

A NEW BUILDING CONTROL SYSTEM — ITS NATURE AND SOME IMPLICATIONS C. W. Hall*

Presented at the Conference on
INFORMATION NEEDS OF THE EARTHQUAKE INSURANCE INDUSTRY
held in Christchurch, November 1989

REGULATORY OBJECTIVES & EXISTING CONTROLS

We live in an age of deregulation. It is well recognised that the limitation of people's freedom is not to be embarked upon lightly and needs to be strictly controlled if it is not to get out of hand.

An excellent report under the general title of "Legislative Change" was published by the Justice Department in 1987 and subsequently adopted by Cabinet. Two important thrusts of that report were, firstly, that regulation should only be resorted to when and to the extent that it is necessary to achieve a policy - in other words it must first be established that the objective is not achievable by other means, such as providing incentives or education to encourage people to act in the desired way - and secondly, that it should be evident that the proposed regulation will achieve the intended result.

Existing building regulation certainly does not measure up all that well against these criteria. In most cases the reason for a control or the reason for pitching it where it has been pitched, is not apparent.

We have regulations that do no more than reflect people's idea of a standard of living; we have building regulations designed to facilitate the sale of produce into foreign markets; others that are designed to make it easy to collect excise duty; and we even have in some places a regulation that prohibits having two sinks in a dwelling. Obviously this last has nothing really to do with sinks. It is there simply to make it easy for the controllers to prevent the illegal creation of apartments within dwellings.

Not only do we have a plethora of regulations that are unnecessary, indirect or of uncertain purpose but we also have a host of regulating agencies. When thinking of building controls people tend to think of the most visible ones, namely the Local Authority's building bye-laws. You may

think it absurd that the approximately 240 territorial authorities in New Zealand are free to make any bye-law they might choose that controls building. If you do, you are going to think it doubly absurd that there are in existence 80 Acts and 80 sets of regulations administered by other agencies, all of which control buildings in one way or another. The reasons for the particular provisions of these multitudinous controls are as varied and obscure as the reasons for the bye-laws, if not more so.

No wonder, then, that the industry finally rebelled in the early '80's, out of a deep sense of frustration at a set of rules that were rigidly prescriptive, of ill-defined obscure and multifarious purpose and that were seen in their sum to place far too much restriction on people's freedom.

THE PERFORMANCE CODE

The concept of specifying a product by its performance and that concept's particular application to building controls grew up in the 1970's in Europe and Scandinavia. The driving force was a commercial one - the facilitating of international trade - but the principle of defining controls in a system of levels which state first what the social objective is (preserving people's health, or safety or property or whatever); second, the particular requirement of the building in response to that objective; and thirdly the performance of the building or building element that will satisfy the building requirement, was attractive because it brings palpable benefits.

Editorial note:

This article was prepared in August 1989. Since then, the Building Industry Commission has presented its Report (in January 1990) and a Building Bill to give effect to the Report's recommendations was introduced into Parliament and referred to a Select Committee in early September 1990. Interested readers are referred to both the Report and the Bill.

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Two very important ones are:-

- by stating the objectives and purpose of the controls the door is closed on the tendency to over-regulate for improper reasons and
- people are freed to use whatever technical solution they might choose, provided the required performance is achieved, thus opening the door to flexibility and innovation.

The proposed new building code follows this form. The objectives are mainly limited to ensuring that minimum requirements for health, safety, and in some cases, amenity, are met, but only in respect of those matters for which other mechanisms, such as market force, can not be relied upon. Protection of people and their property from the acts of others are included, but controls for the protection of people's own property or purse are not. Presently there are 32 requirements of a building that it is proposed to control. Most of these apply to all buildings; but quite a number apply only to particular classes of buildings where, without legal intervention, essential minimum standards could not be assured.

The Building Code is proposed to become a set of Regulations. These would have the force of law and apply uniformly throughout the country. Like all Regulations, it will be possible to change them; but it will require action by the Executive Council to effect change. The requirements and the performances that will meet those requirements therefore are enduring ones and not likely to change with time.

