

## COVID-19 SPECIAL BULLETIN #5

### **MATTERS DESERVING IMMEDIATE ATTENTION**

#### **General Review and Site Visits**

On April 3, 2020 the Government of Ontario amended its list of Essential Workplaces that can remain open. The additional restrictions are described as “aimed at further reducing contact between people and stopping the spread of COVID-19.” Businesses that are not identified on the list were required to close their physical locations. There were significant reductions in the list of construction projects and related services that may remain open. The advice in this Bulletin applies to construction sites that have not been shut down by the Province.

### **ARCHITECTS AND GENERAL REVIEW: ESSENTIAL WORKPLACES OR NOT?**

In response to the COVID-19 pandemic and “social distancing” measures being promoted by health authorities and every level of government, some developers, contractors and owners have suspended work on their projects; other construction projects remain active with uncertain degrees of COVID-19 protection measures.

Although architectural and engineering practices (including attendance at construction sites to carry out general review obligations) were not specifically named in the Province’s April 3, 2020 list of Essential Workplaces, businesses that support or supply services to other Essential Workplaces were included as components of a “supply chain” for those that are listed.

#### *Supply chains*

1. *Businesses that supply other essential businesses or essential services within Ontario, or that supply businesses or services that have been declared essential in a jurisdiction outside Ontario, with the support, products, supplies, or services...necessary to operate.*

Additionally, two of the included categories of construction projects that were listed, those related to healthcare and essential provincial infrastructure specifically refer to: “Construction projects and services....”

Two other categories of construction projects – critical industrial construction activities and several types of residential projects that have already received a permit or have commenced construction

- do not include a specific reference to services. The absence may not be significant; the supply chain category appears to apply to any of the listed construction projects.

It appears reasonable that architects' visits to construction sites to carry out general review and reporting with respect to new and ongoing construction projects within the healthcare sector, provincial infrastructure, and the identified industrial and residential sectors may be considered "essential" within this context – at least to the extent such services cannot be delivered on a work from home or other arrangement that responds to the COVID-19 social distancing objectives.

## **GENERAL REVIEW: PROTECTION OF THE PUBLIC VS CONTRACTUAL OBLIGATIONS**

Most municipalities have suspended the provision of site inspections by their own staff in response to the health concerns posed by COVID-19 pandemic and the social distancing and self isolation measures promoted by governments and health authorities.

Some architects may wish to follow the municipalities' example and suspend site visits for the duration of the COVID-19 threat. However, this approach may not be accepted by others who rely upon the architect carrying out its general review obligations to meet their own objectives – completion of a construction project within their own contractual obligations.

The question of whether or not to continue to visit a construction site is taken out of the architect's hands when the client and contractor decide to suspend work at the site. However, there is no formal requirement that construction work be suspended on sites falling within the listed categories. Work may continue at the site until further notification by the government, provided it is done safely and with due regard to social distancing and other measures to avoid transmission of the virus.

Where work continues at a construction site, architects need to take care to balance their professional and contractual obligations with their duty as a regulated profession to protect the public interest – including NOT endangering the health of the public and themselves.

**Notwithstanding the public health emergency requirements for social distancing, the mandatory closure of many businesses, and the adoption of work from home measures by others, the regulatory and contractual obligations of the architect respecting its general review and contract administration services applicable to its projects have not changed. We are concerned that architects cannot unilaterally withhold services that they have agreed to provide unless their agreement with their client allows for such a decision by the architect.**

## **CONTRACTS MAY HELP... BUT DUTY TO PROTECT THE PUBLIC NEED NOT BE WRITTEN DOWN**

Some architects (or engineering consultants) may have included a provision respecting the architect's (or consultant's) right to suspend its services under certain conditions. OAA Document 600-2013 includes GC9.3 (2) that allows the Architect to suspend services related to general review in the event that *"construction of the Work proceeds in the absence of a building permit and without the chief building official dispatching building officials to the site or, if the Architect becomes aware of an action taken by the Client which violates applicable building codes or regulations."* However, legal advice is that it is questionable whether this clause would apply to allow the architect to suspend its services in the absence of building officials due to COVID-19. Any architect would be wise to consult a lawyer about the specific circumstances before relying upon this wording to suspend its general review services.

