

Provincially-Led Green Initiatives: A Case Study

A number of provincial governments are moving to incorporate energy performance requirements within provincial Building Codes. While varied in detail, these initiatives generally reference both prescriptive and performance-based approaches to compliance. Such regulations can raise important questions related to additional risk for the builder, and for those involved in administration of such new code provisions.

Given the importance of these developments, the CHBA recognized the need for additional insight into the range of risks involved and how this may affect Association members, municipalities and others. The province of British Columbia, in comparison to other provinces, has moved forward in this area quickly, and with a broad array of legislation. Reflecting this, the CHBA has developed this case study based on the current B.C. situation, as this should prove useful to all provincial HBAs and members.

SUMMARY

BC is an example of a province with its own initiatives to regulate environmental performance in construction. It has introduced new measures in three documents (revisions to its Building Code, plus two statutes).

First, BC is revising the energy performance specs in its Building Code, with a new Insulation Table. The Code will also offer two alternatives to compliance with the Table:

- a) Achieving an *EnerGuide* rating of 77 or over, as attested by a licensed *EnerGuide* energy advisor; or
- b) "Equivalent performance" to the Table, as projected in "computer modeling" like HOT2000.

This puts the *EnerGuide* advisor into an unexpected position of responsibility. Details about the mechanics of these alternatives are scant. However, nothing in these initiatives visibly relieves municipalities from their supervisory responsibilities for Code enforcement, nor their potential liability for overlooking flaws.

Meanwhile, the Province has not only opened the door (jurisdictionally) for municipal councils to add their *own* energy, water and greenhouse gas demands *beyond* the Code; the legislation also *requires* that every municipal council adopt its *own* target for greenhouse gas emissions (and insert it into its Official Plan). There may be as many regulatory targets for energy performance in BC as there are municipalities.

The legal backdrop concerning liability for administrative errors, duty of care, and restrictions of the delegation of legislative authority, appears unchanged.

Introduction

There are many ways to launch broad environmentally-conscious construction efforts. Though there are other options, most initiatives originate with:

- Builders,
- National institutions,
- Provinces and provincial institutions, and/or
- Municipalities.

The following memo focuses on where *Provinces* take the initiative – a situation particularly applicable to British Columbia and Nova Scotia; but Ontario is scheduled to follow; and other Provinces are considering doing likewise.

The relationship between building codes and government responsibilities has been a sensitive issue since at least 1937. That is the year in which the National Research Council began development of a model National Building Code. For decades, the regulation of construction standards had been a *municipal* responsibility; but the introduction of the NRC's models gradually led *provinces* to take charge. A major part of the rationale for both this shift and for the model national Codes was *specifically* to avoid

- a multiplicity of systems, with different standards every few miles, and
- municipal jockeying.

For years, BC has allowed municipalities to diverge from Provincial standards and approaches, to a greater extent than most other provinces. Indeed,

- while provinces like Alberta and Ontario have been moving toward greater consistency in building standards (and limiting municipal authority to diverge),
- BC has moved in the diametric opposite direction, most recently in the past few months.

However, aspects of the BC initiative are informative of what *could* occur elsewhere.

The BC Experience

In early 2008, the BC Provincial Government launched initiatives on several fronts, including

- *what* targets to meet,
- and *how* to meet them.

There are three legal documents. Their timing is as follows:

- Bill 10, the new *Housing Statutes Amendment Act* (HSAA), has already been enacted into law.
- The BC *Building Code* is being amended, effective September 5, 2008.
- Bill 27, the proposed *Local Government (Green Communities) Statutes Amendment Act*, has not passed Third Reading in the Legislature yet, but is expected to do so this summer.

<p>1. Province-wide initiatives on <i>what</i> higher targets to meet (Building Code):</p>	<p>BC's amended Building Code will include new energy requirements for single-family and small multi-family residential, commercial and industrial buildings, plus new insulation standards for houses, residential buildings under five stories, and small commercial and industrial buildings.</p>
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<p>2. Provincially-mandated alternatives on <i>how</i> to meet those higher targets (Building Code):</p>	<p>The BC Building Code would acknowledge <i>three</i> ways to meet the higher standards:</p> <p>A. Code Table: Insulation requirements will be outlined in a mathematical <i>Insulation Table</i> in the Code. This methodology, of referring to prescriptive standards specified in the Code, is no different from the status quo.</p> <p>B. Alternative #1: <i>EnerGuide</i> 77: “Achieving an <i>EnerGuide</i> Rating System rating of 77, verified by an <i>EnerGuide</i> Rating System energy advisor licensed by Natural Resources Canada”, will now be an acceptable alternative to meeting the requirements in the <i>Insulation Table</i>. For larger projects, the Province is using the ASHRAE 90.1 (2004) standard.¹</p> <p>C. Alternative #2: computer modelling: A further alternative is “the use of energy computer modeling resulting in an equivalent performance” to the <i>Insulation Table</i>.² The Code itself offers the example of the HOT2000 computer program.</p> <p>To assist informed decision-making, the Province is also upgrading the recognition/designation of specialists in this area, by BC’s professional bodies for architects and engineers.³</p>
<p>3. Adjusting Official Plans to entrench municipal intervention (Bill 27):</p>	<p>In an important long-term proposal, the municipal role in energy performance would be <i>entrenched</i>, by insisting that Official Community Plans “<i>must</i> include (municipal) targets for the reduction of greenhouse gas emissions in the area covered by the plan, and policies and actions of the local government proposed with respect to achieving those targets”. Municipal intervention would therefore not be optional: it would be obligatory.</p>

