

“Beyond Code” Municipal Environmental Regulation in Construction

SUMMARY

Some municipalities are considering regulating construction, beyond what was foreseen in their provincial Building Code (“beyond Code”), particularly in the environmental realm. This paper addresses several scenarios: (#1) the builder *volunteers* to build to a different standard; (#2) officials want a higher standard for their *own* public project; (#3) the municipality offers a benefit (“*bonus*”) for builders who *opt* for a different standard on *private* projects; (#4) the municipality *demand*s that *private* projects *must* work to a different standard (i.e., a new *regulation*); (#5) the municipality adopts criteria from a standard, and applies these as its own. In this technically complex area, what happens if there are problems? Like misconceived measures?

Though municipalities are immune from liability for their *legislative* enactments (e.g., Council By-laws based on *policy*), there are limits. Municipalities have only the powers conferred upon them by the Province. For example, they cannot regulate energy performance unless **duly authorized**; but many Canadian municipalities (e.g., in Ontario and Alberta) are further specifically **banned from imposing their own standards** beyond Code. There are **exceptions** (e.g., B.C.).

Municipalities **cannot normally assign legislative functions** (involving policy/discretionary judgments) to a **third party**. That may be an “**illegal delegation**”, vulnerable to being struck down by the courts on jurisdictional grounds.

Municipal attempts to assign verification to a third party – even a technical matter assigned to a professional – has a potential for liability. That potential multiplies, if the **assignee is not a member of a recognized professional body**. In particular, it also multiplies, if the question is not merely technical, but includes a **policy component** (potential “illegal delegation”).

These principles also apply to municipalities considering “**Green**” **Trade Marks**, of which there are several. They have legal risks. Each is the private property of the organization that owns it (“the holder”), under little legal obligation that its criteria (for Trade Mark use) be scientific, or fairly applied.

- #1. If the builder **volunteers for use of the Trade Mark** on its project, that is like saying the Trade Mark holder will be *part of its project design team* – so any **error in specs exposes the builder to lawsuit**. There are also legal problems if the builder promises to **carry the Trade Mark, but doesn’t deliver** because of a dispute with the Trade Mark holder.
- #2. If a *government* wants a particular **Trade Mark on its own public project**, that is its prerogative as customer. The Trade Mark holder may then be the government’s appointee, not the builder’s, and errors in specs could create exposure to the government, not the builder (unless the error is one the builder should have realized). But that may be cold comfort if the builder is sued anyway.
- #3. A municipality might offer a **bonus for builders carrying the Trade Mark** on *private* projects (“we will improve zoning if you carry this Mark”). Errors in specs would create the same liability situation as #2 above. More importantly, by *making upzoning conditional on approval by a third party* (the trade Mark holder), the municipality might be illegally transferring its legislative authority – meaning there might be **problems ensuring the municipality delivers** on its proposed legislative improvement. Also, errors in specs could again expose the municipality to lawsuit – for which it might have difficulties invoking its normal “legislative” immunity to liability.
- #4. If a municipality **demand**s that *private* projects **carry the Trade Mark**, then there are serious questions about an illegal transfer of legislative authority to the Trade Mark holder.
- #5. If a municipality **demand**s that projects be constructed to Trade Mark “**equivalency**”, by adopting that Trade Mark’s *standards/criteria* as the municipality’s own, then issues of illegal delegation may be lessened, but issues related to Trade Mark infringement and proper administration of the standard or criteria would arise

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1. INTRODUCTION: GOING “BEYOND CODE”

Canada has a long history of comprehensive model building codes, developed by the Canadian Commission on Building and Fire Codes. These models are the basis for Codes officially adopted by the Provinces, and are based on scientific and transparent methodology.

But some other levels of government consider going “beyond Code”, i.e. beyond the requirements vetted through the Code process:

- Sometimes, this is in response to a builder, who has *volunteered* to build to a different (and *presumably* higher) standard;
- Sometimes, it is at the initiative of the municipality, proposing new standards either (a) of their own, or (b) on the advice of a private third party.

