



Construction

CANADA

Photos courtesy EIFS Council of Canada

The Regulation of Building Materials

A case of a municipality trying to control the use of EIFS

By Leo Longo and Meaghan Barrett

An exterior insulation and finish system (EIFS) is considered a general class of nonloadbearing building cladding assembly providing exterior walls with an insulated, water-resistant, and finished surface in an integrated composite material system.¹ It is widely used throughout the country.

In Ontario, issues have arisen about a municipality's ability to regulate the use of EIFS under its site plan control powers.

The EIFS Council of Canada has launched an application to the Superior Court of Justice against the City of Waterloo seeking a declaration that the provisions of the City's Urban Design Guidelines, Supplementary Design Guidelines, and Northdale Urban Guidelines unlawfully trench on provincial jurisdiction by purporting to regulate the use of EIFS as part of its site plan control process.

Some municipalities, including the City of Waterloo, have adopted site plan control guidelines and Official Plan policies targeting the use of EIFS (occasionally referred to as 'stucco') and treating the product as simply an esthetic finish in the construction process. As a result, municipal staff are requiring architects and designers to change project submissions so as to remove the proposed use of EIFS products.

The problem with the approach taken by the City of Waterloo and other municipalities is EIFS is not an esthetic finish, but rather a construction system addressing building science requirements, including exterior wall heat transfer, air leakage, vapour diffusion control, and protection from outside weather elements through standardized composite elements. EIFS is often used for its energy-conserving properties, and, as a secondary point, can be manufactured to meet a wide range of esthetic finishing specifications, including colour, texture, or decorative detail.

EIFS' argument is based on a thorough reading of the statutory framework governing site plan control matters in Ontario. Though a municipality is empowered to regulate the appearance, character, and scale of development through the site plan control process, its authority is limited as it cannot regulate matters falling under the jurisdiction of the *Ontario Building Code (OBC)*. EIFS will argue on this basis certain policies and guidelines of the City of Waterloo governing site plan control (one example of the practice employed by other municipalities across the province) overstep the scope of the municipality's power in this area.

Division of powers

Site plan control is governed by the *Planning Act*, R.S.O. 1990, c. P.13 (the ‘*Planning Act*’) and building construction by the *Building Code Act*, 1992, S.O. 1990, c. 23 (‘*BCA*’) and its accompanying regulation O. Reg. 332/12 (‘*OBC*’).

Under subsection 41(4.1) of the *Planning Act*, municipalities may regulate matters of site plan control, but they do not have the authority to regulate the manner and standards of construction.

41. (4.1) The following matter relating to buildings described in paragraph 2 of subsection (4) are not subject to site plan control:...

3. The manner of construction and standards for construction.

Only the province has the authority to regulate the manner of construction and standards of construction, and this is done through *BCA* and *OBC*. *BCA* provides that the province may make regulations governing standards for the construction and demolition of buildings, including “regulations governing the manner of construction and types and quality of materials used therein.”

When read together, the provisions of the *Planning Act* and *OBC* show that matters relating to a building’s construction, including materials such as EIFS, are regulated by the province and not properly the subject of municipal site plan control.

BCA and OBC

BCA sets out the legal framework for the regulation of building and construction in Ontario. *OBC* itself is regulation made pursuant to s. 34 of *BCA*, with the purpose of establishing:

- standards for public health and safety, fire protection, structural sufficiency, conservation, including without limitation, energy and water conservation, and environmental integrity;
- barrier-free requirements; and
- process that is needed for the enforcement of the standards and requirements.

As outlined, subsection 34(1) of *BCA* provides the broad authority to make regulations governing standards for the construction and demolition of buildings, including “regulations governing the manner of construction and types and quality of materials used therein.” These technical specifications are consolidated into *OBC*.

BCA provides a broad definition of “construction” in subsection 1(1):



In Ontario, the use of exterior insulation and finish systems (EIFS) is regulated by the Ontario Building Code (OBC).

