Role of the Chief Building Official and His/Her Relationship with the Municipal Administration and Council

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Introduction

Throughout my career as a municipal lawyer, I have dealt with the confusion and conflict that has been created between Chief Building Officials ("CBO") and municipal Councils as a result of the rules and responsibilities provided to them under the *Building Code Act, 1992*[1]. The division of the responsibility for enforcement of the *Building Code Act, 1992* and the *Building Code* between municipalities and the CBO is often difficult to understand and becomes complicated due to the practicalities of the employment relationship between the CBO and the municipality, as well as the dependence of the CBO on the municipal Council for its budget. While this tension has continued since the current *Building Code* regime was established in 1974, there have been some unfortunate incidents where the roles have collided – incidents that could have been avoided if the respective roles of Council and the CBO were more clearly defined in the legislation. This paper will explore the roles and highlight the problems.

Position of the CBO in the Municipality

A municipality is responsible for the enforcement of the *Building Code Act, 1992* within its boundaries. A municipality is also obligated to employee a CBO and sufficient support staff/inspectors (and ensure their qualifications) to carry out the municipal responsibilities under the *Building Code Act, 1992* and related regulations. This proposition was summarized by the Ontario Court of Justice in *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.*:

> The council of each municipality appoints the local chief building official and is entrusted with ensuring that such a party meets all appropriate qualifications, including knowledge of each of the statutes that may affect the decision to permit construction in a specific location.[2]

As well, in reviewing the municipality's obligation to appoint a CBO and inspectors as set out in subsection 3(2) of the *Building Code Act, 1992*, the Courts have found:

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[1] *Building Code Act, 1992* S.O. 1992 c. 23.

[2] *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.,* [2004] O.J. No. 5724 (O.C.J.), para 61.

> The phrase indicating that the municipality is "responsible" for the enforcement of the Act in the municipality is of great significance. If the municipality is responsible for the enforcement, one would expect that the municipality would then be responsible for any act taken in the course of enforcing the Act which turned out to be negligently performed.[3]

In *Lepage v. Archipelago (Township)*,[4] the Ontario District Court correctly held that the authority of the CBO arises directly as a delegation from the Province and not from the Province to the municipality and then to the CBO.

The CBO is therefore a "statutory officer" of the municipality. Unlike an ordinary officer of the municipality (ex. the Director of Planning), a statutory officer is relatively autonomous from municipal control and is personally liable (in the absence of statute to the contrary) for his or her actions in the performance of statutory duties. A statutory officer performs duties or functions in accordance with the applicable statute for the general well-being for the community, not in furtherance of the corporate goals of the municipality.[5]

The *Municipal Act, 2001* sets out the role of officers and employees which include section 227(c):

> "to carry out other duties required under this or <u>any other Act</u> and other duties assigned by the municipality."[6]

With respect to the role of Council, the *Municipal Act, 2001* states that the role includes, amongst other matters, the obligation:

> "to carry out the duties of council under this or <u>any other Act</u>."[7]

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[3] *Thatcham Dev. Ltd. v. Teperman & Sons Ltd.,* [1981] O.J. No. 573 (S.C.).

[4] *Lepage v. Archipelago (Township)* (July 7, 1989), (Ont. Dist. Ct.).

[5] Also see OBOA Journal, Legal Corner articles by the author, Issues 17 and 18.

[6] *Municipal Act, 2001* S.O. 2001 c. 25, s. 227.

[7] *Municipal Act, 2001* S.O. 2001 c. 25, s. 224(f).

The MMAH Councillor's Guide also states:

> Furthermore, there may be circumstances where decisions are made by designated staff that operate at arms length from the municipality, and where it would be improper for elected officials to interfere or be seen to be interfering. Examples of this would include decisions made by the fire chief, the chief building official or the medical officer of health.[8]

The role of the CBO and inspectors are now specifically set out in the *Building Code Act, 1992* as follows:

> **1.1** (6) It is the role of a chief building official,
>
> (a) to establish operational policies for the enforcement of this Act and the building code within the applicable jurisdiction;
>
> (b) to co-ordinate and oversee the enforcement of this Act and the building code within the applicable jurisdiction;
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> (c) to exercise powers and perform the other duties assigned to him or her under this Act and the building code; and
>
> (d) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.
>
> (7) It is the role of an inspector,
>
> (a) to exercise powers and perform duties under this Act and the building code in connection with reviewing plans, inspecting construction, conducting maintenance inspections and issuing orders in accordance with this Act and the building code;
>
> (b) to exercise powers and perform duties in respect of only those matters for which he or she has the qualifications required by this Act and the building code; and

[8] MMAH Municipal Councillor's Guide, 2007 <www.mah.gov.on.ca>, ISBN 978-0-7794-54891 (PDF) at page 3.

