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DELIVERED BY HAND

City of Barrie
70 Collier Street
P.O. Box 400
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Attention: Community Services Committee

Re: Draft By-law Governing Backflow Prevention and Cross Connection Control

We are counsel for Hassey Property Management ("**Hassey**"). Hassey manages multiple residential, commercial and industrial rental and condominium properties in the City of Barrie (the "**City**"). It is Hassey's position that the draft by-law governing backflow prevention and cross connection control (the "**Draft By-law**") will be, if passed, inoperative and of no effect, by virtue of section 35 of the *Building Code Act* (the "**BCA**") and section 14 of the *Municipal Act, 2001* (the "**MA**") to the extent of any conflict with the Building Code. Below we provide our analysis in support of this position.

The Draft By-law

The Draft By-law would apply to all properties in the City connected to the municipal drinking water system, and impose the following key requirements:

- No *owner...* shall connect to a plumbing system which is connected to a *municipal drinking water system* or any other *potable water* system any piping, etc. in a manner which may allow any liquid... chemical, gas, or other substance to enter the *municipal drinking water system* or any other *potable water* system (s. 5.1).
- Every *owner...* shall ensure that a *Backflow Preventer* is installed in respect of *source isolation* and/or *zone isolation* in every *building* or *structure* where a *municipal drinking water system* or other *potable water* exists (s. 5.2).
- Every owner of *industrial, commercial, institutional, agricultural, multi-residential property* shall ensure a testable *Backflow Preventer* is installed in respect of *premise isolation* (s. 5.4).

- Every owner of industrial, commercial, institutional, agricultural, multi-residential property shall cause to be carried out a *cross connection survey* of the *plumbing system* associated with his or her property and shall ensure that such survey is undertaken by a *qualified person* pursuant to the *Authorized Functions List...* at the owner's expense (6.1).
- A *cross connection survey* shall be completed at a frequency of (a) every five years; and (b) upon change of ownership or change of use or as otherwise required by the City (6.3).
- The City shall be permitted access to any *property* that is connected to the *municipal drinking water system* for the purpose of performing inspections to verify compliance with the by-law (12.1).
- Where, in the opinion of the City, a risk of possible contamination of the *municipal drinking water system* exists, the City shall be permitted immediate access to any *property* that is connected to the *municipal drinking water system*. In such instances, the City may require a routine *cross connection* inspection of the *property* to be performed by a *qualified person...* Should an unsafe and/or undocumented *cross connection* be found during said inspection, the cost of the inspection shall become the responsibility of the *owner* (12.2).

The Ontario Building Code Act and the Building Code

The BCA itself does not deal with potable water systems. The Building Code (the "**Code**"), however, deals with the protection of potable water systems from contamination in section 7.6.2. The requirements with respect to backflow prevention were most recently updated effective January 1, 2014. It provides, in part:

7.6.2. Protection from Contamination¹

7.6.2.1. Connection of Systems

(1) Connections to potable water systems shall be designed and installed so that non-potable water or substances that may render the water non-potable cannot enter the system.

(2) No connection shall be made between a potable water system supplied with water from a drinking water system and any other potable water system without the consent of the water purveyor.

¹ *Backflow* means a flowing back or reversal of the normal direction of the flow.

Backflow preventer means a device or a method that prevents backflow in a water distribution system.

Back-siphonage means backflow caused by a negative pressure in the supply system.

Back-siphonage preventer means a device or a method that prevents back-siphonage in a water distribution system

Water distribution system means an assembly of pipes, fittings, valves and appurtenances that conveys potable water to water supply outlets, fixtures, plumbing appliances and devices from the water service pipe or from a point of entry treatment unit located in the building.

7.6.2.2. Back-Siphonage

(1) Every potable water system that supplies a fixture or tank that is not subject to pressures above atmospheric shall be protected against back-siphonage by a backflow preventer.

(2) Where a potable water supply is connected to a boiler, tank, cooling jacket, lawn sprinkler system or other device where a non-potable fluid may be under pressure that is above atmospheric or the water outlet may be submerged in the non-potable fluid, the water supply shall be protected against backflow by a backflow preventer.

(3) Where a hose bibb is installed outside a building, inside a garage, or where there is an identifiable risk of contamination, the potable water system shall be protected against backflow by a backflow preventer.

7.6.2.3. Protection from Backflow

(1) Except as provided in Sentence (3) and Articles 7.6.2.4. to 7.6.2.6., where a backflow preventer is required by this Subsection, the backflow preventer shall be selected, installed and tested in conformance with CSA B64.10, "Selection and Installation of Backflow Preventers".

(2) Backflow preventers shall be provided in conformance with Sentence 7.2.10.10.(1).

(3) Tank type water closet valves shall be provided with a back-siphonage preventer in conformance with Sentence 7.2.10.10.(2).

...

7.6.2.6. Premise Isolation

(1) Buildings or facilities where a moderate hazard or severe hazard may be caused by backflow shall be provided with premise isolation of the potable water system by the installation of a backflow preventer selected in accordance with Clauses 5.3.4.2.(b) and (c) of CSA B64.10, "Selection and Installation of Backflow Preventers".

