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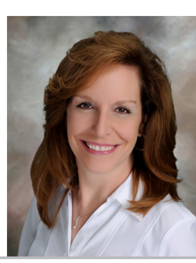
FROM THE EDITOR

It's bad enough having to repair damage to a building you own. Following a loss, however, many property owners are unpleasantly surprised to learn that they have to demolish UNdamaged parts to upgrade them up to current building codes. Your insurance coverage may not be adequate to cover this cost.

This is especially the case in an era when laws and ordinances are changing rapidly as communities continue to respond to the rising number of disasters, trying to minimize damages and promote faster recovery in the future.

The good news is that the scope of protection offered by the insurance industry to meet these current building codes has been expanding, too. However, understanding the available coverages and which are most suitable for a given business has become more complex than ever.

This issue of Adjusting Today *is designed to help our readers with that understanding by presenting an in-depth discussion of this timely subject — which could be crucial to a business's ability to recovery from a loss.*



Sheila E. Salvatore
Editor

Ordinance or Law Coverage

Ever more timely as time goes on

By Joseph S. Harrington, CPCU

Keep this in mind: Building codes and land use ordinances are implemented to protect people and property. When they work as intended, people hardly notice them.

It's easy to lose sight of that, because when property owners are reminded of code requirements or zoning restrictions, it's usually not a pleasant experience. It often involves hassles and costs they did not anticipate, which are especially irksome in the wake of damage to their structures.

Enforcement of construction, electrical, fire safety, plumbing, and other codes often requires use of more expensive designs, materials, and methods of installation after a loss than those originally used in the building. Zoning ordinances may impose more restrictive building, lot size, frontage, or occupancy requirements than were in effect when a building was first constructed.

In the wake of a series of natural disasters, property owners confront heightened requirements to mitigate damage from local hazards, including the release of pollutants by fire, flood, or wind. In an entirely different vein, owners of buildings in any way open to the public, even if only for employees or clients, must ensure that those buildings, if renovated or rebuilt, are accessible to individuals with physical disabilities.

Complying with building ordinances and laws can add substantially to the cost of reconstructing a damaged building.

In such situations, property insurance policyholders often find that "replacement cost" coverage does not cover the complete cost of repairing or replacing a damaged building. This can occur for several reasons, among them the fact that a building cannot be replaced "as was" if it did not conform to current building regulations at the time it was damaged. In that case, it will almost certainly cost more to rebuild a damaged structure to code than it was worth previously. If they want to avoid paying that added expense on their own, property owners need to insure accordingly.

Conflicting principles

Building code enforcement often creates a conflict between two core principles of insurance:

- The understanding, sometimes referred to as a "reasonable expectation," that an insured will be made whole after a loss; and
- The "principle of indemnity," which holds that insurance is intended only to compensate an insured for its loss, not to make an insured better off than he/she/it was before the loss.

In practice, these principles can be fully reconciled only under "actual cash value" (ACV) loss settlement, under which an insurer simply pays its insured a sum equivalent to the depreciated value of the damaged property. (Any loss settlement presumes that the damage results from a covered cause of loss to property covered under the policy, and that recovery is subject to deductibles and coverage limits.)

Enforcement of building ordinances and laws becomes a problem under replacement cost loss settlement, the most prevalent type of loss settlement for building property. Under replacement cost settlement, the insurer commits to covering the cost of repairing or replacing damaged property with property of like kind and quality, without regard to depreciation.

One could argue that replacement cost coverage inherently violates the principle of indemnity to the extent that new replacement property is an improvement over older property that was damaged. Some policyholders have used that very argument to prevent the enforcement of "ordinance or law" exclusions in property policies. On rare occasion, insureds have been successful in arguing along that line, but for the most part, courts have enforced such exclusions, thus requiring insureds to dig deep into their own pockets to reconstruct property they thought was insured.

More codes, more upgrades

The most striking images from Hurricane Andrew, the devastating storm that ravaged south Florida in August 1992, were of the dramatic contrasts between adjacent subdivisions, some of them leveled, others with their structures still standing. It wasn't fickle winds that caused these disparate effects, but the relative strength and soundness of the structures. The images served as vivid indicators of how adherence to building codes can make a huge difference in limiting losses during catastrophes.

