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The Building Official's Role in Managing Geotechnical Risks

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Managing Geotechnical Risks

Roles and Responsibilities

Owners:

- Apply for development approval
- Retain QP to advise and assist with development approval requirements
- Enter into covenants with local government concerning risk/liability
- Develop project in accordance with QP recommendations and local government approvals/bylaws



Managing Geotechnical Risks

Roles and Responsibilities

Qualified Professionals:

- Retained by owner to assess risk, advise re: mitigation measures
- Conduct assessment in accordance with professional standards of practice (EGBC Guidelines)
- Report to owner and local government, “certify” that land may be safely used, provide assurance statement



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Roles and Responsibilities

Local Government:

- Council/Board – adopts policies/bylaws concerning development on hazard land
- Approving Officer – determines whether subdivision is in the public interest, including consideration of geotechnical hazards
- Building Officials – approve building permit applications as per BC Building Code, with authority to require QP report for construction on hazardous land



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Roles and Responsibilities

Province:

- Legislature – delegates authority/responsibility to local government through legislation
- Building Code
- Responsibility for management of Crown land
- MOTI - Provincial Approving Officer in electoral areas



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Statutory Framework – Local Governments

- Official Community Plan:
 - Statements/map designations re: restrictions on use of land subject to hazardous conditions
 - Designation of development permit areas for protection of development from hazardous conditions
 - ✓ Local government may require applicant for DP to provide geotechnical/engineer's report
 - ✓ DP may specify areas that must remain free from development except in accordance with the report
- Zoning Bylaw:
 - Required setbacks, allowable uses may have been established in part based on knowledge of geotechnical hazards
 - Site specific rezoning applications may involve submission of geotechnical reports/registration of covenants on title



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Statutory Framework – Local Governments

- Flood Plain Bylaw:
 - Local government may designate land as a flood plain, and may specify the flood level and required setbacks
 - Exemptions from the bylaw may be granted if consistent with Provincial guidelines, or if supported by a report of a professional engineer/geoscientist (and subject to terms and conditions including a section 219 covenant)
- Subdivision Approval:
 - *Land Title Act* section 86(1)(d) - approving officer may require professional engineer/geoscientist report and a section 219 covenant for land subject to flooding, erosion, land slip or avalanche



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Statutory Framework – Local Governments

- Building Bylaw:
 - Building Officials authorized to review applications and issue building permits for construction
 - *Community Charter*, section 56: Building Official may require report from a qualified professional certifying conditions for safe use of land subject to specified hazards



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Underlying Policy Considerations

- Promotion of public safety
- Allocation of risk of: (a) damage to the development; (b) liability



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Liability Issues

Kamloops v. Nielson (1984 – Supreme Court of Canada):

- Case established principles for application of negligence law to public officials
- When does duty of care arise/considerations that negate the duty including policy decisions
- Local government was aware of deficient foundations – found liable to subsequent owner for failing to enforce building bylaw

Manolakas v. Gohmann (1989 – SCC)

- Common law duty of care owed to owner/builder as well as subsequent owners

Dha v. Ozdoba (1990 – BC Supreme Court)

- Municipality found liable for accepting professionally-certified foundation plans that were deficient on their face – soil conditions proved inadequate to support foundation



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Liability Issues

Parsons v. Finch (2006 – BC Court of Appeal)

- Statutory immunity from liability (LGA section 743) applied where the municipality relied on professionally certified plans
- Lower court held that utilization of a professional design process and reliance on professional certification was a “true policy decision”, and immune from liability

Bowes v. Edmonton (2007 – Alberta Court of Appeal)

- Municipality failed to meet its duty of care when considering a development application – by failing to consider, and to disclose (to the applicant) geotechnical reports which indicated that the building site was unstable
- However, claim dismissed due to expiry of a limitation period



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Liability Issues

Statutory immunity from liability:

- LGA section 743 – immunity from liability where architect or engineer certifies that plans comply with BC Building Code, and where the local government indicates to the owner in writing that it has relied on that certification
- LGA section 738 – immunity from liability for local government officers and employees, except for losses arising from dishonesty, gross negligence or malicious or wilful misconduct, libel or slander.



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Liability Issues

Defences/risk transfer:

- Evidence that standard of care met
- Policy defence – professional reliance
- Section 219 covenant with indemnity/release



Managing Geotechnical Risks

Community Charter – Section 56

Applies where:

- Building bylaw is in effect
- Building inspector considers that construction would be on land that is subject to or is likely to be subject to flooding, mud flows, debris flows, debris torrents, erosion, land slip, rockfalls, subsidence or avalanche.

Building inspector may require the owner to provide a report certified by a qualified professional that the land may be used safely for the use intended



Managing Geotechnical Risks

Community Charter – Section 56

If the QP determines that the land may not be used safely for the use intended, the building inspector *must not* issue a building permit.

Building inspector *may* issue a building permit in accordance with subsection 56(5) if the QP certifies that the land may be used safely for the use intended if the land is used in accordance with the conditions specified in the QP's report.

