



Office of the Auditor General / Bureau du vérificateur général

FOLLOW-UP TO THE 2008 AUDIT OF THE BUILDING CODE

SERVICES PROCESS FOR 215 PRESTON STREET

2010

**SUIVI DE LA VÉRIFICATION DU PROCESSUS DES SERVICES
DU CODE DU BÂTIMENT POUR LE 215, RUE PRESTON DE 2008**

Table of Contents

EXECUTIVE SUMMARY	i
RÉSUMÉ.....	iii
1 INTRODUCTION	1
2 KEY FINDINGS OF THE ORIGINAL 2008 AUDIT OF BUILDING CODE SERVICES PROCESS FOR 215 PRESTON STREET.....	1
3 STATUS OF IMPLEMENTATION OF 2008 AUDIT RECOMMENDATIONS	5
4 SUMMARY OF THE LEVEL OF COMPLETION	18
5 CONCLUSION.....	19
6 ACKNOWLEDGEMENT.....	19

EXECUTIVE SUMMARY

Introduction

The Follow-up to the 2008 Audit of the Building Code Services Process for 215 Preston Street was included in the Auditor General's Audit Plan.

The key findings of the original 2008 audit included:

- The owner proceeded with demolition and the renovations without the appropriate demolition and building permits;
- During the time from the last Stop Work Order, the City Inspector did not monitor the site;
- Staff had the duty to enforce the legislative requirements of the Building Code but did not;
- The City issued a Partial Occupancy Permit without having received all the required professional engineer and architect reports; and,
- The City should have used stricter methods to prevent what appears to be blatant disregard for the Code, the Building By-law and the requirements of the policies, guidelines and standards.

Summary of the Level of Completion

The table below outlines our assessment of the level of completion of each recommendation as of September 30, 2010. Subsequently, management's response in the Spring of 2011 was in agreement with that assessment.

CATEGORY	% COMPLETE	RECOMMENDATIONS	NUMBER OF RECOMMENDATIONS	PERCENTAGE OF TOTAL RECOMMENDATIONS
LITTLE OR NO ACTION	0 – 24	-	-	-
ACTION INITIATED	25 – 49	-	-	-
PARTIALLY COMPLETE	50 – 74	2, 5	2	17%
SUBSTANTIALLY COMPLETE	75 – 99			
COMPLETE	100	1, 3, 4, 6, 7, 8, 9, 10, 11, 12	10	83%
TOTAL			12	100%

Conclusion

The City has addressed all the recommendations of the original audit, and has completed most of them. The two recommendations that are not complete are in progress and, in our opinion, the process for completing them appears sound.

Acknowledgement

We wish to express our appreciation for the cooperation and assistance afforded the audit team by management.

RÉSUMÉ

Introduction

Le Suivi de la vérification du processus des Services du code du bâtiment pour le 215, rue Preston de 2008 était prévu dans le Plan de vérification du vérificateur général.

Les principales constatations de la vérification de 2008 sont les suivantes :

- Le propriétaire a procédé à la démolition et aux rénovations sans avoir obtenu de permis de démolir et de construire;
- L'inspecteur de la ville n'a pas contrôlé le chantier après la délivrance de la dernière ordonnance de cessation des travaux;
- Le personnel avait l'obligation de faire respecter les exigences du Code du bâtiment, ce qu'il n'a pas fait;
- La Ville a délivré un permis d'occupation partielle sans avoir reçu tous les rapports requis de l'ingénieur et de l'architecte;
- La Ville aurait dû user de moyens plus rigoureux afin d'empêcher ce qui semble être une violation flagrante du Code du bâtiment, du Règlement municipal en matière de bâtiment ainsi que des exigences des politiques, normes et lignes directrices.

Sommaire du degré d'achèvement

Le tableau ci-dessous présente notre évaluation du degré d'achèvement de chaque recommandation au 30 septembre 2010. Par la suite, la réponse de la direction au printemps de 2011 concordait avec cette évaluation.

CATÉGORIE	POURCENTAGE COMPLÉTÉ	RECOMMANDATIONS	NOMBRE DE RECOMMANDATIONS	POURCENTAGE DU TOTAL DES RECOMMANDATIONS
PEU OU PAS DE MESURES PRISES	0 – 24	-	-	-
ACTION AMORCÉE	25 – 49	-	-	-
COMPLÉTÉE EN PARTIE	50 – 74	2, 5	2	17 %
PRATIQUEMENT COMPLÉTÉE	75 – 99			
COMPLÉTÉE	100	1, 3, 4, 6, 7, 8, 9, 10, 11, 12	10	83 %
TOTAL			12	100 %

Conclusion

La Ville a abordé toutes les recommandations de la vérification originale et réalisé la plupart d'entre elles. Les deux recommandations qui ne sont pas achevées progressent et, à notre avis, le processus d'achèvement semble solide.