Ideally a performance Code would, for each requirement, establish defined parameters to which assigned values are given for the performance. Artificial light, for example, might be expressed in terms of luminous flux and the performances in different places be given in lux values. Where this is done the Code provision is certain. There will hopefully be a relatively simple test that will establish, quite definitely, whether the performance is being produced or not.

Unfortunately for many Code requirements such clear-cut performances are not available. They are not available either because quantifiable parameters do not exist, or because, although they do exist, they are too complex to be useful, or because the testing for compliance would be too complicated, expensive or destructive. Overseas code writers faced with this problem have usually done one of two things:- either they have resorted to enshrining particular technical prescriptions in the law or they have relied heavily on giving discretion to the officers of the administering authorities.

The Commission has decided to avoid both of these.

The New Zealand Code's way of overcoming the problem is to allow, as a statement of performance, an expanded description of the qualities of the system that satisfies a particular building requirement. For

example, it is necessary for health that provisions be made for hygiene. A quantifiable performance for hygiene is not available, so this requirement is met by providing an adequate number of sanitary fixtures that are smooth, impervious etc. located and installed in a way that ensures privacy and in spaces that are isolated from others and so on.

The proposed New Zealand code is unique in this complete avoidance of the incorporation of technical prescriptions of how to do it, either directly or by reference, into the law.

It also gathers together into a single Code all or virtually all regulatory controls of buildings. Those parts of the Drainage and Plumbing Regulations, Construction Regulations, Dangerous Goods Regulations, Electrical Wiring Regulations and others that affect building will be dealt with in the Building Code.

Thus, for the first time there will be a single focus for all building regulations, and this should ensure a consistent philosophy, style and presentation.

Of course, the Code could not exist on its own. Guidance on what is "adequate" must be given. Moreover many users of the code will not want to profit from the opportunity to do things differently, and they require no more than a description of a building solution that is in conformity with the Code. Groups of experts are currently working on the preparation of these descriptions of acceptable solutions. In many cases they will be familiar N.Z. Standards with some, relatively minor, modification. In others they will be new documents to be published by the eventual Building Industry Authority.

ADMINISTRATIVE FRAMEWORK

New Zealand came late to the process of attempting a reform of building controls. Most western democracies have modernized their building codes within the last ten years.

But if we have come late to the process, we have nevertheless spread the net far wider, in New Zealand, and approached the matter in a far more comprehensive way.

The giving of the job to an independent Commission of people experienced in the industry, rather than having the process controlled by public servants, is without precedent. Also without precedent is the opportunity to examine the whole system within which controls operate, not just the technical control documents themselves.

The Commission has spent most of this year giving consideration to aspects of the administrative framework for control.

Some of the important conclusions that have been reached and that will be embodied within the Commission report can be outlined here.

The task of producing the final

Code - presumably, the Code being prepared by BIC - and any necessary updating or amendment to that Code, will be one of the tasks of a centrally based Building Industry Authority (BIA).

BIA will not in fact make the laws. As has been said earlier, the Code will have the status of a set of Regulations made under the Regulations Act. BIA's job will be to advise the appropriate Minister.

It will also be the job of BIA to either publish, itself, or to schedule by reference, the technical descriptions of building solutions that are accepted as complying with the Code. These documents are not part of the law. However, BIA's publishing or endorsement of them will have the effect of establishing them as unchallengeable means of compliance. The keeping up to date of this set of documents will be a very important responsibility of BIA.

Assuring compliance with the Code for buildings to be constructed will remain the province of the Territorial Authorities. The TA's will also be required to maintain records. This responsibility will be directly given to the TA's by Parliament and will not be under delegated authority from BIA or under its direction, though BIA will have an auditing function to help ensure proper and uniform application of the Code. Building approvals will be given by the TA's before construction and upon completion, and they will, as they do now, examine information before construction is allowed to start and during construction. TA's will be required to issue building approvals within a prescribed time and there will be sanctions that can be brought to bear if they do not perform. While Councils may make use of design certificates or owner provided quality assurance inspections they will not be able to require these as a means of reducing their own involvement. On the other hand, important existing requirements for owner provided inspections - such as are contained in the present concrete code, for example - will be reinforced. Generally speaking inspection requirements will be contained within the examples of acceptable solutions. If such inspection is not forthcoming, then the construction is no longer in accordance with an approved solution and the sanctions available to TA's will be able to be invoked.

