



**STAFF REPORT
ACTION REQUIRED**

Adverse Effects Caused by the Issuance of Building Permits on Adjacent Buildings

Date:	May 16, 2007
To:	Planning and Growth Management Committee
From:	Chief Building Official and Executive Director
Wards:	All
Reference Number:	P:\2007\Cluster B\BLD\CBO Office\PGM005

SUMMARY

This report outlines the legislative context and actions that Toronto Building proposes to take with respect to the impacts of infill housing construction on existing adjacent residential buildings.

New construction, particularly infill housing projects, can occasionally place adjacent buildings into non-compliance with a number of health and safety requirements of the Ontario Building Code, and other federal and provincial regulations.

It has been deemed that the Ontario Building Code cannot, except where specifically mentioned, govern proposed construction based on the impacts that it may cause to an adjacent property. It is recommended that Toronto Building recommend changes to be made to the Ontario Building Code, as well as explore other alternatives to limit the impact that new construction may have on existing buildings.

RECOMMENDATIONS

The Chief Building Official and Executive Director, Toronto Building recommends:

1. Toronto Building, on behalf of the City of Toronto, propose an amendment to the Ontario Building Code regarding the issue of the separation of existing chimneys in relation to proposed adjacent residential buildings;
2. Council request the province to consider relevant technical requirements of other provincial and federal acts and regulations where building construction and/or

maintenance is governed by those acts or regulations, and construction may impact, or be impacted by adjacent buildings and properties; and

3. The appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.

FINANCIAL IMPACT

The recommendations will have no financial impact beyond what has already been approved in the current year's budget

DECISION HISTORY

At its meeting on January 18, 2007, the Planning and Growth Management Committee requested the Chief Building Official and Executive Director to meet with the province to create a framework to resolve issues that have been created with respect to chimney installations and construction of infill residential buildings on adjacent properties.

PG 1.2(8), Planning and Growth Management Committee – January 18, 2007
<http://www.toronto.ca/legdocs/mmis/2007/pg/decisions/2007-01-18-pg01-dd.pdf>

Notice of Motion J(32), Toronto City Council – May 23, 2006
[http://www.toronto.ca/legdocs/2006/agendas/council/cc060523/nomj\(32\).pdf](http://www.toronto.ca/legdocs/2006/agendas/council/cc060523/nomj(32).pdf)

ISSUE BACKGROUND

While the issues addressed in this report are technical in nature, they are rooted in the legislation governing building construction and chimney installations in the province of Ontario. The following pages provide a summary of the legislative framework and history surrounding this issue.

The Ontario Building Code

The Building Code Act, 1992 is the provincial statute governing the construction, renovation and change of use of buildings. The Ontario Building Code is a regulation made under the Act that sets out the technical and administrative requirements for the construction of buildings.

Section 9.21. of the 2006 Ontario Building Code contains the regulations with respect to Masonry and Concrete Chimneys and Flues. Sentence 9.21.4.4.(1) states that:

A chimney flue shall extend not extend less than 900mm (2ft 11 in) above the highest point at which the chimney comes in contact with the roof, and not less than 600mm (23 5/8 in) above the highest roof surface or structure within 3m (9ft 10 in) of the chimney.

The issue with this regulation is that it applies only to the property where the construction is taking place. The impact that the resulting building, even when constructed in accordance with the Building Code, could have on the chimney of an existing adjacent building is not considered.

The Building Code Commission Ruling

The Building Code Commission is a provincial body whose responsibility it is to resolve disputes over matters of interpretation of the Ontario Building Code. These disputes may be between an applicant or holder of a building permit, and the Chief Building Official of a municipality.

In November 1994 in the former City of York, the Building Code Commission considered an interpretation of Sentence 9.21.4.4.(1) (*BCC Decision 94-36-414*) related to whether a building may be constructed within 3 metres of an existing chimney on the adjacent property. The applicant was denied a building permit on the grounds that their proposed house would cause the existing adjacent chimney to be in contravention of the Building Code. It was the view of the Chief Building Official that they had a common law duty of care which extended to neighbouring properties.

