Letters of Assurances required?

A concern was raised that the requirements for Letters of Assurance in the Core Bylaw Provisions do not comply with section 2.6.2 of the ***Building Code***. Section 2.6.2. does not restrict the situations in which Letters of Assurance can be taken. It sets out the conditions for Letters of Assurance with respect to ***complex buildings***. The intention of the Core Bylaw Provisions is to adopt these.

The Core Bylaw Provisions go on to set out situations where Letters of Assurance must be provided in relation to some aspects of the design and ***field reviews*** of ***standard buildings***. This is not contrary to the ***Building Code***. An attempt to require Letters of Assurance in other situations could be challenged because section 692 (3) renders a building bylaw of no force and effect insofar as it is "inconsistent" with the ***Building Code***. Section 695 authorizes a local government to require "certification" of designs in certain circumstances. Section 694 (1) (e) authorizes the setting of conditions governing the issuing of permits and inspection of work. Given these two provisions, a local government is on solid ground if it requires the "certification" of a design to be in the form of a Letter of Assurance. It is fair less certain that a local government can require a Letter of Assurance regarding ***field reviews*** of the work.

Section 15.1 – places the owner in a precarious position. Requirements for a ***registered professional*** *should be articulated in advance.*

This section is required to implement the jurisdiction conferred by section 695 of the *Local Government Act*. Clearly, it is good regulatory practice to impose these requirements at an early stage of the project.

Section 15.2 states that the ***Building Official*** *"may attend" the site and seems to limit his or her role to assuring that* ***field reviews*** *by the* ***registered professionals*** *are taking place. The expression "may attend" begs the question; what is the scope of duties involved in attending at the site?*

This monitoring function is the role contemplated for ***building officials*** by the ***Building Code***. The ***building official*** has enforcement powers conferred by sections 6, 7 and 21 of the Core Bylaw Provisions, which are not materially different from those found in most existing bylaws. It is interesting to note that almost none of the existing bylaws contain any provisions setting out the scope of ***building officials'*** duties when conducting inspections.

Section 15.3 -- I am not entirely certain of the authority for a local government to require ***registered professionals*** *to carry liability insurance. Nevertheless, it is probably better to have such a provision in place, particularly if it is going to be a standard requirement among all local governments.*

Section 694 (1) (e) of the *Local Government Act* authorizes the setting of conditions governing the issuing of permits and inspection of work. The Core Bylaw Provisions seek to impose proof of liability insurance as condition of issuing the building permit and accepting ***field reviews***. This is not an unreasonable condition for a local government to impose. It is, of course, subject to challenge. We are optimistic that a challenge can be defeated because some local governments have adopted this requirement for many years. The court commented favourably about it in the *Parsons* case.

What is the insurance product intended by section 15.3?

The section refers to "professional liability insurance", which is a recognized type of insurance product. It is also known as "errors and omissions" insurance.

Does the insurance run with the project or with the professional?

Both types of insurance products are available in the marketplace. Project insurance is more difficult to obtain and may not be readily available for any given project. Either type of insurance will meet the requirements of the section.

Does the insurance have a time limit or is it for as long as the building exists?

Both types of insurance have time limits. Project insurance runs for a time period set by the policy terms. This can be for as long as ten years. The policies that cover individual professional practices generally must be renewed annually. They are usually written on a "claims made" basis, which means they respond to claims made during the policy term, regardless of when the error or omission is alleged to have occurred.

What types of liability does it cover and not cover?

Although the details vary, the policies generally cover claims of professional negligence. Sometimes the coverage is limited. For example, some insurers will not cover architects for building envelope failures. The policies do not cover general liability claims, such as slip and falls.

*By requiring the **registered professional** to certify all aspects of a project, including the construction, and to provide proof of liability insurance coverage, the coverage could become difficult to obtain or become cost prohibitive to most professionals.*

The Core Bylaw Provisions do not impose any duties or obligations on ***registered professionals***. The ***Building Code*** does. The "certification" required is in a form that has been approved by the professional associations. The cost of insurance is a function of the risks created. The fact that there is a significant cost to ***registered professionals*** to obtain insurance coverage is not a reason for local governments to step in as a potential financing agency. Local government should finance its risks; the other participants in the construction process should finance theirs.