Remerciements

Nous tenons à remercier la direction pour la coopération et l'assistance accordées à l'équipe de vérification.

1 INTRODUCTION

The Follow-up to the 2008 Audit of the Building Code Services Process for 215 Preston Street was included in the Auditor General's Audit Plan.

The key findings of the original 2008 audit included:

- The owner proceeded with demolition and the renovations without the appropriate demolition and building permits;
- During the time from the last Stop Work Order, the City Inspector did not monitor the site;
- Staff had the duty to enforce the legislative requirements of the Building Code but did not;
- The City issued a Partial Occupancy Permit without having received all the required professional engineer and architect reports; and,
- The City should have used stricter methods to prevent what appears to be blatant disregard for the Code, the Building By-law and the requirements of the policies, guidelines and standards.

2 KEY FINDINGS OF THE ORIGINAL 2008 AUDIT

Based on the reviews undertaken to date it is concluded that:

1. The Owner proceeded with demolition and the renovations without the appropriate demolition and building permits. The application for a permit to construct or demolish was submitted after the fact, together with a sketch prepared by the Architect of Record.
2. Responding to complaints, the Building Code Services Branch (BCSB) issued an Order to Comply with respect to the demolition without a permit. Subsequently, the BCSB Inspector found that the renovation work was also proceeding without a permit and issued an Order to Comply and subsequently a Stop Work Order. In response to these, the Owner submitted the required applications for demolition and building permits.
3. The Owner continued construction of the renovations without a permit after he submitted the building permit application. Two days after the application submission, the City Inspector found that the Owner was doing work without a permit and issued a Stop Work Order. After this event, the City Inspector did not monitor the site. The next time the City Inspector went to the site was a month and a half later, when construction was completed.
4. During the time from the last Stop Work Order to May 24, 2006, the City Inspector did not monitor the site. The City Inspector should have monitored the site after the permit applications were submitted. The Act gives the

Inspector sufficient powers to enter and inspect the site once the application is submitted.

5. The Architect, who was the original building designer in 1985, was involved as Architect of Record in the entire demolition and renovation period.
6. The Architect was involved throughout the entire period when demolition and the renovations were done without the corresponding permits. The Architect should have done what he could to stop these actions by the Owner, including notifying the City; he did not. This is contrary to the requirements of The Architects Act.
7. The BCSB has indicated in the response to the draft of this report submitted for fact verification that in fact the BCSB was fully aware that construction was proceeding during this time. The BCSB had the duty to enforce the requirements of the Act, but did not.
8. The BCSB allowed the Architect to act outside of the requirements of the Building Code Act and The Architects Act. The BCSB could and should have put the architect on notice that the BCSB was aware of the actions by the Owner and the Architect was aiding, abetting, or acquiescing in those actions, including earlier notification to the Ontario Association of Architects (OAA).
9. The information provided with the application for demolition permit was not complete, as it was missing the description of the structure and the methods of demolition prepared by a structural engineer, in accordance with the Ontario Building Code (OBC). The City should have requested the required missing information before issuing a demolition permit. Failure to request the required information in effect constitutes a reward to the Owner for carrying out the demolition without a permit.
10. The information provided with the application for building permit was complete, and the City review of the building permit application was done appropriately.
11. The fees charged for review were calculated based on the construction estimate provided by the Owner in the application for building permit. Based on information provided by the Owner during this audit, the amount of the estimate is more than 50% lower than the estimate provided by the Architect to the Owner and less than 25% of the actual construction costs.
12. The permit fee was charged as required by City by-law. In addition to the basic fee and development charges, an additional fee was charged (as prescribed by the City) for the project where the Owner proceeded with work without a permit. The fee required to be levied was based on \$13.50 per \$1,000 of project value. The Owner indicated in the application that the project value was \$180,000. It is normal to rely on the Owner or permit applicant to provide the project value. The correct fee of \$2,430 was charged. An additional fee of 50%

of the permit fee, \$1,215, was charged due to the Owner's work with no permit, in accordance with the Building By-law.