The Building Code Commission ruled in favour of the applicant, determining that Sentence 9.21.4.4.(1) applied only to the proposed construction and was not applicable to adjacent properties. The Building Code Commission further ruled that the Building Code does not address any adverse effects on adjacent properties with respect to chimney flues. The Building Code Commission noted that if there is cause for concern after construction with regard to life safety and the protection of adjacent buildings or properties, other legislation, such as civil litigation is available.

The Ontario Court of Justice Ruling

In March 1995, this matter was ruled upon by the Ontario Court of Justice, (*Alaimo v. York (City) Chief Building Official, 1995*). The court ruled in favour of the applicant stating that applicable law in the Building Code does not include a common law duty of care. The building permit was issued.

The Technical Standards and Safety Authority (TSSA)

The Technical Standards and Safety Authority is a not for profit delegated authority for the administration and enforcement of public safety under the Ontario Technical Standards and Safety Authority Act.

CSA B149.1-05 Code is the CSA code that has been adopted by the Technical Standards and Safety Authority under their Gaseous Fuels Regulation O. Reg. 212/01. It is used to govern the height of chimney installations and vents associated with furnaces in residential buildings.

Section 8.14 - Vent and Chimney Termination of CSA B149.1-05 Code sets forth the following regulations governing chimney heights above buildings:

8.14.1

A vent or chimney shall extend high enough above either a building or a neighbouring obstruction so that wind from any direction will not create a positive pressure in the vicinity of either the vent termination or the chimney termination.

8.14.4

A chimney shall extend not less than 3 ft (900 mm) above the highest point where it passes through the roof of a building and not less than 2 ft (600 mm) higher than any portion of a building within a horizontal distance of 10 ft (3 m).

Although the wording is similar to Section 9.21.4.4 of the Ontario Building Code, the Technical Standards and Safety Authority has interpreted these regulations to apply to all buildings surrounding the chimney installation, whether located on the same property, or a neighbouring property.

The Technical Standards and Safety Authority, is obliged to identify and act upon any non-compliance issues associated with chimney installations through their inspection processes. The end result is that people can fail TSSA inspection and have their furnaces shut off and/or, be required to either relocate their existing chimney or install a high efficiency furnace in their home, due to building construction taking place on adjacent properties.

COMMENTS

In 2006, there were between 1500 and 2000 building permits issued for infill housing projects. In the City of Toronto many infill housing projects are located on properties where the new construction occurs within close very proximity to adjacent buildings.

With the large volume of construction taking place in the city, it is likely that new residential construction will, in some instances, have adverse effects on existing adjacent residential buildings.

Recent Response from the Ministry of Municipal Affairs and Housing

In response to previous Council direction, the Chief Building Official met with staff from the Ministry of Municipal Affairs and Housing to discuss potential solutions to the issues created by the OBC provisions regulating the height of chimneys and adjacent buildings. The substance and outcome of this meeting is summarized in a letter dated November 20, 2006 from David Brezer, Director of the Building and Development Branch, Ministry of Municipal Affairs and Housing, to the Chief Building Official (see Attachment 1).

Staff of the Ministry of Municipal Affairs and Housing continues to be of the view that the regulations contained within the Building Code governing chimneys would only apply to a building (or chimney) under construction, not to any adjacent properties.

The Ministry response also stated that in the few instances where the Building Code does refer to impacts on adjacent properties, it does so in an extremely limited capacity. Examples of this can be found in Sentence 9.12.1.4(1) – ‘Precautions during Excavation’, and Sentence 9.14.6.1(1) – ‘Surface Drainage’.

The Ministry response also re-iterates the position of the Building Code Commission, and the Court of Justice saying that other legal remedies are available to address this situation, including civil litigation.

The final point in the Ministry of Municipal Affairs and Housing Response stated that the City is free to request a change to the Building Code, and that such a change would be considered through the Ontario Building Code amendment process.

Proposed Building Code Amendments

Toronto Building Staff have identified two (2) possible amendments that could be considered as amendments to the Building Code. These are:

1. Amend sentence 9.21.4.4 (1) to take into account the location and height of chimneys, both existing and proposed, to all adjacent buildings – similar to the CSA B149.1-05 Code; and,
2. Create a new provision to allow neighbouring properties to enter into agreements, similar to the limiting distance agreements described in Sentence 9.10.14.1 (4) of the Building Code, regarding separation distances required between adjacent buildings for unprotected openings.

