



The new Building Act 2011

March 2012

Introduction

The new *Building Act 2011* commences operation very soon – Monday 2 April 2012.

The *Building Act* brings about the most significant changes to the approval regime for building works in many years. It also significantly changes the interplay between the planning approval and building approval regimes.

It will replace the provisions in the *Local Government (Miscellaneous Provisions) Act 1960 (LG(MP) Act)* that deal with building, demolition, swimming pool fencing and smoke alarms. The *Building Act* is supported by a new set of regulations, called the *Building Regulations 2012*.

This update provides an overview of the new *Building Act*, and how it impacts upon the planning approval process.

Summary

The *Building Act* commences on Monday 2 April 2012.

- It extends coverage for the requirement for **permits** to the whole of the State.
- There may be difficulties in obtaining a **building permit** where building plans are not consistent with a planning approval issued under the *Planning and Development Act 2005 (PD Act)*.

Building Permits

What is a building permit?

A **building permit** is an approval to construct a building or structure. It is the equivalent of a building licence under the *LG(MP) Act*.

Types of applications

There are two different types of applications – a certified, and an uncertified application. An uncertified application is one where there is no **certificate of design compliance** accompanying the application. Uncertified applications may only be lodged for Class 1a and 10 buildings under the Building Code – that is, for single residential dwellings and non-habitable buildings or structures.

A **certificate of design compliance** is a document that can be prepared by an **independent building surveyor**. This allows developers to engage their own private certifier to confirm that the plans to be lodged comply with the relevant building standards.

Under the *Building Act*, an **independent building surveyor** is one who is not otherwise involved in the project by being the owner, employee of the owner or the person who proposes to construct the building. This means local governments can provide their building surveyors to prospective applicants on a commercial basis, competing with private sector building surveyors.



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Assessment process

For **uncertified applications**, the **permit authority** refers the application to a building surveyor for it to review the plans and for a **certificate of design compliance** to be issued.

For **certified applications**, and for **uncertified applications** once a **certificate of design compliance** is obtained, the **permit authority** must grant the **building permit** if the application complies with the information requirements set out in section 16, and satisfies the criteria set out in section 20 (discussed in further detail below).

Time for making decision

A decision in relation to an **uncertified application** must be made within 25 business days.

A decision in relation to a **certified application** must be made within 10 business days.

There is capacity, pursuant to section 18, for further information to be required. In these cases, the time does not start until there has been compliance with the request. That means that a request could be received towards the end of the initial decision-making period referred to above, thereby potentially more than doubling the period within which a decision is to be made for a certified application.

Occupancy Permits

What is an occupancy permit?

An **occupancy permit** is an approval to occupy a building. It is the equivalent of a certificate of classification under the *LG(MP) Act*.

An **occupancy permit** is required in relation to all buildings except Class 1 and Class 10 buildings under the Building Code, or unless a building licence was not required under the *LG(MP) Act* and either construction or a contract to commence construction was entered into before the *Building Act* commenced.

Certificates of classification are deemed to be **occupancy permits**, pursuant to Part 16 of the *Building Act*.

How to apply

An application for an **occupancy permit** must be accompanied by a **certificate of construction compliance** (for new buildings) or a **certificate of building compliance** (for existing buildings).

A **certificate of construction compliance** is issued by an **independent building surveyor**, and confirms that what has been built is constructed in accordance with the **building permit** and the **certificate of design compliance**.

A **certificate of building compliance** is issued by an **independent building surveyor**, and confirms that the building complies with the building licence, and the building standards that applied at the time of its construction. It must also confirm that the proposed use of the building will be safe for the occupants and other users.

Time for making decision

An application for an **occupancy permit** must be determined within 10 business days from the date of lodgement.



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Some significant changes

Permit authorities

Under the *LG(MP) Act*, approvals and licences in relation to buildings could only be issued by a local government.

Under the *Building Act*, **permits** are issued by a **permit authority**. The default position under the Act is that the local government for the locality in which the proposed building is located is the **permit authority**.

However, the State is also a **permit authority**, and can delegate this authority to a public body, as well as prescribe by regulation a **special permit authority**. This gives the State the power to take approval powers away from local governments in relation to special projects, for example.

Application to whole of the State

The *LG(MP) Act* has limited application in some regional areas of the State. Particularly in the north-west, the requirement for building licences and certificates of classification applied only to town sites in some local government areas. Under the *Building Act*, the whole of the State is covered.

Sections 69 to 74 set out particular types of buildings and structures which are exempt from the requirement for **building permits**, **demolition permits** and **occupancy permits**. These are structures and buildings incidental to infrastructure, mining operations, shipping and boating facilities, industrial processing plants, and to the exploiting of petroleum and other resources.

Note however in each case, the exemption does not extend to any building or structure used for a residential or recreational facility, or to which members of the public have access.

Mining and oil and gas operators in particular should be aware of this change to ensure that workers' camps comply with the new regime.

Relationship with planning legislation

Requirement for planning approvals to be in place

The *Building Act* changes the relationship between the planning and building approval regimes. Currently, under the *LG(MP) Act*, the building licence approval regime is a separate and distinct process to any requirement for planning approval under the *PD Act*. That is, it is legally possible to apply for and obtain a building licence or demolition licence before planning approval is issued. It is up to the land owner to ensure that all the necessary approvals are in place before construction (or demolition) commences.

Under section 20 (for **building permits**), section 21 (for **demolition permits**) and section 58 (for **occupancy permits**), the **permit authority** must be satisfied that the applicant has obtained "each authority under written law that is prescribed for the purposes of this paragraph".

The *Building Regulations* in each case prescribes the requirement for a planning approval issued pursuant to the *PD Act*.

In addition, an **independent building surveyor** cannot issue a **certificate of building compliance** unless satisfied that the building complies with any approval required under the *PD Act*.



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Impact on developers

In the normal course of events, a planning approval under the relevant local planning scheme is the first approval sought by developers. It is at this point, once approval is issued, that a developer puts a project to the market.

Prospective tenants or buyers of the project, through the negotiation process, often request amendments to the design of the building (for example, a reconfiguration of the internal layouts, car parking etc).

These amendments are usually documented on the plans lodged for a building licence. Some local governments have an informal process to then document those amendments on the planning approval plans, and only where significant would they require a formal amendment of the planning approval. Some local governments require no amendment to the planning approval at all.

Under the new *Building Act* regime there is a distinct possibility that **permit authorities** will not issue **permits** where the plans as approved under the *PD Act* are inconsistent with the plans lodged for a **permit**. If this were the case, then the time to commence construction could be substantially delayed while amendments to planning approvals are sought, at a time when construction contracts have already been let.

What can developers do to avoid delay?

Be aware of potential changes, and apply for amendment to planning approvals early:

- In relation to planning approvals issued by Development Assessment Panels (**DAP**), regulation 17 of the *Planning and Development (Development Assessment Panels) Regulations 2011* allows recipients of a DAP approval to return to the DAP to have that approval amended.
- Some local planning schemes have provisions which have a modified approval process to make nonsubstantial amendments to approvals which have not yet been substantially commenced.
- Where there is no minor amendment provision in the local planning scheme, it may be necessary to apply for an amendment to the approval in the usual way.

Consider the level of detail that you provide at planning approval stage, to avoid the need for later amendments.

Conclusion

This update provides a snapshot of a raft of changes to the building approval regime. Please contact Moharich & More if you require specific advice in relation to your project.



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