## **IT IS NOT "BUSINESS AS USUAL"**

If construction continues and observations of progress at the site by the architect or other consultants continue to be required during COVID-19, architects, clients, consultants, contractors and every individual involved in the construction all have a duty to do their utmost to adhere to the recommended and mandated protocols to help control the spread of the virus. Architects, consultants and contractors must adapt their general review procedures so as not to threaten the public interest by contributing to the spread of the COVID-19 virus.

## **WHEN YOU TAKE CARE OF YOURSELF, YOU TAKE CARE OF OTHERS**

The current widely distributed advice from public health authorities encouraging all Canadians to assume responsibility for helping control the spread of the virus includes the reminder: "When You Take Care of Yourself You Take Care of Others." Architects, like everyone else, have an obligation to support the public health objectives of social distancing, self-isolation and work from home. This may mean changing the way they perform general review.

## **SITE VISITS FOR GENERAL REVIEW: WHAT SHOULD ARCHITECTS DO?**

1. Review their Client / Architect Agreements. It is important to determine the precise contractual wording with respect to the architect's general review obligations and suspension of architectural services. If suspension of architectural services is permissible under the contract, the architect may opt to suspend site visits, or use the provision to apply additional leverage to encourage a client or contractor to adhere to the architect's own conditions for visiting a site.

2. Be aware that there will be situations where the architect's choice or inability to visit a construction site could result in shut down of construction at the site with negative consequences for others. Architects should be prepared to consider alternative means of providing general review services for the project during COVID-19, even if the architect is less familiar with the alternatives than actual attendance at the site.

### **DOCUMENT EVERYTHING**

3. While architects and consultants are not responsible for the contractor's activities, including safety on the site, if the architect has concerns about inadequate COVID-19 safety precautions, write to the contractor (with copies to the client, the municipality, consultants, etc.) requesting the contractor's specific advice on what COVID-19 protocols and facilities it has in place to ensure safety and health at the construction site.
4. Write to the client (with copies to the municipality, the contractor and consultants) advising the client of the responses (or lack thereof) received to date and whether you are satisfied that your general review responsibilities can be carried out safely.
5. If the architect is not satisfied that its general review obligations can be carried out safely, it will need to notify the client, contractor, municipality and consultants regarding the time period that the architect will not be providing general review with the reasons for the temporary suspension of its general review obligations. The architect should clearly state in its letter that it continues to provide contract administration services remotely. Obtaining legal advice for this step is recommended as clients may interpret the temporary suspension of general review services as a breach of contract. Additionally, suspending general review of the construction in circumstances in which the municipalities are not inspecting the work may cause delays and potential claims against the architect.

### **LOOK AFTER YOURSELF AND OTHERS**

6. If the architect is satisfied that it can perform its field review services safely, in accordance with the social distancing and other COVID-19 measures described by the contractor, it can decide to do so. The architect may add its own conditions – perhaps scheduling visits at times when other activity and persons will be absent or well away from the work being reviewed, or with the contractor or subcontractors providing date-stamped photographs or videos of the work that the architect may not be able to see under safe conditions.
7. If the architect, any consultants, or key employees are subject to non-voluntary self-isolation measures, the architect should write to the client, contractor, other consultants and the building department explaining the reasons for not attending the site.

