



AMO Response to the Ontario Building Code Consultations: Mandatory Fire Sprinklers and Septic System Inspections

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Association of
Municipalities
of Ontario

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Introduction

Ensuring safe buildings and structures are built according to the standards of the building code and ensuring residents have access to clean, safe drinking water are among the core responsibilities of municipal governments in Ontario. Since the creation of the Ontario Building Code (OBC) in the 1970s, municipalities have had a role in enforcing standards to ensure that new structures within their communities were safe for people and municipal responsibilities for delivering safe drinking water are much older.

Ontario municipalities are proud of this history and the role they play in providing fundamental services that advance the quality of life of our citizens. They are fully committed to continuing to ensure that the OBC and its standards continue to be enforced in communities across this province. However, they also share concerns about the efficacy and the efficiency of new OBC proposals to mandate fire sprinklers in residential buildings three storeys and higher and the periodic re-inspection of on-site sewage (septic) systems by municipal Code Authorities.

Proposal

The Ministry of Municipal Affairs and Housing (MMAH) is consulting on a number of proposed changes to the *Ontario Building Code Act, 1992*, intended to enhance fire safety and water quality. These changes include a new requirement that fire sprinklers be included in new multiple-unit residential or mixed-use buildings higher than three storeys. Also proposed are new administrative requirements to support the enforcement of Building Code standards for the maintenance and operation of existing on-site sewage systems (i.e. private septic systems). Enforcement would be carried out by principal authorities under the Act: Conservation Authorities, Public Health Units and municipal building departments depending on location.

Designed to provide an added layer of protection to smoke alarms, the new sprinkler requirement aims to reduce the release of toxic smoke into the environment, eliminate fatalities, and provide safe housing as intensification grows. Similar requirements are already in force in the rest of Canada. Under the current proposal, the new fire sprinkler requirement would not apply to smaller residential buildings, including houses, or mandate the retrofit of existing buildings. It would come into effect September 1st, 2009, allowing industry time to adapt with the aim of minimizing redesign costs.

Requirements for septic system inspection are being carried out in support of the *Clean Water Act (CWA)* and Justice O'Connor's Walkerton Inquiry recommendations. Amendments to the Ontario Building Code in 1998 required permits to build or repair septic systems and inspections to ensure new and repaired systems met code requirements. MMAH estimates that there are 1.2 million septic systems in operation in Ontario. Of this amount, the new code requirements would only capture those identified as a threat to sources of drinking water under local Source Protection Plans required under the CWA. However, principal authorities would also have the discretion to implement discretionary inspection programs for those not identified in Source Protection Plans to capture a greater number of septic systems within municipal or watershed boundaries. Some municipalities have already enacted discretionary inspection

programs and the proposed regulation will provide authority for these, however, MMAH indicates that some changes to these programs are anticipated. Inspections must take place within five years of the approval of a Source Protection Plan, except for those systems for which a Building Code permit was not issued and have never been inspected, re-inspection must occur every five years thereafter. Amendments are also proposed to establish technical regulatory requirements for area beds, soil absorption systems used in conjunction with septic systems that offer tertiary treatment. New standards will regulate:

- Area bed footprint size
- Sizing of stone and sand layers and when imported fill must be used
- Type of sand used
- Proper effluent distribution
- Maintenance and testing

Inspection and maintenance requirements will come into effect on January 1, 2009, while area bed requirements come into effect on filing. However, Source Protection Plans identifying threats to drinking water intakes including septic systems must be filed with the Ministry of the Environment for approval no later than August 12, 2012, five years after the appointment of Source Protection Committee chairs. Remedial work on septic systems is eligible for funding under the province's \$7M *Clean Water Act* Stewardship Fund.

Code Creep

The Ontario Building Code is the regulatory tool by which the Ontario government and Code Authorities through their inspectors such as municipal building departments, public health units and sometimes Conservation Authorities, regulate new buildings to ensure their safety. The Fire Code, Electrical and Plumbing Codes and the experience and educational standards for trades people and practitioners working in these areas traditionally ensure safety of pre-existing buildings and installations. These instruments have for many years worked to protect the public from public safety and environmental hazards that could potentially threaten emergency situations.

While it is noted that the provision for inspecting newly installed septic systems existed in the Ontario Building Code previous to the current proposal, the newly proposed changes are a departure in the Code's application. As the regulatory instrument for new buildings, the OBC has always dealt with the safety of buildings as they are being built and Code Officials have developed skills in plan review and inspections for this purpose. The skills required to carry this out are philosophically at odds with the Ontario Government's current proposal to require Code Officials to carry out maintenance

inspections on installed fire sprinkler systems and septic systems. Doing so will mandate additional municipal resources to be dedicated to these new responsibilities and skills that will require on-going training and capital costs as well. The result of these proposals is Code creep: the extension of code authority to an area it wasn't intended to regulate.