13. It is noted that in the interview the Owner stated that the original budget given to him by the Architect was \$400,000, and that the budget had been exceeded by more than 100%; the final cost, according to the Owner, was \$900,000. This discrepancy in construction cost appears to have resulted in permit fees that were too low. It is noted that if the Architect's budget of \$400,000 had been applied the resulting fee would have been \$8,100, including the additional fee of 50% of the permit fee; if the resulting cost of \$900,000 is used the resulting fee is \$18,225, or \$14,580 more than the fee collected. The fine that was eventually paid by the Owner is less than the fee that would have been charged based on the actual cost.
14. On this basis, it is concluded that independent confirmation of construction value may result in higher permit fees to the City.
15. The City issued a Partial Occupancy Permit without having received all the required professional engineer and architect reports.
16. No Final Occupancy Permit has been issued, but the Owner is using the facility as if he already had the final permit. The Owner is using an area of the building not covered by the Partial Occupancy Permit.
17. The original design structural engineer was not involved during the construction reviews because the building construction was proceeding without a building permit. The letter report provided by a second structural engineer retained by the Owner to provide the consultant report required by the City is not sufficient given the complexity of the structure and that the required construction review was carried out after the structure was covered and not during construction. There are concerns with respect to the extent of verification and testing done to provide the letter, as the engineer visual inspection did not cover the entire structure and was limited by the building finishes. It is our opinion that the City should not have accepted the second structural engineer's letter as a valid engineering report.
18. The City Inspector has the authority to demand the structural engineer report, as he did. The Inspector also has the authority to determine whether the structural engineer report is sufficient. Based on the fact that the field inspection done by the second structural engineer and the letter that was provided in this case does not meet the required level of detail, and that the inspector nevertheless accepted it and relied on it, we believe that in this case and similar cases, the City's Structural Review Engineer should be the person who determines the sufficiency of the structural engineer report.
19. The City used some of the methods available to have the Owner comply. However, given that the BCSB was fully aware that construction was

proceeding without a permit, we consider that the BCSB should have used stricter methods to prevent what appears to be blatant disregard for the Code, the Building By-law and the requirements of the Policies, Guidelines and Standards.

20. The BCSB indicated the following: "It should be noted, the Ontario Building Code Act is a permissive legislation rather than a punitive one. The Branch is the centre of expertise in the interpretation and enforcement of the Act and the Code and thus the Branch must assume a role that facilitates and ensures Code compliant construction (thus meeting the minimum standards for public health and fire, fire protection, structural sufficiency, accessibility, conservation and environmental integrity) while not unnecessarily impeding the economic engine of the construction industry, nor increasing construction costs that would stymie the private sector."

However, the Building Code Act (section 1.1) indicates the following regarding the roles of the Chief Building Official and the Inspectors:

Role of chief building officials

- (6) *It is the role of a chief building official,*
- (a) to establish operational policies for the enforcement of this Act and the building code within the applicable jurisdiction;*
 - (b) to co-ordinate and oversee the enforcement of this Act and the building code within the applicable jurisdiction;*
 - (c) to exercise powers and perform the other duties assigned to him or her under this Act and the building code; and*
 - (d) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct. 2002, c. 9, s. 3.*

Role of inspectors

- (7) *It is the role of an inspector,*
- (a) to exercise powers and perform duties under this Act and the building code in connection with reviewing plans, inspecting construction, conducting maintenance inspections and issuing orders in accordance with this Act and the building code;*
 - (b) to exercise powers and perform duties in respect of only those matters for which he or she has the qualifications required by this Act and the building code; and*
 - (c) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct. 2002, c. 9, s. 3; 2006, c. 22, s. 112 (2).*

The main requirement in both cases is for enforcement of the Act and the Code.

21. In the same response to the draft for fact verification, the BCSB indicated that: “The Branch must regulate construction of buildings first through leadership, education and collaboration, then if these approaches fail to obtain compliance, through enforcement, including prosecution, etc. Council and the public’s expectations, as stated in our Branch’s objectives, are that we *assist the property owner, builder, contractor, architect or engineer by providing direction in the application and interpretation of the Building Code Act, the Building Code, and applicable law to ensure construction meets the performance and safety standards.* The Province’s training guides encourage new building officials to first encourage owners and their agents to comply through the powers of persuasion before enlisting the more formal enforcement tools.” We could not find in the Act or the Ontario Building Code any reference to the Building Official having to provide direction to owners, architects, or engineers. It is the professional responsibility of the architect or engineer to comply with the Act; the Building Official is responsible for enforcing the Act and the Building Code. If the architect or engineer is not meeting their responsibilities, the BCSB should report them to their respective associations for disciplinary action.
22. One of the owners of the property was at one time an employee of the City, but he had ceased to be one at the time of the events subject of this audit.

3 STATUS OF IMPLEMENTATION OF 2008 AUDIT RECOMMENDATIONS

2008 Recommendation 1

That the Building Code Services Branch (BCSB) ensure the documentation received with the Application For a Permit to Construct or Demolish is complete in all cases, as we found in this case the documentation provided with the application for demolition was not complete.

2008 Management Response

Management does not agree with the recommendation.

Management does not agree that there were procedural omissions with regard to the applications for demolition and construction at 215 Preston Street. Building Code Services (BCS) did receive sufficiently detailed documentation to ensure that the proposed demolition and construction was reasonable and could be carried out in accordance with the Building Code.

