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BodyCorporate**ONE**

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Development offences in bodies corporate

Ben Seccombe & Ben Sandford

In Queensland the Planning Act (2016) provides the framework under which all residential development work is performed.

When a new building is approved by the local council, a package of conditions is prepared – that conditions package sets out the rules with which the owner (including any subsequent owner) of the land must comply. Additionally, every local council within Queensland maintains their own system of zoning and mapping overlays that either permit or exclude certain development activities in certain areas.

Development that might be allowed in one suburb could be completely prohibited in another and vice versa. Development prohibitions can relate to activities that would not ordinarily be thought of as "development"; for example, clearing vegetation, short term letting, enclosing balconies and putting in retaining walls (if not properly approved) can all fall afoul of the Planning Act if the unlucky property owner doesn't make enquiries first.

Under the Planning Act it is an offence to:

- carry out assessable development work without all necessary development permits in effect for the development; or
- contravene a development approval (i.e., the conditions of the development).

The above offences can carry hefty penalties - the current maximum penalty for contravening a development approval or carrying out assessable development without a permit is $587,475. If you carry out assessable development on a heritage listed site the penalty can increase to up to $2,219,350.

It's easy to comply when you know what the conditions are – if you built a house yourself, you're unlikely to be taken by surprise by conditions that the council imposed on you. Where the difficulty can arise is when a subsequent owner assumes they have a right to do whatever they want in relation to a property that they own, and they don't seek appropriate advice before they commence work.

This is particularly relevant to bodies corporate– the approval that applies to the development of the entire scheme also applies, and is legally binding on, each of the lots.

The quintessential example is the enclosure of balconies. Many lot owners believe they have the right to do what they want to their balcony, and don't consider the possibility that they might need approval from the local council, or that their balcony may actually form part of the common property.

It's important that both owners and bodies corporate get advice before they start (or in the case of a body corporate, approve) work. Both the lot owner (for carrying out the work) and the body corporate (for failing to comply with the conditions of approval) can be punished for a contravention of the Planning Act.

If you have concerns about proposed development or construction work in your body corporate it is better to be safe than sorry – contact us.

Meet the author

Ben Sandford has worked almost exclusively in commercial litigation since his admission as a solicitor. Ben has substantial experience in all aspects of strata litigation and has acted for lot owners, bodies corporate and caretakers in a broad range of disputes including management rights contract termination, building defects, Office of Fair Trade prosecutions and levy recovery. Ben also has experience in planning and environment litigation, and has acted in large and small scale development appeals and in disputes relating to development offences.

Recovering costs from lot owners

Author: Todd Garsden

Aside from the recovery of levies, the Body Corporate and Community Management Act 1997 (Qld) (BCCMA) gives bodies corporate a number of specific protections to allow costs to be recovered from owners who have:

- failed to comply with their obligations where the body corporate has been required to step in (for example, when the body corporate is required to repair plumbing in someone's lot); or
- caused damage to other parts of the scheme (for example, a tree in a backyard where the roots are damaging the common property).

These mechanisms are not well known or often utilised because of the better known principles that:

- by-laws cannot impose a monetary liability; and
- the Commissioner's Office is generally a no-cost jurisdiction.

Failing to comply with obligations

If an owner or occupier fails to comply with one of their obligations in the BCCMA, regulation module, by-laws or an adjudicator's order, the regulation module provides that:

> *"The body corporate may carry out the work, and may recover the reasonable cost of carrying out work from the owner of the lot as a debt."*

There is no requirement to first obtain the permission of an adjudicator's order to exercise this power, or have any enabling by-law. However, the body corporate should:

- firstly, write to the owner or occupier and require the work to be carried out within a reasonable amount of time, giving them the opportunity to arrange the work at their cost;
- authorise any decision to take action or incur spending by passing a resolution;
- document the work carried out, and keep evidence of the need for the work to be carried out; and
- provide any necessary access notices as part of carrying out the work.

Causing damage

Despite the Commissioner's Office generally being a no-cost jurisdiction, the BCCMA specifically authorises an adjudicator to make orders for:

- payment of up to $10,000 towards damage that has been caused in repairing property; or
- requiring the person to carry out particular repairs of up to $75,000.

In seeking such an order, there needs to be sufficient evidence showing the cause of the damage otherwise an adjudicator would be unable to assist.

How can we help

In exercising any of these rights, the body corporate must always act reasonably.

If a body corporate is unsure as to whether it can (or should) exercise one of these rights, please let us know.

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Meet the author

Todd Garsden is a leading body corporate lawyer who has practised entirely in body corporate and strata. Todd is an active member of the Strata Community Association of Queensland (SCA), including a member of their Legislation Panel, and acts extensively for bodies corporate, body corporate managers and unit holders.