<p>4. Greater powers for municipalities to go beyond Code (HSAA):</p>	<p>BC municipalities (governed by the <i>Local Government Act</i>, <i>Community Charter</i>, and/or <i>Vancouver Charter</i>) are now authorized to adopt by-laws on new topics. Among other new provisions, the Community Charter provides (and the other statutes are complementary) that:</p> <p>8 (3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:</p> <p>53 (1) buildings and other structures;</p> <p>(2) A council may only exercise its authority under section 8(3)(1) or this Division for the following...</p> <p>(b) the <i>conservation of energy or water</i>;</p> <p>(c) the reduction of <i>greenhouse gas</i> emissions;</p> <p>(d) the <i>health, safety or protection</i> of persons or property.</p>
<p>5. Reduction or waiver of Development Cost Charges (Bill 27):</p>	<p>Local governments would also be allowed to waive or reduce DCCs for...</p> <ul style="list-style-type: none"> • “A subdivision of small lots that is designed to result in low greenhouse gas emissions”; and • “A development that is designed to result in a low environmental impact”. <p>A DCC by-law to waive and/or reduce DCCs would have to include:</p> <ul style="list-style-type: none"> • A definition (with presumably more specificity, tailored to the municipality) of "eligible development" in the above categories; and • The amount or rates of DCC reduction.

Observations on the New Legislation As a Whole

Given the stakes involved, EnerGuide advisors could well be drawn into lawsuits over their opinions. They will presumably want to carry substantial insurance.

In other respects, the Code offers almost no detail about the mechanics of the process for these advisors – i.e., reporting systems, reviews of findings, accountability, liability or appeal.

The Code offers even less information about the procedures associated with the computer modelling alternative.

The next question is: what is the purpose of the Province’s statutory expansion of municipal responsibilities?

It is not to assist them to enforce the Code (either in its previous or its new iteration). B.C. municipalities were *already* fully mandated to enforce the Building Code. They did not need the HSAA (Bill 10), or any other new legislation, to do so, either in its previous format, nor with the Building Code's new provisions for alternatives (EnerGuide or computer modeling).

The expansion of municipal powers in the HSAA (Bill 10) appears to have only one apparent purpose: to provide specific legislative authority for municipalities to go beyond Code.

This authority is not unlimited:

- The legislation says nothing, for example, about **liability**;
- nor does it provide any new leeway for municipalities to **delegate authority**.

There is no question, however, that the HSAA offers municipalities the *option* of intervening in the subject of construction standards for energy, water, and greenhouse gas emissions.

Bill 27 goes further: what the HSAA (Bill 10) makes optional, Bill 27 essentially makes obligatory. It would *require* municipalities to set "targets for the reduction of greenhouse gas emissions" in their Official Plans.

This forces municipalities to do the opposite of what Codes were intended to accomplish in the first place, concerning broad consistency and predictability. Bill 27 essentially guarantees (a) that there will be a patchwork of environmental requirements, varying from one municipality to another (with the prospect of different requirements for projects across the street from one another); (b) that the temptation for one-upmanship will enter the municipal picture, as local politicians may compete for the title of who is "greenest"; and (c) every individual municipality will henceforth have an entrenched role in intervening in this aspect of construction, for the elementary reason that it is obliged to enforce *its* Official Plan.

This initiative therefore places substantial responsibilities, in a highly complex and technical subject, on the level of government which has the least financial and research resources to fulfill them responsibly.

Some Specific Questions

In practice, this new BC arrangement gives rise to several questions about legal mechanics, particularly concerning the new pivotal role which EnerGuide energy advisors are being asked to play. EnerGuide is maintained by the Government of Canada, and EnerGuide are licensed by Natural Resources Canada (NRCan), but legal issues will still arise.

- **Question:** Does reliance on an EnerGuide energy advisor (or, e.g., a HOT2000 computer program) represent a *delegation* (assignment) of governmental authority that is potentially illegal?

Answer: No. It is specifically authorized by the Code.

- **Question:** Do the Province’s initiatives affect liability, or the due diligence that is owed?

Answer: The documents make **no reference** to any such change. The longstanding court position has been that once the municipality takes discretionary steps to regulate construction, “it must take care not to injure persons” who are foreseeably affected. There is no sign that this duty of care has changed.⁴
- **Question:** If an EnerGuide energy advisor is used, because the project is targeting an EnerGuide rating of 77+ (instead of using the Insulation Table), who is the EnerGuide adviser working for?