In the decades since Andrew, there have been sustained efforts by insurance trade associations and other groups to promote the implementation, upgrading, and enforcement of building codes and land use regulations. Despite those efforts, only about a third of communities across the U.S. have adopted current codes without weakening provisions designed to help structures withstand natural hazards.[1]

To speed progress on building code adoption, the Biden Administration in June 2022 launched its National Initiative to Advance Building Codes. This program uses federal infrastructure funding to advance the use of building sciences while mandating that federally supported construction financing ensure that funded projects adhere to modern building codes and standards.[2]

As more and more communities adopt building codes, upgrades to those codes come more rapidly. The International Code Council (ICC), created in 1994 to consolidate the maintenance and upgrading of building standards, now seeks to upgrade each of its 15 codes every three years.

Growing exposure

Building codes do not have the effect of law until jurisdictions formally adopt them, and statutory codes don't necessarily include all the most recent provisions. Nonetheless, the proliferation and updating of building codes and land use regulations results in a growing number of buildings that do not conform to standards currently in effect.

Existing buildings are generally "grandfathered" and considered compliant at the time a code is adopted or revised, but structures and systems will have to be reconstructed or reinstalled up to current standards when a building is substantially renovated, remodeled, or repaired. Municipalities establish their own thresholds for the extent of work needed to trigger that requirement; typical thresholds are 50%, 60%, or 75% of a structure.

At the point where the extent of physical damage triggers a requirement to rebuild, in essence, a property owner faces a three-fold task:

- Repairing or replacing damaged property with new property that complies with relevant codes;
- Demolishing the undamaged remainder of a non-compliant structure and removing the debris; and
- Repairing or replacing the previously undamaged portion to bring it into compliance with current codes.

In short, reconstructing property to conform with an updated building code is all but guaranteed to cost more than to reconstruct it "as was," and a growing number of properties are exposed to the potential for this additional cost.

> *Under replacement cost settlement, the insurer commits to covering the cost of repairing or replacing damaged property with property of like kind and quality, without regard to depreciation.*