> (c) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.[9]

Further, section 31 of the *Building Code Act, 1992* provides that:

> **31** (1) No action or other proceeding for damages shall be instituted against the director, a member of the Building Code Commission or the Building Materials Evaluation Commission, or anyone acting under their authority, a person conducting an inquiry under section 30, a chief building official, an inspector or an officer for any act done in good faith in the execution or intended execution of any power or duty under this Act or the regulations or for any alleged neglect or default in the execution in good faith of that power or duty.
>
> (2) Subsection (1) does not relieve the Crown, a municipality, an upper-tier municipality, a board of health, a planning board or a conservation authority of liability in respect of a tort committed by their respective chief building official or inspectors to which they would otherwise be subject and the Crown, municipality or upper-tier municipality, board of health, planning board or conservation authority is liable for any such tort as if subsection (1) were not enacted.[10]

When all of this is put together, one can draw the conclusion that the function of Council is to implement the enforcement of the *Building Code Act, 1992* and related regulations through the appointment of a CBO, who functions independently as a statutory officer as regards to the *Building Code Act, 1992* without direction by municipal Council. In essence, the CBO has the "executive" function for the enforcement under the *Building Code Act, 1992* and the municipal Council the "legislative" function through providing funding and resources.

How Independent is the CBO?

As set out in the above-referenced legislation and in the jurisprudence, the municipality's role as defined in the *Building Code Act, 1992* and continued (or at least not contradicted) by the *Municipal Act, 2001* is to enforce the *Building Code Act, 1992* under the direction of a CBO, who is given this executive function. The role of the municipality

[9] *Building Code Act, 1992*, S.O. 1992, c. 23, s. 1.1.

[10] *Building Code Act, 1992*, S.O. 1992, c. 23, s. 31.

is complex as it is responsible for the enforcement of the Act within a statutory framework where the executive function for that enforcement is confined to a statutory officer who Council is obligated to appoint. Council also must ensure that the CBO has the proper staff required to carry out the enforcement. The independence and to some extent the complexity of the statute is highlighted by a few interesting Court cases, both old and new.

In the case of the *Township of Oro v. Kneeshaw*[11] the Court, in wrestling with the proper parties to an action to remedy a violation of the then *Building Code Act, 1974*, determined as follows:

> I think it is noteworthy, however, that the Building Code does not say that the right of enforcement of the *Building Code Act, 1974* under that Act is exclusively vested in the chief building official.
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> The chief building official is a legislatively authorized creation of Council. That is to say, in the absence of some action by Council, the chief building official would not, and does not, exist.
>
> The overriding responsibility both in terms of the enforcement of those and in terms of the creation or appointment of the chief building officer is that of Council.
>
> I recognize that in some circumstances the chief building official might well be in a position of asserting a position contrary to that being advanced by the municipal corporation itself. That may well justify an action being commenced in the name of the chief building official. The right to commence proceedings in that way does not eliminate the township's right to commence an action such as this, in its own name.[12]

The fact that a CBO and the Council could potentially take different positions in litigious matters is alluded to by the Superior Court of Justice in *Ross v. Muskoka Lakes (Township)*.[13] Here, the CBO determined that site plan approval pursuant to the *Planning Act* would not, in these circumstances, constitute "other applicable law" and

[11] *Township of Oro v. Kneeshaw* (1979) 24 O.R. (2d) 690 (High Court of Justice).

[12] *Supra,* p. 693.

[13] *Ross v. Muskoka Lakes (Township)* (2004) 46 M.P.L.R. (3d) 119 (SCJ).

issued a building permit. The Council did not want the permit issued and had not approved a site plan pursuant to the *Planning Act*. The Court reviewed Council's procedure in determining to ultimately approve the site plan in light of the fact that the building permit had or was going to be issued.

