

May 29, 2020

BY EMAIL: s.hawkins@drhba.com

Our File No. 157052

Durham Region Home Builders' Association
1 – 1255 Terwillegar Ave.
Oshawa, ON L1J 7A4

Attention: Stacey Hawkins, Executive Director

Dear Ms. Hawkins, Executive Director

**Re: The Whitby Green Standard
Legal Analysis**

Aird & Berlis LLP has been retained by the Durham Region Home Builder's Association ("DRHBA"), an association representing the interests of the residential construction industry in Durham Region, to provide an opinion respecting the Town of Whitby's proposed Green Standard sustainable guidelines ("WGS"). In particular, this opinion will address the legality of the proposed Tier 1 Standards which are described as being mandatory. No opinion is being provided respecting the Tiers 2, 3 and 4 Standards that are discretionary and to be incentivized.

DRHBA has asked for our legal opinion with respect to the following questions in relation to municipal regulation of energy efficiency materials and standards related to the construction of buildings in Ontario:

1. Can municipalities impose on land developers/builders a construction standard for energy efficiency which exceeds the Building Code?
 - a. Can environmental sustainability measures be characterized as "building standards" under the Building Code regarding the "construction of buildings" and subject to s. 35 of the *Building Code Act, 1992* ("BCA" or "Act")?
 - i. Are such measures permitted by subsections 41(7) [site plan] or 51(24) [subdivision] of the *Planning Act*?
 - ii. As site plan and subdivision agreements are not "applicable law", is it lawful for such agreements to link occupancy permits to such energy efficiency construction?
2. Given that the Building Code allows for a variety of measures to conform with its environmental standards, can municipalities require one standard brand of energy efficiency to the exclusion of other approved equivalent standards?
 - a. Would such contravene the federal *Competition Act*?

3. Upon what authority does the Town of Whitby propose to adopt its WGS? Are all provisions in the WGS within the City's legislative authority, particularly the "mandated" Tier 1 requirements?
4. What is the impact of s. 97.1 ("Environmental Standards; Construction of Buildings") of the *Municipal Act, 2001*?

In preparation of this opinion we watched the deputation made at the Special Council meeting held May 11, 2020 and undertook necessary research.

BRIEF ANSWER

We are of the opinion that municipalities do not have the authority to impose on land developers/builders a construction standard for energy efficiency which exceeds the Building Code. The Building Code governs construction-related environmental sustainability measures, which means that such measures are beyond municipalities' regulatory authority. Furthermore, sections 41 and 51 of the *Planning Act*¹ do not grant municipalities the authority to regulate energy efficiency construction as part of their site plan control or draft plan of subdivision processes. Similarly, municipalities do not have the authority to link occupancy permits to energy efficient construction other than to note same be Code compliant.

We also conclude that municipalities do not have the authority to require that energy efficiency be supplied or measured according to one particular brand to the exclusion of other approved equivalent standards that are set out in the Building Code. However, this is not a contravention of the *Competition Act*² as the *Competition Act* does not apply to municipalities.

Like other municipalities, the Town of Whitby does not have the authority to impose construction standards for energy efficiency through its proposed Green Standard. Many of its mandated Tier 1 requirements are beyond the Town's jurisdiction to impose.

Finally, we conclude that s. 97.1 of the *Municipal Act, 2001* only has a narrow and limited impact on municipalities' powers to regulate energy efficient construction of buildings.

DISCUSSION AND ANALYSIS

1. Municipalities do not have the authority to impose on land developers/builders a construction standard for energy efficiency which exceeds the Building Code

The Building Code governs environmental sustainability measures, which means that such measures are beyond municipalities' regulatory authority.

Environmental sustainability measures that relate to the construction of buildings are "building standards" under the Building Code and are accordingly subject to s. 35 of the BCA³ which means that municipalities may not pass by-laws include environmental sustainability measures related to building construction.

¹ R.S.O. 1990, c. P.13

² R.S.C. 1985, c. C-34.

³ S.O. 1992, c. 23.

