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SEEKING PAYMENT FROM OWNER FOR RECTIFICATION OF NON-COMPLIANT WORKS

By Candice Cham, Miro Djuric, and Justin Cotton

The law states that if an owner served with a Building Order fails to carry out the works stipulated in the Order, Local Council is entitled both under the *Building Act 1993* and the *Local Government Act 1989* to carry out the works necessary to rectify the owner's breach of building laws.

When that occurs, Local Councils can prosecute the owner for failing to carry out the works. Local Council can also carry out the rectification works themselves and thereafter recover the costs from the owner by commencing proceedings against the person at the appropriate Court.

Issuing Court proceedings can be both costly and time-consuming, and most people would prefer not to tread down the litigation path to achieve a desired result.

The question is whether Local Councils have other avenues (apart from commencing Court proceedings) available to them to recover the costs. Can Local Councils recover rectification costs from the offending individual by, for example, levying a Special charge against the person for those rectification costs?

Special charge

Council may declare a Special charge in relation to the performance of a function of the Council that is of special benefit to the persons required to pay the special rate or charge. Whether the "special benefit" to the individual may include works necessary to rectify that person's breach of building laws is debatable.

The procedures required to declare a Special charge are cumbersome, including that:

- (a) Council must give a public notice of its intention to make the declaration, particularly to the individuals who will be liable to pay the charge;
- (b) The public notice must state which persons have the right to object to the proposed declaration (that is, the persons required to pay the special charge);
- (c) The total amount of the charge must be calculated in

accordance with the formula set down in section 163 (2A) of the *Local Government Act*;

- (d) Council must specify the groups and uses or areas for which the special charge is declared.

Local Councils cannot make the declaration if it receives objections from a majority of the persons who will be required to pay the charge. Hence, if the owner of the subject land objects to the charge, Council is impeded from recovering the costs of rectification. This may prove a major obstacle to the effectiveness of this course of action.

Moreover, Councils must comply with further procedures in making the declaration, including:

- (a) Issuing a public notice which contains an outline of the proposed declaration and the date on which it is proposed to make the declaration;
- (b) Providing copies of the proposed declaration for at least 28 days after the publication of the public notice;
- (c) Sending a copy of the public notice to each person who will be liable to pay the Special charge;
- (d) Declaring the total amount of Special charges to be levied, the manner in which the Special charge will be assessed and levied, and the land in relation to which the Special charge is declared.

Once the charge is declared and levied, the charge becomes payable to the Council. Failure to pay entitles Council under section 156 of the *Local Government Act* to register a charge on the land by way of enforcing payment.

The procedures involved in making the declaration of a special charge for rectification costs appear to be as equally time-consuming and cumbersome as commencing Court proceedings. In determining whether or not to explore this avenue, Local Councils should weigh up factors such as costs, benefits, and whether or not levying a Special charge will ultimately be effective in recouping the costs incurred for rectification.



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