Section 17

*Inspections and plan reviews by **building officials** have always been a part of the municipal permitting and inspection process. The process also includes a monitoring and spot-check function. If the role of the **building official** is to insure that there has been a reasonable level of conformance to the **Building Code**, these activities must continue.*

The Core Bylaw Provisions anticipate that ***building officials*** will continue to undertake plan reviews and inspections. The inspections take the form of monitoring the process in the case of ***complex buildings***, which is the role anticipated by the ***Building Code***. . The role of ***building officials*** is defined in the building bylaw. '**Insuring** conformance to the Building Code", laudable a goal as that may be, is not a role currently anticipated by either the ***Building Code*** or current bylaws

*The Bylaw should clarify what **building officials** do when they are in attendance.*

We doubt this is necessary. The monitoring and enforcement powers conferred by the bylaw should be carried out at the ***building officials*** discretion. We note that ***building officials*** do no seem to have been hampered in their activities by current bylaw wordings that say nothing about what they must do when conducting an inspection.

*Under what statute can the local government delegate its duty to inspect construction to **registered professionals**?*

There is no duty to inspect imposed on local government by any statute. The only inspections contemplated by the ***Building Code*** are the ***registered professionals' field reviews*** of Part 3 buildings. The *Delta* case suggested the municipality would have had a successful defence if it had called for and relied on professionals' letters of assurance. The *Parsons* case specifically upheld the City of Richmond's policy decision to delegate geotechnical inspections to professional engineers.

*The proposal not to do inspections on **complex buildings** is not viable especially in small communities because:*

- *Sufficient third party expertise is not available.*
- *There is a conflict of interest because the **Owners** would contract with the third party inspectors.*
- *Removing local government from the inspection process may be contrary to the policy underlying the bylaw.*

Availability

The availability of ***registered professionals*** in rural areas is a concern that must be addressed when making the fundamental decisions about building regulation. It is a significant issue with respect to ***standard buildings*** where the involvement of a design professional is deemed to be appropriate. This will arise in dealing with the foundation conditions and in situations where a design professional is required pursuant to section 695 of the *Local Government Act* or section 10.2 of the Core Bylaw Provisions. It also is a cause for concern because of the requirements of the *Engineers and Geoscientists Act* and *Architects Act*, but those statutory requirements have been imposed by the legislature and a local government does not have the authority to waive them.

The policy decision to be made by the local government in those circumstances is whether to inject its ***building officials*** into the process instead of the ***registered professional*** or to withdraw from inspection services completely. There is no doubt that using ***building officials*** in place of ***registered professionals*** creates a substantial liability risk. The matter comes down to a determining what will be accomplished if inspections are undertaken. In the case of foundations, the overwhelming evidence tends to suggest that visual inspections by a ***building official*** is not an effective means of avoiding poor construction. The effectiveness of other types of inspections depends on the nature of the inspections and the expertise of the ***building officials*** performing them.

As far as ***complex buildings*** are concerned, the ***Building Code*** requires that ***registered professionals*** prepare the design and undertake ***field reviews***. The ***field reviews*** must be sufficient "to ascertain whether the work substantially complies in all material respects" with the ***design***. The Core Bylaw Provisions assume that a policy decision has been made to accept this as an adequate standard of review. If an owner cannot retain registered professionals to undertake this level of service, then the building cannot be constructed in compliance with the ***Building Code***.

Conflict of Interest

We are not clear of the basis for this concern. It may be due to a perception that it is in the designer's interest to overlook ***Building Code*** deficiencies in implementation of his ***design***. Alternatively, it may be the result of a concern that the ***registered professional*** would be inclined to accept substandard work in order to ease the regulatory acceptance of his client's project. In either case, the ***registered professional*** would be in breach of

his professional obligations and subject to discipline by the appropriate regulating authority.

Underlying Policy

The Core Bylaw Provisions assume that the local government has made the policy decision not to conduct inspections where construction is subject to ***field reviews*** undertaken by registered professionals. This issue must be squarely addressed at the time the bylaw is adopted. Obviously, each local government is free to choose whether to adopt this policy. Should it decide not to do so, it must acknowledge the fact that it is accepting very high liability risk at the cost of questionable benefits to the ultimate owners and residents of the building.

