

ROUNDTABLE 1 – INCREASING PUBLIC SAFETY

MONDAY, NOVEMBER 18, 2013

Senior staff from various divisions in the City of Toronto contributed to this review of the questions posed for this roundtable, for consideration in the review and discussion. The Divisions participating include Toronto Building which oversees enforcement of the Building Code and Municipal Licensing and Standards which develops and enforces the City's property standards, as well as the City's Legal Services Division.

Although the City of Toronto did not directly participate in Phase I of the inquiry, we support the work of the Commission and have been monitoring the proceedings with interest. We welcome the opportunity to participate in these roundtables.

It is important to recognize the impact that this building failure had on the Elliot Lake community, and the individuals and families affected. The consequences of the failure necessitate a careful review of what led to the failure and consideration of actions that may be taken to reduce the likelihood of similar failures.

It is also important to understand that the collapse of parts of the Algo Mall were specific to that situation and not necessarily representative of the level of safety resulting from building design, construction or maintenance across the Province today. One aspect of note is that the requirements related to construction of parking structures that are currently in the Ontario Building Code (the "Building Code" or the "Code") were not in place at the time the Algo Mall was designed. We believe parking standards contained in CAN/CSA413 were first referenced in revisions to the 1986 Ontario Building Code, brought into the Code in 1988. Changes to protect the structural systems of floors and roofs were included in the standard.

We recommend that reforms to the building regulatory systems be focused on current risks or gaps in the system that relate to potential failure of structural components of buildings to reduce the risk of a similar tragedy occurring in Ontario.

In summary, and in response to Question 6 below, the City of Toronto's top five recommendations are:

1. Enact provincial laws to require that owners maintain the structural integrity of their buildings;
2. Require that owners retain an engineer to review and report on the structural integrity of specific elements of certain buildings on a specified schedule. The specific elements, building types and the appropriate schedule to be determined on the basis of further research and consultation. Require that reports be filed with the Chief Building Official where a structural deficiency is identified and remedial action is required;
3. Provide additional authority to municipal Chief Building Officials to require owners to retain an engineer to review the structural integrity of a building or class of buildings, and report to the Chief Building Official, where the Chief Building Official is of the opinion that there is a potential risk with a building or class of buildings;
4. Provide clear authority to Chief Building Officials to require that the work identified by an engineering review be undertaken, similar to those available under Sections 15.9 and 15.10) of the *Building Code Act, 1992* (the "*Building Code Act*" or the "*Act*"); and,
5. Practice guides be developed under the *Architects Act* and *Professional Engineers Act*, to guide the review by these professionals of the structural integrity of buildings in keeping with the standards and requirements of the *Building Code Act*.

The City recommends the following Other Supporting Measures to support these changes:

1. The City of Toronto notes that Section 18 of the *Act* could be clarified and expanded upon to address the authority of the Chief Building Official to require a professional to review and report on specified building elements.

The following provides detailed responses to each question posed for Roundtable 1:

1) Should there be mandatory periodic inspection of all buildings? If so, by whom (province, municipality or building owner)? How often? What kinds of buildings?

In determining whether or not there should be mandatory periodic inspection of buildings in Ontario, the City of Toronto submits that the following factors should be considered:

1. Nature of potential building component failures;
2. Potential risk to the public;
3. Incentives of private property owners;
4. Cost of inspection and administration; and,
5. Current regulatory scheme.

1. Nature of Potential Building Component Failures

The primary focus of any mandatory periodic inspection of a building ought to be restricted to inspecting for the warning signs of building component failures that are relevant to the structural soundness of the building. This factor guides in what would be covered in a potential mandatory inspection program and the frequency of the same.

2. Potential Risk to the Public

The degree of risk to the public is a relevant factor in determining the scope of any mandatory periodic inspection program. Where buildings are frequented by the public, or will affect areas frequented by the public, there is a stronger case for measures to protect the public. Potential risk to the public would tend to be limited to building component failures that are relevant to the structural soundness of a building. This weighs in favor of a program focused on the potential for failure of the building envelope, or other building element, potentially leading to a structural collapse.

