



UNDER CONSTRUCTION

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Municipality Code Review Self-Certification Programs Can Add Exposure to Owners, Developers and Design Professionals

By Jason Ebe

Owners, developers and design professionals who historically have sought to avoid the sometimes long and painful process of municipal code review will likely welcome opportunities to self-certify code compliance to bypass the time and effort of the review process. The benefit of cutting down the time for this municipal review process can often make the difference between success (profit) or failure (loss) of a project, particularly in this tight economy. However, the flip side of this benefit is that the owners, developers and design professionals participating in the self-certification program, and particularly the entities and even individuals making the certifications, can expose themselves to potentially significant liability.



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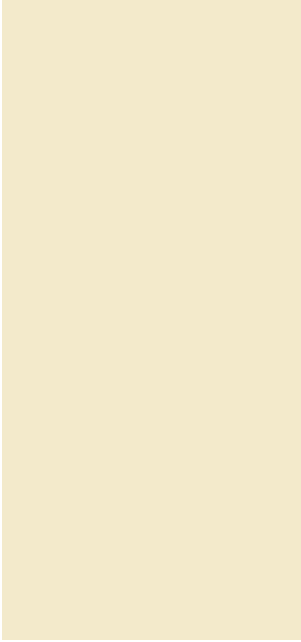
Take as an example the City of Phoenix Planning and Development Department's Self-Certification Program Rules and Regulations. Phoenix's self-certification program eliminates building plan reviews by allowing a registered architect or engineer to take responsibility for code compliance and to certify that the project complies with the Phoenix Building Construction Code. Depending on the scope of the project, permits can be issued within one to five calendar days. Eligible projects include single family residential, multiple family residential, town homes, mixed use, mercantile, business or storage and site/civil engineering.

The self-certification submission consists of a signed, personal verification that (a) is made by a self-certified professional identified in a building permit application, (b) accompanies plans filed with the city by the professional, (c) attests that the plans do not contain any false information, (d) attests that the plans are in compliance with the requirements of the code and (e) attests that the plans were prepared by, prepared under the direct supervision of, or were reviewed and stamped by the professional identified in the permit application.

To this point, owners, developers and design professionals may see no issue with the requirements for self-certification, as they likely all intend that the plans submitted for permit are in compliance with code and do not contain any false information. However, the certification requirements further include a defense, indemnity and hold harmless provision. Specifically, for each project, the self-certified professional is required to submit a letter signed by the owner responsible for the work in which the owner agrees to protect, defend, indemnify and hold harmless Phoenix and its officers, representatives, managers and employees against any and all claims, liabilities, judgments, costs, expenses, delays, demands or injuries arising out of or in any way connected with the design, construction, code compliance review or issuance of a building permit for the project identified in the building permit application. Further, the owner must agree that if construction is

contrary to the code or any other applicable law or to any permit issued under the self-certification program, the owner shall, without undue delay, remove or modify, at such owner's own expense, any component of such construction that does not conform to the requirements of the code or any other applicable law or to such permit.

This defense, indemnity and hold harmless obligation does not exist in the absence of the self-certification program. In many prior articles of this newsletter and with respect to defense and indemnity obligations in design and construction agreements generally, we recommend that significant attention and extreme care be given to the obligations imposed on any party with respect to defense and indemnify obligations for claims brought against others. This example is no exception. Owners, developers and design professionals alike know that plans are rarely if ever perfect. It is not uncommon for the code review process to reveal code violations that can be corrected before the design is permitted for construction. Although the code review process should not be relied upon in lieu of an internal quality review and assurance process, the avoidance of this code review process could have the effect of allowing hidden code violations in the design pass through to construction, resulting in claims and liability. Any owner or developer providing this defend, indemnify and hold harmless letter, and any self-certified professional submitting the application, should be concerned about the potential exposure that might exist as a result of any code violations or any false information contained within the plans submitted for permit. In addition, although the regulations expressly require the self-certified professional to maintain certain minimum limits of professional liability insurance (\$500,000 per claim, \$1,000,000 annual aggregate), there is no assurance that this insurance will cover claims made by Phoenix against owner signing the defend, indemnify and hold harmless letter, or other claims against the self-certified professional who submitted the plans for permit. You should discuss this issue thoroughly with your insurance broker.



With respect to Phoenix's program, nothing in its rules and regulations prevents a self-certified professional from submitting a project through the standard plan review process. Therefore, it is recommended that for each project, the involved owner, developer and design professional, including the self-certified professional, perform a risk analysis of the project, consider the potential for hidden code violations and resulting defense indemnity and hold harmless exposure, the insurability of the exposure, and other relevant business factors in deciding whether the time saved in the code review process warrants the additional risk assumed through the certification and defense, indemnity, and hold harmless provisions. The same recommendation applies to any similar self-certification program in your jurisdiction.

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