It is the role of the Chief Building Official (CBO) to determine the sufficiency of information supporting an application based on the unique set of circumstances and conditions of each project and the CBO’s interpretation of the requirements and

standards as they apply to the application. In this instance, the submissions were deemed sufficient for the purpose of issuing the permits.

Management Representation of the Status of Implementation of 2008 Recommendation 1 as of September 30, 2010

It is the role of the Chief Building Official (CBO) to determine the sufficiency of information supporting an application based on the unique set of circumstances and conditions of each project, and the CBO's interpretation of the requirements and standards as they apply to the application. In this instance, the submissions were deemed sufficient for the purpose of issuing the permits.

As a result of further discussion with the auditor, management understands the auditor's concerns, and can advise that staff are trained and provided with tools to ensure consistency in decision-making. Provision of tools, training and support to staff to maintain service excellence on all files is integral to the Branch's strategic plan.

Management: % complete ***100%***

OAG's Follow-up Audit Findings regarding 2008 Recommendation 1

The City solicitor advised in the September 5, 2008 memorandum that in his view construction could include demolition in those cases where construction is contemplated than can only be achieved with demolition occurring first.

BCS has guidelines for plan examiners and inspectors. Staff is trained incrementally, starting with the internship program, followed by attendance at training events held for building officials, such as those offered by the Ontario Building Officials Association.

BCS prepares a calendar of training events based on the needs of the BCS staff. The training covers all aspects of the BCS services.

These are updated regularly. New guidelines and/or changes to existing guidelines are communicated to staff by management. Issues not covered by the guidelines will be discussed as required.

OAG: % complete ***100%***

2008 Recommendation 2

That the BCSB advise property owners that the Branch reserves the right to verify the actual construction cost and to adjust the fees accordingly. If this cannot be done, that the BCSB implements a database of cost per unit area to permit it to verify the budget estimates provided with the application.

2008 Management Response

Management does not agree with the recommendation.

In the absence of legislative authority, there is no basis for verifying the actual construction costs and adjusting the fees after the permit has been issued and the construction completed. The process of verification of estimated value of construction and adjusting undervalued fees prior to the issuance of the permit is already in place. This is a standard practice of municipalities that assess fees based on the value of construction.

While the branch maintains a database of cost per unit area for new construction, it is too difficult to obtain a cost per unit area for renovations due to the nature of this construction activity (too many variables and unknowns).

The building permit fee is based on “assessed valuation of the work”, which is not the same as the “actual construction costs”. An “Architect’s estimate of costs” may include many elements, which do not form part of the “assessed valuation of the work”, and which may vary greatly from the “actual construction costs”, due to many unquantifiable factors.

Finally, the Building Code Act and Building Code prevent the permit fees collected from exceeding the cost of providing the service, along with reasonable reserves to offset liability and construction fluctuations. The Chief Building Official is legislatively required to provide an annual report on these matters, and any request for increases are subject to consultation with the industry and public.

Management Representation of the Status of Implementation of 2008 Recommendation 2 as of September 30, 2010

As previously stated, there is no legislative authority to adjust fees after a permit has been issued. The process of verifying estimated value of construction and adjusting undervalued fees prior to permit issuance is already in place. In the case of new construction, the Branch does maintain a database of cost per unit area. The Branch calculates fees in accordance with Schedule A of the Building By-law.

In addition, the Branch strives to continuously improve processes and performance and accordingly, is introducing in Q4 2011, a new fee methodology that will promote transparency and provide for more accurate assessments.

Management: % complete 50%

OAG’s Follow-up Audit Findings regarding 2008 Recommendation 2

BCS provided a copy of a table it maintains for cost per square foot for different types of buildings. The values in the table are used by BCS staff to set the permit fees.

The process is in progress for the new fee methodology.

OAG: % complete 50%

Management Representation of the Status of Implementation of Recommendation 2 as of Spring 2011

The process of verifying estimated value of construction and adjusting undervalued fees is completed prior to permit issuance and is calculated in accordance with the Building By-law. As part of the Branch's commitment to Service Excellence, implementation of a new fee methodology that will promote transparency is on track for Q4 2011.

Management: % complete

50%

2008 Recommendation 3

That the BCSB ensure all files are properly documented and complete, including a complete record of telephone conversations, for future reference and possible litigation.

2008 Management Response

Management does not agree with the recommendation.

It is the current practice for staff to document observations and key discussions, particularly where conflict and/or litigation is anticipated. However, it is not possible, from a time-management perspective, to document all communications. Each Building Official must make a subjective assessment of the relevance of the communication and the degree of recording based on the circumstances at the time of the communication. Further, a requirement that all files include a record of all telephone conversations would require significant additional resources and investment in technology, for the few occasions where conflict arises.