Liability

The outcome of this proposal will be the transfer of private responsibility for the safe upkeep of private septic systems from the owner of a property to the municipality. The maintenance and upkeep of septic systems has traditionally been the responsibility of the property owner and the owner is legally bound to maintain the system in working order so as not to pollute the surrounding environment. By requiring municipal building officials to warrant that a system is safe, even if repairs are required to make a system safe, is to put municipalities in the position of liability should anything happen that allows the system to pollute. The issue of municipal liability for the sound working and maintenance of inspected systems would likely extend beyond any problems revealed and subsequently righted due to an inspection because an inspection would warrant that the entire system is safe and if a problem that was not detected or detectable during the inspection resulted in an incident, municipalities would likely be held to account by the system owner and any other affected parties.

In addition, the government's proposal that municipalities could accept third-party certificates of inspection, as long as this was provided by someone other than the system installer or maintainer, may not ease municipal liability or organizational concerns. This is because, even if a septic system designer or installer not responsible for the installation or maintenance of the septic system can be found in a given area to provide inspections, it is unlikely that such a private company would be willing to provide inspections and certify safety for liability issues. It is uncertain whether insurance could be obtained for such services, and holding that company accountable could result in bankruptcy. Even if a willing third-party could be found to provide such services, municipalities would still take on liability by accepting an inspection certificate of safety and would need to independently verify its veracity to safeguard liability and thus, erase any administrative efficiencies that might be gained as a result of using a third-party.

Furthermore, it is likely that municipalities would be held liable in any lawsuit involving a third-party certificate as municipal organizations are governments and permanent as compared to a private company that can file for bankruptcy. Municipalities are, therefore, a better bet for legal action. The expense of such lawsuits and the legal liability for septic inspections in the case that one malfunctions and pollutes a water source, is a very heavy burden for the province to impose on municipal governments and the municipal property taxpayer who will eventually be responsible for the bill. It also effectively transfers liability from the individual for the safe maintenance of his or her septic system and the province for regulating that maintenance to the municipal sector.

Training and Resources

Conducting mandatory maintenance re-inspections on septic systems will also require municipalities to increase staffing, training and resources. Septics re-inspection would be a new business line for most municipalities and the extent of the demand for inspections in any given municipality is unknown and unknowable until the approval of Source Protection Plans under the *Clean Water Act* which must be filed no later than August 12, 2012. Until that point, municipal Building Code Officials will not know which septic systems will need to be inspected for certain. This would make planning difficult for staffing, training and resource acquisition. However, as an example, one Code Official in one a smaller municipality has estimated a minimum 33 per cent increase in staffing complement would be necessary in that organization to accommodate the septic system inspection requirements of the proposal for systems that are known to be close to drinking water intakes in that municipality. Additional threats identified through a Source Protection Plan would only add to that estimate.

Considering septic systems are overwhelmingly, though not exclusively, located in Ontario's rural and northern areas which are also home to the province's majority of smaller and less populous municipalities, those municipalities will likely assume the majority of administration costs.

In addition, to conduct adequate septic systems inspections that safeguard drinking water sources, municipal Code Officials have identified the need for enhanced training beyond the existing courses for certification under the OBC. This is a particular need in smaller communities which have small staffs for building inspections and who have multiple responsibilities. These are also the communities that can least afford training and will face fierce competition for qualified Code officials in what is defined by the Ontario Building Officials Association as an already shrinking potential work force that is facing the prospect of increasing retirements.

The need for new systems and technologies to support septic system inspection and administration will also present challenges to municipal budgets. To properly administer these regulatory requirements, municipalities may need to invest in database and GIS systems as well as potentially wireless technology to identify septic systems, record their locations in relation to intakes and other sensitive areas, issue and keep track of orders, allow inspectors to file reports from the site and prompt check backs on orders issued as well as the efforts needed to communicate and educate residents. This will be in addition to the work needed to sift through original records, mostly paper, that set out septic system location, ownership, installation dates, designs, et cetera, if such records even exist. Required technology upgrades could have significant capital requirements for municipalities.

Municipal staff have also identified that inspections could fail to have their intended outcome if, as anticipated, an inspection sweep of an area by municipal officials results in an incentive for residents to pump out their septic systems before inspection and could even provide a business opportunity for those who offer this service. This would greatly reduce the chances that a compliance inspection would reveal a maintenance issue with the system and could reduce the overall efficacy of the regulation.

With regard to the fire sprinklers proposal, municipalities have always been dedicated to public safety and are committed to fire prevention and fire protection efforts in Ontario's communities. The Government's move to introduce fire sprinklers to high rise buildings represents a desire to harmonize OBC requirements with similar requirements already in force in the rest of Canada. However, it should be noted that while the overall intent is to bolster public safety and fire protection, the sprinkler imperative comes with reduced requirements for non-combustible materials and compartmentalization to mitigate cost impacts for developers.

