

June 30, 2008

City of \_\_\_\_\_  
XXXXX  
XXXXX, BC VXX VXX

Attention: \_\_\_\_\_

Dear Sirs/Mesdames:

**Architectural Institute of British Columbia (“AIBC”) and the City of \_\_\_\_\_ (the “City” or “\_\_\_\_\_”): *Architects Act* requirements**

I am writing to follow up on our teleconference of May 13, 2008, to provide supplemental information to assist the City’s efforts to comply with the *Architects Act* (the “*Act*”). It was a pleasure to speak with you, and our team appreciates your willingness to work with the AIBC to ensure the City’s compliance with the *Act*.

**AIBC Concerns**

As mentioned during our conversation, \_\_\_\_\_ is the largest single source of AIBC professional conduct and illegal practice investigations in the province by a wide margin. We receive complaints and information from clients, architects, city officials, the general public and others on a regular basis.

The AIBC is expressing its concerns and proposing solutions quite cognizant of the difficulties inherent in managing and planning an area undergoing tremendous growth. However, we believe that the City and the AIBC share common goals, including protection of the public interest and the desire to improve the quality of development in the built environment.

**Buildings Requiring an Architect by Law**

Our primary concern is the inordinate volume of projects requiring an architect by law<sup>1</sup> that are permitted to proceed through City applications – whether re-zoning, development permit or building permit – without an architect’s involvement. We attach an updated copy of AIBC Bulletin 31 for your information, and encourage any City manager or staff to contact us if there is any uncertainty as to which buildings require an architect’s services.

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<sup>1</sup> The ‘exceptions’ to the general requirement that a building requires the services of an architect are found in Section 60 of the *Act*. The primary statutory exceptions include: residential/apartment buildings of four or fewer units and commercial/industrial buildings of 470m<sup>3</sup> or less in aggregate floor area.

As we discussed, the *Act* is provincial legislation that applies to all parties – developers, architects, non-architect ‘designers’ and authorities having jurisdiction alike. The B.C. Building Code, like municipal by-laws, is subordinate legislation that cannot derogate from the province’s professional regulatory scheme. Where they intersect, municipal by-laws and processes must conform with the *Act*.

Confusion may arise because of the Building Code’s ‘registered professional’ designation, referring to both engineers and architects, and the differences in building ‘size’ terminology between the *Act* and Code. For example, the *Act*’s definition of “gross area” does not equate to the Building Code’s “building area”. The Code’s divisions, such as Part 9 vs. Part 3 buildings, are not relevant to the legal requirements for architects as set out in legislation.<sup>2</sup>

Bulletin 31 attempts to deal directly with some of the more confusing aspects inherent in considering both the Building Code and *Act* when processing applications. The bottom line is that the Building Code is a secondary source of authority as to when an architect is required, with a different focus and intent than professional regulatory legislation. The *Act* is the primary legal authority and must be considered during every application.

With respect to the use of ‘registered professionals’ in the Building Code, it is important for municipalities to understand that the professions of engineering and architecture are distinct, each with its own legal scope of practice. A professional engineer may ‘practise architecture’ only in the very limited circumstances set out in the legislation. The same principle applies to architects ‘practising’ engineering. When in doubt as to whether the right professional is planning, designing or supervising building construction, we urge municipalities to contact the AIBC and APEGBC for clarification.

### Case Law

For information, we attach a copy of the *Muir v. City of Surrey* decision from 2006 that we mentioned briefly during our May conversation. In that decision, the City of Surrey had ceased processing a development permit application for renovation of a commercial building made by a building designer, on the grounds that an architect was required under the *Act*. The project’s owner then terminated the building designer’s services and hired an architect to complete the building process. The building designer sued the City of Surrey. Interestingly, Surrey had followed a different procedure for the initial building construction and an earlier addition – likely not in keeping with the *Act*. Nevertheless, the Judge dismissed the lawsuit against the municipality and concluded:

The fact that the City followed a different procedure [for initial construction and first addition] does not prevent or preclude the City from adopting a different procedure in subsequent development applications of this nature. The development permit itself contemplates that the owner will comply with all applicable legislation and by-laws. **The Planning Department is required to fulfil its mandate to comply with relevant and applicable legislation and is thereby justified in requiring a party, when engaged in the development and building process, to comply with such legislation.**<sup>3</sup>  
[emphasis added]

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<sup>2</sup> For example, a two-storey commercial building with a ‘footprint’ building area of 590 m<sup>2</sup> would not trigger the need for a letter of assurance under the Building Code. However, at 1180m<sup>2</sup> total floor space (both storeys included), the building would be more than double the maximum size allowed (470m<sup>2</sup>) to proceed without an architect under the *Act*.

<sup>3</sup> 2006 BCPC 53166 at 17.

In 2005, the Manitoba Association of Architects took the City of Winnipeg to court for issuing building and occupancy permits on the basis of architectural drawings prepared, signed and sealed by professional engineers. The Court issued declaratory relief and a permanent injunction prohibiting the City of Winnipeg from issuing permits contrary to the Manitoba *Architects Act*. The following passages are relevant to the AIBC's concerns:

**43** The City's argument was premised on the Code and the Building By-law having the same authority as The Architects Act and The Engineering and Geoscientific Professions Act. In my view this issue was considered by Monnin J. and properly rejected on the grounds that subordinate legislation cannot expand or limit the scope of a professional regulatory scheme. Monnin J. correctly found that **the Code does not have the same weight as a statute and cannot purport to bestow on the engineering profession an expanded area of practice not authorized by the governing Acts. As stated by him, if it were otherwise it would amount to "the regulation wagging the statute" ([paragraph] 45). The same applies to the Building By-law under which it was adopted.**

...