The Evolution of ISO Commercial Property Ordinance or Law Coverage

	LOSS TO UNDAMAGED PORTION OF BUILDING	COST OF DEMOLISHING UNDAMAGED PORTION	INCREASED COST OF CONSTRUCTION
Endorsements used prior to mid-80s simplified forms	Separate endorsement for Contingent Liability for Operation of Building Laws; typically applied within building property limit	Separate endorsement for Demolition Cost; typically applied as additional insurance for costs of demolition and debris removal	Separate endorsement for Increased Cost of Construction (Excess of Replacement Cost); typically applied as additional insurance
ORDINANCE OR LAW COVERAGE ENDORSEMENTS (PROVISIONS PARAPHRASED)			
CP 04 05 07 88 *(consolidated endorsement introduced)*	In the event of covered damage to an insured structure, the endorsement pays for additional loss caused by enforcement of a building or zoning ordinance or law. . .	In the event of covered damage to an insured structure, the endorsement pays for costs to demolish and "clear the site" of undamaged parts as required by enforcement of a building, zoning or land use ordinance or law. . .	In the event of covered damage to an insured structure, the endorsement pays the increased cost to repair or reconstruct the property for a similar occupancy as before the loss, unless prevented from doing so by an ordinance or law.
	• Applies only to enforcement of ordinances and laws in effect at time of loss. • Includes a provision excluding coverage for any cost to identify or clean up "pollutants." • All coverage paid within the building property limit.		
CP 04 05 10 90 *(current format introduced)*	**Coverage A - Coverage for Loss to the Undamaged Portion of the Building** • coverage provided under the building property limit • applies only to enforcement of ordinances/laws in effect at time of loss	**Coverage B - Demolition Cost Coverage** • covers costs to "clear the site" • coverage provided under an additional scheduled limit of insurance	**Coverage C - Increased Cost of Construction Coverage** • applies only if restored property intended for same occupancy, unless prohibited by land use or zoning law • coverage provided under an additional scheduled limit of insurance
	• The terms of the endorsement to apply separately to each building indicated.		
CP 04 05 06 95 *(expanded to apply to building property not covered)*	Cov. A essentially unchanged	Cov. B essentially unchanged	Cov. C expanded to apply to repair of excavations/grading/backfilling; building foundations and pilings; and underground pipes/flues/drains.
	• Schedule expanded to allow separate or combined Cov. B and Cov. C limits for separate insured locations. • Provision added stating that endorsement does not pay for any loss due to failure to comply with a previous requirement under a building or land use ordinance or law.		
CP 04 05 10 00 *(allocating payment for covered and non-covered losses)*	Cov. A essentially unchanged	Cov. B essentially unchanged	Cov. C essentially unchanged
	• Provisions added that (1) the endorsement will pay only a proportional share of losses caused by both covered and non-covered damage; and (2) there is no coverage for losses caused by damage not covered under the policy if that damage is the subject of the ordinance or law being enforced; this limitation applies even if the building also suffers damage from a covered peril.		
CP 04 05 04 02 *(fungus exclusion added)*	Cov. A essentially unchanged	Cov. B essentially unchanged	Cov. C essentially unchanged
	• Expands earlier exclusion for pollutants to exclude losses due to the presence of fungus, bacteria, and wet or dry rot.		
CP 04 05 10 12 *(expansion of trigger)*	Cov. A essentially unchanged	Cov. B essentially unchanged	Cov. C essentially unchanged
	• Insuring agreement modified to include "the enforcement of *or compliance with* any ordinance or law." • Additional limit provided in new endorsement CP 04 09—Increase in Rebuilding Expenses Following Disaster (i.e., "demand surge"* coverage) can be applied to ordinance or law coverage.		
CP 04 05 09 17 *(option added for covering post-loss code changes)*	Cov. A essentially unchanged	Cov. B essentially unchanged	Cov. C essentially unchanged
	• Option added to provide coverage if the ordinance or law is promulgated or revised after the loss but before work starts on reconstruction or repair, provided that compliance with the measure is required to obtain a building permit or certificate of occupancy.		

