

Immunity for Owners Who Build Contrary to Approved Plans and Specifications

By Peter Gillett

Prior to the commencement of the *Building Act 2011* (**Act**), owners of land on which buildings were erected pursuant to a building licence were required to ensure the building complied with the plans and specifications approved by the local government and any conditions imposed by the local government in relation to that building licence. That is no longer the case.

Pursuant to s.29 of the Act, where a building permit is issued for the construction of a building, the person named as the builder on the permit must ensure the building is completed in accordance with the plans and specifications and that the building otherwise complies with the building permit and any conditions specified therein.

There is no obligation on the owner of the building to ensure compliance. This creates a number of difficulties for local governments.

First, local governments are no longer able to take action against the owner of a building which has been constructed contrary to approved plans or otherwise

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than in accordance with conditions. As a result, local government are no longer able to prosecute the person who stands to benefit from the breach. That is significant from an enforcement perspective given that departures from approved plans and failure to comply with conditions almost always occur at the direction of an owner.

Second, a local government may be unable to prosecute the builder named on the permit for a breach of s.29 of the Act if the person named as the builder on the permit was not the person who actually carried out the work. That may occur, for example, where the owner chooses to engage a different builder after the permit was issued. In those circumstances, the person named as the builder on the permit will not have committed any offence under s.29 if they did not carry out the building work and had no knowledge the building work was being carried out, in accordance with the permit or otherwise. In those circumstances, the local government would not be able to prosecute anyone person for the offence because the only person who can commit the offence under s.29 is the person named as the builder on the building permit.

Finally, a builder will likely have a complete defence to a charge of failing to comply with a condition imposed under a building permit where the owner of the property refuses to allow the builder back onto the property to carry out the

necessary works to comply with the condition. In those circumstances, the condition would likely be considered invalid and unenforceable because it would be impossible for the builder to comply with the condition without committing an offence of trespass.

The above issues could all be resolved if s.29 of the Act was amended to include owners as persons who must ensure that a building to which a building permit applies complies with plans and specifications and any conditions specified in the permits.

While the shortcomings of s.29 do not prevent a local government from giving a building order under s.110 of the Act requiring an owner to alter a building so that it complies with the approved plans or in accordance with conditions of a building permit, the failure of s.29 to apply to owners removes a significant deterrent to owners contemplating building contrary to the requirements of a building permit. That should be of significant concern to local governments as it is the owners of buildings who have the ultimate control over how their buildings are constructed.

Please contact Peter Gillett on 9424 6229 or pgillett@mcleods.com.au if you have any queries regarding the issues raised in this Update.

The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstance of each case