Management Representation of the Status of Implementation of 2008 Recommendation 3 as of September 30, 2010

Management agrees that all files must be properly documented and complete and this is current practice. It is standard practice for staff to document observations and key discussions, particularly where conflict and/or litigation is anticipated.

The current practice meets all Code requirements and is sufficient to manage any potential risks associated with a file. Management trusts that this is the intent of the recommendation, and that it would not be practical or a wise use of resources for a higher standard to be applied.

Staff are trained and provided with tools to ensure completeness of files. Provision of tools, training and support to staff to maintain service excellence on all files is integral to the Branch's strategic plan.

Management: % complete

100%

OAG's Follow-up Audit Findings regarding 2008 Recommendation 3

Based on other files reviewed and the results of the content of files it can be concluded that BCS is following a reasonable process for keeping information in its files.

OAG: % complete

100%

2008 Recommendation 4

That Occupancy Permits be issued only when all the construction review reports by all professionals have been received to the satisfaction of the City.

2008 Management Response

Management does not agree with the recommendation.

In 2002, the branch established an operational policy that requires all required construction review reports to be submitted prior to the issuance of the "partial occupancy permit"; although the OBC only requires this threshold to be met prior to the "final occupancy permit" being issued. As a best practice, BCS moved this threshold to an earlier stage because once a building is occupied it becomes more difficult to address outstanding deficiencies.

In this instance, based on the Architect's assurance that the reports would be submitted in short order and relying on the professional integrity accorded an Architect and their legal responsibilities under the Architect Act, the Inspector issued the partial occupancy permit.

The Architect subsequently notified the City that he and the Structural Engineer of Record would not produce the reports due to a dispute with their client, which has yet to be resolved. The Architect alleged there were welding deficiencies, and on this basis, an occupancy permit should not have been issued. As they are lawfully entitled to, the owners engaged the services of two other engineering firms, one specialized in welding, to carry out the reviews and provide the required reports. These reports confirmed the structural adequacy of the welds and the structure; therefore, the partial occupancy permit was allowed to stand as the requirements for partial occupancy had been met.

Finally, it is noted that there are no areas of the building being used that are prohibited from use and occupancy, although the final occupancy permit has not been issued (only the partial) and the permit file remains open.

Management Representation of the Status of Implementation of Recommendation 4 as of September 30, 2010

See previous management comments with regard to City of Ottawa best practice regarding partial occupancy permits. The Building Code requires submission of review letters only prior to passing the final inspection, not at partial occupancy inspection.

In this instance, the Building Official deviated from Branch Standard Operating Procedure (SOP) and the very difficulties the SOP was designed to avert, materialized. The Building Official has gained knowledge and wisdom from this error in judgement. Staff was reminded of their duty to adhere to the SOP.

Management: % complete

100%

OAG's Follow-up Audit Findings regarding Recommendation 4

The City has operational policies that cover this issue. In addition, the City has taken steps to confirm that the subject staff member is aware of the City's requirements.

The City has implemented the performance development program, which will assist supervisors to bring procedure deficiencies to the attention of the staff member, if required.

OAG: % complete

100%

2008 Recommendation 5

That Inspectors be instructed to actively monitor sites for which an application for building permit has been submitted, including access to the site if necessary.

2008 Management Response

Management does not agree with the recommendation.

Such inspections would serve only to document the fact that illegal construction or demolition is continuing. As well, caution must be taken to ensure that any inspections, prior to the issuance of a permit, not be for the purpose of reviewing the illegal construction for Code compliance, nor appear to do so, as this would encourage illegal construction to continue. The implementation of this recommendation will require additional resources to integrate these inspections in addition to the mandatory inspections, which form the basis of the City's existing program and service delivery levels. This recommendation will be explored when the branch's Strategic Branch Review is undertaken in Q2 2009, as this review will be an appropriate forum to consider higher service delivery levels.

In this instance, the Inspector was well aware of the on-going illegal construction activities, had issued the requisite Orders and a court action had commenced. Any additional inspections after the Stop Work Order was issued and prior to the completion of the construction (a 7 week period) would have confirmed only that illegal construction was continuing, which was already known to staff and sufficiently documented for purposes of the court case. Additional resources would have been required to monitor the site more frequently.

Management Representation of the Status of Implementation of Recommendation 5 as of September 30, 2010

Management has further considered the recommendation and its implications. Given current workloads and resource capacity, the focus for the Branch continues to be the completion of mandatory inspections within the existing program.