The legal framework for building and construction regulation in Ontario is set out in the BCA. The BCA establishes the duties and powers of those enforcing construction regulations in the province, and also the duties and rights of those subject to construction regulation.

The Ontario Building Code⁴ is a regulation made pursuant to s. 34 of the BCA. Subsection 34(5) of the BCA provides that the purposes of the Building Code are to establish:

- standards for public health and safety, fire protection, structural sufficiency, conservation, including, without limitation, energy and water conservation, and environmental integrity; [emphasis added]
- barrier-free requirements; and
- processes for the enforcement of the standards and requirements.

Subsection 34(1) of the BCA provides the broad authority to make regulations governing standards for the construction and demolition of buildings, including regulations “governing the manner of construction and types and quality of materials used therein”.⁵

The BCA provides a broad definition of “construction” in subsection 1(1):

“construct” means to do anything in the erection, installation, extension or material alteration or repair of a building and includes the installation of a building unit fabricated or moved from elsewhere and “construction” has a corresponding meaning

The Building Code contains the technical specifications for the construction of buildings, including the types and standards of materials and systems that may be used in the construction of buildings.

In 2016, the Ministry of Municipal Affairs amended Part 12 of the Building Code to require energy efficient construction of buildings in Ontario and issued Supplementary Standard SB-12 “Energy Efficiency for Housing” detailing the new energy efficiency standards.⁶

Articles 12.2.1.1 and 12.2.1.2 of the Building Code provide that buildings must meet certain energy efficiency requirements. Article 12.2.1.1 of the Building Code applies to construction for which a permit was applied for before January 1, 2017. Article 12.2.1.2 of the Building Code applies to construction for which a permit was applied for after December 31, 2016.

Sentence 12.2.1.1(2) of the Building Code provide that the energy efficiency of all buildings must conform to Division 1 and Division 2 or 4 of the Ministry’s Supplementary Standard SB-10, “Energy

⁴ O. Reg. 332/12 (the “Building Code”).

⁵ See in particular s. 34(1)3 of the BCA.

⁶ Ontario, Minister of Municipal Affairs, “Energy Efficiency for Housing”, Supplementary Standard SB-12 (Toronto: MMA, July 7, 2016) (“Supplementary Standard SB-12”).

Efficiency Supplement”.⁷ Sentence 12.2.1.2(2) of the Building Code imposes a stricter energy efficiency standard, based on the Ministry’s Supplementary Standard SB-10.

Sentences 12.2.1.1(3) and 12.2.1.2(3) of the Building Code provide that buildings the energy efficiency of buildings must either meet a particular performance level when evaluated in accordance with Natural Resources Canada’s “EnerGuide for New Houses: Administrative and Technical Procedures” or conform to the Ministry of Municipal Affairs’ Supplementary Standard SB-12.

Supplementary Standard SB-12 provides for four different options to measure energy efficiency compliance for housing: Prescriptive, Performance, Energy Star for New Homes v12.1 or v12.6, and the R-2000 (2012) Standard.⁸

While municipalities have some power to enact building by-laws, this power is limited to local matters of administration and enforcement. The BCA is clear that its provisions and the Building Code take precedence over all municipal by-laws respecting the construction or demolition of buildings. Section 35 of the BCA states:

35. (1) This Act and the building code supersede all municipal by-laws respecting the construction or demolition of buildings.

As noted above, the Building Code imposes environmental efficiency standards under Articles 12.2.1.1 and 12.2.1.2, and that such standards and methods for measuring compliance are clearly set out in Supplementary Standards SB-10 and SB-12.

Accordingly, by reason of s. 35 of the BCA, we conclude that a municipality does not have the authority to legislate in relation to environmental sustainability measures that fall within the broad scope of the Building Code, particularly when it comes to prescribing specific construction materials or methods for measuring compliance.