Section 17 may impair the Registered Professionals insurance coverage.

The purpose of section 17.1 of the Core Bylaw Provisions is to articulate a municipal policy to rely on the ***registered professional's field reviews*** rather than periodic inspections conducted by its ***building officials.***

The Core Bylaw Provisions are not the source of a requirement that the ***registered professional*** provide "certification". The provision comes into operation when Letters of Assurance, in the form set out in the ***Building Code***, are provided. The section goes on to set out the reliance that the municipality will place on those Letters of Assurance. The section was drafted to track the wording of section 290 of the *Local Government Act*, which provides a defence to municipalities when carrying out design reviews. It does not purport to make the ***registered professional*** responsible for anything other than what is set out in the Letters of Assurance. Nor does it purport to impose liability on the ***registered professional*** for deficiencies in the ***constructor's*** work. As noted, this is something a municipality cannot do.

Nevertheless, if the section could be read as creating the mischief that gives rise to this concern, it should be changed so that nothing more than its purpose is achieved. We did this by substituting the word "assurance" for the word "certification" and deleted the phrase "plans and specifications and that the construction complies".

*S. 17.1 implies that the **registered professional** has full responsibility for "certification" of **Building Code** conformance of the **design** and construction.*

The ***Building Code*** places responsibility for compliance with its provisions on the ***owner.*** Most current building bylaws do the same. The purpose of section 17.1 of the Core Bylaw Provisions is to articulate a municipal policy to rely on the ***registered professional's field reviews*** rather than periodic inspections conducted by its ***building officials.*** It is important to bear in mind that the Core Bylaw Provisions do not create a cause of action, on the part of the municipality or any other person, against the ***registered professional*** arising out of any construction deficiencies that may subsequently manifest

themselves. Indeed, even if the section purported to do so it would be *ultra vires*, as a local government does not have this jurisdiction.

*If the **building official** steps on site, could it not be said that he or she has now under some duty toward inspection of the construction?*

The case law is clear that a ***building official's*** duty to inspect arises from, and is limited by, the terms of the building bylaw. Any action the ***building official*** takes must be undertaken with reasonable care. If not he or she is negligent. So in that sense there is a duty of care, but its scope is set by the bylaw.

*If the **building official** is given the discretion to attend the site and to monitor the **registered professionals**, does this not put the duty of making sure that all is OK back onto the **building official**?*

No, because the ***building official*** is not evaluating and approving specific aspects of the work. He or she is monitoring the process. Both the *Delta* and *Parsons* cases have endorsed this approach.

Section 17.1 authorizes ***building officials*** to attend any number of times at the construction of ***complex buildings*** to ascertain that ***field reviews*** are taking place and to monitor the ***field reviews*** undertaken by ***registered professionals***.

As far as ***complex buildings*** are concerned, the ***Building Code*** requires that ***registered professionals*** prepare the ***design*** and undertake ***field reviews***. The ***field reviews*** must be sufficient "to ascertain whether the work substantially complies in all material respects" with the design. The Core Bylaw Provisions assume that a policy decision has been made to accept this as an adequate standard of review.

Is section 17.3 consistent with 17.4?

We think so. Section 17.3 is intended to give a ***building official*** a general discretion to conduct inspections as he or she sees fit, but limits the purpose of the inspections to the health and safety aspects of the work. Section 17.4 is meant to delineate the various intermediate inspections to be conducted on ***standard buildings***.

Is it intended that we inspect aspects of the work that are outside the definition of Health and Safety?

No, we expect each local government to adopt a definition of Health and Safety aspects of the work that is consistent with its policies. We also expect that it will stipulate intermediate inspections that are consistent with its definition of Health and Safety aspects of the work. The two provisions must go hand in hand. It would be poor practice, and counter-productive, to impose obligations on the ***building officials*** that they do not have the resources or expertise to fulfill.

*Section 17.3 seems to limit a **building official's** discretionary inspections to health and safety issues.*

This is true, but it must be read in conjunction with sections 6, 7 and 21.