A major innovation will be the provision for an alternative to TA inspections of plans and calculations before construction and of work during construction. Whilst it is not thought that certification of his own work by a designer is acceptable in the public interest, certification by approved independent persons for designated parts of a building - or even, in some cases, for whole buildings - is being provided for. This option will be available at the owners discretion and may be for pre-construction inspection, on site inspection, or both. The operation of this certification procedure is discussed in some detail in the Commission's Working Paper No. 5 published in August.

Another very important matter is the provision of means for dealing with new solutions, disputes and waivers.

Even though a major objective of the new Code is to allow flexibility, it is not intended that people should decide for themselves whether their new idea complies with the Code or not. If their new solution differs from an established acceptable solution its compliance with the Code must be established. The matter will be able to be determined by the TA. In the case of a disagreement, or by mutual agreement, it will be possible to refer it to BIA for determination. The option for an owner to access BIA directly will also exist. The same access will be available in the case of any other dispute that requires an answer to the question "Will this solution, when constructed, comply with the Building Code?"

Determinations by BIA would be final (as would favourable responses to applications to the TA) unless BIA had failed to fulfil its statutory obligations - i.e. they would only be able to be attacked on a point of law. In making its determinations BIA would use the same types of procedure that BIC is using now - i.e. it would consult on technical matters with suitable experts, before making its decisions.

Inevitably there will be situations where waivers or dispensations will be sought. These differ from the other kinds of determinations to be made, in that what is sought is in fact a departure from one or more level 3 performances. It is proposed that the application of waivers or dispensations will be as limited as is reasonably possible; but where it is permitted, the same procedures would apply as apply to questions of compliance. The power to make waivers or grant dispensations would be given directly to the TA's, but there would be a right of appeal to BIA whose verdict would be final except, of course, were it to err in law. TA waivers and dispensations would be 'audited' from time to time by BIA to help ensure that local alternative Codes were not coming into being.

Another major issue being given attention by BIA is the matter of on-going compliance. At the time of writing this paper conclusions had not been reached so that the subject cannot be dealt with here.

Nevertheless it is hoped that this brief resume gives you a reasonable notion of the proposed new regime.

IMPLICATIONS

What, then, are the implications of all this, especially for the insurance industry?

Dealing first with your special interest in earthquake resistance and land stability, it can be said that the requirement of the Code will be substantially what it is now. The stability requirements will be that buildings shall resist the loads likely to be imposed upon them. They will also

require that stable land is not made unstable and that unstable land is either made stable or the building is designed to accommodate to the land. In these respects there will really be no great change.

Resistance to earthquakes is one aspect of codes that tends to reflect the economic capacity of the community. In poorer countries the law can only require measures that are within the economic capacity to pay for them. New Zealand has always seen itself as a country that can afford the highest standards of earthquake resistance and therefore the degree of resistance is related to the severity of the likely earthquake, not to the ability to pay. There is no intention to change this. Even though the Code does not have a property protection objective, such an objective is likely to be fully met by the safety objectives anyway. Although this concept might be a little more debatable in respect of ground conditions, no distinction has in fact been made. That a building should stand up and do its job of providing shelter is something that is fundamental.

Discussions have been held with those concerned in the environmental law reforms, especially with regard to S 164 of the Local Government Act which gives TA's special powers in relation to unstable land. The Commission quite agrees that for subdivision and large scale problems there is a place for such measures in the environmental law. For any particular building site, however, which may or may not have got through that net, the building code requirements are quite specific and it is proposed that the s.164 provisions, in so far as they relate to individual sites, will be consolidated within the building legislation.

The question has been asked what is the scope for having different degrees of earthquake resistance for buildings and appropriate insurance premium scales to accord with those differing degrees.