Sections 41 and 51 of the *Planning Act* do not grant municipalities the authority to regulate energy efficiency construction

The Site Plan Control provisions under the *Planning Act* permit municipalities to regulate certain matters related to building and site development. These items are set out in subsection 41(4), which grants municipalities the power to approve site plans, and in subsection 41(7), which permits municipalities to impose conditions on site plan approval.

Subsection 41(4) authorizes municipalities (and/or the Local Planning Appeal Tribunal) to approve plans or drawings containing certain, specified information before development may be undertaken in the municipality. Subsection 41(4.1) establishes a limit on the subject matter and information required in the site plan drawings contemplated in s. 41(4)2, restricting the municipality’s site plan approval power to planning issues and not the manner of construction or standards of construction.

⁷ Ontario, Minister of Municipal Affairs and Housing, “Energy Efficiency Supplement”, Supplementary Standard SB-10 (Toronto: MMA, July 1, 2011) (“Supplementary Standard SB-10”).

⁸ See Chapters 2 and 3 of Supplementary Standard SB-12, *supra* note 6.

Pursuant to subclause 41(4)2(d) of the *Planning Act*, municipalities have the power to regulate in relation to exterior design of residential buildings containing more than 25 units:

(d) matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality;

The relevant meaning of the word “design” is “the selection and arrangement of artistic or functional elements making up a work of art, machine, etc.”⁹

This power is limited by subsection 41(4.1) of the *Planning Act*, which reiterates the division between provincial and municipal areas of regulation set out in section 35 of the BCA. The manner of construction and standards of construction, including construction materials and systems, are prescribed by the Ontario Building Code alone. Subsection 41(4.1) of the *Planning Act* provides:

41. (4.1) The following matters relating to buildings described in paragraph 2 of subsection (4) are not subject to site plan control:

3. The manner of construction and standards for construction.

Subsection 41(4.1) was first added to the *Planning Act* and came into force in 2005 by way of the *Building Code Statute Law Amendment Act, 2002*, S.O. 2002, c. 9 (Bill 124) which provided:

(4.1) The colour, texture and type of materials, window detail, construction details, architectural detail and interior design of buildings described in paragraph 2 of subsection (4) are not subject to site plan control.

Section 41 was again amended by *An Act to Amend the Planning Act and the Conservation of Land Act, 2006* (Bill 51).¹⁰ These amendments included the addition of subclauses (d)-(f) under s. 41(4) and the amendment of s. 41(4.1) to its current form. These amendments represent a refinement of the legislative scheme governing municipal power over matters of site plan control but, because of s. 35 of the BCA, cannot be read as granting municipalities the authority to prescribe matters already dealt with under the Building Code.

Pursuant to s. 51(24), of the *Planning Act*, municipalities must have “regard to” energy efficiency when considering draft plans of subdivision. Subsection 51(24) of the *Planning Act* provides:

51. (24) In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience, accessibility for persons with disabilities and welfare of the present and future inhabitants of the municipality and to,

⁹ Canadian Oxford Dictionary, Second Edition

¹⁰ S.O. 2006, c.23 (“Bill 51”).

(l) the extent to which the plan's design optimizes the available supply, means of supplying, efficient use and conservation of energy...

Clause 51(24)(l) has been considered by the then Ontario Municipal Board (the "Board") on few occasions. In one example, the Board found that the criterion in Clause 51(24)(l) had been met based on evidence from an expert planner the lots in the draft plan of subdivision were south facing and had solar gain potential.¹¹ In another case, the Board found that the criterion in Clause 51(24)(l) had been met based on evidence that the subject property's urban location with good pedestrian access to public transit, local shops and amenities would minimize car use, and that "the energy efficiency of new homes often far exceeds that of older homes".¹²

These decisions illustrate that the scope of the authority granted to municipalities pursuant to s. 51(24)(l) is general in nature and does not extend to the complex and technical details contemplated under the Building Code.

As noted, a municipality's authority to address exterior design with respect to its site plan control powers was revised in 2006 by Bill 51. Clause 51(24)(l) was also added to the *Planning Act* by Bill 51 in 2006.