*Why are the **building official's** inspections restricted to "health and safety" issues?*

Municipal jurisdiction over building regulation is limited by section 694 (1) of the *Local Government Act* to "health, safety and protection of persons and property". This is done in accordance with policy decisions made by each local government. The purpose of a building bylaw is to articulate and implement these policies. As such the local government has the discretion to determine what matters it will regulate and how it will regulate them. This is a decision based on policy considerations, including economic factors and the availability of resources.

*Section 17.4 sets out a list of inspections that would be carried out by the **building official**. Presumably the inspection under 17.3 (the discretionary inspections) are in addition to the inspections that must be called for by the owner under 17.1.*

Yes, the intention is to give the ***building official*** the authority to conduct additional inspections if he or she deems it necessary in order to enforce the bylaw.

*Although most local governments require a framing inspection, this is typically done upon completion of framing. Many details of the work specified in section 9.22 of the **Building Code** are concealed and cannot be inspected. Is the **building official** liable for all potential deficiencies?*

No. First, a ***building official*** can only be liable for failing to detect defects that ought to be picked up during the course of a reasonable inspection. If defects are covered up, they are not capable of detection. Second, a ***building official*** cannot be criticized for failing to inspect at an earlier stage if the policy of the municipality is not to conduct an inspection until the framing is complete.

*My concern is that unless a local government has policies as to when the additional inspection powers may be exercised under 17.3 there is a potential for the **building official** to be deemed to be negligent in not carrying out further or additional inspections over and above the inspections called for in 17.4. Therefore, a local government probably wants to have a fairly clear and defined inspection policy to deal with 17.3.*

This is a valid concern, although the courts have not gone so far as to require discretionary inspections. Clear policies are always appropriate. The real liability exposure would arise if the ***building official*** were aware, or ought to have been aware, that non-conforming work that poses a danger to health or safety was underway. If he or she declined to inspect in those circumstances there could well be a successful claim from a subsequent owner. Perhaps the best way to deal with this scenario is to accept it as the way things should be.

Why do the Core Bylaw Provisions not require an inspection of building envelope?

There is nothing to prevent a municipality from deciding there should be an inspection of the building envelope. We have not included this as a core provision for two reasons. First, we have not encountered evidence that this is a significant problem with ***standard buildings***. Secondly, we are not at all confident that a municipal inspection would be an effective way to prevent such problems from occurring. The evidence developed to date is that envelope failures are the result of a combination of many conditions introduced at various times during the construction process. It may be that larger municipalities with more sophisticated personnel could develop effective inspection regimes, but we do not think this is something that can be expected of the majority of ***building officials*** in British Columbia.

Section 17.6 indicates that inspections by a ***building official*** *are not required when a* ***registered professional*** *is involved. How can the local government monitor the process if site visits and spot checks are not conducted by the* ***building official****?*

The authority to conduct site visits is conferred by section 17.3. The ***Building Official's*** authority is set out in sections 6, 7 and 21.

Section 18

Will we have to change our practice of giving "occupancy approvals"?

Probably not. Section 694 (1) of the *Local Government Act* gives municipalities the jurisdiction to require that an "occupancy permit" be obtained. There is probably nothing wrong with calling it something else. The *Act* does not stipulate any criteria that must be imposed before an occupancy permit is granted. Consequently, a local government may impose whatever requirements it deems appropriate. Our concern is that many bylaws attach conditions to the occupancy permit that suggest it warrants that the construction fully complies with all aspects of the ***Building Code*** and bylaw. The Core Bylaw Provisions restrict the criteria to simply being that all the appropriate inspections have been conducted and the required certification received.

We may want only to issue Occupancy Permits for projects where people will occupy buildings.

This is a policy decision for a local government to make. If it settles upon a policy that is inconsistent with the Core Bylaw Provisions, then a suitable change will have to be made to the terms of the bylaw.

A list should be included in the bylaw that details the items that will be inspected or monitored at the time of occupancy.

This is generally covered by section 18.2.1. An individual municipality may include more or less than the generic inspections identified in section 17.4. It also has the option to include such matters on the occupancy permit form.

Section 19

Is the 1.5 metre height of a retaining wall appropriate and consistent with the ***Building Code****?*

Many retaining walls are not covered by the ***Building Code***. Local governments are conferred jurisdiction to regulate them by section 694 (1) (a) of the *Local Government Act*. Most have selected, as a matter of policy, the 1.5 metre height as a threshold to regulation.