Since we have a high degree of earthquake resistance and no lower level is distinguished as being satisfactory from the point of view of personal safety, the scope for this would seem to be small. However we already have, and will continue to require, resistance to higher level earthquakes for certain classes of buildings where it is in the public interest that those buildings survive when other buildings fail. It would be entirely appropriate that earthquake damage insurance premiums should be less for these buildings than for others.

With personal property protection not being a code objective, fire protection requirements are likely to be somewhat reduced from those we have been used to. Here, one imagines, there will be considerable scope for insurers to tailor their premiums to the risk. Perhaps we will see the overdue return of significant premium rebates for the inclusion of automatic fire sprinklers in buildings!

Insurance considerations have loomed very large in the Commission's deliberations and

the administrative provisions of the codes are being very much shaped around considerations of legal liability and insurance.

The very desirable general objective of a proper allocation of responsibility, and consequently, financial liability, to the various participants in the building process, including the owner, can only be achieved to a limited extent without tampering with the application of the common law. Tampering with the application of the common law is not on the Commission's agenda.

Yet for owners to be able to evade their responsibility for providing adequate quality assurance programmes and for TA's to be required to pick up the tab where things go wrong and a case can be made that the TA ought to have picked up the fault, is inequitable.

That the new Code will only cover some essential user requirements for buildings will clearly place more responsibility back on owners and their advisers. The Code will not contain measures that are directed simply at protecting an owner's property or purse. The clarification of the TA's role and the lessening of the amount of control will move people away from the wrong reliance on the TA's to look after their personal interest and will encourage them to apply much the same criteria in the purchase of a house or other building as they would apply in the purchase of a vehicle or other major asset.

One outcome of the new regime is that currently hidden costs in the building control system are unlikely to remain hidden. This should encourage the use of the alternative procedure of using Approved Certifiers for aspects of the pre-construction approval and for inspections during construction.

Whilst the Regulations can make it possible for this route to be followed, it will be up to the industry to show that it wants it. Professional indemnity insurance will have to be available to Approved Certifiers at a cost that is commensurate with their work input. The cooperative insurers have indicated a willingness to meet this challenge - but it is really a challenge to, and opportunity for, the whole industry. What is necessary from the insurers is a recognition that their risk is diminished where the designers work is checked and certified, as to compliance with the Code, by an Approved Certifier.

The Commission has given serious consideration to a compulsory defect insurance scheme for housing and some other small buildings. It has found much to commend in the scheme in operation in the State of Victoria in Australia. Amongst the benefits of such a scheme are that, for the buildings covered,

- 1 the first and subsequent owners, being the people least likely to be able to accommodate quickly to the shift of responsibility and risk, could have a guarantee that defects related to code

compliance would be put right without a need for legal proceedings, and

2 the shift from reliance on TA checking to the producer getting it right in the first place would be greatly encouraged thus relieving the TA's of a good deal of their inspecting load and furthering the end of achieving an appropriate allocation of responsibilities.

It is likely that the Commission will recommend not to bring in a compulsory scheme in the first place, but would leave it open to BIA to advise the Ministers on the matter, if it sees fit, once they have settled down and it can be seen how the new regime is doing.

But here is another opportunity for the industry; it could well write such insurance itself and make it sufficiently attractive so that there is no need for a separate, compulsory scheme, possibly under a State monopoly.

Yet another insurance issue arises from the possible provision for there being certifying firms that provide an alternative to virtually all of the TA's co-ordinating and checking responsibilities in relation to Code compliance for new buildings. Provision for these has existed in England since 1985. Similar provisions in principle have been enacted in a recent amendment to the Victorian Building Act, though there, Regulations that would give effect to the amendment remain to be worked out. It is likely that the Commission will recommend doing much as the Victorians have done - set up the umbrella statute and leave implementation to the future.

The Approved Certifier concept depends on there being in place reasonable P.I. insurance cover; a workable defects insurance depends on the period of insurance being rather longer than what has been customary; and the potential liability of the alternative to TA checking and co-ordinating for the whole of major buildings requires substantial insurance to be in place for a long term, rather than on the annual basis that is customary today.

These are real challenges and opportunities for the insurance industry and it is very gratifying to hear, after several years of stagnation, of significant progress being made on all these fronts.