When introducing Bill 51 for second reading, the Hon. John Gerretsen, Minister of Municipal Affairs and Housing at the time, emphasized the new powers that municipalities would have to consider exterior design aesthetics as part of its site plan control process:

As I've already mentioned, through official plan policies, municipalities could consider the exterior design of buildings. It will allow for consideration of the character, scale and appearance of proposed buildings in relation to the surrounding environment. Quite often in the past, when a municipal council has been dealing with a zoning issue or an official plan matter or a site plan control matter, particularly with respect to site plan control, it could only look at the exterior features surrounding the actual development, but not at issues such as how the development fits into the rest of the community, into the rest of the streetscape. This is one of those powers that I believe in the long run can be very effectively used by municipalities.¹³ (emphasis added)

The scheme set out above clearly draws a line between the design of a building and the "manner of construction and standards for construction" of a building.

While municipalities have the authority to regulate the character, scale and appearance of development through the site plan process, they do not have the authority to regulate the actual materials used in construction.

Similarly, while municipalities may have regard to, amongst other matters, the "means of supplying, efficient use and conservation of energy" as part of the draft plan of subdivision process in a broad and

¹¹ *Re McNally*, (2001) 65 O.M.B.R. 225 at paras. 57 and 66.

¹² *Lehrer v. Bunea*, 2007 CarswellOnt 3355 at paras. 30 and 76.

¹³ Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl., 2nd Sess. (19 April 2006) (Hon. John Gerretsen).

general sense, a line is drawn by s. 35 of the BCA and accordingly this authority does not extend to include any matters already dealt with under the Building Code as outlined above.

We have considered what has been alleged to be the legal foundation for the WGS. Sections 2, 41 and 51 of the *Planning Act* offer no such foundation to permitting a municipality to mandate the manner of construction or construction standards. As well, other resources referenced in support of the legal jurisdiction for such municipal green standards fail to provide anything but the mention of broad policy objectives and statutory provisions without any detailed consideration and legal analysis.¹⁴

Green Standards are not “applicable law” – Building Permits

Building permits are issued pursuant to section 8 of the BCA. Under this section, a building may only be constructed or demolished once a permit has been issued by the chief building official.

Subsection 8(2) of the BCA directs and requires a chief building official to issue a building permit as long as certain requirements are met, including that the proposed building, construction or demolition does not contravene the BCA, the Building Code and “any other applicable law”. “Applicable law” is defined in sentence 1.4.1.3(1) of the Building Code and does not include site plan or subdivision agreements entered into pursuant to sections 41 or 51 of the *Planning Act*. The content of those agreements are of no consequence to Chief Building Officials in performing their duties.

Further, that “applicable law” definition does not include any reference to by-laws passed under s. 97.1 of the *Municipal Act, 2001*, official plan policies or any green standards or guidelines that a municipality might adopt. Such matters are not to be assessed by a Chief Building Official when determining whether to issue a building permit.

It is unlawful for site plan or subdivision agreements to link occupancy permits to energy efficient construction

Before a building may be used or occupied, a building inspector must issue either a Partial Occupancy Permit or a Final Occupancy Permit.¹⁵ Occupancy Permit requirements are set out in Division C, Part 1, Article 1.3.3.1 of the Building Code. None of the Occupancy Permit requirements listed in the Building Code relate to energy efficient construction.

On this basis, we conclude that municipalities do not have the authority to link occupancy permits to energy efficiency construction through site plan or subdivision agreements.

2. Municipalities do not have the authority to require that energy efficiency be to one standard brand to the exclusion of other approved equivalent standards

¹⁴ See for example “Towards Low Carbon Communities: Creating Municipal Green Development Standards – An Implementation Toolkit for Municipal Staff”, Part 1, Section 2.0 “Legislative and Policy Framework”.

¹⁵ Subsection 11(1) of the BCA provides:

11. (1) Except as authorized by the building code, a person shall not occupy or use a building or part of a building that is newly erected or installed or permit it to be occupied or used until the requirements set out in this section are met.