The Court found as follows:

> … it was entirely reasonable for Council to believe that the issue before it could potentially be litigious. It is too narrow an interpretation of s. 55 (5)(e) to say that because no legal or privileged advice was received in the closed session Council had no right to go into a closed session. There will be occasions when Council will want to take stock of an issue which could blossom into a lawsuit without the municipal lawyer being present or having given legal advice. In this instance there was a very real prospect that the Chief Building Official would be sued. Although he has an independent function he is, nonetheless, an employee of the Township for which Council is ultimately accountable. Moreover, his position was odds which that taken by Council on the issue of whether the proposed development should proceed.[14]

The independence of the CBO and Council could not be more graphically demonstrated then in the case of *Ottawa (City) v. Ottawa (City) Chief Building Official*.[15]. In this matter, the City of Ottawa appealed, pursuant to section 25 (1) of the *Building Code Act, 1992*, a decision of its CBO regarding renovations and alterations of buildings and structures in connection with the operation of an intensive commercial pig farm. The City was only partially successful at the Superior Court of Justice. The City appealed and the intervenor/owner of the operation cross-appealed to the Divisional Court. The appeal was ultimately dismissed.

The Divisional Court stated that if the parties could not reach an agreement on costs with respect to the appeal and cross-appeal, then the Divisional Court would receive submissions from the parties on costs in accordance with the schedule established. Based upon our research there was no subsequent decision on costs and it is presumed that the parties somehow worked them out. The interesting question is whether the CBO

[14] *Supra,* p. 129.

[15] *Ottawa (City) v. Ottawa (City) Chief Building Official* (2003) 45 M.P.L.R. (3d) 29 (Div Crt).

could request and get costs from the City or if the City (in an appropriate circumstance) could demand costs from the CBO. If the City successfully obtained costs from its CBO, who would pay?

Also of note is the fact that both levels of Court recognized the Independence of the CBO:

> [6] Undoubtedly, the respondent was caught in a very difficult situation. Despite her quasi-independent status within the City of Ottawa administration, she was, on the one hand, being told by her bosses not to issue the permit, and on the other, being threatened with legal action if she didn't issue the permit. The respondent sought advise from various experts, including legal experts, and finally determined that the provisions of s. 8(2) of the *Ontario Building Code* had been met and that she had no choice but to issue the building permit to the intervenor, which she did on October 17, 2002. …[16]
>
> [11] It is also obvious that the Chief Building Officer and the City of Ottawa were on a collision course. The respondent's focus was on the *Building Code Act* and more specifically, s.8, dealing with the construction and renovations of the existing barns on the property. The applicant's priority was in the use that the intervenor would be making after renovations to the dairy barns. The concern of the City was the impact that such use would have on the neighbours, and such environmental issues, as the impact of spreading nutrient over unused wells, near streams that flow into neighbouring rivers, etc. Given these different priorities and the quasi-independent status of the respondent within the City of Ottawa, it was inevitable that the granting of the building permit would result in litigation.[17]

[16] *Ottawa (City of) v. Chief Building Official of the City of Ottawa,* 2003 CanLII 3952 (SCJ), para. 6.

[17] *Supra*, para. 11.

> It is well established in the jurisprudence that, pursuant to s. 8(2) of the *BCA,* the CBO, having properly considered the provisions of the *BCA*, the Building Code and "other applicable law" to ensure they will not be contravened, is required to issue a building permit, even if the will of the City of Ottawa's residents, as expressed through City Council, is otherwise. The independence of the CBO and her lack of discretion in this regard were not contested by the parties.[18]

A somewhat contrary view is suggested by the Divisional Court in *Mohammed v. Sayers*[19]*.* In this case, the only parties listed were the owner/applicant, Mohammed, and the CBO, Sayers. It is also interesting that neither were represented by legal counsel. In wrestling with the issue of legal non-conformity under the zoning by-law, the Court commented on the imputed knowledge of the CBO regarding past use of the property. It noted:

