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May 19, 2016
File No.: 306627.00001

Canadian Association of Radon Scientists
and Technologists
450 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

Dear Sirs/Mesdames:

Re: Potential Liability of Municipalities Arising from Failure to Apply Building Code

You have brought to our attention that some Ontario Municipalities may be issuing building permits in contravention of the *Ontario Building Code Act, 1992*, SO 1992, c 23 (collectively the “**Building Code**”). You have requested our opinion regarding the potential liability of such municipalities and their officials for risk to health and damages caused by their failure to properly interpret, apply and enforce the Building Code.

We have reviewed applicable legislation and case law. Based on our review, the facts and law regarding the potential liability of such municipalities may be summarized as follows:

- The Building Code requires municipalities to ensure that “all wall, roof and floor assemblies in contact with the ground” are constructed to “resist the leakage of soil gas from the ground into the building” (Section 9.13.4.2(1)).
- The Building Code requires soil gas barriers or other protective radon measures to be installed to achieve the Building Code’s requirements (Sections 9.13.4.2, 9.13.4 and 6.2.1.1).
- If a municipality or its officials approve building plans or issue permits for buildings that do not comply with the requirements of Section 9.13.4.2(1), then it may be liable for the breach of its statutory duty to enforce the Building Code (Section 3(1) Act).
- The Building Code contains certain exemptions from the requirements in Section 9.13.4.2(1) to install soil gas barriers or other protective measures (Section 9.13.4.2(2)).

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- The exemptions include (a) garages and unenclosed spaces; (b) areas where it can be “demonstrated that soil gas does not constitute a hazard” and (c) buildings containing single dwelling units where subfloor depressurization controls have been used to the required standard.
- We understand that some municipalities have been misinterpreting exemption (b) [demonstrated that soil gas is not a hazard] by essentially applying the exemption as the default position, unless the municipality is provided with evidence of a radon gas hazard. With respect, that is a clear misreading of the Building Code.
- The Building Code requires a soil gas barrier or the other required measures unless the exemption is demonstrated. Given the practical difficulty of proving the exemption (the primary difficulty being that the potential hazard cannot be effectively determined until the building is constructed) in most cases a soil gas barrier must be required.
- If a municipality approves plans or issues permits for buildings that do not comply with the requirements of Section 9.13.4.2(1) without requiring evidence to “demonstrate that soil gas does not constitute a hazard”, the municipality will have breached its statutory duty to enforce the Code and may be liable to fines of up to \$50,000.
- Municipalities and municipal officials could also be liable to third parties for breach of statutory duty or in negligence including liability to owners, purchasers, users or occupiers of affected buildings and any other individual who suffers harm or damages as the result of a municipality’s failure to properly interpret, apply and enforce the Building Code (*Ingles v. Tutkaluk* [2000] 1 SCR 298).

In summary, municipalities and municipal officials bear a risk of liability for misapplying or not applying the Building Code. The most obvious way to limit the risk is for municipalities to comply with the Building Code’s requirement that all wall, roof and floor assemblies in contact with the ground are constructed to resist the ingress of soil gas through the installation of a soil gas barrier, unless a permit applicant can “demonstrate that soil gas does not constitute a hazard.”

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Paul C. Wilson