Municipalities are creatures of statute. Consequently, municipalities may only exercise such powers they have been granted by the province. The statutory scheme created by the province through the BCA, the Building Code, the *Planning Act* and the *Municipal Act, 2001*¹⁶ that is set out above clearly limits the scope of municipalities' authority when it comes to matters related to the construction of buildings.

Notably, one of the purposes of the Building Code pursuant to s. 34(5) of the BCA is to establish "processes for the enforcement of the standards and requirements". Requiring that energy efficiency be to one standard brand, for example, Energy Star, to the exclusion of other approved equivalent standards unlawfully trenches on the provincial authority expressly contained in the BCA.

The *Competition Act*, R.S.C. 1985, c. C-34 does not apply to municipalities. It only applies to the conduct of businesses in Canada.

3. The Town of Whitby does not have authority under the *Planning Act* to impose many of the policies contained in its WGS related to the construction of buildings

The WGS is a set of performance measures proposed to be put in place by the Town for the purpose of establishing green development standards. The WGS has four "tiers": Tier 1 is mandatory set of standards enforced through the site plan control and subdivision process; Tiers 2-4 are described as higher, voluntary standards with a financial incentive.¹⁷

See Attachment "A" to this opinion letter which sets out certain of the Tier 1 requirements which we believe go beyond the town's jurisdiction to impose for the reasons set out herein. It is not a complete listing of all impugned provisions but meant to illustrate the nature and scope of the legal issue.

4. The *Modernizing Ontario's Municipal Legislation Act, 2017, S.O. 2017, c. 10, [Bill 68]* has only limited impact on municipalities' powers to regulate the energy efficiency of buildings

Bill 68 introduced the following new provision to the *Municipal Act, 2001*:

"Environmental standards; construction of buildings

97.1 (1) Without limiting sections 9, 10 and 11, those sections authorize a local municipality to pass a by-law respecting the protection or conservation of the environment that requires buildings to be constructed in accordance with provisions of the building code under the *Building Code Act, 1992* that are prescribed under that Act, subject to such conditions and limits as may be prescribed under that Act.

Conflict

¹⁶ S.O. 2001, c. 25.

¹⁷ See <https://www.whitby.ca/en/townhall/whitby-green-standards.asp>

(2) Despite section 35 of the *Building Code Act, 1992*, if there is a conflict between that Act or the building code under that Act and a by-law to which this section applies, that Act or the building code prevails.

Green roofs or alternative roof surfaces

(3) Without limiting sections 9, 10 and 11, the power described in subsection (1) includes the power to require the construction of green roofs or of alternative roof surfaces that achieve similar levels of performance to green roofs.

Definition

(4) For the purposes of subsection (3),

“green roof” means a roof surface that supports the growth of vegetation over a substantial portion of its area for the purpose of water conservation or energy conservation.”

Section 97.1 permits the Town to pass a by-law respecting the protection or conservation of the environment requiring buildings to be constructed in accordance with the Building Code and BCA. The section specifies that in the case of a conflict between such by-law and the Building Code or the BCA, the Building Code and BCA supersede the municipal by-law.

Bill 68 also made an amendment to the BCA by adding the following provisions to the province’s regulation-making powers set out in s. 34(1):

“39.4 prescribing provisions of the building code for the purposes of section 97.1 of the *Municipal Act, 2001* and section 108.1 of the *City of Toronto Act, 2006*;

39.5 prescribing conditions and limits for the purposes of section 97.1 of the *Municipal Act, 2001* and section 108.1 of the *City of Toronto Act, 2006*;...”

The province appears to have provided for municipalities to pass by-laws in relation to the construction of energy efficient buildings; however this is an extremely narrow broadening of municipal powers. Bill 68 underlines that the intention of the province is to continue to regulate all aspects of building construction in Ontario under the BCA and the Building Code and that these will prevail over municipal by-laws.¹⁸

CONCLUSIONS

Based on the foregoing, it is our conclusion that municipalities do not have the authority to impose on land developers/builders a construction standard for energy efficiency which exceeds the Building Code.