1. Consideration of Adjacent Buildings

The first of these proposed amendments would propose that Sentence 9.21.4.4(1)(b) of the Building Code to be amended to specifically require a chimney to be separated from all adjacent buildings and structures, similar to that of the CSA B149.1-05 Code. Currently, this sentence only speaks to “the highest roof surface or structure”; without a specific reference to all buildings or structures, this sentence will continue to be interpreted to mean only the roof of the building that the chimney is attached to, and not buildings or structures located on adjacent properties.

As well, the requirements with respect to chimney height in Sentence 9.21.4.4(1)(b) are inconsistent with the requirements in Section 8.14 of the CSA B149.1-05 Code; these should be reviewed and amended to be uniform.

2. Limiting Distance Agreements Between Neighbouring Properties

The second of these proposed amendments would propose that the Building Code have provisions for neighbouring properties to enter into agreements regarding separation distances, or limiting distances for chimneys. This would provide an opportunity for neighbouring properties to agree on any proposed construction that may influence the effectiveness of their respective chimneys.

The Building Code currently provides similar authority with respect to limiting distances for unprotected openings (i.e. windows and doors) in the exposing building face (wall) of a building.

To illustrate the purpose of limiting distance agreements: The Building Code requires that the amount of wall area devoted to unprotected openings be dependent on the distance of that wall from the property line. The limiting distance agreement provisions contained within Sentence 9.10.14.2(4) of the Building Code allow for the manipulation of these requirements by allowing the distance of the building wall to be measured from a point other than the property line subject to the conditions contained within the agreement.

The power to enter into limiting distance agreements has been delegated to the Chief Building Official and the Deputy Chief Building Officials in Chapter 363-20 of the City of Toronto Municipal Code provided there are: no City of Toronto lands being affected by the agreement; the agreement does not impose any obligations to the City; and, the agreement is satisfactory to the City Solicitor.

By having the option to enter into limiting distance agreements regarding the chimney location, the onus would be on the permit applicant and the neighbour to agree upon a mitigating alternative, such as: the extension or relocation of the effected chimney; the installation of a high efficiency gas furnace that would require no chimney; or an increased setback from the chimney structure to the proposed construction so that the performance of the chimney would not be reduced, and to ensure that the Building Code and TSSA requirements to be satisfied.

Some consideration could also be given to whether the provincial regulations could be modified to place some obligation on the adjacent property owner to consider reasonable remedies that would achieve compliance with both the Ontario Building Code, and the CSA B149.1-05 Code.

Other Possible Remedies:

While this issue is largely technical in nature, there are other possible remedies that would not require any amendments to the Building Code. Other remedies may be available through the Planning Act. These remedies may include: imposing conditions on minor variances granted by the Committee of Adjustment; regulating the location of chimneys through zoning by-laws; and, regulating the location of chimneys through site plan control.

Although these options may provide remedies in certain situations, it is difficult to resolve a technical issue through the use of land use controls. There would also be considerations as to how changing land use controls to require higher standards than currently exist could affect the property rights of individuals in this situation.

Final Considerations:

As the City of Toronto continues to develop and intensify, occurrences of infill housing construction affecting existing adjacent properties will continue. It is not acceptable for homeowners adjacent to infill housing projects to have their chimney installation be deemed unsafe, and through no fault of their own, be forced to make expensive modification to their homes or chimneys.

An amendment to the Building Code that would clearly state that buildings on adjacent properties must have regard for the location of chimneys installations on existing buildings; and, allowing neighbouring properties to have an opportunity to negotiate an outcome that is fair and equitable for both would have widespread benefits across the City of Toronto.

It is therefore recommended that Council endorse an amendment to the Ontario Building Code as detailed in this report to be submitted by Toronto Building as authorized.

CONTACT

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SIGNATURE

V. Ann Borooah,
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ATTACHMENT(S)

1. Letter dated November 20, 2006 from David Brezer, Director, Buildings and Development Branch, Ministry of Municipal Affairs and Housing