Answer: The Code is **silent**. It *appears* that the advisor is working for the builder – not unlike a surveyor, architect or engineer; but the exact relationship between the advisor and the municipality’s Chief Building Official is undefined at this stage.
- **Question:** Do municipal officials need to verify the EnerGuide advisor's conclusions? Or the computer modeling?

Answer: The Code is **silent**, but the answer still appears to be **yes**. The new initiatives say nothing about **relieving the municipalities from their overall supervisory responsibilities**. They continue to be responsible for Building Code enforcement, and energy requirements are now an integral part of that.⁵ The courts have previously held that even where the builder’s project is formally endorsed by a professional, municipal officials still had “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”.⁶ That duty, and the ensuing requirement for review, have not been changed by the new initiatives.
- **Question:** So if the EnerGuide advisor’s conclusions contained a flaw, which escaped the attention of the builder and municipality, who would likely be sued if the shortcoming later had negative consequences?

Answer: The advisor, the builder, and the municipality.
- **Question:** Can municipal officials take EnerGuide *system* itself at face value, or do they need to do double-check, for example, whether the Government of Canada’s approach in EnerGuide is well-founded?

Answer: The Code authorizes municipalities to use the EnerGuide as published, without having to check independently whether the *system* is sound.
- **Question:** What happens if, instead of an EnerGuide rating of 77, the project obtains a rating of 76.9?

Answer: According to the wording of the Code, it is non-compliant.
- **Question:** What happens if the advisor's conclusions are disputed?

Answer: Nothing in these three documents answers that question. However, it is likely that the dispute would be subject to the same BC procedures as for other disputes among professionals over the Building Code, i.e. an appeal to the BC Building Code Appeal Board.⁷

- **Question:** Who judges whether the project, associated with a “computer modelling” proposal, “results in an equivalent performance” to the Insulation Table?

Answer: In the absence of anyone else designated, the ultimate decision would belong to the Chief Building Official.

- **Question:** How would these new BC initiatives affect a municipality that was considering “green” Trade Marks, like R-2000™, Energy Star®, Built Green™ or LEED®? What if the municipality was considering offering a benefit (“*bonus*”) for builders using the Trade Mark? Or considering making the Trade Mark a *requirement* on private projects?

Answer: The new initiatives make little difference to those scenarios.

- The Code’s new emphasis on the *EnerGuide* Rating System *may* draw attention away from other labelling systems, though that is not yet clear.
- Future statements in the municipality’s Official Plan *may* lead municipalities to reflect and set out an intellectual framework for such ventures.
- Otherwise, the situation is little changed from what was described in a separate memo.⁸ Unlike the situation of licensed *EnerGuide* advisors (who are specifically *named* in the Code as appointees for certain delegated functions), there is nothing in this package which names *other* organizations as eligible recipients of delegated authority. This means that the municipality still faces a risk that any by-law arrangement, where land-use or development approvals are *conditional* on the approval of another third party (in this case, the Trade Mark owner), could be challenged as an **illegal delegation of the municipality’s legislative authority**. Since the three recent BC documents do not address that question, it remains in issue.

ENDNOTES

¹ American Society of Heating, Refrigeration and Air-Conditioning Engineers.

² “**A-10.2.1.1.(3) Alternatives to Prescribed Insulation Requirements** Computer modelling can provide options to the requirements of Table 10.2.1.1.A by considering factors other than insulation that impact energy efficiency and greenhouse gas emissions. These include items such as higher fenestration efficiency, more efficient Heating, Ventilating, Air Conditioning (HVAC) systems, renewable energy systems and reduced envelope air leakage from what is required or is common practice. The Natural Resources Canada EnerGuide Rating System program uses Hot2000 Version 10 for modelling.”

³ The HSAA provides for arrangements for building specialists in technologies such as rain screen and green building techniques. Professional associations will have authority to create building specialist designations and determine the level of knowledge needed for certification as a specialist.

⁴ In *Kamloops v. Nielsen* [1984] 2 SCR 2, the Supreme Court of Canada said that a BC municipality had “a statutory power to regulate construction by bylaw. 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.... 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?”

⁵ The terminology would be that the EnerGuide Rating System is now being “incorporated by reference” into the BC Building Code.

⁶ *Dha v. Ozdoba* (1990) 39 CLR 248.

⁷ The BC Building Code Appeal Board is authorized to adjudicate appeals (usually by written submission) submission which “involve a dispute or disagreement between an Authority Having Jurisdiction (Building Official) and an owner or his agent (designer, builder, etc.) over interpretation or application of the B.C. Building Code”. See The Board’s website at: <http://www.housing.gov.bc.ca/bcab/>

⁸ “*Beyond Code*” *Municipal Requirements for Energy Efficiency*.