(2) Buildings of residential occupancy within the scope of Part 9 are not required to be isolated unless they have access to an auxiliary water supply.

(3) Except as provided in Sentence (1), where no direct connection exists between the auxiliary water supply and the potable water system, premise isolation shall be provided by a dual check valve backflow preventer conforming to CAN/CSA-B64.6, "Dual Check Valve Backflow Preventers (DuC)".

The Statutory Regime

The BCA deals with differences between the BCA and the Code on the one hand, and municipal by-laws on the other hand. It provides as follows:

35. (1) **Municipal by-laws** - This Act and the building code supersede all municipal by-laws respecting the construction or demolition of buildings.

(2) **Different treatments** - In the event that this Act or the building code and a municipal by-law treat the same subject-matter in different ways in respect to standards for the use of a building described in section 10 or standards for the maintenance or operation of a sewage system, this Act or the building code prevails and the by-law is inoperative to the extent that it differs from this Act or the building code.

Similarly, the *Municipal Act*, 2001 provides:

14. (1) **Conflict between by-law and statutes, etc.** - A by-law is without effect to the extent of any conflict with,

(a) a provincial or federal Act or a regulation made under such an Act; or

(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

(2) **Same** - Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

The Draft By-law, if Adopted, Will be Inoperative and Without Effect

It is our client's position that section 7.6.2 of the Code and the Draft By-law deal with the same subject matters, which is the prevention of potable water contamination and backflow protection. In addition, the Code and the Draft By-law treat protection from contamination and protection from backflow differently. The Draft By-law requirements are more detailed and more onerous than the Code requirements, particularly as those requirements relate to retrofitting older plumbing. The requirements of the BCA and Code are expressly not retroactive. The Draft By-law, by requiring retro-fitting therefore imposes greater obligations than those contained in the BCA and Code.

On a plain language reading of section 35 of the BCA, the Draft By-law would be inoperative to the extent of its differences and conflict with the Code.

This interpretation is supported by the Divisional Court's decision in *Minto Construction Ltd. v. Gloucester (Township)* (1979), 23 O.R. (2d) 634 ("*Minto*"). In that case, the Court considered municipal by-laws, which imposed requirements, restrictions and standards for the purpose of preventing and containing fires upon all residential buildings constructed in the municipality. The issue was whether these standards, which were more onerous than the requirements of the Building Code were *ultra vires* the municipality. *Minto* argued that the Building Code is a uniform and exclusive regime of regulations that ousts the jurisdiction of municipalities to legislate contrary to or inconsistently with its provisions. The municipality argued that so long as by-laws otherwise valid do not directly conflict with the Building Code so that the two cannot stand together, they are valid; the Code does not prohibit the imposition of stricter standards

than are required by its own provisions for the specific objects of fire prevention and control. The Court held that:

In our opinion, the intent of the Legislature, as expressed in the language of s. 18 and in the Act generally, is to provide a comprehensive and unified code for all areas in the Province to which it applies without variations arising from local municipal enactments.

...

Assuming without deciding that the language of s. 354(1) is apt to permit the municipality to regulate building construction for fire prevention and control purposes, I am of the opinion that the by-laws are, nevertheless, rendered inoperative by s. 18 of the *Building Code Act, 1974*, because they fall within the expression "all municipal by-laws respecting the construction of buildings."

In *Whiteley v. Shuniah (Municipality)*, 2008 CanLII 35710 (ONSC), the Superior Court relied on the *Minto* decision in interpreting section 35 of the BCA to mean that standards that are in conflict with the BCA are inoperative. At issue in *Whiteley* was the way in which the height of a building was measured. The Court in *Whiteley* held:

[74] The Divisional Court in *Minto Construction Ltd. v. Gloucester (Township)* (1979) 1979 CanLII 1829 (ONSC), 23 O.R. (2d) 634 held that the legislative intent in enacting the Building Code Act was to establish a "comprehensive and unified code" throughout the province "without variations arising from local municipal enactments."

[75] It would therefore be unreasonable for the chief building official to apply a standard for construction that is in conflict with the Building Code, which is promulgated under the Building Code Act. Application of a building standard that is in conflict with the Building Code is against the law and necessarily unreasonable.

The language of "conflict" used in *Whiteley* parallels the language of the MA. The MA states that there is a conflict where a by-law "frustrates the purpose of the Act, regulation or instrument." Taking the Divisional Court's view of the purpose of the BCA and the Code, i.e. to provide for a complete and unified code in relation to the construction and maintenance of buildings and plumbing in the Province, the Proposed By-law is not only different from the Code, it is also in conflict with the Code, as it creates a unique set of requirements for the City. The Proposed By-law would therefore, if adopted, also be without effect pursuant to section 14 of the MA to the extent of the conflict with the Code.

Hassey therefore requests that this Committee not recommend adoption of the Draft By-law to Council.

Sincerely,
DLA Piper (Canada) LLP

Per:

A handwritten signature in black ink, appearing to read 'Chris Barnett', written over a horizontal line.

Chris Barnett
CMB:sxo