3. Incentives of Private Property Owners

Private property owners already have an obligation and incentives to review the structural condition of their property periodically. However, some property owners may make sub-optimal decisions in an effort to minimize costs while exposing others to the risks of an unsafe building. A well-defined periodic inspection scheme should prevent property owners from exposing others to those risks, without requiring a property owner to incur costs beyond those that they would already incur through the exercise of reasonable prudence in maintaining their properties.

4. Cost of Inspection and Administration

There will be a cost associated with any mandatory periodic inspection program. The economic cost cannot be entirely ignored. This factor will favor the tailoring of any safety objective undertaken to protect the public without imposing prohibitive costs on the

regulatory authority or property owners. Essentially, any mandatory periodic inspection program ought to require property owners to act prudently, but not more cautiously or proactively than prudence dictates.

5. Current Regulatory Scheme

Any mandatory periodic inspection program should be coordinated with the current regulatory scheme so as to limit the costs of compliance and administration. Clarification of the current regulatory scheme may be required to implement this goal.

It is important to be aware of the differences between the role of the Chief Building Official and Inspectors appointed under the *Building Code Act* whose principal role is to enforce the Building Code and the provisions of the *Act* related to the Code, as well as other duties pursuant to the *Act*, in contrast to the enforcement of property standards and the officers assigned to enforce property standards adopted under Section 15.1 of the *Building Code Act*.

The Building Code, which is a regulation adopted pursuant to the *Building Code Act*, establishes **mandatory** provincial standards for the construction of buildings in Ontario. The *Building Code Act* requires municipalities to appoint a Chief Building Official and such inspectors as are required to enforce the *Act* and the Code.

There is also an enabling provision under Section 34(2) of the *Building Code Act*, that has not been used to date, and which provides the Province with the **authority to establish standards for existing buildings**, including those contained in the Building Code with respect to new construction, as well as **mandatory standards for the maintenance, retrofit, operation, occupancy and repair of buildings**.

In contrast, the authorities to enact property standards, which are self-contained within Sections 15.1 to 15.8 of the *Building Code Act*, are **discretionary** and allow municipalities to **pass a by-law** to establish standards for the **maintenance and occupancy of property** in a municipality. A number of the larger municipalities, including Toronto, have adopted property standards by-laws containing provisions addressing public safety. However, extending this authority across the province from the current patchwork of by-laws is unlikely to be an effective approach.

Although property standards are often assigned to the Chief Building Official, particularly in smaller municipalities, the authorities in Sections 15.1 to 15.8 are not the responsibility of the Chief Building Official in their capacity as Chief Building Official. Similarly, the role of

inspector for the purposes of enforcing the Building Code is distinct from the role of the property standards officer carrying out the authorities under Sections 15.1 to 15.8. If an individual carries out both roles, in any municipality, they are in effect wearing two hats or performing both functions.

Where municipalities have property standards provisions related to the maintenance of building structures, there can be, and sometimes is, an overlap between the authorities of the Chief Building Official to address unsafe building conditions under Section 15.9 of the *Act* and the powers to address a building safety emergency under Section 15.10 of the *Act*, with the powers of an officer to address an immediate danger to a person as a result of dangerous non-conformity with the standards under Section 15.7 of the *Act*. This can be particularly confusing where the municipal employee is authorized to perform both functions.

Taking all of the above factors into consideration, the City of Toronto could support a mandatory periodic inspection program, with the following characteristics and limitations:

1. Limited in scope to specific classes of buildings. Stakeholder consultations should be held and relevant research reviewed in order to determine the appropriate scope of buildings to be included. It is expected that the following buildings would **not** be included in the scope of a mandatory periodic inspection program: detached or semi-detached single family dwellings, townhomes, residential condominiums subject to periodic review pursuant to the *Condominium Act, 1998*, and industrial buildings;
2. Limited in scope to aspects of the building that are related to its structural integrity and water tightness;
3. The frequency of the inspections required be limited to once in a period of time commensurate with the potential risk of failure. Stakeholder consultations should be held and relevant research reviewed in order to determine the appropriate period;
4. New buildings to be exempted from the mandatory periodic inspection for a specified number of years commencing on the date of the building's completion. The number of years of the exemption to be determined through stakeholder consultation and review of relevant research.