*Please see definition on p. 10

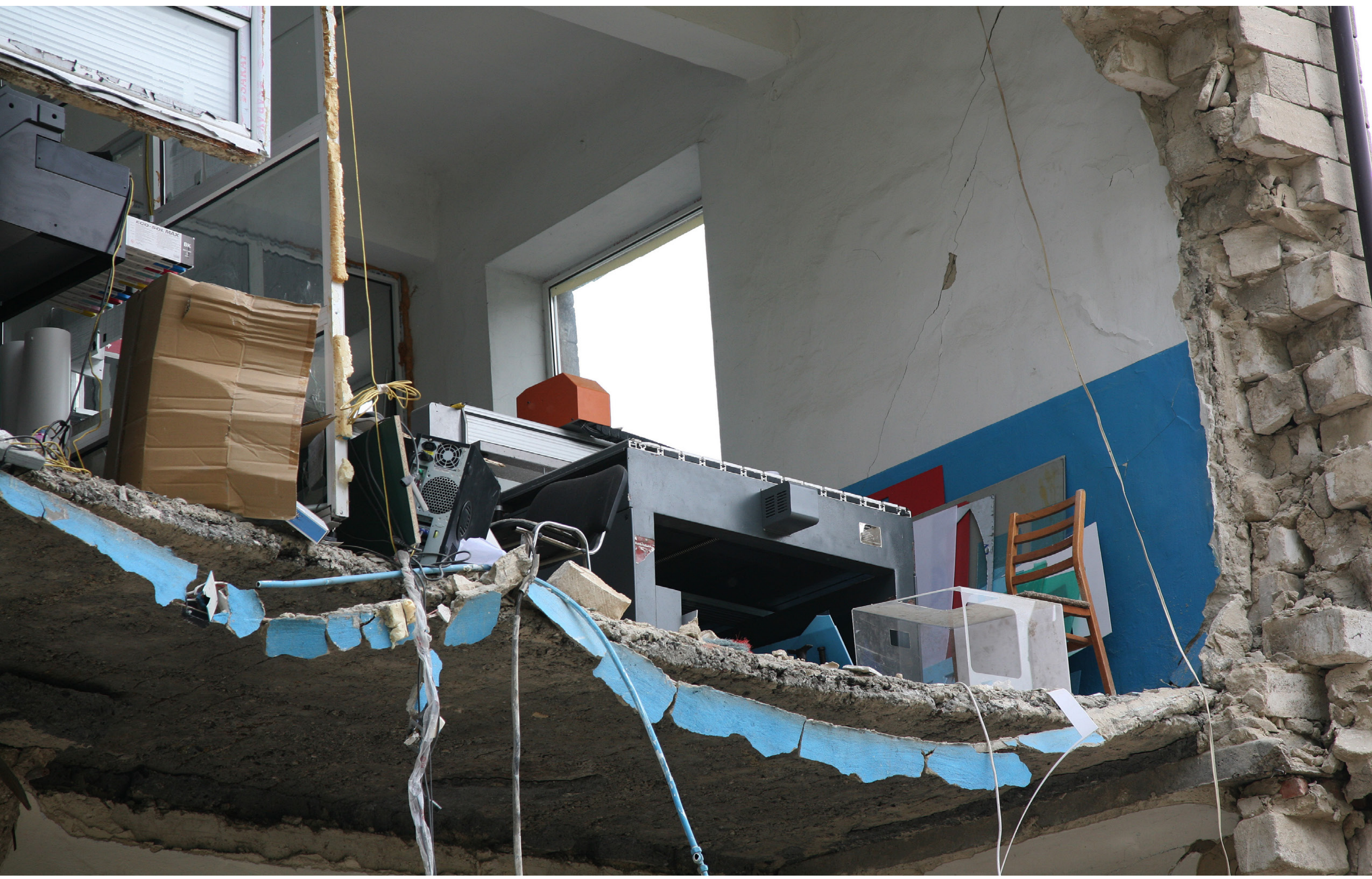
Ordinance or law exclusions

The introduction of modern building codes in the 19th century, and their application to damaged buildings, prompted insurers to exclude coverage for the cost of retrofitting existing structures to standards enacted after they were built (or ignored while being built).

The logic of excluding coverage was that building code compliance was a cost of ownership outside the control of insurance underwriting.

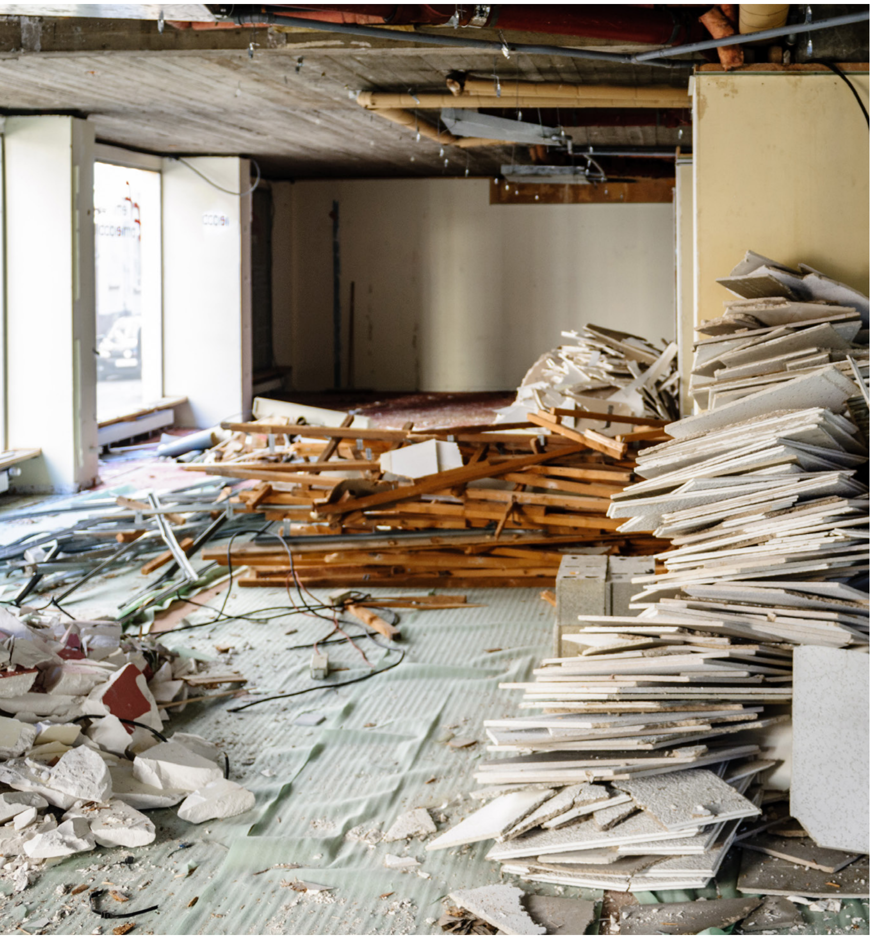
If additional costs for complying with codes were automatically included in building property coverage, insurers would be on the hook for increased losses resulting from factors that fall outside insurance underwriting. Building codes would, in essence, become a stealth peril to be triggered by a covered loss.