Like all initiatives which diverge from the public tested process, such ventures imply risk. Lawsuits may challenge (i) the *jurisdiction*, (ii) the *procedure*, and/or (iii) the *substantive merits* of non-Code measures. The following memo surveys applicable principles, with particular focus on one area where such instances are numerous – municipal governments.

The subject is legally sensitive for a simple reason. Sometimes, new construction standards are technically unsound: this can occur with ideas that have been inadequately tested. For example, there are lawsuits underway in the United States, alleging that some unproven energy technologies for construction failed to deliver, or caused more harm than good.¹ Venturing into this area has potential negative legal implications.

2. MUNICIPAL AUTHORITY

2.A. Sticking to Code

Legally, it is safest for a municipality to work with existing Codes. For example:

- **Question:** Can a **municipality be held liable** for damage/injury, resulting from a flaw in a *provincial code*?
Answer: Unlikely for several reasons – including not only the fact that the municipality was not responsible for enacting the Code (the Province was), but also because there are several formal exemptions from liability specified in typical legislation for municipalities.²
- **Question:** Parenthetically, can a **Province be held liable** for damage/injury, resulting from a flaw in a provincial code?
Answer: Unlikely; provincial "accountability" is primarily *political, not legal*. This is a significant exception to broad-based perspectives on "duty of care". Codes are usually developed by provinces (on the model of the national Codes), and adopted as part of a "legislative" package. The Crown is not normally liable for its legislation.³

2.B. Going Beyond Code: Four Scenarios

Here are four main situations where municipalities venture beyond Code:

- #1. If the builder *volunteers* to build to a different standard.
- #2. If officials want a different (higher) standard for their *own public project*, like a new municipal building.
- #3. A municipality might offer a *bonus for builders who opt for a different standard* on *private* projects (e.g., "we will improve zoning if you do this").
- #4. If a municipality *demands that private projects must work to a different standard* (i.e., a new *regulation*).

There is seldom much legal question as to whether a municipality has the legal *authority* to undertake scenarios #1 or #2. Scenario #3 is more complex, described later.

Scenario #4, obligatory regulation, involves a jurisdictional issue.

- At one time, municipalities in Canada could apparently "regulate" many construction standards;
- Then the courts specified that *without specific enabling legislation*, "matters which do not affect the **appearance, the general plan and dimensions** of the building cannot be the

subject of regulation. Moreover, a regulation as to dimensions is outside the enabling clause" (because then it would be a *zoning* matter, subject to distinct procedural requirements, as opposed to a building standards matter).⁴

- Subsequently, several provinces produced an **outright ban** on municipal regulation in this area. Today, three alternative situations exist:
 - In some provinces (e.g., Ontario⁵, Alberta⁶), **municipalities cannot impose standards “beyond Code”** on private projects.
 - In some provinces (e.g., B.C., where there is *specific authorization*⁷), **they can.**
 - Some provinces (e.g., Nova Scotia⁸) compromise: municipalities can go “beyond Code”, but must first secure provincial consent.

In short, scenario #4 (*imposing* requirements that are beyond Code) is jurisdictionally possible in some provinces, but banned in others.

If *any* of the above initiatives venture beyond the Code, and produce mistakes that cause damage, who can be sued? This is discussed below.

2.C. Fundamentals of Municipal Liability

The municipal regulatory process has two main steps:

- *Legislative* enactment (i.e., Council *adopting* by-laws), and
- *Administrative* enforcement (i.e., local officials ensuring the by-laws are *obeyed*).

The two are not always synchronized. Sometimes, local officials must *enforce* rules that were not enacted by Council – like the Building Code. Inversely, some by-laws are not enforced, and become a dead letter (though sometimes with costly consequences, as described later). Each step must be examined in turn.

The distinction is crucial for liability reasons. Municipal law distinguishes between

- “*Legislative*” functions (like enacting rules for the citizenry), and
- Other functions (called “administrative” or “operational”), including construction of public works, processing documentation, personnel management etc.