The Branch is working with ITS to improve technological tools, such as enhanced functions of MAP, remote technology, and an electronic “Bring Forward” system, that will increase efficiencies and enable Building Officials to better manage their workloads. The multi-phased project will be complete in 2014 as part of the corporate Mobile Workforce Solutions Project and the replacement or enhancement of MAP, subject to ITS priorities and resource commitments.

Notwithstanding, where feasible (in terms of resources) and where circumstances dictate a higher level of inspections and enforcement, management does pursue more aggressive enforcement, including court action, as was the case herein.

Management % complete *50%*

OAG’s Follow-up Audit Findings regarding Recommendation 5

BCS has demonstrated that they are taking steps to improve their systems to enable them to monitor the status of applications. By improving mobile systems, it can be expected that the staff ability to monitor sites will improve substantially.

OAG: % complete *50%*

Management Representation of the Status of Implementation of Recommendation 5 as of Spring 2011

The key constraint to monitoring beyond mandatory inspections is resource capacity. The Mobile Workforce Solutions Project, to be completed in 2014, should create increased efficiencies that will allow the Branch to optimize its resources.

Implementation of IT solutions alone will not guarantee increased monitoring of sites. Notwithstanding, where feasible (in terms of resources) and where circumstances dictate a higher level of inspections and enforcement, management will continue to pursue more aggressive enforcement, including court action as was the case herein.

Management: % complete *50%*

2008 Recommendation 6

That the CBO review the file to determine if the Owner should be required to uncover areas of the roof structure to allow more detailed and thorough inspection and testing of the structural steel.

2008 Management Response

Management agrees with the recommendation.

The CBO has carefully considered this recommendation, consulted with Legal Services and has determined that there is no legal basis for the owner to uncover areas of the roof structure for this purpose.

- There are certain pre-conditions that must exist for a CBO to consider issuing an Order to Uncover. These are:
- The CBO must have reason to believe that the construction is not in accordance with the Code and permit drawings. In this instance, the belief that the construction was not compliant was that of the Architect in regard to the welding. The welding and surrounding construction were reviewed by two structural engineers, one of who was a welding engineer and a level III welding inspector. Both found the welding work to be Code compliant. Thus, there was no remaining reason to believe there was non-compliance; and
- The Order must be issued prior to the issuance of the partial occupancy permit. In this instance, the partial occupancy permit had been issued.

Management Representation of the Status of Implementation of Recommendation 6 as of September 30, 2010

The Chief Building Official has reviewed this recommendation with Legal Services and has determined that there is no legal basis for the owner to uncover areas of the roof structure for this purpose.

Management: % complete 100%

OAG's Follow-up Audit Findings regarding Recommendation 6

The City relied on the opinion of Legal Services regarding this recommendation.

OAG: % complete 100 %

2008 Recommendation 7

That the City require that structural review letters be reviewed by the City's Structural Review Engineer in cases similar to the subject project.

2008 Management Response

Management does not agree with the recommendation.

Building Officials (Plans Examiners and Building Inspectors) are qualified by the Province of Ontario to review structural review letters. In addition, the branch provides Building Officials valuable in-house training to sufficiently equip them to review the reports and render a decision as to adequacy. The Building Officials do consult with the branch's Building Code Engineers in cases where they do not feel

that the review letters are adequate or where the issues are of such complexity as to require additional review.

In this case, the reports submitted by the engineering consultant were considered sufficient for purposes of determining compliance.

Management Representation of the Status of Implementation of Recommendation 7 as of September 30, 2010

As previously stated, Building Officials (BOs) are qualified and trained to review structural review letters and are the most familiar with the technical requirements of the specific construction project. It is current practice for the BO to consult with the City Structural Engineer when deficiencies are identified or in cases of complexity.

Current practice is consistent with this recommendation, in that the City Structural Engineer is consulted on complex cases and when it is warranted from a risk management perspective as assessed by the BO. A directive will result in an abdication of responsibilities by the BO notwithstanding the BO's qualifications, experience and knowledge and would tax the already limited engineering resources. No further actions are required to meet the intent of the recommendation.

Management: % complete *100%*

OAG's Follow-up Audit Findings regarding Recommendation 7

The City has demonstrated that it has guidelines and procedures in place to guide the Building Officials in case of complex or unusual matters.

OAG: % complete *100%*

2008 Recommendation 8

That the City consider pursuing a complaint with the appropriate professional architectural and engineering associations regarding the professionals identified in this report.

2008 Management Response

Management agrees with the recommendation.

Although, the City is not the regulatory authority of engineers and architects, where the conduct of these professionals undermine the Building Code Act and the OBC or the Chief Building Official's ability to enforce the Act and Code, referrals are made to the governing body to review, investigate and determine corrective action, if any. The Chief Building Official will assist the OAA in the investigation should the OAA request such.