Even today, almost every policy covering building property, including homeowners' policies, includes some form of the following exclusion, developed by the Insurance Services Office (ISO)[3]:



> We (the insurance company) do not insure for loss caused directly or indirectly by … any ordinance or law requiring or regulating the construction, demolition, remodeling, renovation or repair of property, including the removal of any resulting debris … or requiring any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to, or assess the effects of, pollutants.

Used in one form or another over decades, this exclusion seeks to protect insurers from having to pay for damage due to changes in legal requirements arising outside of the underwriting of property coverage.



Giving it back

While insurers resist "ordinance or law" exposure on a default basis, over time they developed the means to underwrite and price coverage for those costs and make it available by endorsement to individual policies.

In its 1990 Commercial Property Program revision, ISO consolidated the provisions of three previously separate endorsements (see table on page 7) into its **CP 04 05 — Ordinance or Law Coverage** endorsement. The three-coverage format introduced at that time is still used today:

- **Coverage A - Coverage for Loss to the Undamaged Portion of the Building,** which extends the basic building property limit to cover losses arising from the enforcement of building ordinances or laws to undamaged portions of an insured structure;

- **Coverage B - Demolition Cost Coverage,** which provides an additional limit of insurance, indicated on a schedule in the endorsement, for the cost of demolishing undamaged property and "clear[ing] the site;" and

- **Coverage C - Increased Cost of Construction Coverage,** which provides an additional scheduled limit for the increased cost to reconstruct undamaged property to conform to building ordinances and laws.

While coverages A and B remain essentially unchanged from when they were introduced, Coverage C was significantly expanded in the mid-1900s to extend to components of building property not typically covered by property insurance. These components include excavations, grading, filling, and backfilling; foundations and pilings; and underground pipes, flues, and drains.

These structural features are typically categorized as property not covered because repairing even a partial loss to them would often require replacing the building entirely. For its part, ordinance or law

Ordinance or Law Coverage: What's covered, what's excluded, and where?

Most property insurance coverage in the U.S. is written on policy forms provided by or modeled after those developed by the Insurance Services Office (ISO), the largest advisory organization serving U.S. property/casualty insurers.

This table shows how "ordinance or law" coverage for the increased cost of reconstructing property to current building and land use regulations is allocated under current ISO forms. When purchasing coverage or settling claims, keep in mind that insurers may use older versions of these forms, or proprietary forms that differ in some ways from them.

In virtually all cases, ordinance or law coverage is predicated on these conditions:

- The structure in question is covered under the policy;
- The damage is caused by a peril insured against under the policy;
- The ordinance or law being enforced regulates building construction; and
- The loss does not result from an earlier failure to adhere to an ordinance or law.