Implementation Guide

Implementation Guide

The *Core Bylaw Provisions* do not constitute a "model" building bylaw. They are intended to be adopted with minimal modifications, but can be augmented to deal with additional matters to suit a local government's needs. The purpose of this *Implementation Guide* is to set out in a systematic manner the various issues a local government must resolve in order to tailor the *Core Bylaw Provisions* to achieve its purpose.

The "Policy Considerations" section of the *Building Bylaw Project Report* outlines the basis for the various key policies that have been incorporated into the *Core Bylaw Provisions*. It should be reviewed and applied in conjunction with the *Implementation Guide*.

The first policy consideration is to determine whether the local government wants to regulate construction. It would be a legitimate decision to decline to do so. Obviously, the *Implementation Guide* assumes that your local government has decided to regulate construction by adopting the key policies implemented by the *Core Bylaw Provisions*.

Section 2

- Designate the ***building official***. Ensure that the titles employed by your building regulators are accurately incorporated into the bylaw.

- Determine the "health and safety aspects of the work". The *Core Bylaw Provisions* include a generic list of ***Building Code*** references. You may wish to augment or reduce them. Regardless of what is done, it is very important that this issue be given careful consideration. Prior to expanding this list, ascertain whether your building regulatory staff has the expertise and resources to administer the ***Building Code*** sections under consideration.

  Many local governments do not require their ***building officials*** be certified. This point should be addressed at this time. The Building Officials Association of B.C. has developed a certification system for its members. This provides a useful guide in determining the health and safety aspects to be regulated. The system sets three levels of certification:

Level 1	competence in Part 9 of the ***Building Code*** as it applies to one and two family dwellings.
Level 2	competence in all of Part 9 of the ***Building Code.***
Level 3	competence in all parts of the ***Building Code.***

  It would seem to follow from this that if your staff is uncertified or certified at Level 1 that only those aspects of the ***Building Code*** that relate to one and two family dwellings should be monitored. If your staff is certified to Level 2 then all of Part 9

can be monitored. This, however, does not mean that all of Part 9 should be included as a "health and safety aspect of the work". Only those parts that ***are*** necessary for the protection of persons and property ***and*** that can be effectively monitored should be designated.

- Confirm that you are content with the 1.5 metre height as the threshold for regulating retaining structures. If not, fix the threshold in a manner that you prefer.

Section 3

- Insert the name of your local government in the blank fields in sections 3.2, 3.2.2, and 3.2.4.

Section 4

- Insert the name of your local government in the blank fields in sections 4.2 and 4.4.

Section 5

- Confirm that the bylaw application and exemptions are appropriate for your purposes.

Section 6

- Confirm that all the permits intended to be governed by the bylaw are listed. Some local governments issue plumbing, swimming pool and similar permits. These should be included in this section.

Section 9

- Consider whether you want to permit an "authorized agent" of the ***owner*** to sign the forms referred to in sections 9.1.1 and 9.1.2

  This provision poses problems no matter what course is taken. Owners are sometimes absent or located out of the province and so it might seem onerous to require them to attend and sign the application. Conversely, the ***Building Code*** and bylaw both place fundamental responsibilities on the ***owner*** and it is critically important that the ***owner*** acknowledge and appreciate this.

  One solution is to authorize the application to be made by an agent of the ***owner***. If so, this should be a "true" agent who has legal authority to bind the ***owner*** and make decisions on his or her behalf. This should ***not*** be a "representative" of the ***owner*** such as a ***constructor*** or ***registered professional***.

  It should be borne in mind that section 9 applies only to ***complex buildings***, which are significant undertakings. In such circumstances it should not be unreasonable to

expect the ***owner*** to sign the form required by section 9.1.2. The form can be sent out of the province for execution if necessary.

- Confirm that the material requested to accompany the building permit application is appropriate for your purposes. The requirements included in the *Core Bylaw Provisions* are quite detailed. This is probably appropriate for complex buildings but you do not want to be requiring information you do not need. On the other hand, there may be additional information you must get; such would be the case if construction in a flood plain were a concern. Sections 9.1.5 – 9.1.8 summarize the ***Building Code*** requirements and should not be altered.