With respect to the impact on municipalities, the new fire sprinkler requirement could lead to increased training for municipal building officials. For larger municipalities, no associated cost implications are anticipated. For smaller communities, however, particularly in rural and northern areas with limited inspection and enforcement capacity and vast geographic areas of responsibility, increased training costs are expected. There is potential to mitigate these increased training costs by cross-training with other local fire enforcement personnel. At the same time, Provincial subsidies could help smaller municipalities with limited capacity adapting to the demands of the proposed changes. These subsidies could be phased out as the changes to the OBC come into effect.

Enforcement Obligations and Public Responsibilities

Finally, municipalities would be put in a very difficult position should these regulatory proposals become law with regard to homeowners and municipal residents. Unsafe septic systems are a health and safety hazard that municipalities could enforce through the issuance of orders to do work. However, such orders are difficult to enforce and an owner unwilling or unable to comply would result in the municipality either doing the work themselves and applying to the courts to have the costs added to the residential tax bill, requiring that the residence be vacated as unsafe, or both.

Municipalities are reluctant to undertake work on behalf of homeowners, because it leaves the courts in judgment of costs awards and there is a real risk that the court may award a lower payment than what is spent by the municipality to repair a system. In addition, court costs are an added burden to municipal budgets.

Requiring premises to be vacated, while understandably a last resort, will correspondingly result in the obligation for municipalities to provide shelter for the residents. The very real prospect of forcing those people who can least afford it out of their homes because they cannot repair their septic system is something most municipalities are likely to avoid at all costs.

Recommendations

Fire Sprinklers

Municipalities accept the need to provide inspections for fire sprinkler system installation in multi-unit residential buildings three storeys and higher as a mechanism to increase public safety. However, the government should consider implementing a subsidy to help building officials in smaller, northern and rural communities complete training to offer the inspection services with consistency across the province.

Private Responsibility

The sound maintenance of septic systems is a vital step to protecting Ontario's drinking water and water resources. Properly maintaining septic systems and decommissioning or replacing them when necessary is a key precaution for our health and safety as well as the environment and a responsibility that should not be taken lightly. However, it is a private responsibility to ensure that private residential sewage systems are properly functioning. For reasons of liability, organizational issues and administrative costs municipalities are imperfect delivery vehicles for these policies.

A better policy would be to mandate that individual homeowners carry out maintenance inspections with their septic companies and create maintenance contracts and schedules. These should conform to the five-year timeframe proposed in the regulation and proof of inspections and certification that a system is working properly should be attached to the property title so that buyers can satisfy themselves that they are acquiring a sound asset or are aware of the work that must be undertaken to upgrade a system when a buying decision is made. The government should also require that the maintenance company inform the relevant public health officials, ministries, agencies and municipalities if any immediate hazard is uncovered during the course of an inspection to ensure ongoing public safety. All inspection reports should in addition be filed with the relevant provincial body.

Provincial Agency Inspections

Another possible enforcement mechanism for inspections of septic systems would be to appoint a provincially mandated organization or agency to carry these out. Since Conservation Areas are principally concerned with the integrity of watershed systems in the province and form the principle organizations supporting the *Clean Water Act* administration, it may make sense for the province to explore providing CAs with a mandate to inspect septic systems identified as threats in Source Protection Plans. The province should also provide funding to the CAs for undertaking this so that this function does not affect municipal funding contributions to CAs.

A potentially better option might be the addition of a mandate to a provincial Delegated Administrative Authority such as the Technical Standards and Safety Authority (TSSA). The TSSA carries out fee-based, cost recovery inspections in a number of areas for the province such as fuels safety equipment, amusement rides, elevators and stuffed articles. It has experience in performing risk-based regulation and actually administers the Ontario *Technical Standards and Safety Act* and regulations and offers inspection

services to Ontario Power Generation for nuclear devices on a contract basis. The Authority has considerable experience in dealing with regulatory enforcement on buried fuel oil and petroleum tanks for which the regime is not dissimilar to that being proposed for septic systems, carries insurance and prosecutes offences under its Act.

An additional mandate to inspect septic systems would likely result in a number of synergies for the organization that municipalities and CAs do not share such as: existing risk based data systems, field based inspection systems, a reporting mechanism to the Ontario legislature and public and the ability to issue orders. The fact that the TSSA is already province-wide in its authority also ensures consistency of application across the province. Finally, it has sophisticated public education and information apparatus that could be of considerable help in disseminating the new requirements and will be key to ensuring that system owners continue to live up to their responsibilities in the future.

Owner Affordability Issues

Research from CMHC and other parties indicates that an individual septic system can cost sometimes tens of thousands of dollars to repair and up to \$30,000 to replace. This could result in long-term affordability issues for residents with a septic system no matter how enforcement of the inspection requirements is conducted. While the Stewardship Fund is available for septic system repair and upgrade, these funds will likely also be needed for a greater range of projects. Therefore, it would be advisable for the government to create a special fund to help Ontario residents who cannot afford to meet the objectives of the proposed OBC septic system requirements. This would avoid situations in which a person could potentially lose a home or the ability to live in their home due to the Ontario Government's new regulatory regime for septic system inspections.