> "The municipal corporation is not a party herein. Nonetheless, the respondent [CBO] acts on behalf of the Council of the municipal corporation, and it is trite law that the Council is the general agent of the municipal corporation and exercises its powers. Section 3(1) of the *Building Code Act, 1992*, S.O. 1992 ch. 23 as amended makes the Council responsible for the enforcement of the *Act*, within the municipality. Section 3(2) requires the Council to appoint a chief building official, as necessary for the enforcement of the Act. Consequently, the respondent in his capacity as chief building official is the agent of the Council in discharging its responsibilities under the *Act* on behalf of the municipal corporation. The respondent therefore acted on behalf of the municipal corporation in refusing to issue the building permit in issue. The respondent has been sued in his official capacity."[20]

[18] *Ottawa (City) v. Ottawa (City) Chief Building Official* (2003) 45 M.P.L.R. (3d) 29 (Div Crt), p. 36.

[19] *Mohammed v. Sayers* (2003) 45 M.P.L.R. (3d) 282 (Div Crt).

[20] *Supra,* p. 290.

The decision further reads:

> For these reasons, I am satisfied that it was within the power of the respondent, given his position on behalf of the municipal corporation itself, to have produced evidence respecting the "lawful use" issue, and the "continued use" issue prior to 1996.[21]

The Court ultimately ordered the issuance of the building permit. The appellant and the CBO, still unrepresented, argued costs, which were awarded to the appellant. Strangely, given the Court's earlier finding that the CBO had appeared as an agent of municipal Council, when the CBO attempted to raise other debts that the appellant owed to the municipality as set-off from the costs, the Court determined it would not deal with the matter as it did not have the appropriate materials before them and "… the Municipality is not a party to this proceeding". Therefore, for some purposes the Court seems to have found the municipality is present through the CBO as its agent and for other purposes that they are separate entities.

In another case involving intensive hog farming, *Peacock v. Norfolk (County)*,[22] an issue arose regarding the independence of the CBO in an application where municipal officials certainly wished the CBO would not issue a permit and raised a number of environmental and health concerns with the CBO. The Court found that while appearances may have suggested improper influence on the CBO, it ruled that on the facts presented, this was not the case. Of significance here is the Court's suggestion that it is incumbent on the municipality to provide the CBO with the appropriate expert evidence regarding environmental concern before a permit should be issued. The Court indicated:

> Clearly, county officials made building officials aware of their concerns over the risk of contamination of the Town's water and the potential for future curbs on development. I see nothing sinister in that. As a matter of fact, given the tragedy of Walkerton, vigilance in such matters is to be commended, not criticized. It would be indefensible to be critical of the type of communication that is necessary between various municipal departments to ensure

[21] *Supra,* p. 291.

[22] *Peacock v. Norfolk (County)* (2003) 40 M.P.L.R. (3d) 12 (SCJ).

> competent management when the issues being discussed are public safety.[23]

This decision suggests that a municipality's obligation towards the CBO includes the provision of sufficient expert assistance by its municipal officers, employees or consultants in order to arrive at an appropriate decision under the *Building Code Act, 1992*.

In *Peter Kiewit Sons Co. Ltd. v. Tillsonburg (Town)*,[24] the Ontario Superior Court of Justice found that municipal Council 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 or not. It is solely the CBO, pursuant to section 8 of the *Building Code Act, 1992*, who may or may not issue a permit. The Court found that notwithstanding sections 3 and 7 of the *Building Code Act, 1992*, the CBO is entirely independent of the municipality and is bound in law to perform his or her duties entirely independent of any direction or recommendation the municipality may seek to give.

Similarly, the Court in *Ernted Investments Ltd. v. Toronto (City)*[25] had earlier found that when the executive committee of City Council had requested the CBO to revoke a permit, it had influenced the CBO improperly through such a request even though the CBO was not ordered to revoke.

The Problem

While statutory authority and case law establish that a CBO is appointed by the municipality to undertake the executive aspects of the municipality's responsibility for enforcement of the *Building Code Act* and mandates "independence", practical questions remain unanswered. In addition to the statutory case law framework, the saying "he who pays the piper calls the tune" comes into play.

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[23] *Supra,* p. 30.

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

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

Query:

- What is the obligation of a Council where (as in the case of *Ottawa (City)* noted above), the CBO is of the view that a building permit should be issued and the municipal is so opposed that it appeals that decision?