Management Representation of the Status of Implementation of Recommendation 8 as of September 30, 2010

A complaint was made to the Association of Architects (OAA) on behalf of the Chief Building Official (CBO) on September 18, 2008. The CBO and Legal Services assisted the OAA in its investigation of the complaint which culminated in the OAA's decision dated July 14, 2009.

While a complaint was made and pursued in relation to the architect of record, after due consideration of the file and upon consultation with legal counsel, no referral was made in relation to the engineer to the Professional Engineers of Ontario (PEO).

Management: % complete **100%**

OAG's Follow-up Audit Findings regarding Recommendation 8

The matter was referred to the City Solicitor, who proceeded with the complaint with OAA, but concluded that the complaint to the PEO was not warranted.

OAG: % complete **100%**

2008 Recommendation 9

That in future similar situations where an architect, engineer, or other professional regulated by a professional regulatory body, appears to have engaged in conduct unbecoming the standards expected by such a professional and/or where the public interest demands, the City pursue complaints to the OAA, or other such professional body as the case may be.

2008 Management Response

Management agrees with the recommendation.

However, in order to effectively implement this recommendation, additional specialized resources (1 FTE, vehicle, equipment, training and qualification and work space - minimum \$125K) would be required to investigate, document and refer complaints to the governing bodies where the actions or omissions of the professionals have undermined the Building Code Act and the OBC or the CBO's ability to enforce the legislations. This will be explored when the branch's Strategic Branch Review is undertaken in Q2 2009, as this review will consider changes to program and service delivery levels.

Management Representation of the Status of Implementation of Recommendation 9 as of September 30, 2010

Management has further considered this recommendation and its implications. Management has not sought to establish an FTE to address this issue at this time. It has been determined that changes to program or service delivery levels are not feasible, as the Chief Building Official's priority has been to resource front-line positions (building officials, technical clerks, etc.) in order to ensure the branch

meets its legislative and core responsibilities, particularly in view of the continued robust construction activity level. Accordingly, new FTEs were added in 2010 and similarly are proposed in Budget 2011 to address the priority needs. With regard to the conduct of professionally regulated individuals, the City will continue, as always, to fulfill its role in the public interest.

Management: % complete

100%

OAG's Follow-up Audit Findings regarding Recommendation 9

It is not clear why one FTE would be required, since the referral to the regulatory body would not be a full-time activity, but only when required.

Once the issue is referred to Legal Services they make the decision on whether further action is warranted.

OAG: % complete

100%

2008 Recommendation 10

That the City develop a policy by which the BCSB can request an injunction or restraining order to ensure that the Owner complies in cases of disregard for the rules, such as this example.

2008 Management Response

Management does not agree with the recommendation.

Each case must be evaluated on its own merits and the option to seek an injunction is already available in the Building Code Act and has been resorted to in the past, as circumstances have warranted. In addition, the seeking of injunctions requires considerable resource allocation, on the part of both BCS and Legal Services. Additional resources would be required to implement a more aggressive enforcement strategy. Whether injunctions are obtained is a determination of the Court and they are only granted in extraordinary circumstances.

In this instance, BCS did undertake the necessary inspections, did issue the required Orders and did successfully prosecute the owners of 215 Preston Street. Once the owners obtained the requisite planning approvals, a permit was issued, construction was inspected and it was determined to meet the minimum OBC standards.

Management Representation of the Status of Implementation of Recommendation 10 as of September 30, 2010

The option to seek an injunction is already available to the City pursuant to the *Building Code Act*. This eliminates the requirement for the City to develop an additional policy. The granting of injunctions is a determination of the courts only on an exceptional basis. Management contends that actions in this case were taken as appropriate.

As previously stated, the City did successfully prosecute the owners of 215 Preston Street who were required to pay fines as deemed by the Court.

Management: % complete **100%**

OAG's Follow-up Audit Findings regarding Recommendation 10

The City has in place the procedures to support its legal right to stop construction.

OAG: % complete **100%**

2008 Recommendation 11

That the BCSB ensure compliance with the Building Code Act and not try to balance the BCSB enforcement obligations and requirements with the business objectives of the Owner.

2008 Management Response

Management does not agree with the recommendation.

BCS did escalate enforcement action when the owners failed to comply with the Orders and successfully prosecuted the owners. Once the owners had obtained the requisite planning approvals, a permit was issued, construction was inspected and it was determined to meet the minimum OBC standards.

The Act is written in terms of imperative "shall" and permissive "may" statements. While the CBO and Building Inspectors "shall" enforce the Code, they "may" issue Orders, and "may" prosecute. The reason for this disparity, in language, is that the legislators recognize that enforcement is achieved when there is compliance. This is usually arrived at without the necessity of either Orders or prosecutions and is usually in response to an incremental escalation of enforcement options.