This is relevant if, for example, the municipality introduces a construction standard which is unsound. In Canadian municipal law, *enacting* standards (e.g., by by-law) does not usually trigger a legal “duty of care” (for which one can be sued, in case of a breach of that duty), whereas *enforcing* standards, *after* they have been adopted *does* trigger a legal “duty of care”.⁹

- **Question: So what duty of care** do municipalities have, to assure that their *legislative* enactments are well-researched and well-considered (whether obligatory or optional)?
Answer: Relatively little. Municipalities are generally protected from lawsuit, by the principle of immunity *when they are acting in a “legislative”* capacity (i.e., enacting rules, as opposed to acting in an *administrative* capacity).¹⁰
- **Question: What is the research requirement** for a municipality which proposes adding to Codes, via one formula or another?
Answer: Negligible, again because of the “legislative immunity” question.¹¹
- **Question: If a municipality added “beyond Code” standards** (in a province which allowed same), would it have **enforcement obligations**?

Answer: Yes. Municipalities have a legal obligation to enforce their by-laws uniformly. They cannot adopt a pattern of sometimes enforcing by-laws, and sometimes not.

2.D. Municipal Authority for Bonusing

In Scenario #3, a municipality might take the initiative of offering some benefit (a “bonus”, like improved zoning), in *return* for a different (and presumably higher) construction standard.

- **Question:** If a municipality wanted a “beyond Code” standard to be a *condition* for a land-use control (e.g., upzoning), what would it have to do, to **verify that this standard was met?**

Answer: Several options. For example, the municipality could rezone immediately, but attach an "H" ("Holding") symbol to the rezoning, meaning that the rezoning would not take effect until specified conditions were met. Another technique, on properties subject to site plan control, would be to insert the conditions into a site plan that is then duly approved. In any event, there would need to be verification, to attest that the conditions have been met; typically, that attestation is a sign-off by a senior member of municipal staff, like the Planning Director.

- **Question:** If a municipality (i.e., its officials) attests that conditions have been met, is it under a duty of care?

Answer: Problematic. Jurisprudence is sparse, but on principle, this is no longer a "*legislative*" function but an administrative one, so the municipality can no longer claim the same exemption. This suggests that in the event of **negligence, there is possible exposure to lawsuit against the municipality, by any aggrieved party.**

2.E. Assigning Verification to Someone Else

This has led to this question: could the municipality mitigate its risk, by assigning the verification function to someone else? Like a consulting engineer? Or even a private “environmental” or “green labeling” organization?

The answer is that this does not entirely relieve the municipality from exposure. A report by the B.C. Municipal Insurance Association described the common municipal practice of resorting to outside *professionals* (notably engineers) to verify matters which local inspectors may be unsure of (e.g., components that are no longer visible).¹² However, even resorting to recognized outside professionals does not totally relieve municipalities from exposure:¹³

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.¹⁴

If the potential for municipal liability cannot be entirely avoided by shifting the verification function to a professional *recognized* by the Province's statutes for engineers and architects, then it is even *less* likely to be avoided, by shifting the verification function to a third party that is *not* a card-carrying member of the recognized professional bodies.

However, there is the further question of the municipality's *jurisdiction* to assign such functions to outsiders in the first place. If the third party is, say, an engineer who is being assigned a purely technical function, then that appears to be a purely "administrative" matter. But what if the third party is also expected to make judgment calls, which border on *policy* – i.e., "legislative" matters? What if the third party is assigned

- not only to verify whether something *meets the municipality's predetermined standard* (a **technical** decision),
- but also whether that standard should change, or be replaced by the third party's *own opinion* (a **policy** decision)?