5. The limits to scope and period identified in Items 1, 2 and 3 above, as well as the exemption set out in Item 4, be expressly overridden where the Chief Building Official has reason to believe, (or potentially the Minister has reason to believe), that the risks warrant an earlier review (such as evidence of broad failure of a building element, e.g. the recent failure of glass balcony guards);
6. Provided for in the regulatory scheme consistent with current authorities, accountabilities, and expertise in various Acts, most particularly the *Building Code Act*, where authority for enforcement of mandatory standards for the construction of buildings, and their structural safety in the event of building failure, are the responsibility of the Chief Building Official and inspectors appointed for this purpose and who are already required to be qualified with respect to the standards which apply to these matters with respect to the construction of buildings;
7. Minimize the administrative burden and rest responsibility for the review with the owner, by:
 - Requiring the owner to engage professional engineers to conduct the structural review and identify the degree of deterioration of the building;
 - The preparation of the reports by the engineer be carried out based on standards developed by the Professional Engineers of Ontario, and may include: an architect, dependent on the scope of the review, in accordance with standards developed by the Architectural Association of Ontario, to include, the determination of structural sufficiency; the recommended actions to maintain structural integrity and recommended dates for further review, if in advance of the period required by the regulatory schedule;
 - Requiring filing of reports with the Chief Building Official where remedial actions are recommended;
 - Providing the Chief Building Official with the power to request copies of any engineering review required by the regulation, and where such a request is made and no copy is provided to the Chief Building Official, the power to issue an order requiring a fresh engineering review be undertaken;

- Providing the Chief Building Official with powers to require that repairs be completed by the owner, similar to the powers to remedy unsafe building conditions under Section 15.9 of the *Building Code Act*;
- Determine through further stakeholder consultation whether it would be beneficial to adopt minimum maintenance requirements for existing buildings, through Section 34(2) of the *Building Code Act*, to support the owner's review of the structural integrity of their building(s).

2) Should there be mandatory minimum property standards for all buildings? If so, who should establish them (province or municipality?) How should they be enforced?

The City of Toronto would not support mandatory minimum property standards for buildings, set by the Province. They would overlap with and be redundant in the event that a mandatory periodic inspection program is adopted in accordance with the response to Question 1 above. This would be a significant departure from the current discretionary authority municipalities have to pass any by-laws such as this and would require a significant expansion in scope, knowledge and training if administered province-wide within the current property standards enforcement scheme.

However, should minimum Provincial standards for structural safety and water penetration for existing buildings be considered necessary, they should be enacted within the current authority under Section 34 (2) of the *Building Code Act*, and should only be enacted to provide benchmarks for the mandatory periodic structural review program outlined above, to address specific risks identified, subject to further consultation as noted above.

The *Building Code Act* currently contains provisions for property standards that mirror or overlap with the role of the Chief Building Official and inspectors where property standards address matters such as the structural sufficiency of buildings. Any confusion created with respect to who is doing what could be addressed through the proposed changes. Critical building safety issues on new and existing building should be provincially consistent and administered by Chief Building Officials who are trained and provincially qualified for this purpose.

- 3) **Should those who have responsibility for public safety in buildings (municipalities, MOL etc.) have the power, or be required, to force owners to retain a professional (engineer or architect) to approve proposed repairs or maintenance to existing buildings? Should a record be kept of all remedial actions undertaken by the owners?**

The primary responsibility of the Ministry of Labour is the safety of workers, and worker and public safety during the construction of buildings.

The *Building Code Act* provides tools for inspectors to require property owners to retain appropriate professionals to design and oversee necessary repairs. The City of Toronto submits that the current legislative scheme is sufficient in this regard. For example, sections 15.9, 15.10 and 18 of the *Building Code Act* provide as follows:

Inspection of unsafe buildings

15.9 (1) An inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of inspecting a building to determine,

- (a) whether the building is unsafe; or
- (b) whether an order made under subsection (4) has been complied with. 2002, c. 9, s. 26.

