



## Response regarding

### Ontario's Proposal:

## Transforming and Modernizing the Delivery on Ontario's Building Code Services

November 24, 2019

Please submit questions/comments to: [info@canadiansforproperlybuilthomes.com](mailto:info@canadiansforproperlybuilthomes.com).

Founded in 2004, Canadians for Properly Built Homes (CPBH) is a national, not for profit corporation dedicated to healthy, safe, durable, energy efficient residential housing for Canadians, and is the only organization of its kind in Canada. Working for consumer awareness and protection, CPBH is run by a volunteer Board of Directors and is supported by a volunteer Advisory Council of industry experts and other key stakeholders. CPBH earned "partner" status with the Canadian Consumer Information Gateway (Industry Canada).

Website: [www.canadiansforproperlybuilthomes.com](http://www.canadiansforproperlybuilthomes.com)

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## Introduction and Overview

CPBH welcomes efforts to address issues with the lack of enforcement of the Ontario Building Code (OBC) during the construction of newly built homes. Our organization has been raising concerns about the lack of enforcement of the OBC, and the consequences of code violations for consumers, for more than 15 years.

We have reviewed the consultation package, and two of our volunteers participated in the Ministry's Technical Consultation on Nov. 8, 2019. We appreciated the invitation to participate. We have also discussed the related discussion paper with others, in order to listen, as well as share our perspective and experiences.

The following highlights four key areas of concern, as well as other crucial considerations.

We urge the Government of Ontario to move quickly to address the serious issues associated with the lack of enforcement of the OBC during construction of newly built homes.

CPBH will welcome questions and comments related to this document. CPBH remains ready, willing and able to work with the Government of Ontario as it moves forward with this initiative.

## Key Concerns

### 1. **Emphasis is on Elliott Lake shopping mall catastrophe, without recognition of consequences for owners of newly built homes stuck with Code violations.**

- While the 2012 Elliott Lake catastrophe concerning a shopping mall was obviously tragic, MMAH must start to recognize and acknowledge that there are ongoing serious issues across the province with the lack of enforcement of the OBC during construction of newly built homes, e.g., homeowners freezing in homes that don't meet the OBC, homeowners living in homes with serious structural defects, and becoming sick from toxic mould, etc. CPBH has provided considerable evidence to MMAH of these OBC violations in newly built homes in the past, e.g., examples of many related media reports, as well as "A Report Prepared at the Request of PC Party Critic for Municipal Affairs and Housing, MPP Ernie Hardeman, Regarding The Lack of Enforcement of the Ontario Building Code during construction", dated Oct. 11, 2017.
- Many serious consequences have emerged for many homeowners due to OBC violations and Tarion's improper handling of homeowners' claims. These range from financial

hardship, mental illness such as stress, anxiety and trauma, physical illness such as asthma from mould resulting from Code violations, marital breakdown and bankruptcy. As reported in the Toronto Star (Feb. 20, 2019), Dr. Earl Shuman took his own life in 2016 after a 27-year battle for compensation concerning his newly built home. Another example involves two small children made sick from living in an improperly built home resulting in toxic mould; who knows what the long-term consequences may be for their development and health. As more recent examples, in the summer of 2019, two people (separate situations) reported to CPBH that they had considered suicide after the ongoing stress, illness and threat of financial ruin as a result of their never ending, years-long battles to get the homes they paid for, free of health and safety issues, fixed and code-compliant.

- The Ontario Government and its municipalities both allow this to happen and have the capacity to stop it. The health and safety of Ontario's families cannot be allowed to be a part of the collateral damage in a business plan or an audit. Now is the time to end the regime that produces such outcomes.

## **2. Insufficient focus on Code-compliant newly built homes**

- The slide deck provided for the Nov. 8, 2019 technical consultation included a slide with the header "What we are trying to achieve with transformation". There is no mention of Code-compliant newly built homes on that slide as either an Objective or Desired Outcome.
- This is a serious concern.
- We request that Code-compliant newly built homes be specifically noted as a Desired Outcome and reflected throughout all of the work on this initiative.

## **3. Proposal to create another Delegated Administrative Authority/Administrative Authority (DAA/AA), even though serious problems with this model have been raised for decades.**

### **Regulatory Capture is a specific key concern.**

- Serious problems with DAA/AAs have been well recognized for decades now, e.g., "The 'New Public Management' Comes to Ontario: A study of Ontario's Technical Standards and Safety Authority and the impacts of putting public safety in private hands" by Winfield, Kaufman and Whorely of the Canadian Institute for Environment Law and Policy that was published in 2000.