This is where one encounters the important **principle of "delegation"**: in legal language, the question is whether there has been an "*illegal delegation of authority*", i.e., whether the municipality has conferred its decision-making powers on an ineligible recipient. The argument is in several steps:

- First, municipalities have only those *powers that have been assigned* ("*delegated*") to *them* by the Province, no more, no less.
- However, a longstanding legal principle is that someone who has been delegated an assignment is like an agent: he/she/it cannot *sub-delegate* the assignment without consent.
- Hence the **impossibility of municipalities to transfer their legislative or discretionary functions without permission**.¹⁵

This leads to a potential problem for municipalities. If a particular land-use or legal status is *conditional* on a third party, does that constitute an illegal delegation? In one "beyond Code" case, where a municipality turned over its construction standards (in that case, for fire protection) to its own Fire Chief (i.e., projects could not proceed without the Fire Chief's certification), that arrangement was struck down in court as an illegal delegation.¹⁶

In another case¹⁷, a municipality's zoning generally prohibited a certain kind of construction – but then **allowed it on condition that approval were secured from third parties**. This was struck down as an illegal delegation. In that case, the banned construction was swimming pools, and the third parties were the neighbours; but the principle appears the same.

This suggests that

- A. Municipal attempts to assign verification and approval to a third party – even a strictly technical matter assigned to a member of a recognized **professional body** – has a potential for liability.
- B. That potential multiplies, if the assignee is **not a member of a recognized professional body**.
- C. In particular, it also multiplies, if the question is not merely technical, but includes a **policy component**.

2.F. Municipal Authority Concerning Beyond-Code Regulation

As mentioned, municipalities in some provinces are authorized to *impose* beyond-Code regulations ("Scenario #4"), whereas others are not. Here again, another question is this: if the

municipality is one which can do this (e.g., in B.C.), can it assign the verification function to a third party?

- **Question:** Is the municipality at risk of lawsuit if a non-governmental green certification is made an obligatory requirement?

Answer: Yes. If obligatory, there is a definite risk that such an arrangement is an illegal delegation. This is further discussed later.

3. VARIATION: MUNICIPAL USE OF “GREEN” TRADE MARKS

3.A. “Green” Trade Marks and How They Work

If a municipality is unsure about developing its *own* different standards for construction, could it opt instead for someone else’s standards – i.e., someone *other* than its Province’s Code officials? Could it refer the matter to another body altogether, for the latter to apply its own standards? Many officials appear increasingly interested by the prospect of asking private organizations to put their own “green” label on buildings.

There is nothing new about "green" labels for buildings. A generation ago, Canada pioneered the “Super Energy Efficient Housing” label for environment-conscious home design, which evolved into the **R-2000™** Trade Mark. Other “green” Trade Marks include **LEED®**, **Energy Star®**, **Green Globes™**, **Built Green™** etc.

This is how they work:

- Each Trade Mark is the **private property** of its owner, called the Trade Mark “holder”. R-2000™ belongs to the Government of Canada, but most Trade Mark holders are private organizations. The holder of LEED® is called the Green Building Council in the USA (represented in Canada by the Canada Green Building Council); Built Green™ belongs to the Built Green Society of Canada, etc.
- Being **private property**, **Trade Marks cannot be used without the contractual consent of their holder**, based on the holder's *own* criteria. This is legally no different than, say, Coca-Cola® or Pepsi-Cola®, where individual bottlers sign contracts in return for the right to use the Trade Mark.
- In the case of green Trade Marks, the purpose of the exercise is to suggest to the public that the end product is physically different from “normal” construction, according to the *criteria* by which each holder assesses applications for use of its Trade Mark. Those criteria can vary from one holder to another. Indeed, a single Trade Mark holder may change its criteria mid-stream, subject only to its contract with its applicants.

The attraction is this. Usually, meeting the holder’s criteria is portrayed as the stepping-stone to significant environmental benefits, e.g., energy savings. However, the principle of *caveat emptor* still applies: this is a *private law* matter, and aside from principles of contract law and rudimentary consumer law,

- there is **no legal prerequisite that either the contract or the criteria be well thought-out, or even fair**: the Trade Mark holder has the right to deal with its own property as it

sees fit (most notably, how it picks those who will be allowed to use *its* Trade Mark). It can set its own rules.

- Substantively, though there is a system to double-check R-2000™ standards via government research, most green Trade Marks have no direct counterpart, and no **public/transparent/independent verification** that their criteria are sound; nor is there much legal obligation that, procedurally, the criteria be *consistently applied*.