Form	Provisions regarding costs to comply with building ordinances or laws
CP 00 10 Building and Personal Property Coverage Form (base form for a commercial property policy)	Includes additional coverage under the building limit for "increased costs of construction" incurred to comply with minimum standards of a building ordinance or law. The built-in limit is the lesser of $10,000 or 5% of the applicable building limit.
CP 10 20 Causes of Loss, Broad Form (named perils version of essential coverage part to commercial property policy)	No reference to costs incurred in response to enforcement of ordinance or law.
CP 10 30 Causes of Loss, Special Form (open perils version of essential coverage part to commercial property policy)	Expressly excludes coverage for loss or damage arising from the enforcement of or compliance with any law or ordinance.
CP 04 05 Ordinance or Law Coverage (optional commercial property endorsement)	Adds coverage for loss to undamaged portion of an insured building, accompanying costs of demolition and debris removal, and increased cost of reconstruction.
CP 04 46 Ordinance or Law Coverage (optional "BOP" endorsement)	The equivalent of CP 04 05 for Businessowners policies that combine property and liability coverage for small and midsized commercial accounts.
CP 00 30 Business Income (and Extra Expense) Coverage Form (optional coverage for revenue lost or extra expenses incurred during suspension of operations due to covered loss)	Definition of covered "period of restoration" expressly excludes any increased period of time required due to enforcement of or compliance with building ordinance or law. This effectively excludes income and extra expense coverage for ordinance or law losses.
CP 15 31 Ordinance or Law - Increased Period of Restoration (optional endorsement for expanding definition of period of restoration)	Expands the period of restoration to include additional time required due to enforcement of or compliance with building ordinance or law, thus closing a gap in coverage under CP 00 30.
CP 04 09—Increase in Rebuilding Expenses Following Disaster (optional endorsement to address "demand surge" situations)	Provides additional insurance to cover increased building costs following a federally or state-declared disaster. Allows up to 20% of the additional insurance to be used for coverage provided under Coverage C of CP 04 05.

Comparing coverage: CP 00 10 and CP 04 05

	CP 00 10—Increased Cost of Coverage (built-in additional coverage)	CP 04 05—Ordinance or Law Coverage (optional endorsement)
Property covered	Applies only to property damaged by a covered cause of loss.	Applies to damaged property and to undamaged property that must be demolished due to enforcement of a building ordinance or law.
Costs of demolition and debris removal	All costs covered under the policy's separate additional coverage for debris removal.	Costs to demolish undamaged property and remove debris covered under Coverage B.
Coverage for increased cost of reconstruction	Pays for increased costs to comply with minimum standards of an applicable ordinance or law.	Covered for increased costs of reconstructing both damaged and undamaged property up to minimum requirements of an applicable ordinance or law.
Limit	Built in at the lesser of $10,000 or 5% of the limit for the covered building.	Loss to undamaged portion of a covered structure falls within the limit for that building. Limits for demolition/debris removal and increased cost of reconstructing to code indicated on endorsement schedule.

coverage already anticipates the likelihood that a partial loss will result in a total loss, so extending the coverage to structural components may not, on its own, expand the scope of the loss.

For additional premium, Coverage A is established simply by checking a box on the endorsement schedule, while Coverages B and C are established by indicating per-location or blanket limits on the schedule.

Limitations and expansions

CP 04 05 was introduced with some important provisions affecting application of the coverage provided; some of those provisions have been modified over time, others have not.

Pollution and mold

Since 1988, ISO ordinance or law coverage endorsements have excluded coverage for any requirement to test for, remove, contain, etc., any type of "pollutant." In 2002, that exclusion was expanded to exclude coverage for any requirement to test for, remove, contain, etc., any type of "fungus, wet or dry rot, or bacteria."

Applicable laws and ordinances

The 1988 version included a provision (still the default position) that coverage applies only to enforcement of ordinances and laws that were in effect at time of an insured loss. In 1995, a clarification was added stating that the endorsement would not pay for any loss due to failure to comply with a previous ordinance or law requirement. Insurers would not pick up the cost of someone ignoring a building ordinance or law when they had a chance to comply.

In 2017, ISO added an option to the endorsement to allow coverage for costs due to an ordinance or law that is issued or revised after the loss but before work starts on reconstruction or repair. To be eligible for coverage, compliance with the measure must be required to obtain a building permit or certificate of occupancy. This post-loss code coverage option is a reaction to the rapid promulgation of new building standards in some areas following disasters where numerous buildings were damaged.