- Key issues with DAAs/AAs include the serious problem of regulatory capture, the lack of accountability and the lack of transparency to the taxpayers they serve. Further, DAA/AAs add another layer of bureaucracy which increases red tape, and potentially the costs.
- PA MPP McDonell himself tabled a private members' bill: Bill 219, Delegated Administrative Authorities Accountability and Transparency Act, 2016.
- In a June 19, 2018 email to CPBH from PA MPP McDonell, he said: *"...Thank you for writing to me about the new government's plan for DAAs and Tarion. As you know, we are still in transition and, once sworn in, Premier Ford will issue mandate letters to the new Ministers. When the previous Minister admitted TARION had drifted too far from government, we agreed and highlighted the issue wasn't just TARION but the entire DAA model. Accountability and transparency remained a key plank in our election platform and will form the basis of future PC government policies. Concrete and certain action to reform DAAs would need to come as government legislation. We committed to meaningful consultation with stakeholders and to a set of policymaking principles that value input, review and revision to ensure we get it right the first time, unlike the previous government's approach of legislating first and asking questions later. We fully intend to apply those principles while delivering our commitments to accountability across government, and I look forward to having CPBH as a valuable partner at the consultation table soon."*
  - But no meaningful consultation has yet taken place.
- Possible Ministry lack of knowledge about Ministry requirements to provide oversight to the AA. As well, possible Ministry lack of knowledge about the AA needing to pay the Ministry oversight fees.
  - In the Ministry's Technical Consultation on Nov. 8, 2019, the slide related to AA's did not include the requirement for AA's to pay the Ministry an oversight fee. Nor was there any discussion about the Ministry's responsibilities to provide oversight to the AA. When we asked about this in the Nov. 8 consultation, Ministry staff appeared unfamiliar with this requirement of AAs to pay an oversight fee to the Ministry. Could it be that the Ministry does not understand that it needs to provide oversight to the AA, and that the AA would be required to pay an oversight fee to the Ministry?
  - We are aware that some municipalities are expressing concern about a possible AA. Do they all understand that DAA/AAs also pay an oversight fee to the Ministry? We cannot find the oversight fee paid by the AA to the Ministry addressed in the Discussion Document. Did we miss it?

- For years, CPBH has been recommending to the Ministry that it needs to provide oversight to municipalities, e.g.,
  - Develop a meaningful set of performance indicators for all municipalities, e.g., sufficient, qualified building inspectors;
  - Monitor those performance indicators regularly to ensure that the municipalities are all performing satisfactorily; and
  - Take swift appropriate steps to ensure that municipalities are adhering to what is required of them, and ensure accountability. These could include serious financial penalties levied to the municipality itself, publication of publication of offences to inform the public of a municipality’s history of non-compliance, etc.

**Important Note:** Oversight needs to be administered at two levels: the municipality itself, as well as the individual professional involved. Further comments are offered below.

- Further, it is important for the Ministry to be transparent to the public regarding how it uses any oversight fee. This is a general concern related to all Ontario Government DAAs/AAs. Tens of millions of dollars have been collected by the Ontario Government for DAA/AA oversight fees since 2009, and there is no transparency. CPBH has raised this serious issue previously, e.g., CPBH’s Presentation to Standing Committee on Finance and Economic Affairs regarding Pre-Budget Consultations 2018.

#### **4. Lack of accountability by -- and consequences for -- municipalities, Building Officials and other involved professionals when homes are not properly inspected during the construction of newly built homes.**

These issues have been reported by the media, homeowners, CPBH and others over the past, at least, fifteen years. They have been primarily noted in larger municipalities, however, there have also been issues reported in small municipalities/rural settings as well.

Various reasons for lack of adequate inspections have been offered by municipalities over the years, including building booms, town council members concerned about driving building out of their area and preferring to leave Tarion to address the issues, and the lack of sufficient qualified inspectors available to municipalities. Across the province, in far too many cases, municipalities

simply continue to approve housing that has not been properly inspected, typically leaving unsuspecting new home purchasers to fend for themselves.

New home buyers pay tens of thousands of dollars for the inspections as part of the cost of their building permits, which they pay as part of the price of the home. Charging a customer for a service that is not rendered is certainly unethical and arguably fraudulent. And yet, this is taking place and is even commonplace. This is unacceptable and must stop. If the house will not be inspected nor the code enforced, the house should not be built. Far too often municipal inspectors are compelled to simply turn a blind eye when these sorts of challenges arise, and sign off on an improperly built home, frequently because the municipality will not provide sufficient resources for the task – *services already paid for in full by the home buyers*. There must be accountability by and consequences for municipalities when they do not properly inspect during construction. Failure to properly inspect also unacceptably forces buyers into lengthy battles with builders, the municipality, the warranty provider and dispute resolution mechanisms in order to get the product they paid for: a properly built, code violation-free, home. The regime that permits this is broken and must be fixed. That is the government's job.