**60** ... In the result, **the City's Winnipeg Building By-law, No. 4555/87 must be interpreted and administered by the City in a manner which is consistent with the provisions of The Architects Act and which does not admit of, acquiesce in or condone the violation of it by non-members.**

...

**63** In so deciding I am influenced by the position taken by the City throughout these proceedings that it is not its function to enforce professional regulatory statutes and further, that it is questionable whether the City has any obligation to consider such statutes in interpreting The Manitoba Building Code. **While not going so far as to suggest that it would flout the decision of this court, the City and its administrators are to be reminded that they are indeed bound to observe the laws of this province including the provisions of The Architects Act.**

**64** Whereas governments and government servants can usually be expected to obey declaratory orders, and generally the coercive powers of injunctive relief are not required to ensure compliance, I find that the particular circumstances here create a practical necessity for such an order. An injunction will ensure that the City brings its Acts, regulations and administrators into prompt compliance [Little Sisters Book and Art Emporium v. Canada (Minister of Justice) (1996), 134 D.L.R. (4th) 293 (B.C.S.C.) and (Mathias Colomb Band of Indians v. Saskatchewan Power Corp. at [paragraph] 31)].

[emphasis added – copy of decision enclosed]

## **Working Together**

We appreciated your questions during our conversation about when and how the AIBC would become involved in the event that an application appeared to contravene the *Act*. To be absolutely clear, there is no expectation whatsoever that the City will enforce the *Act*. Enforcement is the AIBC's statutory responsibility. However, as the decisions referred to above both note, municipalities must comply with the relevant legislation. Failure to do so exposes the City to liability by third party claims and through proceedings under the *Act*.<sup>4</sup>

To put it directly, compliance means ceasing the processing of any application (including zoning, development permit and building permit) that does not satisfy the *Act*'s requirement that a registered architect be retained for the planning or supervision of the erection or alteration of buildings. In such cases, the City should simply make it clear to the applicant that an architect is required and that no further steps will be taken until that legal requirement is met.

Some municipalities find that copying the AIBC with the communication that lays out this requirement helps with compliance. Applicants can be directly referred to us so that the AIBC can explain the legal requirements in the *Act* and can support your staff's decisions to stop processing such applications, including taking legal action where appropriate. We commit to responding promptly to any information requests and to explaining to applicants, including developers of whatever heft, that they must also comply with provincial legislation.

We also take very seriously any authority's concerns that an architect may be in contravention of the *Act* or the AIBC's *Code of Ethics and Professional Conduct*. For example, architects are not permitted to facilitate the practise of architecture by non-architects, or to fail to adequately supervise and control such services, by simply 'sealing' a non-architect's drawings. In addition, it is an ethical requirement whenever a formal presentation is made to a municipality on an architectural matter that an architect either makes the submission or attends the meeting to supervise. The AIBC has received information that such presentations are being made in \_\_\_\_\_ without an architect in attendance on a fairly routine basis. Concerns about architectural competency are also taken seriously. We appreciate that the government and public not only expect us to police illegal practice, but also to be diligent in addressing concerns about our members' failures to observe the standards of the profession.

During our teleconference, we also discussed the possible amendment to one or more City by-laws to incorporate mention of the *Act* directly, or at least reference to compliance with 'all relevant legislation' or similar phrasing. The AIBC encourages \_\_\_\_\_ to do so to ensure that all relevant enactments, including of course the *Act*, are properly considered during any zoning, development and building permit process. These efforts, along with improved communication with the AIBC and ensuring that the *Act*'s requirements are applied consistently, can help avoid unnecessary litigation and liability exposure – and most importantly, protect life safety and the public interest.

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<sup>4</sup> As the *MAA v. Winnipeg* case shows, and your legal department or external counsel can advise, the *Local Government Act* ("LGA") does not provide a blanket immunity against judicial reviews and other lawsuits by third parties or proceedings under the *Architects Act*. As an example, Section 290 of the *LGA* explicitly lifts immunity for claims made in relation to building permits where a municipality was aware that the person certifying the plans was not in fact a registered architect or engineer.

We will be contacting Mr. \_\_\_\_\_ directly with respect to the offer to participate in an upcoming \_\_\_\_\_ conference. The AIBC welcomes that opportunity. Interacting with staff and officials more regularly and listening to their concerns and suggestions will also help us improve our professional conduct, illegal practice, practice and professional development processes.

With this letter and information now in hand, the AIBC looks forward to hearing back from the City with any concerns. We ask you to ensure that your planning and development services staff are properly directed with respect to the *Act's* requirements. We will be bringing those \_\_\_\_\_ illegal practice files that are underway to appropriate resolution, but look forward to improved compliance and more open communication with the City to avoid recurrences.

Please let us know when arrangements can be confirmed to visit \_\_\_\_\_ and speak to City staff and/or Council. We want to participate in every opportunity to promote understanding of the *Act's* requirements and discuss the interplay with municipal by-laws and the Building Code.

Yours truly,

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Director of Professional Conduct & Illegal Practice  
Encls.

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