As set out above, environmental sustainability measures related to the construction of buildings are explicitly contemplated in the Building Code, including Supplementary Standards SB-10 and SB-12.

¹⁸ See discussion at pp.9-12 of the 2020 Edition of the *Annotated Ontario Building Code Act*, J. Levitt & J. Mascarin, LexisNexis.

Sections 41 and 51 of the *Planning Act* do not grant municipalities the authority to regulate energy efficiency construction as part of their site plan control or draft plan of subdivision processes. In fact, the manner and standard of construction are expressly excluded from the site plan control provisions in section 41. Moreover, we conclude that municipalities do not have the authority to link occupancy permits to energy efficient construction.

We also conclude that municipalities do not have the authority to require that energy efficiency be measured according to one particular brand to the exclusion of other approved equivalent standards that are set out in the Building Code. However, this is not a contravention of the *Competition Act*¹⁹ as the *Competition Act* does not apply to municipalities.

The Town does not have the authority to impose construction standards for energy efficiency through the WGS. Many of proposed WGS requirements under Tier 1 are *ultra vires* the City's authority.

Finally, we conclude that s. 97.1 of the *Municipal Act, 2001* has a very limited impact on municipalities' powers to regulate energy efficient construction of buildings; i.e. only respecting "green roofs" and "alternative roof surfaces" and only as prescribed under the Building Code.

Should you have any questions or wish to discuss any of the information herein, please do not hesitate to contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



Leo F. Longo
LFL/ly

¹⁹ R.S.C. 1985, c. C-34.

ATTACHMENT "A"

Site Plan Application Checklist

- ELE1.1 – Affordable Housing
 - Site plans cannot impose affordable housing requirements; see *Reemark Holdings No. 12 Inc. (Re)* (1991), 25 O.M.B.R. 451 (O.M.B.)
 - Affordable housing is currently addressed through the Region's collection of DCs for this mandate.

- SW1.2 - Permeable pavement
 - This is generally resolved through water balance analyses in consultation with conservation staff. Mandating these types of surface treatments is not prudent as ground conditions may have low permeability, and therefore permeable surface treatments would provide zero benefit.
 - By-law 1784 says that products that provide infiltration are permitted, not required, as per this guideline.

- TT1.4 - Roundabouts
 - There is currently no requirement for roundabouts in Whitby site plans.
 - Roundabouts are land intensive and more than a road widening.

- ECC 1.2 – Renewable Energy
 - What would be required to determine feasibility?
 - Relates to constructions standards; see OBC.

- ECC1.3 – Passive solar orientation
 - This will be a challenge for planners and their clients.
 - How is "where feasible" determined?

- ECC1.6 and ECC 1.7 – Building Energy Performance
 - Relates to constructions standards; see OBC.
 - Builders are already mandated to build to the Building Code. Anything over and above the building code is voluntary.

- ECC1.8
 - Relates to constructions standards; see OBC.
 - Providing backup generation for multi-unit buildings is already required. Providing spaces that have heat, cooling, water and power over and above this is redundant.

Draft Plan of Subdivision Checklist

ELE1.1 – Affordable Housing

- Affordable housing is currently addressed through the Region's collection of DCs for this mandate.

- ELE1.2– Accessible Design

- Mandating anything over and above the Building Code is not permitted.
- In all subdivision plans, the grading is what dictates the ability to be able to accommodate accessibility features. In many cases, subdivision plans, especially in infill conditions create grading conditions that cannot be made accessible.
- Where necessary, builders already work with homeowners who may require accessible features to be implemented into their homes at the time of purchase.

- TT1.4 – Traffic Control

- There is currently no requirement for roundabouts in Whitby.
- Roundabouts are land intensive, and the loss of land translates to additional costs to purchasers.

- ECC 1.2 – Renewable Energy

- What would be required to determine feasibility?
- Relates to constructions standards; see OBC.

- ECC1.3 – Passive solar orientation

- This will be a challenge for planners and their clients.
- How is "where feasible" determined?