We note that the Ministry is proposing to develop an effective compliance model, e.g.,

- engineers and architects to support building code enforcement,
- extending a code of conduct to all building code professionals and annual attestations,
- ongoing professional development similar to other professions such as architects, lawyers and accountants,
- a formal, documented complaints process,
- remedial training, re-taking examinations and financial penalties,
- publication of offences to inform the public of an individual's history of non-compliance,
- fines,
- etc.

CPBH supports all of these initiatives. There must be swift and appropriate action taken. CPBH also encourages the Ministry to also put a strong focus on ethics when addressing these issues. Currently the word "ethics" is not mentioned in the Ministry's Discussion Paper document. For example, it could be a Code of Conduct and Ethics.

CPBH's position is that:

- a. The ability to examine/review/discipline the conduct of Building Officials must be included.
- b. There must be "whistle blower" protection.
- c. The ability to complain about/examine/review the management of a Building Enforcement Department must be included.

- d. All building code professionals must be required to participate in continuing professional development similar to other professions such as accountants, lawyers, architects, etc. <sup>1</sup>
- e. All Building Code professionals must adhere to a code of conduct.
- f. There must be “practice management guidelines” for a building enforcement department.
- g. There must be appropriate training for Building Department Managers.
- h. Building sector data and research must be significantly improved, and made available to the public, not just industry.
- i. There must be a clear obligation to investigate and report publicly on failures to enforce the building code. In the present system, this is not an obligation. The Director is no longer required to investigate and the Minister “may” investigate. Previously this was mandatory.
- j. There should a mechanism to review the management of a Building Enforcement Department management. This should be a) periodic (five to seven year cycle) and b) remedial if there is cause.
- k. There should be a mechanism to assume management control of a building enforcement department, in the same way that the Ministry of Health has the ability appoint an external supervisor and relieve the CEO & Board of the their duties. (This happened recently at the Brantford General Hospital.)
- l. The new authority should have the obligation to bring complaints to the governing bodies of professionals which are not required to be BCIN registered, i.e., architects and engineers. <sup>2</sup>

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<sup>1</sup> Certainly the technical skills required to be a good Building Official do not automatically lead to the ability to manage an Enforcement Department, just the same as being a good M.D. does not translate into the ability to manage a Medical Practice. The management of a building enforcement department is complex. There many aspects to consider, e.g., technical, cultural, recruitment, retention, interactions with council, etc. Technical advisors have observed that most “technical” failures can be traced to failures in management, but management is often in charge of assigning blame, so the root causes typically do not get addressed.

<sup>2</sup> They won themselves exemption in court, but as we have learned the engineer’s discipline process is not very effective. The Elliott Lake deaths can be directly traced to a suspended engineer, for whom a “buddy” signed his report. (As sub-text, the deaths can also be attributed to the political decision not to move forward with a provincial parking garage inspection and maintenance program because it would be “too expensive”.)



## Other Points of Consideration

- 1) There must be a clear schedule of service level, e.g., that indicate which reviews are mandatory and which are not. For example, HVAC is in a grey zone and it is not clear if an Authority Having Jurisdiction (AHJ) is obliged to enforce them.
- 2) There must be mandatory insurance for all practitioners. For example, currently there are exemptions for “HVAC House” holders as well as those preparing designs for Tarion registered Builders.
- 3) There must be explicit and supported consumer representation, e.g., real consumers on advisory councils – not advisory councils stacked with industry insiders. Conflict of interest – and perception of conflict of interest - needs to be paramount in this initiative. Financial support must be provided for consumers, e.g., travel and accommodation costs.
- 4) There must be transparency and disclosure introduced into the regime so consumers can clearly understand what their house purchase may produce. Consumers should be provided with clear information about the inspection process, what inspections they are paying for through the building permit, who is responsible for carrying them out, what the objective of the inspection process is and how they will obtain the results for their home. If the average buyer was informed as well that the inspections may or may not take place at the discretion of the city/municipality, would a reasonable person sign the agreement and buy the house? Would the buyer’s lawyer advise the buyer to sign the agreement in light of that information? This means that far too much risk is being put upon the buyer. This must stop.