

# No permit: no review

by Bernard Ennis, P.Eng.

All too often, contractors kick off construction before a building permit is issued. Engineers then perform “general reviews” as the work progresses. The only problem is that they’re both breaking the law.

All building projects in Ontario, except those that are covered by Part 9 of the building code, must be reviewed during construction by an architect, professional engineer, or both. These “general reviews of construction” are required to verify that the building is being constructed in general conformance with plans approved by the municipal building department. Building officials approve plans only when they are certain that they conform to all applicable laws, such as the building code and municipal by-laws, as well as site plan agreements. Permits are issued only after the plans are approved.

Construction is not supposed to begin until a permit is issued but it’s common knowledge that contractors occasionally do not wait. Building officials complain that professional engineers retained to pro-

vide general reviews of construction sometimes proceed along with the contractor. The officials contend that this is a violation of Section 8(1) of the *Building Code Act*, which states that “no person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued by the chief building official.” According to the officials, reviewing is an act that essentially causes the building to be constructed. They say that developers and contractors would not proceed with construction without the implicit support offered by professional engineers providing general reviews. Therefore, engineers providing this service are aiding and abetting the contractor in the commission of an illegal act.

## What the law says

A legal opinion received by PEO agrees with the building officials. According to William Black of McCarthy Tétrault: “There is a risk that an engineer [in this situation] could be construed as a party to the relevant offence under the *Building Code Act*,” depending on the specific facts of the case. If a P.Eng. is charged and found guilty of such an offence, fines of up to \$25,000 for the engineer and \$50,000 for the engineering firm could be levied. The city of Niagara Falls recently sent form letters to engineers in the region warning of its intention to take legal action against them if they review projects without permits.

The Ontario Association of Architects (OAA) has already warned its members not to review such projects. As noted in its *Practice Bulletin A.11*, the OAA considers an architect who provides site review services in such a situation to be in breach of the *Architects Act* and to have committed an act of professional misconduct.

Though engineers occasionally ignore it, the Regulation to the *Professional Engineers Act* imposes the same restriction. Under Section 72(2)d of Regulation 941, the “failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules in connection with work being undertaken by or under the responsibility of the practitioner” is defined as professional misconduct. In other words, by failing to comply with any law affecting their work, professional engineers can be disciplined by PEO, in addition for facing penalties under the building code.

During the past few months, many PEO volunteers have discussed this issue and, though most agree that they do not provide review services when a building permit is not evident at the site, a significant number disagree with the building officials’ position.

## Engineers’ fears

These engineers believe that to protect the public safety, they must review buildings under construction to ensure that the buildings are properly constructed or that the conditions of construction are not a danger to the workers. For instance, one engineer was asked to attend a site where a structural bearing wall was being undercut. Though no permit had been issued, construction was well underway. This engineer felt that he had to review the situation because:

- ◆ workers would be endangered if the undercut wall was not properly braced during construction;
- ◆ the welfare of the building owner and others would be at risk if the wall were not properly supported with permanent foundations;

- ◆ the foundations would eventually be hidden and unavailable for review at a later date; and
- ◆ construction work would proceed regardless of whether or not he attended the site.

Engineers also expressed concern about whether they would be professionally liable if they refuse to provide a general review and damage or personal injury results from a deficiency that they would have noted. Others feared they could be sued for delay of work or breach of contract.

Recognizing the legitimate concerns of professional engineers facing a conflict between their obligations to protect the public while faithfully serving a client, and their legal obligations to comply with all applicable laws, PEO sought a legal opinion. The opinion gives reasonable assurance that the contractor, building owner or a third party cannot sue an engineer who refuses to conduct a general review on a building that is being constructed

### ***To resolve this lapse in professional conduct, it's likely a new standard of practice will be introduced in a revised PEO Guideline for Engineers Providing General Review of Construction.***

without a permit. According to Black: "It would not be negligent [and, therefore, tortious] for an engineer to refuse to conduct a general review in circumstances in which there is no building permit," since proceeding with such work would be an illegal act. Also, because one cannot be compelled under a contract to perform an illegal act, it's unlikely that the engineer would face any contractual liability.

For the same reason, professional engineers are not violating their duty to protect the public welfare if they refuse to conduct a general review of construction under such

circumstances. In fact, they should consider complying with all laws to be an essential part of the public's protection. Enforcing laws by acting against offenders and taking corrective action are extremely costly in both time and public funds.

#### **New standards**

To resolve this lapse in professional conduct, it's likely a new standard of practice will be introduced in a revised PEO *Guideline for Engineers Providing General Review of Construction*. The new standard would require that should an engineer discover upon arrival at a construction site that no building permit has been issued, he or she shall immediately:

- ◆ inform the site superintendent that the engineer cannot review the work and that this fact must be reported to the building department;
- ◆ immediately contact the building department and inform the official of the situation;
- ◆ leave the site and not return until the builder confirms that a building permit has been obtained and is present at the site;
- ◆ if, while at the site but without conducting a review, an engineer observes an unsafe condition or practice, he or she should immediately advise (preferably in writing) the site superintendent of the danger or dangers associated with the condition or practices.

This standard of practice incorporates the professional engineer's duty to comply with applicable laws and the duty to report unsafe conditions. Building officials have indicated to PEO and the OAA (through the Engineers, Architects and Building Officials Working Group) that they will respond quickly to any professional engineer who is aware of construction that is proceeding without a permit. The official is expected to issue a compliance order as soon as possible after notification. ❖

**Engineers should contact Bernard Ennis, P.Eng., PEO manager, professional practice, if they are concerned that officials are not dealing properly with projects that they have refused to review.**