In other jurisdictions,¹⁸ this led to lawsuits in several categories:

- (i) Though many criteria *appeared* progressive, some were problematic, ranging from recommended measures that underperformed, to criteria favouring applicants who buy goods/services from members of the Trade Mark holder's board of directors.
- (ii) A larger concern with verification arose when activities, favoured by the holder's criteria, failed to perform as expected.
- (iii) Several disputes involved builders who argued that they had been unfairly denied use of the Trade Mark – or by clients who argued that the builder was allowed to use the Mark despite a questionable project.

The potential impact on builders is described below.

3.B. Five Scenarios on How these Trade Marks Can Affect Builders

This memo previously outlined four main scenarios where municipalities may be interested in venturing “beyond Code”. There are four corresponding scenarios for how builders interact with these “green” Trade Marks, plus a fifth variation:

#1. Builders choosing to brand their product

For years, builders have taken the initiative of using Trade Marks like R-2000™ to help promote their product. This sometimes involves the municipality directly *if*, for example, the builder *also* takes the initiative of using this branding to help solicit some municipal benefit, e.g., "If our project carries this ‘green’ Trade Mark, will you improve our zoning?"

#2. Governments wanting their public project to carry a particular Trade Mark

Some governments want their own buildings to carry one of these "green" Trade Marks. Though some observers might complain about favouritism (toward one Mark over another), governments, like any other customer, have the right to define objectives for their own property.

#3. Governments offering a bonus for the Trade Mark on private projects

The difference with scenario #1 above is that here, using the Trade Mark is at the government's initiative, not the builder's – e.g., a municipality announcing that any builder who uses a given green Trade Mark would be eligible for a density bonus.

#4. Governments *demanding* that builders use a given Trade Mark on *all* projects.

In this scenario, a municipality might enact a rule that for all projects (or for all in a given class), the builder *must* sign an agreement with a specified holder, and meet the latter's criteria, in order to build private projects for third parties.

#5. Government requires builders to use “equivalent” of the Trade Mark on all projects, i.e. same standards/criteria as the Trade Mark holder would have used.

In this variation on the above scenario, the municipality does not demand that private projects carry the actual Trade Mark; instead, the municipality announces that builders should achieve “the equivalent” of carrying the Trade Mark. The municipality would do the verification (not the Trade Mark holder), by comparing the project to the Trade Mark’s criteria/standards, and having municipal staff review the project *as if they were* the Trade Mark holder.

3.C. Legal Impact, and Exposure

#1. Builder volunteers for green Trade Mark, to promote product.

If the builder takes the initiative of announcing that it will comply with the Trade Mark holder's specifications/criteria, then it is saying that the standards of the project will be what the Trade Mark holder says – as if the *builder has just appointed the Trade Mark holder as its agent, for defining what the appropriate standards shall be.*

Announcing that a project will carry a particular holder’s Trade Mark is not unlike saying it will carry a particular architect’s seal. But as in the case of architects and others with input to design, the builder will need to **be confident that the holder's standards are correct**, or there is potential exposure to liability. If the holder's specs turn out to be erroneous (e.g., compromising Code compliance or safety) and create risk of lawsuit, the builder would likely be at risk too, in much the same way as if the error had been committed by the builder's own consultants or agents.

The builder will also need to **be confident that it will obtain use of the Trade Mark.** The Trade Mark is the holder’s property; so if the holder withholds it arbitrarily (and unless the contract with the holder provides a recourse), it is not clear what the builder’s recourse would be.

Finally, the builder must be wary of **what performance claims to make about its building** if it carries the Trade Mark. Several builders in other jurisdictions were tempted to make claims (e.g., about energy savings) that proved exaggerated, resulting in lawsuits, and in at least one case, accusations of fraud.

#2. Public authorities want their own public project to carry the Trade Mark.

Matters are different if a government announces *it* wants the Trade Mark on its own public project. If a municipality called for bids on, say, a new City Hall, insisting that the project carry a specific green Trade Mark, then the municipality is saying its specs are in the hands of the Trade Mark holder – acting more like the municipality's agent than the builder's. If there were an error in the specs/criteria, the municipality would be more at risk of lawsuit than the builder, who was merely following the instructions of the party that the client designated be followed.