Conditions for permit issuance under 56(5):

- the owner of the land covenants with the municipality to use the land only in the manner certified by the QP as enabling the safe use of the land for the use intended;
- the covenant contains conditions respecting reimbursement by the owner for any expenses that may be incurred by the municipality as a result of a breach of the covenant;
- the covenant is registered under section 219 of the *Land Title Act*.



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Community Charter – Section 56

If the building inspector is authorized to issue a building permit under section 56 but refuses to do so, the council may, on application of the owner, direct the building inspector to issue the building permit subject to the requirements of subsection 56(5).

Note: No limitation or exclusion of liability under section 56, except by reference to the covenant requirement.



Managing Geotechnical Risks

Community Charter – Section 56

Issue: “...land may be safely used....”

- Who decides what is “safe”?
- No Provincially mandated standards for landslide or flood safety
- EGBC suggests local government should define acceptable levels of risk
- Some local governments have adopted policies that define the accepted level of risk for geotechnical hazards – DNV, FFGRD, FVRD, CVRD, District of Squamish, etc.

“Landslide risk assessment and amelioration of risk is clearly an area of decision-making for which elected municipal councils such as the District are particularly well suited.”

- Madaninejad v. North Vancouver (District) (2015 – BCSC)



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Community Charter – Section 56

Issue: ... *“land may be safely used....”*

EGBC – Landslide Assessments in BC (2023)/Legislated Flood Assessments (2018):

- If the Approving Agency has not adopted a standard, the QP should refer to an appropriate and identified provincial, national (or international) guideline



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Community Charter – Section 56

Issue: “...*if a qualified professional certifies that the land may be used safely...*”

- QP’s will not “certify” that the land may be used safely
- EGBC Assurance Statement (Landslide/Flood) substitutes the word “assurance”
- Likely within the realm of “reasonableness” to accept the EGBC Assurance Statement as a sufficient “certification”



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Community Charter – Section 56

Issue: *“If...a building inspector considers....is subject to or is likely to be subject to...”*

What guides the building inspector’s “consideration”?

- “Reasonableness” standard applies to exercise of discretion
- Informed by:
 - ✓ OCP policies/mapping
 - ✓ Other local government policies
 - ✓ Local knowledge of hazardous conditions, previous development approvals



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Community Charter – Section 56

Issue: *What if there's already a geotechnical covenant on title, as a result of a rezoning, subdivision or previous building permit application?*

Compagna v. Nanaimo (City) 2018 BCCA 396:

- Nothing in section 56 limits the building inspector's power to request a new report if a report has previously been provided at subdivision, or if the inspector otherwise considers an updated report is required.
- The “use intended” in section 56 = the specific proposed development, not development generally.



Managing Geotechnical Risks

Community Charter – Section 56

Issue: *Is the building inspector **obliged** to issue the permit if a report is provided that the land may be safely used, etc.?*

Compagna v. Nanaimo (City) 2018 BCCA 396:

- The use of “may” in section 56(4) makes it clear that the decision to issue is discretionary.
- Building inspector is not obligated to issue a permit on receipt of a single favourable report – the discretion to refuse furthers the purpose of ensuring public safety.
- Requiring a peer review is not inconsistent with section 56.
- Schedule B (Building Code) Form providing assurances re: geotechnical components of construction is not sufficient.



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Community Charter – Section 56

Issue: *Any other considerations as to the form or content of the report?*

- The report should acknowledge that it is being provided to satisfy the requirements of section 56 and that the building inspector/local government may use/rely on the report for purpose of issuing the permit
- The report should address all hazards the local government is aware of/concerned about.
- The “use intended” as referred to in the report should align with the proposed construction.
- The conditions for safe use should be clearly communicated/make sense.
- Consider circumstances/policies under which a peer review may be required.



Managing Geotechnical Risks

Section 219 Covenants

If the building inspector accepts the QP report, the owner must grant a covenant to be registered under section 219 of the *Land Title Act*.

- Covenant must require the owner to use the land only in the manner and subject to the conditions determined in the QP report as enabling the safe use of the land
- Covenant should affirm the potential requirement for additional QP reports before any additional construction is undertaken
- Covenant should state that enforcement is at the discretion of the Transferee (local government)
- Covenant must contain conditions respecting reimbursement of the local government for expenses incurred as a result of a breach of the covenant (section 56)



Managing Geotechnical Risks

Section 219 Covenants

If the building inspector accepts the QP report, the owner must grant a covenant to be registered under section 219 of the *Land Title Act*.

- Covenant should include an indemnity and release of claims as permitted under section 219.
 - *Rai v. Sechelt (District)* 2021 BCCA 349 holds that a release in a covenant is a provision “in respect of the use of the land”
 - Section 219(6) provides that a covenant may include an indemnity
- Covenant must be registered in priority to all financial charges.
- Binding on all subsequent owners.



Questions?