Interpretation

(2) A building is unsafe if the building is,

- (a) structurally inadequate or faulty for the purpose for which it is used; or
- (b) in a condition that could be hazardous to the health or safety of persons in the normal use of the building, persons outside the building or persons whose access to the building has not been reasonably prevented. 2002, c. 9, s. 26.

...

Emergency order where immediate danger

15.10 (1) If upon inspection of a building an inspector is satisfied that the building poses an immediate danger to the health or safety of any person, the chief building official may make an order containing particulars of the

dangerous conditions and requiring remedial repairs or other work to be carried out immediately to terminate the danger. 2002, c. 9, s. 26.

...

Emergency powers

15.10 (3) After making an order under subsection (1), the chief building official may, either before or after the order is served, take any measures necessary to terminate the danger and, for this purpose, the chief building official, an inspector and their agents may at any time enter upon the land and into the building in respect of which the order was made without a warrant. 2002, c. 9, s. 26.

...

Powers of inspector

18. (1) For the purposes of an inspection under this Act, an inspector may,

- (a) require the production for inspection of documents or things, including drawings or specifications, that may be relevant to the building or any part thereof;
- (b) inspect and remove documents or things relevant to the building or part thereof for the purpose of making copies or extracts;
- (c) require information from any person concerning a matter related to a building or part thereof;
- (d) be accompanied by a person who has special or expert knowledge in relation to a building or part thereof;
- (e) alone or in conjunction with a person possessing special or expert knowledge, make examinations or take tests, samples or photographs necessary for the purposes of the inspection; and
- (f) order any person to take and supply at that person's expense such tests and samples as are specified in the order. 1992, c. 23, s. 18 (1); 1997, c. 30, Sched. B, s. 11.

- 4) **Should clear guidelines be established in the regulations governing the Chief Building Official in cases where public safety may be at risk based on the degree and imminence of the threat and the response of the owner, making it clear that in cases where an owner is either unwilling or unable to take steps necessary to avoid risks to human safety that (a) an order be promptly issued; (b) a clear period of time be allowed for**

compliance; (c) at the end of that time, the city must take further enforcement steps to prosecute, conduct the work at the owner's expense or to close and condemn the structure.

The City of Toronto submits that the current regulatory scheme already provides the necessary tools and guidance for effective and efficient protection of public safety in emergency and unsafe situations. The provisions of the *Building Code Act, 1992* address each of the elements posed in the question. Experience with enforcement and case law demonstrates that each circumstance and related facts are unique and it would be impossible to determine the correct response that would address all circumstances.

However, whether a mandatory periodic inspection program is adopted or not, it would be appropriate to provide the Chief Building Officials, or the Minister, with the authority to require a similar inspection to the mandatory periodic inspections, when they believe that the potential risk associated with a building condition warrants it. The City of Toronto notes that Section 18 of the *Act*, reproduced above, could be clarified and expanded upon to address the authority of the Chief Building Official to require a professional to review and report on specified building elements. This would allow for a Chief Building Official to address known building element concerns well in advance of an actual building failure by expanding the scope of the mandatory periodic inspection program in appropriate circumstances and on a case-by-case basis.

- 5) **Is the training for building officials, in particular, for property standards officers, sufficient? Should there be mandatory training, competency qualifications and certification of property standards officers? What degree of independence should property standards officers have from other municipal officials? Should building officials, including property standards officers, be regulated as a profession?**

As currently posed, the questions suggest that property standards officers are a subset of building officials. The City of Toronto finds that it is more accurate and convenient to address building officials (chief building officials and inspectors) and property standards officers separately.

The City of Toronto submits that the training of building officials is adequate. The qualification requirements for building officials are clearly set out in the *Building Code Act, 1992* and Building Code. Qualification includes passing exams designed and administered by the Ministry of Municipal Affairs and Housing. The examinations comprehensively address all building types and systems regulated under the Building Code, including examinations for the structural requirements related to buildings where the structure is being reviewed or inspected.

Building officials are appointed pursuant to statute and exercise discretion independently when carrying out their statutory duties and powers. Building officials operate with an appropriate degree of independence. Further, the *Building Code Act, 1992* provides robust appeal and review rights for individuals affected by the decisions and orders of building officials.