There are three caveats:

- If, on instructions of the Trade Mark criteria, the builder did something where it *ought* to have known better, the builder would have trouble escaping at least partial liability, along with the holder and the municipality.
- Also, much depends on the *contract* which the builder must sign with the Trade Mark holder. It may contain exclusions of liability for the latter.

- Finally, even if the builder is blameless (“I was just following the specs of the client and its appointee”), any lawsuit over those specs is likely to *add the builder as a co-defendant*, because it is almost effortless for a plaintiff to do so.

#3. Government offers *bonus* for Trade Mark, on private sector project.

A municipality might announce: "This site's zoning allows an eight-storey condo tower; but if the project carries a certain green Trade Mark, we will allow ten". This is hazardous uncharted territory for both municipalities and builders, and not only because it creates a similar liability situation to #2 above.

First, it is not clear the arrangement would be legal. Since Municipal Councils cannot *transfer their rule-making authority*, unless specifically authorized, it is unclear whether a Council could pass a by-law saying its zoning by-law could be superseded, if the builder met criteria in the hands of someone else, like a Trade Mark holder. This arrangement provides for the property to be upzoned – but then confers on an outside party (the Trade Mark holder) a *veto on the upzoning*, according to the holder's own criteria and the holder's own procedures, both of which are outside municipal supervision, let alone municipal control. There is a possibility of lawsuit over whether this is an illegal delegation – in which case, the builder might have difficulties *obtaining* the promised upzoning. In short, even where the builder's buy-in is strictly voluntary, questions could be raised concerning the way that the municipality proceeded.

Parenthetically, the municipality's own exposure is a factor. Normally, municipalities are *immune* from lawsuit, for ill-considered public by-laws enacted as part of their “legislative” functions. But does that immunity still apply, when the requirements are not adopted by the municipality, but instead by a private third party (the Trade Mark holder)? That is unclear. In short, if a municipality ties any by-law to compliance to some third-party standard – and that standard proves erroneous – then the municipality might have difficulty invoking its “legislative” immunity against ensuing litigation.

#4. Government *demand*s a particular Trade Mark, on private sector project.

This is most problematic, because it *requires* that in order for a builder to build, the builder *must* first

- do business with a non-governmental entity,
- sign a contract with it,
- and comply with the latter's specs.

In essence, what has just occurred is that the relevant regulatory process has been privatized, with the applicable rules not enacted by Council, but by someone else.

The statutory authority for such arrangements is most unclear, and there would be a distinct risk of lawsuit for illegal delegation.

#5. Government “equivalent”, i.e. *same standards/criteria* as the Trade Mark

The municipality may think that it can avoid the “illegal delegation” problem, by stating that the Trade Mark holder will *not* be given any decision-making role: the Trade Mark holder will not be asked to certify the project. Instead, the municipality will do the “equivalent”, by adopting essentially the *same* standards/criteria as the Trade Mark holder would have used, and then using municipal staff to review the project *as if they were* the Trade Mark holder.

This strategy would probably be successful in avoiding the objection about “illegal delegation”. However, it is not as simple as it may appear:

- Announcing that the municipality will apply “the equivalent” of the Trade Mark’s standards/criteria may be problematic, because some of these Trade Marks *change* their standards/criteria frequently.
- The Trade Mark holder may object that the municipality is misappropriating the Trade Mark holder’s intellectual property. In fact, the Trade Mark holder would be within its rights to demand that the municipality cease and desist the use of its Trade Mark name, and possibly its content.
- It is already difficult enough for municipal staff to enforce the standards of the Code, without making mistakes that could trigger lawsuits. The prospect of municipal staff also learning and enforcing a *second* set of standards (those of the Trade Mark) would multiply the possibility of mistakes, and hence the risk of lawsuit.

4. CONCLUSION

Venturing “beyond Code”, i.e. beyond the vetted areas of construction technology, involves risk.

