

April 6, 2020

Risk Management During COVID-19

COVID-19 | MATTERS DESERVING IMMEDIATE ATTENTION Building Officials Suspending Site Inspections – Part II

These are extraordinary times. Our work continues during the COVID-19 pandemic, but under circumstances that none of us – including the *Building Code Act* and the *Architects Act* – ever anticipated.

As discussed in [Part I \(Bulletin 3\)](#), architects who provide Contract Administration and General Review services on projects in municipalities that are not sending building inspectors to construction sites must adopt measures to protect themselves from claims that may flow from the absence of building inspectors during construction.

Architects who are carrying out Contract Administration and General Review services should include a prominent “disclaimer” in any correspondence or reports directed to clients, consultants, contractors and authorities, including municipal building departments.

DISCLAIMER – Short Form

This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.

This disclaimer **should be considered mandatory** for any reports or correspondence that are submitted to a building department or any authority having jurisdiction. There is an alternate Long Form of the disclaimer at the end of the following discussion that includes other issues that will arise during COVID-19.

Architects Cannot Replace Building Officials

Further to the advisory from the City of Toronto and other municipalities that their Building Departments have put their permit processing and construction site inspections “on hold,” it is important to note that these decisions assume that others – architects or other consultants retained by the applicant / owner – will step in to fill the void left by municipal staff.

Quoting from a recent City of Toronto advisory:

Building Permits and Inspections

Toronto Building will not be able to accept or issue building permits. In addition, no preliminary project applications, zoning reviews, or property information letters can be applied for, processed or issued.

No progress inspections will be undertaken by City Inspectors during this service disruption. However,

construction may proceed without a City inspection, provided the applicant submits a report from the qualified designer responsible for the design, after City services have resumed. This report must demonstrate, with supporting documentation, that the construction was carried out in accordance with the approved drawings and the requirements of the Ontario Building Code. Toronto Building will require and review documentation provided by the applicant after this service disruption.

This is Dangerous – The City Can Blame the Architect for the City’s Inaction

There is no explanation of the stance the City might take if it is dissatisfied with the report or the work that has taken place in its absence. Importantly, the City has declined to accept responsibility for the items

that it missed or overlooked during its absence. Nor is there any suggestion of an indemnification for the architect who went along with the City's process.

In the event a claim arises against the City related to its failure to carry out its mandated role under the *Building Code Act*, it is realistic to anticipate that the City will attempt to defend itself by blaming the "qualified designers" – the architect and other consultants – who accepted the City's position and provided the reports that the City will claim it relied upon.

In effect, the position taken by the City of Toronto is a transfer of the City's role, responsibilities and risks onto the architect and other consultants retained by the owner. There are insurance coverage implications. **It would be very unwise for any architect to agree to the City's position without taking measures to protect itself from a claim that would likely not be covered by professional liability insurance.**

The concern is not limited to the City of Toronto. Other municipalities have opted to suspend some or all of the services provided by their building departments, although not necessarily under the same conditions. The wording of a municipality's notice of any process they have adopted to fill the void left by their absence is important. "The Devil is in the details!" If you have concerns, contact Pro-Demnity's Practice Risk Management service or have the municipality's wording reviewed by a lawyer.

The *Building Code Act* requires that a building official perform a general review in conjunction with an architect performing its duties in accordance with the *Architects Act*. OAA Regulatory Notice R.9, "General Review Where Contractor Proceeds Without a Building Permit" provides guidance regarding the integral role of Building Inspectors:

In combination, the building official and the architect provide two sets of eyes acting independently of each other in reviewing construction for general conformity with plans and specifications that formed the basis for issuance of a building permit.

In providing general review in the absence of building officials' inspections, the architect may well be motivated by his or her perception of the public interest. However, the public interest is best served by construction under the watchful eyes of both the architect and the building official in accordance with the building legislation in Ontario.

The architect's proper motivation may be no defence to the allegation that he or she is acquiescing in the contravention of the law.

Unless the Province enacts special COVID-19 measures that override the *Building Code Act*, municipalities remain responsible for meeting their obligations under the *Act*. **Architects should take care NOT to accept the unilateral transfer of risk from a municipality to the architect.** That is not what the law requires and it is not what architects have contractually bargained for.

Insurance Coverage Implications

The effort to transfer a municipality's own role and risks onto the architect carries potential adverse consequences for the architect who does not take appropriate measures to protect itself.

The "usual or customary" services of an architect that are the subject of an architect's professional liability insurance policy do NOT include assuming a municipality's statutory obligations under the *Building Code Act*. Any claims alleging the architect assumed the municipal building department's role could be excluded from the architect's professional liability insurance coverage.

What Should Architects Do?

Architects who continue to provide services on projects in municipalities that are not providing the normal services of their building departments must adopt measures to protect themselves from claims that may flow from the absence of required building department services.

One action that every architect can take immediately is the inclusion of a prominent "disclaimer" in any correspondence or reports directed to any clients, consultants, contractors and authorities, including municipal building departments. The recommended disclaimer from Bulletin 3 is repeated below.

During the COVID-19 crisis, architectural practices are encouraged to make special efforts to maintain open lines of communication with everyone involved in their projects – contractors, suppliers, authorities and clients – and to share information as early and as often as possible.

For many architects, this won't be a departure from normal behaviour, but it's particularly important now, when uncertainty, confusion and a constantly shifting business environment are keeping us all on edge. No one will benefit from the fallout that may result from a simple misunderstanding, or from lack of clarity surrounding your role and services compared to those of the municipality and their building inspectors. Keeping the lines of communication

open gives the architect the opportunity to re-affirm the importance of adhering to its professional duties of care, the significance of the role of the missing building inspectors and the reasons why an architect cannot accept the transfer of the municipality's role onto themselves. Contractors and clients may not always like what they hear, but they will appreciate and respect

your efforts to be transparent and forthcoming. Clarity in your position as a professional may assist others to make better informed decisions for themselves.

The [Pro-Demnity COVID-19 Special Bulletins](#) are provided to support your efforts to maintain your professional role through difficult circumstances.

DISCLAIMER – Long Form

*This report is issued and should be read together with all previously issued reports, including reports issued by any and all consultants. Nothing in this report relieves the contractor from performing its work in accordance with the plans and specifications, pursuant to the requirements of the Ontario Building Code and the requirements of all authorities having jurisdiction. The contractor shall ensure that its work is inspected by all authorities having jurisdiction. **This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.***

The full wording of the recommended Long Form of the disclaimer addresses a number of issues that may arise on construction projects during COVID-19. **The final sentence in bold should be considered mandatory** for any reports or correspondence that are submitted to any authority having jurisdiction including a municipal building department.

The contents of this Bulletin are provided for general information purposes only. The information contained herein is not legal advice and should not be relied upon as such. Readers must consult their own lawyer respecting the applicability to any particular circumstances of any of the information provided in this Bulletin.

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In the event of a claim against an architect, the terms and conditions of the Pro-Demnity insurance policy will apply. Coverage decisions can only be made at the time a claim arises, based on the allegations and the then known circumstances.