The City of Toronto submits that regulation of building officials as a profession is entirely unwarranted and inconsistent with requirements applicable to other positions and officers reporting to municipal governments.

With respect to property standards officers, internal training program design should be left to municipalities as the nature and scope of property standards by-laws may and do vary. Internal training provides the necessary flexibility to address municipality specific policies, organizational structure, administration, and issues of local concern. Municipalities are equipped, with the current support of the Ontario Association of Property Standards Officers, to ensure property standards officers are trained, competent, and qualified, without any specific mandatory training or certification program being imposed.

Property standards officers exercise their duties and powers independently from other municipal officials, and their orders can be appealed to a municipally appointed Property Standards Committee. The current regime provides the appropriate level of independence.

The City of Toronto submits that regulation of property standards officers as a profession is entirely unwarranted and inconsistent with requirements applicable to other positions and officers reporting to municipal governments.

- 6) **Considering the information you have gleaned from the proceedings of the Elliot Lake Commission of Inquiry, can you provide your top five recommendations as to what should be done to ensure that a similar tragedy does not occur again in Ontario or Canada? If possible, identify the sort of buildings or occupancies which should be the highest priority?**

(Please see answer set out above.)

ROUNDTABLE 2 – IMPROVED SHARING OF REPORTS AND INFORMATION

TUESDAY NOVEMBER 19, 2013

The City of Toronto submits that our responses to this roundtable should be read in concert with the comments provided with respect to Roundtable 1.

Other Supporting Measures Recommended in Response to Questions for Roundtable 2;

1. Practice standards for professionals (architects and engineers) that require architects and engineers retain records of their reviews and recommendations related to the structural integrity of buildings for a specified period of time, and that they have an obligation to share the records with professionals retained to conduct a subsequent review upon request.
 2. Request that the Law Society of Upper Canada provide a practice guideline to its members in relation to requesting and reviewing mandatory periodic structural reports prior to closing real estate transactions. Further request that the same practice guideline address the prudence of doing local authority searches, whether or not title insurance is being purchased.
- 1) **Should the Owner of a building be required to keep a secure record of and provide the information relating to the condition of a building (all private, as well as public, documents and information dealing with the condition of those buildings over their lifetime, including information on the nature and extent of the services provided by an engineer and an architect, the name, identity and contact information of those professionals and any remedial actions taken as a result of inspections)**
- a. **to any purchaser or other person seeking to acquire an interest in the building, financial or otherwise**
 - b. **to any person or agency conducting or supervising any inspection, assessment, repair or renovation of a building before any such inspection, assessment, repair or renovation begins**
 - c. **To the municipality whenever a building permit is required for repairs and renovations?**
 - d. **to a provincial agency.**

Currently, there are no requirements for building owners to keep secure records of building conditions, or remedial actions undertaken to maintain buildings in a safe condition, or a requirement to provide them to any authority. Repairs undertaken in response to either a building permit or municipal order are kept as public records, increasingly in perpetuity as these records become electronic.

It would be onerous to require that records be kept with respect to all activities associated with building maintenance and impractical to require that such records be filed with a regulatory authority, where the regulatory authority is not involved in the activity. However, professionals (such as architects or engineers) are well advised to keep records of their involvement and advice, where they may be liable for their involvement.

It may be practical for the Acts governing the professions and/or professional practice bulletins to establish an obligation on these professionals, in some circumstances, such as the structural sufficiency of buildings, to retain records of any review or actions recommended and make them available to prospective purchasers, any person or agency conducting an inspection or overseeing a repair or failure; to a municipality upon request when undertaking a repair and/or a provincial agency with an interest, within areas identified as known risks and to establish standards of practice for sharing that information.

2) Should the Owner of a building (and perhaps those who prepared the building information?) be required to register the information (i.e. Reports) relating to the condition of a building on the title to the property?

Currently, there is no requirement to register such information on title and in the experience of the City of Toronto, there is limited capacity for the registry system to support this level of information in the system administered under the *Land Titles and Registry Acts*. The current onus on owners to conduct due diligence prior to purchase of property should not be replaced with further regulation.