For Builders: When considering the use of green Trade Marks, the builder should consult

- (a) its insurer, and
- (b) its lawyer.

If the builder *volunteers* to use the Trade Mark on its project, any error in specs could expose the builder to lawsuit. There are also legal problems if the builder promises to carry the Trade Mark, but doesn’t deliver because of a dispute with the Trade Mark holder.

If a government wants a particular Trade Mark on its *own* public project, that is its prerogative as customer. The Trade Mark holder may then be the government’s appointee, not the builder’s, and errors in specs would create exposure to the government, not the builder (unless the error is one the builder should have realized). But that may be cold comfort if the builder is sued anyway.

For Municipalities:

- (a) Although municipalities may believe they are immune from liability for their legislative enactments (and hence can circumvent the Code process, by adding provisions with relative impunity), that authority is *limited*.
- (b) Municipalities have only the powers that were conferred upon them by the Province. For example, they cannot regulate energy performance unless duly authorized in their enabling statute.
- (c) Far from being so authorized, many Canadian municipalities (e.g., all in Ontario and Alberta) are specifically banned from imposing their own standards beyond Code; but there are exceptions (e.g., B.C.).
- (d) Municipalities cannot normally assign *legislative* functions (involving policy/discretionary judgments) to a third party. That may be an “illegal delegation”, vulnerable to being struck down by the courts on jurisdictional grounds.
- (e) Municipal attempts to assign verification to a third party – even a strictly technical matter assigned to a member of a recognized professional body – have a potential for liability.

- (f) That potential multiplies, if the assignee is *not* a member of a recognized professional body.
- (g) In particular, it also multiplies, if the question is not merely technical, but includes a *policy* component.
- (h) There are several “green” Trade Marks, but they are private property, and involve their own legal considerations.
- (i) If a government wants a particular Trade Mark on its *own* public project, that is its prerogative as customer. The Trade Mark holder may then be the government’s appointee, not the builder’s, and errors in specs could create exposure to the government.
- (j) If a municipality offers a *bonus* for builders carrying the Trade Mark on *private* projects (“we will improve zoning if you carry this Mark”), errors in specs would create the same exposure for municipalities as in the paragraph above. More importantly, by *making upzoning conditional on approval by a third party* (the trade Mark holder), the municipality might be illegally delegating its legislative authority – meaning there might be problems ensuring the municipality delivers on its proposed legislative improvement. Also, errors might not be covered by the municipality’s normal “legislative” immunity to liability.
- (k) If a municipality *demand*s that *private* projects carry the Trade Mark, then there are serious questions about a possible illegal delegation of legislative authority to the Trade Mark holder.
- (l) If a municipality proposes to use the “equivalent” of the Trade Mark (i.e., purports to adopt the Trade Mark’s standards/criteria as its own, and have municipal staff do the verification), that scenario also has legal risks.

In 2002, the B.C. Municipal Insurance Association offered this advice¹⁹, which is still valid today:

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.**²⁰

- 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 officials’ 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.
- **Local governments must be more prudent in making their policy decisions in the building regulation sphere.**

ENDNOTES

¹ See *Don't Let Green Design Cause Red Ink*, by Frank Musica. American Institute of Architects Convention, 05/03/2007.

² According to *The Law of Canadian Municipal Corporations*, "The law affords some... immunity to municipal corporations to the extent that their acts are sanctioned by the legislature and acts are performed on behalf of the province".

³ No matter how substantively wrong-headed the policy, a provincial government would not be exposed to liability, unless that government had already passed a law *specifying* that it was exposed. That does not usually occur in this situation.

⁴ *Canadian Law of Planning and Zoning*.

⁵ For example, addenda are not allowed under Section 35(1) and (2) of the Ontario *Building Code Act*: "This Act and the building code supersede all municipal by-laws respecting the construction or demolition of buildings. In the event that this Act or the building code and a municipal by-law treat the same subject-matter in different ways in respect to standards for the use of a building code..., this Act or the building code prevails and the by-law is inoperative to the extent that it differs from this Act or the building code".