Covered and non-covered losses

In 2000, the ISO ordinance or law endorsement was revised to specify that there would be no coverage for losses resulting from damage not covered under the policy if that type of loss was the subject of the ordinance or law being enforced.

Thus, under a standard property policy with no coverage for flood or earthquake damage, the ordinance or law endorsement would not pay for losses due to enforcement of flood or earthquake standards, even if the insured property had suffered flood or earthquake damage.

In the case of losses by both covered and non-covered causes, the endorsement was revised to indicate it would pay only the portion of covered losses attributable to the covered cause.

Insuring agreement

In 2012, the ordinance or law insuring agreement was expanded from responding to "the enforcement of any ordinance or law" to responding to "the enforcement of *or compliance with* any ordinance or law." This modification clarifies that an insured does not need to wait for an enforcement action (notice of a violation) in order to commence work and recover covered costs.

Income coverage and demand surge

Building code and zoning enforcement doesn't just increase the cost of replacing property, it also usually increases the time needed to complete reconstruction work. That, in turn, can increase the amount of "down time" and lost revenue an enterprise incurs when it suffers damage.

To cover the loss of revenue (plus any extra expenses needed to resume operations), commercial accounts can purchase business income (or business interruption) insurance in conjunction with its commercial property policy. Business income coverage applies only to suspensions of operations due to damage by causes covered under the property policy.

The amount of income coverage is typically limited to (at most) the normally expected time and cost needed to resume operations, without consideration of an extended period to upgrade a structure to meet current building codes.

> ***Building code and zoning enforcement doesn't just increase the cost of replacing property, it also usually increases the time needed to complete reconstruction work.***

To cover that exposure, ISO provides endorsement **CP 15 31 Ordinance or Law—Increased Period of Restoration,** which extends the period for restoring operations to include additional time needed to repair or reconstruct property to comply with a building ordinance or law.

Another situation in which property owners may find themselves underinsured for their actual losses can come amid conditions of "demand surge." **Demand surge happens when a large number of properties in a single area suffer damage, resulting in sharply increased demand and rising costs for repairs.**

To address this situation, insurers have access to the ISO endorsement **CP 04 09—Increase in Rebuilding Expenses Following Disaster.** CP 04 09 provides additional insurance for damage to covered buildings in situations where the cost of materials and labor have increased following a federally or state-declared disaster. Among other things, the endorsement expressly allows up to 20% of the additional insurance to cover costs under Coverage C of the Ordinance or Law endorsement (CP 04 05).

Built-in coverage

As building codes proliferate and enforcement becomes more rigorous, insurers have moved to build some degree of coverage for building upgrades into standard insurance policies.

In 2000, ISO introduced an **additional "ordinance or law" coverage in Homeowners policy forms.** This additional coverage pays for increased costs of reconstruction due to enforcement of an ordinance or law that regulates the construction, renovation, demolition, etc., of damaged or undamaged building property. The built-in limit for this additional coverage is 10% of the limit for the insured residence; the limit can be increased by adding an endorsement to do so.

Similarly, in 2012, ISO introduced an **additional coverage for "increased cost of construction"** in its Building and Personal Property form, the base form for an ISO-based commercial property policy. Like the homeowners ordinance or law coverage, the commercial increased loss of construction coverage pays up to a built-in limit (the lesser of $10,000 or 5% of the limit on the damaged building), provided the building is covered on a replacement cost basis. Unlike the homeowners coverage, however, the commercial increased loss of construction coverage pays only for the additional cost of restoring damaged property to current codes; it does not pay for loss to undamaged property.

Questions remaining

For all the detail in the various insurance policy provisions addressing losses due to the enforcement of building ordinances or laws, there are still fundamental questions regarding the exposure that can only be addressed on a case-by-case basis according to the specific circumstances of a law.

What is the nature of the law?

Standard insurance policy language generally defines a building ordinance or law as a measure "regulating the construction, use or repair of any property," or words to that effect. Ordinance or law provisions were developed with building codes and zoning regulations in mind, but they can respond to other types of building laws.