- Does the Council have an obligation to provide sufficient funding to the CBO for him or her to hire competent legal counsel, and if need be, experts in order to properly defend his or her decision?

- If the CBO is unsuccessful in an appeal and costs are awarded against him or her, does the municipal corporation have an obligation to pay those legal costs? (Given the wording of section 31 of the *Building Code Act, 1992*, it may not be possible for a successful party to collect on an order of costs so the situation is far from certain).

- If a municipality is seeking costs from the CBO, does it then pay them to itself?

- Is the CBO personally liable for costs or can the CBO rely on municipal insurance coverage or indemnification policies to fund any costs award?

- What are the obligations where the Council opposes the issuance of a building permit, the CBO issues it, a third party appeals the issuance and then Council, while taking no active role in the litigation, supports the third party's position? Is there an obligation on Council to fund the CBO's legal costs? The author has personal knowledge of a situation where a municipal Council opted not to fund the CBO in such a situation.

- Does the CBO have any recourse against Council for reimbursement of legal costs incurred regarding his or her defence of an appeal under section 25 of the *Building Code Act, 1992* and/or an award of costs (if they are collectible)?

- Should a CBO contract independently for insurance that would include a retainer for legal counsel and the payment of legal costs in such circumstances?

Conclusion

Unfortunately, there are no easy answers to these questions. On my reading of the legislation and applicable case law, there is a strong suggestion that a municipal Council could be in derogation of its obligation to enforce the *Building Code Act, 1992* if it did not provide the CBO with adequate legal and other expert assistance regarding challenges or enforcement of his or her decisions. While a Council may disagree to the extent that it actually appeals a decision of its CBO, the executive function of determining matters such as whether a building permit should or should not be issued, whether various orders should be issued, etc. has been removed from the authority of Council since 1974 and transferred directly by the Province, as an executive function, to the CBO. To refuse

to fund a vital aspect of enforcement of the Act (i.e. not provide legal counsel or funds for legal counsel or other experts regarding section 25 appeals) is arguably a dereliction of section 3(1) of the *Building Code Act, 1992* (the municipality is obliged to enforce the Act).

If in fact a municipality were not enforcing the *Building Code Act, 1992* and Ontario *Building Code* provisions by not funding the CBO's defence of Court challenges, some person (the CBO?) could bring it to the attention the Director of Building, Development Branch, Ministry of Municipal Affairs and Housing. However, aside from conducting an inquiry under s. 36 of the Act, it is uncertain as to what the Director could do.

It may also be possible to bring an application pursuant to the *Judicial Review Procedures Act* obligating the municipality to do certain things to support their CBO. This could be in the nature for order for mandamus or some sort of declaratory order. Obviously, if the matters have reached such a stage, the relationship between the CBO and the municipality would not be good, to put it mildly, and given the CBO's role as an officer, presumably the municipality could attempt to formally terminate the relationship.

What we have is a situation of mutual responsibilities in the absence of ultimate control. For the municipal Council, it is responsible for the enforcement of the *Building Code Act, 1992* and, as the Courts have sometimes found, the CBO is seen as the agent of the municipal Council. Municipal Council also bears the ultimate financial and presumably political responsibility for the actions of their CBO. As well, residents of a municipality turn to Council or the municipality corporately if they have *Building Code* issues and view the municipal Council as the responsible authority with the CBO as agent or functionary of the municipal Council.

However, municipal Council does not have ultimate control. The CBO may make decisions that Council vehemently disagrees with and which are corporately or politically damaging for the Members of Council. Conversely, the CBO is obligated to implement the *Building Code* and the *Building Code Act, 1992* independent from direction from municipal Council or the municipal corporation. Yet the CBO is totally dependent on Council and the municipality for his or her employment, salary and resources.

When considering the inherent opportunity for conflict and dysfunction, it is a testament to municipal Councils and CBO's that this very imperfect system has functioned so well for the past 25 years. It appears that some further direction in the *Building Code Act, 1992* may be needed as regards to the obligations owed by a municipality to its CBO. This could include further enumeration of what is expected of municipalities as regards to their obligations to enforce the *Building Code Act, 1992*. Thus far, these issues, have been written about occasionally (including by myself), but have not resulted in substantive changes to the relevant legislation.

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