- Insert the name of your local government in the blank field in section 9.2.1.

Section 10

- Confirm that the material requested to accompany the building permit application is consistent with your practice and requirements. This section deals with ***standard buildings,*** which may not require the level of detail needed for the ***complex buildings*** dealt with in section 9. There may also be additional requirements you wish to add. Sections 10.1.5 – 10.1.8 summarize the ***Building Code*** requirements and should not be altered.

- Sections 10.1.10 – 10.1.12 are very important. If there is a concern that sufficient expertise is not available in your area to impose these requirements, then special attention must be paid to what will be done in their place. One option that should not be considered is to maintain the current practice of conducting foundation inspections. This has consistently proven to be an ineffective regulatory practice that results in extremely high liability costs. Perhaps the best alternative is to reinforce the ***owner's*** appreciation that it is his or her responsibility to ensure foundations are properly excavated and constructed. A clear statement that the local government will not be inspecting or approving foundation conditions should accompany this.

- Attention should also be given to section 10.2, which gives the ***building official*** authority to require a ***registered professional*** to be retained for the design and construction of ***standard buildings*** in some cases. You may wish to alter the criteria for invoking this authority. In doing so, you should keep in mind the provisions of the *Engineers and Geoscientists Act* and the *Architects Act*, which require that a professional engineer or architect be retained for certain projects. These are statutory constraints that cannot be waived by a local government.

- Insert the name of your local government in the blank field in section 10.2.1.

Section 11

- Insert the name of your local government in the blank field in section 11.1.

- Determine the appropriate fee reduction to be set out in section 11.2. Section 290 of the *Local Government Act* requires the fees to be reduced to "reflect the cost of the work that would otherwise be done" conducting plan reviews. The *Core Bylaw Provisions* set this at 5% of the fee, with a maximum reduction of $500. This is a common formula that has been used by many local governments, only your local government can determine whether it is appropriate in your case. This is difficult to do in most cases, because the ***building officials*** continue to conduct plan reviews as they did in the past, so there really is no money saved by employing the section 290 procedure. No doubt this is the reason the section states the fee reduction should merely "reflect" this cost. An additional consideration is that staff salaries and overhead only make up a part of the cost of provided building regulation services. The liability costs should also be considered. Viewed in this light, it is doubtful that many local governments recover the true cost of the service in the form of building permit fees.

Section 12

- Insert the name of your local government in the blank field in section 12.5.

- There may be aspects of this section that are not in accord with your local government's practices. The section should be modified to reflect your practices and procedures.

Section 13

- Insert the name of your local government in the blank fields in sections 13.1.5, 13.7 and 13.8.

- The requirement to confirm compliance with the provisions of the *Engineers and Geoscientists Act* and the *Architects Act* is something that will be new to most local governments. The failure to do this was a major component in the liability finding against the municipality in the *Delta* case. Many existing building bylaws, no doubt inadvertently, incorporated this provisions by using words such as:

  > *Where ... the applicant has paid all charges and met all requirements imposed by any other statute or bylaw, the Building Inspector shall issue the permit for which the application is made.*

  The *Core Bylaw Provisions* are clearer and unambiguous.

- Sections 13.5 and 13.6 may be altered to fit with your local government's policies.

- If your local government wants to set conditions for the revocation of a permit, they can be inserted as section 13.9.

Section 15

- Insert the name of your local government in the blank field in section 15.2.

Section 17

- Insert the name of your local government in the blank fields in sections 17.1 and 17.4.

- Determine what inspections are to be called for in section 17.4. The *Core Bylaw Provisions* include a generic list of inspections that are common to many existing building bylaws. The inspections included in your bylaw should be consistent with the "health and safety aspects" defined in section 2. Care must be taken to ensure that each inspection is carried out for a specific purpose and can be conducted effectively.

- Confirm that the notice period set out in section 17.4 is appropriate, given your ***building officials'*** resources.

Additional Matters

Your local government may have other matters its wants included in the building bylaw. Sections dealing with these can be drafted and inserted in the appropriate part of the bylaw.

Section 23

Once the foregoing has been completed, the various forms and schedules can be prepared.