



ONTARIO BUILDING OFFICIALS ASSOCIATION

pro bono publico “for the public good”

ELLIOT LAKE INQUIRY

PART 1 – PHASE 2

ONTARIO BUILDING OFFICIALS ASSOCIATION

BRIEFING NOTE

“CBO INDEPENDENCE”

ROUNDTABLE NO. 1 - PUBLIC SAFETY

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OBOA BRIEFING NOTE

ELLIOT LAKE INQUIRY – ROUNDTABLE NO. 1

“CBO INDEPENDENCE”

REQUESTED OUTCOME:

That the *Building Code Act, 1992*, S.O. 1992, c. 23, as amended, be further amended to codify judicial decisions and explicitly provide that Chief Building Officials exercise their powers and fulfill their duties under that Act independently from the Council that employs such Official.

RATIONALE:

There is ample judicial authority that confirms the independence of Chief Building Officials from Council when performing their statutory duties. This should be made explicit in the legislation to make it patently clear to Councils that their CBO is required to perform their statutory duties in accordance with the law without interference of Council and/or the municipality's senior staff.

Although Chief Building Officials fulfill statutory duties and are independent from council, this is often not recognized or acknowledged at the local level. As such, specific statutory recognition of this independence is warranted.

Clear statutory acknowledgement of such independence will likely lessen, if not eliminate, the need for future judicial determinations about the CBO's existing independent statutory role and duties.

CASE LAW*:

***Ross v. Muskoka Lakes (Township)*, [2004] O.J. No. 24, 46 M.P.L.R. (3d) 119, 32 C.L.R. (3d) 241 (S.C.J.).**

Although a chief building official has an independent function under the BCA, he is nonetheless an employee of the municipality for which council is ultimately accountable.

***Pedwell v. Pelham (Town)*, [2003] O.J. No. 1774, 37 M.P.L.R. (3d) 161 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 355.**

There was evidence that municipal officials told the chief building official to "hold off" in issuing building permits. While the chief building official was entitled to seek advice from whomever he thought would assist him in making his decision, he could not refuse to issue the permits, if they otherwise complied with the law. If the municipal officials ordered the chief building official to refuse the permits, this would be an improper interference in his duties.



Mohammed v. Dysart (Municipality) Building Official, [2003] O.J. No. 5322, 45 M.P.L.R. (3d) 282 (Div. Ct.).

Subsection 3(1) of the 1992 BCA makes the municipal council responsible for the enforcement of the BCA within the municipality. Subsection 3(2) requires the council to appoint a chief building official for the enforcement of the BCA. Consequently, the chief building official is the agent of the council in discharging its responsibilities under the BCA on behalf of the municipal corporation. The chief building official was therefore held to have acted on behalf of the municipal corporation in refusing to issue the building permit.

Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 1945, 39 M.P.L.R. (3d) 1 (S.C.J.), aff d [2003] O.J. No. 4530, 45 M.P.L.R. (3d) 29 (Div. Ct.).

The chief building official has a "quasi-independent" status within the administration of the municipality.

Ottawa (City) v. Ottawa (City) Chief Building Official, [2003] O.J. No. 4530, 45 M.P.L.R. (3d) 29 (Div. Ct.).

Where the chief building official is required to issue a building permit under subs. 8(2) of the BCA, she is required to do so even if the will of the municipality's residents, as expressed through the council, is otherwise. The independence of the chief building official was not contested by the parties to the appeal.

Peacock v. Norfolk (County), [2003] O.J. No. 2771, 40 M.P.L.R. (3d) 12 (S.C.J.).

Communication is necessary between various municipal departments to ensure competent management when the issues being discussed are public safety. Appearances are compromised to some extent when the chief building official, whose duty it is to act judicially and fairly in the discharge of his responsibility to implement provincial legislation, is answerable to and supervised by a higher municipal official. However, more than appearances are required to prove bad faith on the part of the municipality or that the chief building official was motivated by improper objectives. The chief building official's testimony that he was not influenced by municipal officials regarding the processing of a building permit application was accepted.

Peter Kiewit Sons Co. v. Tillsonburg (Town), [2002] O.J. No. 1497, 28 M.P.L.R. 3d) 277 (S.C.J.).

It is plain from the provisions of the BCA that a municipality has no authority to issue a building permit, no authority to direct that a building permit issue, and no authority to recommend that it be issued. It is the chief building official who by virtue of s. 8 of the 1992 BCA, has the sole statutory authority to issue a building permit. Notwithstanding ss. 3 and 7 of the BCA, the chief building official is entirely independent of the municipality, and he is bound in law to perform his duties entirely independent of any direction or recommendation the municipality may seek to give.

Country Pork Ltd. v. Ashfield (Township), [2001] O.J. No. 1127, 18 M.P.L.R. (3d) 1 (S.C.J.), aff d [2002] O.J. No. 2975, 31 M.P.L.R. (3d) 1, 60 O.R. (3d) 529 (C.A.).

There was no evidence that the township council interfered with the authority of the chief building official in connection with the processing of an application for a building permit. The suggestion that additional engineering information be required from the permit applicant's consultant came from the township's engineer



and, while the chief building official had asked council about compliance with a zoning by-law, council directed him to the municipal solicitor.

Pedwell v. Pelham (Town), [1998] O.J. No. 3461, 47 M.P.L.R. (2d) 222 (Gen. Div.), affirmed [2003] O.J. No. 1774, 37 M.P.L.R. (3d) 161 (C.A.).

It is imperative that municipal officials not interfere with the chief building official in the performance of the duties imposed upon him pursuant to s. 6 of the 1990 BCA [now s. 8 of the 1992 BCA]. Once a chief building official has been appointed he should be left alone to perform the functions entrusted to him.

Ernted Investments Ltd. v. Toronto (City), [1989] O.J. No. 620, 44 M.P.L.R. 173 (Dist. Ct.).

While the Executive Committee of council "requested" the chief building official to revoke a demolition permit, the committee interpreted its powers correctly in that it did not "order" him to revoke the permit. However, the committee certainly imposed upon the chief building official's better judgment to such an extent that it brought about an improper result.

Lepage v. Archipelago (Township) (July 7, 1989) (Ont. Dist. Ct.).

There is a clear delegation of authority by the province to the chief building official under the BCA; it is not a delegation from the province to or through the municipal council. Once this is done, the issuing of a permit with respect to the construction or demolition of a building is up to the chief building official. The municipality, through council, showed some bias and attempted to interfere with the decision and function of the chief building official.

McDonald's Restaurants of Canada Ltd. v. Humm, [1983] O.J. No. 2445, 24 M.P.L.R. 103 (Dist. Ct.).

A direction by the municipal council to the chief building official not to issue a building permit "subject to such legal advice as he may receive" was of no significance other than it tended to corroborate that the chief building official had made a decision to refuse to issue the permit and had no intention of departing therefrom.

*Cases and summaries extracted from "Annotated Ontario Building Code Act" (2014 Edition), J. Levitt & J. Mascarin (LexisNexis Canada Inc., 2013)