In addition, the CBO is a persona designata deriving authority from the Building Code Act, with responsibilities defined by, not only the Act and the OBC, but also by the Building By-law, Ministry rulings, the Building Code Commission and the Building Materials Evaluation Commission rulings or decisions, and more importantly, by the judicial system (court decisions and common law principles). How the Act and Code are interpreted and implemented is very much couched or formulated from best practices, legal principles and actual court case precedents. In fact, there are only three entities that can determine Code compliance: the Chief Building Official, the Building Code Commission (for sufficiency only) and the Courts.

The Courts have held that the Act is "a complex piece of legislation which is, in general terms, aimed at setting and enforcing standards for all manner of construction and building projects in Ontario." In this regard, the complexity and technical nature of the Act require flexibility and balancing of various factors. There is an expected degree of reasonableness and flexibility to account for other variables, including business and practical realities of the property owner and the

building industry. Thus, the branch mandate refers to the regulation of construction of buildings, first through leadership, education and collaboration. If these approaches fail in obtaining compliance, then through enforcement, including prosecution, etc. This was the approach adopted for this particular case and although orders, court prosecution, etc., were required, the construction was made compliant and the occupancy permit was eventually issued.

If the CBO does not have discretion or flexibility in the administration or enforcement of the OBC, this could lead to unintended and undesirable results of increased Code non-compliance and may force aspects of the building industry “underground”. Diversion of this nature would defeat the objectives of the Act which seeks to ensure minimum standards for building construction in Ontario.

Finally, there is misapprehension as to what BCS is attempting to balance. It is not the needs of an individual business owner. Rather, it is recognition of the realities of a fast-paced development construction industry and the benefits to the broader public. The objective is to ensure that the construction will achieve Code compliance and that there is a sufficient discipline within the industry to enable this to occur.

Management Representation of the Status of Implementation of Recommendation 11 as of September 30, 2010

At no time in this case, or any other for that matter, has the CBO neglected the fundamental duty to enforce the requirements of the *Building Code Act*. The Act assigns discretionary authority to the CBO, thus allowing for flexibility in how such enforcement is managed. This does take into account the realities of the construction process, the industry, the proprietary rights of the owner, case law, duty of care, etc., and public safety. At no time was there dereliction of duty, nor was health and safety ever compromised.

In balancing all of the variables, at no time did the CBO neglect legal or statutory requirements, or compromise health and safety. The business objectives of the owner were not and would never be given priority over regulatory duty.

Management: % complete 100%

OAG’s Follow-up Audit Findings regarding Recommendation 11

The CBO has responsibility for the enforcement of the Building Code.

OAG: % complete 100%

2008 Recommendation 12

That the CBO review the file for the specific building to ensure that all possible options for enforcement have been reviewed with Legal Services.

2008 Management Response

Management agrees with the recommendation.

The CBO has and will take whatever action is considered necessary to obtain compliance. BCS did undertake the necessary inspections, did issue the required Orders and did successfully prosecute the owners of 215 Preston Street. Once the owners had obtained the requisite planning approvals, a permit was issued, construction was inspected and it was determined to meet the minimum OBC standards. There are no further options for enforcement.

Management Representation of the Status of Implementation of Recommendation 12 as of September 30, 2010

The Chief Building Official has reviewed this file, consulted with Legal Services and has determined that there are no further options for enforcement.

Management: % complete **100%**

OAG’s Follow-up Audit Findings regarding Recommendation 12

The CBO referred the file to Legal Services and the owners were convicted and fined under the terms of the Building Code Act. Legal Services has indicated that the decision to prosecute or not is part of their mandate.

OAG: % complete **100%**

4 SUMMARY OF THE LEVEL OF COMPLETION

The table below outlines our assessment of the level of completion of each recommendation as of September 30, 2010. Subsequently, management’s response in the Spring of 2011 was in agreement with that assessment.

CATEGORY	% COMPLETE	RECOMMENDATIONS	NUMBER OF RECOMMENDATIONS	PERCENTAGE OF TOTAL RECOMMENDATIONS
LITTLE OR NO ACTION	0 – 24	-	-	-
ACTION INITIATED	25 – 49	-	-	-
PARTIALLY COMPLETE	50 – 74	2, 5	2	17%
SUBSTANTIALLY COMPLETE	75 – 99			
COMPLETE	100	1, 3, 4, 6, 7, 8, 9, 10, 11, 12	10	83%
TOTAL			12	100%

5 CONCLUSION

The City has addressed all the recommendations of the original audit, and has completed most of them. The two recommendations that are not complete are in progress and, in our opinion, the process for completing them appears sound.

6 ACKNOWLEDGEMENT

We wish to express our appreciation for the cooperation and assistance afforded the audit team by management.