Most notably, the 1990 Americans with Disabilities Act (ADA) and its state and local analogs are designed to open opportunities to people with physical disabilities, not to regulate building safety. Nonetheless, ADA mandates regarding handicapped accessibility directly regulate the construction and reconstruction of buildings.

Thus, the added cost to reconstruct a damaged building to meet ADA standards today would either be excluded under an older version of a commercial property policy or limited to the increased cost of construction coverage provided under newer versions.

Not all types of regulations impacting construction would qualify for ordinance or law coverage, however. Suppose that a state or municipality passed a law with standards for recreational facilities to protect user safety or promote competitive balance. Since the law was not enacted to regulate construction or protect public safety, reconstruction of a damaged facility might not qualify for coverage of the increased costs imposed by the new standards.

What constitutes enforcement?

The most current versions of ordinance and law provisions refer to increased costs incurred for "enforcement of or compliance with" a building ordinance or law. As stated above, the "compliance with" language effectively allows insureds to proceed with reconstruction to code without having to be compelled to do so by a municipal enforcement action. This does not suggest, however, that insureds can voluntarily comply with codes that are not mandatory and expect the insurer to pay the cost.

Some communities promote certain types of construction, particularly "green" construction designed to be environmentally and energy efficient, through tax incentives and other benefits. If a building owner is not required to reconstruct to those standards, and the requirement is not enforced by some sort of penalty, the owner can expect no ordinance or law coverage. Building owners and municipalities are not free to expand the exposure of insurers on their own.

Policies and codes

A surprising number of building owners are caught by surprise when they learn their insurance doesn't cover substantial costs they incur after their property is damaged.

When the time comes to place or renew coverage, property owners and their insurance agents or brokers need to carefully consider the following:

- When each insured structure was built and last renovated;
- How current structures and systems compare with the latest code requirements;
- The likelihood of imminent code changes, particularly in catastrophe-prone areas; and
- The desirability of rebuilding after a loss for the current occupancy or moving to another location.

Even with "replacement cost" coverage, property owners and their risk counselors need to know if the coverages and limits they've selected truly meet their needs following a loss.

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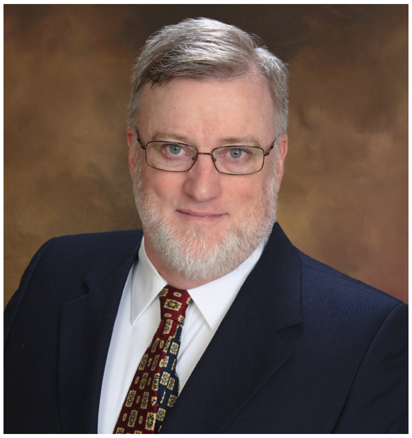
[1] Federal Emergency Management Agency, Building Codes Strategy, March 2022, p. 6; accessed at https://www.fema.gov/sites/default/files/documents/fema_building-codes-strategy.pdf

[2] White House Briefing Room, FACT SHEET: "Biden-Harris Administration Launches Initiative to Modernize Building Codes, Improve Climate Resilience, and Reduce Energy Costs," June 1, 2022; accessed at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/01/fact-sheet-biden-harris-administration-launches-initiative-to-modernize-building-codes-improve-climate-resilience-and-reduce-energy-costs/

[3] ISO is an insurance industry organization that· among other things· develops standardized policy forms used directly by insurers or as the basis of their proprietary forms·

ABOUT THE AUTHOR



Joseph S. Harrington, CPCU

Mr. Harrington is an independent insurance writer and communications specialist. He served for over 20 years as communications director for the American Association of Insurance Services (AAIS). His work has been published in *Best's Review, Rough Notes,* publications of The Institutes, and elsewhere.

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CORPORATE OFFICE
126 Business Park Drive, Bldg 2
Utica, New York 13502
800.382.2468
Outside U.S. (315) 797.3035
FAX: (315) 272.2054

Editor@AdjustingToday.com

WEB ADDRESSES
AdjustersInternational.com
AdjustingToday.com

PUBLISHER
Stephen T. Surace, CPA, CFF, MBA

EDITOR
Sheila E. Salvatore

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