⁶ The Alberta *Safety Codes Act*, Section 66(1), similarly provides that "A bylaw of a municipality that purports to regulate a matter that is regulated by this Act is inoperative".

⁷ In 2008, amendments to the *Community Charter*, the *Local Government Act* and the *Vancouver Charter* actually expanded those powers.

⁸ In another variation, the Nova Scotia *Building Code Act*, at Section 4(1)(a) and (2), specifically authorizes municipalities to produce addenda – *on condition* that they get ministerial approval, whereupon they become provincial Regulations: "Upon the recommendation of the council of a municipality, the Minister may, by regulation, prescribe additional standards applicable to the construction or demolition of buildings in that municipality, where such standards are more stringent than the standards in the Building Code or relate to matters not regulated by the Building Code. The exercise by the Minister of the authority... shall be regulations within the meaning of the *Regulations Act*".

⁹ In *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, the Supreme Court of Canada explained the distinction between legislative/policy decisions and administrative (or "operational") ones as follows: "To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, the court must determine whether the scheme represents a policy decision on the part of the authority, or whether it represents the implementation of a policy decision, at the operational level. True policy decisions are exempt from civil liability to ensure that governments are not restricted in making decisions based upon political or economic factors.... Municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers".

¹⁰ According to *The Law of Canadian Municipal Corporations*, "a municipality is immune from liability for damages where the claim is based on an exercise of a legislative function". This is explained: "An action does lie for doing that which is authorized, if it is done negligently... (but) the passage of a resolution approving a development permit did not give rise to a right of action... to sue for negligence since the resolution was a legislative rather than an operational function and no duty of care was owed".

¹¹ However, if a municipality in Ontario wanted to use the device of piggybacking building standards onto a land-use arrangement (zoning, an Official Plan, or site control) and the landowner wanted to attack it as unreasonable, there might be a recourse to the Ontario Municipal Board, because such land-use arrangements are supposed to be judged against objective criteria which can include hard data.

¹² The report described the Supreme Court of Canada's decision in *Ingles v. Tutkaluk Construction*, above, where the court mentioned the municipality's option of referring the matter to a recognized professional:

When a building inspector is undertaking an inspection ... 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.

This practice of resorting to outside experts was also mentioned in the "*Delta*" Decision [2001] BCSC 1214, a case arising out of the "leaky condo" situation:

The legislative scheme allows that the District can largely avoid the costs of enforcement and supplement its resources through reliance on professional certification.... 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.

¹³ As illustrated in *Dha v. Ozdoba* (1990) 39 CLR 248. In that case, it was the owner/builder's professional engineer who prepared deficient foundation plans that were accepted by the municipal building inspector in the course of issuing a building permit. Notwithstanding the fault of the outside professional, the court held the municipality liable:

(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.

¹⁴ *Municipal Insurance Association of British Columbia Building Bylaw Project* (July, 2002).

¹⁵ Indeed, this restriction can sometimes extend to the municipality's own officials; as stated in *The Canadian Encyclopedic Digest*, "in the absence of express statutory authority, a municipal council is not justified in entrusting an official (or any other person or body) any legislative or discretionary power vested in it".

¹⁶ *R. v. Sandler* [1971] 21 D.L.R. (3d) 286 (C.A.); *Minto Const. V. Gloucester* (1979) 23 O.R. (2d) 634 (Div. Ct.)

¹⁷ *Davies v. Forest Hill (Village)*, [1965] 1 O.R. 240 (Ont. H.C.).

¹⁸ *Don't Let Green Design Cause Red Ink*, by Frank Musica. American Institute of Architects Convention, 05/03/2007. For further analysis, see *LEED® Us Not Into Temptation* (distributed by Pro-Demnity Insurance Co.).

¹⁹ *Municipal Insurance Association of British Columbia Building Bylaw Project* (July, 2002).

²⁰ *Municipal Insurance Association of British Columbia Building Bylaw Project*. The authors add:

The regulatory review of... 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.... It is (also) 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.

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*.

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.