The City is not recommending registration of maintenance records. City of Toronto experience suggests that registration of information related to building condition should only be considered where the need for remedial action has been identified and the action has not been taken. Registration of a municipal order under the *Building Code Act* could be considered, perhaps only in the areas of potential risk identified in any standards adopted under Section 34 (2) of the *Act*.

3) If so, should the availability of this information apply to all buildings or just commercial buildings?

Given the response that information be limited to situations where the need for remedial action has been identified and the action has not been taken, the City of Toronto sees no reasoned basis for distinguishing between commercial and non-commercial buildings.

4) If there is no requirement to register the information (i.e. Reports) relating to the condition of a building on title to the property, should the information be made accessible to the public by some other means such as a central registry? Or should they at least be filed with the Chief Building Official?

The City of Toronto is not well positioned to comment on the possibility of having some other central registry system for the registration of reports. With respect to filing them with the Chief Building Official, as set out above, only those reports that identify an un-resolved unsafe condition, within the narrow scope of identified risks related to structural adequacy, or reports specifically required to be filed at the direction of the Chief Building Official, ought to be filed with the Chief Building Official. Where such reports are received, their disclosure would be subject to the applicable freedom of information legislation.

5) Should the building owner be required to complete an Affidavit as mandatory closing document that states at a minimum the following:

- 1. The owner has disclosed all engineering reports that have been conducted while the building has been owned by the present owner.**
- 2. That the owner has undertaken appropriate inquiry in order to obtain the history of all engineering reports on the property and there are stated here.**
- 3. There are no report or document that the owner is aware of with respect to this real property that deal in any way with the structural assessment or condition of this building that has not been disclosed to the purchaser.**

Any requirements applied to disclose information to future purchasers are consistent with the principle that the building condition is the owner's responsibility. Municipalities are commonly asked to advise of the existence of any outstanding municipal orders or permits prior to the closing of real estate transactions, although less so with the advent of title insurance. The observation is that fewer purchasers' lawyers are conducting local authority searches to determine whether there are any outstanding municipal orders or permits as they

and/or their clients choose, wisely or not, to rely solely on the provisions of their title insurance policies. Consideration should be given to making a request that the Law Society of Upper Canada provide a practice bulletin to its members in relation to these issues.

- 6) **Should any and all engineers and architects who have provided services to an owner of a building make available all information in their possession to successor engineers or architects requesting such information?**

This should be included in standards of professional practice developed by the Professional Engineers of Ontario and the Ontario Architects Association of Ontario, suggested in response to Question 1 of this roundtable.

- 7) **Should municipal governments be required to document all oral and written complaints, even if the person wishes to remain anonymous? Should municipal governments be required to keep a public registry of all property standards by-law violations that deal with the safety and soundness of a building structure, including any follow up action taken by the municipality and remedial action taken by the owner or municipality?**

There is already an obligation to keep records of municipal action with respect to a property. It would be onerous to require that municipalities record every verbal inquiry or conversation. However, if a complaint is not resolved based on an initial conversation, most municipalities create an electronic or paper file and some tracking system for these complaints or inquiries. The disclosure of these records would be subject to the applicable freedom of information legislation.

- 8) **The *Occupational Health and Safety Act* (sections 51 and 52) currently provides for certain obligations on employers to provide notice to the Ministry of Labour where a person is critically injured or killed at a workplace or a person is disabled from performing his/her work or requires medical attention because of an accident, explosion, fire at a workplace. Should these notice obligations be expanded to include situation of imminent danger, accident or injury? In addition, should an employer be required to report to the Ministry of Labour any health and safety recommendation made by a joint committee or a health and safety representative which is not followed and may lead to critical injury?**

In our experience, the Ministry of Labour is already notified when there is an imminent danger or failure associated with a building, as the contractors are required to notify the Ministry to undertake the work required to remediate the unsafe condition.

- 9) **Considering the information you have gleaned from the proceedings of the Elliot Lake Commission of Inquiry, can you provide your top five recommendations as to what should be done to ensure that a similar tragedy does not occur again in Ontario or Canada? If possible, identify the sort of buildings or occupancies which should be the highest priority?**

(Please see comments summarized above.)