“construct” means to do anything in the erection, installation, extension or material alteration or repair of a building and includes the installation of a building unit fabricated or moved elsewhere and “construction” has a corresponding meaning.

While municipalities have some jurisdiction to enact building bylaws (see s. 7 of *BCA*), this power is limited to local matters of administration, fees, and enforcement. Section 35 of *BCA* particularly provides that the *OBC* is paramount to any municipal bylaw respecting the construction or demolition of any building.

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

The Planning Act

Pursuant to the site plan control provisions contained in section 41 of the *Planning Act*, municipalities are permitted to regulate certain matters related to building and site development.

Subsection 41(4) grants municipalities the power to approve plans or drawings containing certain, specified information before development may be undertaken in the area. The information includes matters relating to exterior design.

41. (4) 2. (d) matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the municipality;

Municipalities’ power to control aspects of exterior design is expressly limited by subsection 41(4.1) of the *Planning Act* that reiterates the division of provincial and municipal jurisdiction and provides the manner of construction and standards of construction, including construction materials and systems, are prescribed by *OBC* alone.



EIFS is not an esthetic finish. It is a comprehensive building envelope addressing building science requirements such as exterior wall heat transfer, air leakage, and vapour diffusion control.

What subsection 41 (4.1) does, in effect, is establish a limit on the subject matter and information required in the site plan drawings contemplated in s. 41(4)2. This restricts the municipality's site plan approval power to "exterior design" which includes the "character, scale, appearance, and design features of buildings," and not the manner of construction or standards of construction.

The City of Waterloo as a case study

Like other municipalities in Ontario, the City of Waterloo has put in place policies and guidelines purporting to limit the use of EIFS through its site plan control process.

The city's *Urban Design Manual* includes both the general urban design objectives and supplementary guidelines for specific types of developments or locations in the city, with an emphasis on the site plan review process. While for the most part the guidelines contained in these documents address matters properly considered as part of a municipality's site plan review process, there are a number of policies purporting to regulate what construction methods and materials may be used and where. For example, Guideline 37 of the *Urban Design Manual* dictates the circumstances in which EIFS may be used:

37. Reserve stucco and EIFS (exterior insulating finishing systems) for architectural features, accent(s) and additions rather than primary wall material. Consider a range of strategies to reduce the scale of larger wall façades, including larger window openings, curtain wall systems, spandrel panels and alternative materials.

Similarly, certain guidelines in the city's Supplementary Design Guidelines and Northdale Urban Design Guidelines prescribe the type of materials and how they ought to be

utilized in different circumstances. For example, Guidelines 3 and 5.10.6 of each set of guidelines, respectively, purporting to restrict the use of EIFS:

3. Design buildings with high quality materials, including brick, stone, masonry, decorative panels and glass. Restrict stucco and EIFS for accent purposes rather than primary wall material.

5.10.6 Building Materials

The following building materials are preferred in the Northdale Study Area: architecturally finished block, stone, granite, metal and wood panels, brick, glass and spandrel glazing finishes. These elements will be approved through the site plan process and would help establish expectations for all buildings. The use of stucco as an exterior finish should be minimized especially at grade.

While the city has the authority to regulate the character, scale, and appearance of development through the site plan process, it does not have the authority to regulate the actual materials used in construction beyond matters of appearance.

In Ontario, the use of EIFS is regulated by *OBC*. By virtue of section 35 of *BCA*, since the use of EIFS is monitored by code, it cannot be regulated in a different or more restrictive way by a municipality. Further, the *Planning Act* draws a bright line on the limit of a municipality's power to regulate site plan control matters—the authority does not extend to matters related to the standards or manner of construction. While municipalities may regulate the 'look' of a particular finish, the choice of construction materials achieving such a prescribed appearance is a matter to be dealt with pursuant to the regulations prescribed in *OBC*.

