MEMO TO FILE

Stretching the Stretch Code

The construction industry has a knack for finding sly ways around perceived regulatory overkill. Lately, it's the Massachusetts Stretch Code getting duped. Specifically, we see the practice of "phasing" large additions or major renovations to avoid the notorious whole-home upgrade, which can double the project cost. Under the Stretch Code for low-rise residential, major alterations and major additions trigger whole-home compliance (see 225 CMR 22.00, R502.1.1, R503.1.5). The existing structure needs to meet the HERS rating criteria for the addition or alteration. Depending on the age of the house, this probably means all new windows and doors, new HVAC, adding insulation to the building envelope – plus all the related electrical, plumbing and carpentry tasks and material costs necessary to achieve these upgrades. It's no wonder that people try to avoid it.

There is no authority in the state building code or the Stretch Code for the practice of phasing. "Let's just split this project in half," the conversation goes. "We'll have Phase I and Phase II, and then we only need to comply with the Stretch Code for each individual phase." No code provision allows this. R107.3.4 of the code allows "Phased Approval" in some circumstances relating to foundations and demolition, but that is it. The code writers did not forget to include Stretch Code.

Yet, this phasing "strategy" is practiced, if not embraced, by many registered design professionals and general contractors, with many building inspectors going along. Does that make it legal or a good idea? Not necessarily. Three points to consider:

1) As a practical matter, ask if this "phased" approach is logistically possible – or is it a stretch? If done with fidelity, project phasing would mean each phase has separate contracts with the homeowner, separate building permits, separate construction efforts, separate sets of inspections, maybe even separate sets of plans – all with no overlap. At best, this would be a spectacle of massive inefficiency. At worst, it could end up costing the homeowners almost as much as the whole-home upgrade everyone is trying to avoid.

   This means that the "phasing" occurs only on paper. It's smoke and mirrors. Do you want to do that? If the project goes sideways, Stretch Code related or not, how is this all going to look to a judge or a jury? "Well, your Honor, you see we were trying to avoid complying with the Stretch Code" … good luck with that. The homeowners (and their counsel) won't have your back on this, even if they "agreed" to the phasing (more on that below).

2) The most problematic feature of phasing is that it puts a homeowner in the position of waiving code compliance. It is well-settled law in Massachusetts that homeowners cannot waive code compliance, no matter what they sign, knowingly or unknowingly. Contractors

that are complicit or participate in that violate the state's consumer protection law (M.G.L. c. 93A) and the state's Home Improvement Contractor law (M.G.L. c. 142A).

Common examples of "agreed upon" (but illegal) code violations include:

- adding a third-layer of asphalt shingles to a roof, because the customer wants to save money on labor and dumpster fees (see R908.3);
- creating an additional bedroom in a finished basement project when the bedroom is not allowed by septic, fire or building code (see 310 CMR 15.002);
- removing guardrails on an elevated deck after final building inspection, so the customers can have an unobstructed view of the waterfront (see 780 CMR 51.00, R312.1.1); and
- increasing the limit stop on a shower valve, because the customer complains that 120 degrees (the maximum temperature allowed for tubs/showers) is not hot enough (see 248 CMR 10.10(4)(c)(4) and 105 CMR 410.150).

Note that these illegal code-compliance waivers are not just limited to the building code, but extend to other codes and regulations, like the state plumbing code, sanitary code and septic regulations, that a general contractor should know about (see 780 CMR 51.00, R101.4).

In these examples, the code violation can result in bodily harm and/or property damage. Is playing fast-and-loose with the energy code just as bad? Maybe not, but a savy homeowner (or their counsel) could put forth some convincing evidence that the substantial deviation from Stretch Code compliance will deprive the owner of future cost savings. The only possible counter-argument is that substantial savings were achieved by avoiding whole-home compliance. But who wants to try convincing a judge that avoiding full code compliance was doing the homeowner a favor? Also, communities that adopt the Stretch Code tend to do so with much fanfare and a strong belief in the underlying public policy. Depriving a customer of these things is no small matter.

It's no help to you, legally, that the building inspector or architect went along with or encouraged it. In general, building inspectors enjoy a high degree of municipal immunity. There is simply not as much at stake, in terms of legal liability, for them as for the general contractor. The registered design professional, on the other hand, certainly could face a professional liability consequence. One more reason to have the owner, not you, hire the architect, unless you are a true design-build firm (for example, you have an in-house registered design professional on staff).

3) Meeting the required whole-home HERS rating can be a budget buster. But remedies exist. In this case, that would be an appeal to the state Building Code Appeals Board. The BCAB is not authorized to waive code compliance, per se, "but may consider alternative methods of complying with the intent of the code." The delay caused by the appeal may be a minor inconvenience relative to the potential benefit of a successful appeal vs. the risks associated with "phasing." There is no guarantee that the appeal will be successful, but going through the proper channels is never a bad thing.

12/19/2025