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Legal Bulletin

“The Troubling Case of Lapsed Building Permits”

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There is one aspect of a private building surveyor's role that is proving as vexing as a Sherlock Holmes mystery. It has to do with a building surveyor's engagement, the potential factors that suggest the end (if any) to that engagement, and how closely the building surveyor's role is tied to the initial Building Permit that he/she has issued.

The 70s tune “*Baker Street*” is a reminder of Sherlock Holmes, and in the opening seconds of the clip the screenshot focuses in on a parking meter that has expired. Building Permits likewise are only current for a finite point of time. Could it be that when a Building Permit has expired (or “lapsed”) that this brings about the end of the building surveyor's engagement?

Building Permits will specify a commencement date and completion date for the building work and specify the mandatory inspections. The period of time to complete works under a Permit for a class 1 or 10 building is two years, and the Building Permit will lapse if the building work has not commenced and been completed within the relevant periods.

Prior to lapse of a Permit, the owner of the land may seek an extension of time to commence or complete the works, and that application must be made to the Relevant Building Surveyor (RBS) who approved the Permit. The RBS then has a discretion to grant an extension if the extent of the works so warrants this, and any refusal by the RBS to grant the extension may be appealed to the Building Appeals Board.

Often times a Building Permit will be allowed to lapse without anyone taking any action, and it is suggested that good practice for a Building Surveyor would be to have a “bring up” diary system so that they can warn

owners of the pending expiry date.

The danger is that if no action is taken, and the Building Permit lapses, works can continue without mandatory inspections being undertaken. If work has been completed on the basis of a lapsed Permit it is then at the discretion of the Building Surveyor, after an inspection, as to whether that work will be approved as compliant for the purposes of an Occupancy Permit (or Certificate of Final Inspection).

Needless to say, it may be very difficult to certify work for compliance after it has been completed – in some cases destructive testing may be necessary to expose parts of the structure.

Significantly, where a Building Permit has lapsed, the original Building Surveyor (RBS) remains responsible for enforcement at the site. In other words, their role is not terminated, merely because the Permit has lapsed. Authority for this is found at section 81 of the Act that states that the appointment of a private building surveyor cannot be terminated without the written consent of the Building Commission.

An application must be made by the owner (or the owner's agent) to obtain a new Building Permit in relation to any building work not commenced or completed. That application must be made to the original Building Surveyor, unless an application is made under section 81(1) to the Building Commission for the Commission to consent to the Building Surveyor's termination.

Alternatively, a Building Surveyor's engagement may be deemed to be terminated under section 81(3) if the building work for which they were appointed has been

terminated before commencement or completion. The Building Commission can then provide written consent to a new private Building Surveyor or a Council Building Surveyor completing the necessary functions.

Therefore, as a general rule only the same Building Surveyor who was initially appointed for the particular work site, can issue a new Building Permit in respect to the same functions for that site. The exception to that is if the Building Surveyor is replaced, with the Building Commission's consent, under the provisions of the *Building Act 1993*.

If an application for a new Building Permit is made to complete unfinished works on a site, an entirely new Building Permit application will be required together with plans and specifications for the future works, and certification (for example by an engineer) of works carried out since the lapse of the original Permit.

It is a vexed area but a "gypsy's warning" to those practitioners who consider that their role has ended at a site just because a Building Permit has lapsed. In

fact, the original Building Surveyor remains responsible and if necessary should be willing to use enforcement powers, for example a Building Notice or Building Order that compels an owner to make work compliant or demonstrate that work is compliant with the Act and Regulations.

A danger is that if nothing is done, potentially unsafe works could remain in existence, in an uncertified and parlous condition.

It should be remembered that the enforcement powers for the RBS are found in Part 8 of the Act. If an owner fails to comply with a Building Order issued by the RBS, then the RBS must refer the matter to the Building Commission for future enforcement, and at that time their role is effectively at an end (as far as enforcement under Part 8). This referral must occur within 14 days after the final day for compliance in the Building Order.

If in doubt as to the extent of your obligations and powers as a Building Surveyor, you should seek expert legal advice as soon as possible.

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