Conclusion

The provisions of *BCA* and the *Planning Act*, when read together, make it clear a municipality does not have the jurisdiction to regulate the use of particular construction materials under the auspices of its site plan control authority. Though a municipality may provide for such things as the appearance, character, or scale of development through urban design guidelines, it does not retain the power to regulate the materials that can or cannot be used in actual construction. It is on this basis the policies and guidelines introduced by the City of Waterloo—one example of the practice employed by other municipalities across the province—illegally and improperly trench on the division of powers set out in *BCA* and the *Planning Act*. 📌

Note

¹ An earlier version of this article appeared in the September 2018 issue of the Ontario Building Official Association's (OBOA's) *Journal*.



EIFS achieves a wide range of esthetic and traditional finish options, including colour, texture, and decorative details. This photo shows three different EIFS finish options.

Similarly, certain guidelines in the city's Supplementary Design Guidelines and Northdale Urban Design Guidelines prescribe the type of materials and how they ought to be utilized in different circumstances. For example, Guidelines 3 and 5.10.6 of each set of guidelines, respectively, purporting to restrict the use of EIFS:

3. Design buildings with high quality materials, including brick, stone, masonry, decorative panels and glass. Restrict stucco and EIFS for accent purposes rather than primary wall material.

5.10.6 Building Materials

The following building materials are preferred in the Northdale Study Area: architecturally finished block, stone, granite, metal and wood panels, brick, glass and spandrel glazing finishes. These elements will be approved through the site plan process and would help establish expectations for all buildings. The use of stucco as an exterior finish should be minimized especially at grade.

While the city has the authority to regulate the character, scale, and appearance of development through the site plan process, it does not have the authority to regulate the actual materials used in construction beyond matters of appearance.

In Ontario, the use of EIFS is regulated by *OBC*. By virtue of section 35 of *BCA*, since the use of EIFS is monitored by code, it cannot be regulated in a different or more restrictive way by a municipality. Further, the *Planning Act* draws a bright line on the limit of a municipality's power to regulate site plan control matters—the authority does not extend to matters related to the standards or manner of construction. While municipalities may regulate the 'look' of a particular finish, the choice of construction materials achieving such a prescribed appearance is a matter to be dealt with pursuant to the regulations prescribed in *OBC*.

Conclusion

The provisions of *BCA* and the *Planning Act*, when read together, make it clear a municipality does not have the jurisdiction to regulate the use of particular construction materials under the auspices of its site plan control authority. Though a municipality may provide for such things as the appearance, character, or scale of development through urban design guidelines, it does not retain the power to regulate the materials that can or cannot be used in actual construction. It is on this basis the policies and guidelines introduced by the City of Waterloo—one example of the practice employed by other municipalities across the province—illegally and improperly trench on the division of powers set out in *BCA* and the *Planning Act*. 📌

Note

¹ An earlier version of this article appeared in the September 2018 issue of the Ontario Building Official Association's (OBOA's) *Journal*.



Leo Longo is a senior partner at Aird & Berlis LLP and a member of the firm's municipal and land use planning group. Admitted to the Ontario Bar in 1979, Longo's practice is devoted to all areas of land use planning and development and municipal laws. He is certified by the Law Society of Upper Canada (LSUC) as a municipal law specialist in both local government and land use planning and development law. He is the 2010 recipient of the Ontario Bar Association's (OBA's) Award of Excellence in Municipal Law. He is a member of the International Municipal Lawyers Association (IMLA) and a member and former chair of both the Canadian and Ontario Bar Associations' (C/OBAs') municipal law sections. Longo can be reached at llongo@airdberlis.com.



Meaghan Barrett is an associate in the municipal and land use planning group at Aird & Berlis LLP. She provides advice and representation to both private and public sector clients, regularly appearing before the local planning appeal tribunal, the Toronto local appeal body, and various committees. Barrett is particularly interested in matters relating to the Ontario Heritage Act and other heritage protection and conservation issues. She also works on a variety of municipal accountability matters. Barrett received her law degree from the University of Ottawa and was called to the bar in 2016. She is a member of the Canadian Bar Association (CBA), Ontario Bar Association (OBA), Ontario Expropriation Association (OEA), and the Urban Land Institute (ULI). Barrett can be reached at mbarrett@airdberlis.com.