### **ADOPT ALTERNATE MEASURES THAT WORK FOR YOU**

8. Consider use of available technologies as a means of viewing and recording the status of the work at the site. For instance, observations by the architect and other consultants required for general review, deficiency reviews, and reports required by a municipality for an Occupancy Permit may be able to be achieved by photographs or videos taken by the contractor, or video conferencing between the contractor at the site and the architect at a remote location. If possible, confirm that the municipality will accept technological alternatives to the progress reports that the architect would normally provide.
9. Any reports or communications to the client or any authority, including the municipal building department, should clearly describe the means and conditions under which the site observations that the architect (or consultant) is relying upon were carried out. It would be prudent to include date, time, location and a brief description on any video or photographs. It goes without saying that image quality should be sufficient to allow recipients to make an effective evaluation. Photographs and video recordings should be retained for reference if required by any authority at a later date.
10. Remind clients and contractors that, if they choose to proceed with construction in the absence of inspections by municipal building officials, they do so at their own risk. Upon returning to the site, a building inspector may require concealed work completed in its absence to be opened up so that it can be inspected.
11. In the event that a Client / Architect agreement includes a *force majeure* provision, obtain legal advice to assess whether the COVID-19 circumstances are covered. To trigger a force majeure provision the architect must send out written notices that it is enacting the provision. Legal advice is essential.
12. Monitor the OAA website and advisories respecting COVID-19 regulatory and practice concerns raised by architects. The circumstances arising from COVID-19 are unprecedented, and a pandemic is not specifically anticipated in the Regulation to the *Architects Act* or in the Regulatory Notices and Practice Tips previously issued by the OAA. Questions from architects and answers available from the OAA respecting regulatory concerns and the delivery of architectural services during COVID-19 will continue to evolve.

## ARCHITECTS CANNOT REPLACE BUILDING OFFICIALS

Architects should be reluctant to accept the unilateral transfer of risk from a municipality to the architect. That is not what the law requires and it is not what architects have contractually bargained for. As discussed in Pro-Demnity COVID-19 Special Bulletin 4, taking on the statutory obligations of the municipality and its building officials is NOT among the “usual or customary” services of an architect covered by professional liability insurance.

If an architect is unsure whether the municipal building officials are performing site inspections,

write to the municipality (with copies to the client, the contractor, consultants, etc.) requesting the municipality's specific advice on whether they intend to carry out their statutory obligations under the *Building Code Act* for each specific project.

In the event the municipality is not performing its independent inspections, the architect should expressly indicate by way of a disclaimer (in all correspondence and all site review reports) that the architect's site reviews:

- DO NOT relieve the contractor of its duty to perform its work in accordance with the plans and specifications pursuant to the Ontario Building Code and the requirements of all authorities having jurisdiction, and
- ARE NOT a substitute for and DO NOT replace the statutory duties of authorities having jurisdiction including the municipal building officials, to carry out their own independent inspections.

If an architect provides general review in circumstances in which the authorities having jurisdiction, including the municipal building officials, have stopped performing progress inspections, it is strongly recommended that a disclaimer be included in any correspondence or reports directed to any clients, consultants, contractors and authorities, including municipal building departments.

The recommended disclaimer from Special Bulletins 3 and 4 is repeated below.

#### **DISCLAIMER - Short Form**

***This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own independent inspections.***

This disclaimer should be considered mandatory for any reports or correspondence submitted to a building department or any authority having jurisdiction.

#### **DISCLAIMER - Long Form**

***This report is issued and should be read together with all previously issued reports, including reports issued by any and all consultants. Nothing in this report relieves the contractor from performing its work in accordance with the plans and specifications, pursuant to the requirements of the Ontario Building Code and the requirements of all authorities having jurisdiction. The contractor shall ensure that its work is inspected by all authorities having jurisdiction. This report is not a substitute for and does not replace the statutory duties of authorities having jurisdiction to carry out their own***

### ***independent inspections.***

The full wording of the recommended Long Form of the disclaimer addresses a number of issues that can be anticipated may arise on construction projects during COVID-19. The final sentence in bold should be considered mandatory for any reports or correspondence submitted to any authority having jurisdiction including a municipal building department.

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