



PROFESSIONAL PRACTICE:

Provisional Building Rules Consents and Responsibilities

The Building Policy Branch of Planning SA has been receiving numerous enquiries on various issues relating to privately certified building work, building assessments generally and council responsibilities at different stages in the process. This Advisory Notice responds to some of the more frequently queried responsibilities, processes and practices required by the *Development Act and Regulations 1993* and should be read in conjunction with Advisory Notices 28/03 on *Consistency between Planning and Building Consents* and 29/03 on *Consents, Inspections and Complaints*.

Appointment

PRIVATE CERTIFIER'S ROLE IN THE DEVELOPMENT ASSESSMENT PROCESS

A private certifier engaged under the Act to assess development against the Building Rules is exercising the statutory powers of the prescribed relevant authority in doing so. As such, a private certifier is subject to the same duties and requirements that the relevant authority (normally council) would otherwise be exercising under the Act. A private certifier must therefore act with good faith in the discharge of these duties and must be free, and be seen to be free, of conflict and bias in undertaking these statutory functions. Whoever is engaged to undertake the Building Rules assessment (council or private certifier) becomes part of the development assessment process and must be independent of the planning and design process for the development.

BUILDING SURVEYOR CANNOT ASSESS OWN WORK

Employees of local councils, and those exercising the powers of a relevant authority under the Act (i.e. private certifiers), must be careful to avoid conflict of interest situations which may compromise, or be seen to compromise, their ability to impartially assess a proposal. While they are free to offer advice and assist applicants through the development approval process, they must not become involved in **making decisions for an applicant** regarding the planning and design of a development if they will later have to assess the proposal for Provisional Building Rules Consent. The duty of those engaged as private certifiers to avoid a conflict of interest is clearly stated in Section 92 of the Act, but it is also inherent in the duties of a public officer such as those exercising statutory functions as employees of councils.

So, while a private certifier can act as a "post office" for the purposes of forwarding a Provisional Development Plan Consent (PDPC) application to the relevant authority (council) they should never operate as the applicant's agent to resolve technical planning and design issues as to do so then compromises their ability to impartially assess the work for Provisional Building Rules Consent (PBRC).

Provisional Building Rules Consent**PRIVATE CERTIFIERS CERTIFIED CONSENT MUST BE ACCEPTED**

The head power for private certifiers to issue the PBRC is provided under Section 89 of the *Development Act*. The same Section makes provides that a relevant authority (council) incurs no liability if it relies on the certificate or for any matter within the ambit of the certified consent. Further, Section 36 (4) of the *Act* says that the relevant authority **must** accept compliance with the Building Rules if certified by a private certifier.

The intent of these provisions is clear; councils must accept a PBRC from a (registered) private certifier. If council becomes aware of a technical matter that could impact on a PBRC received from a private certifier, before issuing the Development Approval, then it is suggested that the council take the following action:

- Advise the private certifier by telephone of the matter.
- Accept the certified PBRC under Section 36 (4) and rely on it for issuing the development approval within the prescribed 5 days time period; and
- If necessary, confirm in writing that,
 - the matter has been brought to the attention of the private certifier, and
 - advise that the certified PBRC has been relied on (pursuant to Section 36 (4)) when issuing the development approval.

ONUS FOR DEVELOPMENT APPROVAL

The responsibility for issuing a valid PBRC rests with the relevant authority (or the private certifier exercising the powers of a relevant authority) that is undertaking the assessment. If a subsequent development approval issued by a council is held to be invalid because of a PBRC then the responsibility for that, is with whoever issued the PBRC.

With regards to a private certifier's certification that the Provisional Building Rules Consent (PBRC) is 'consistent' with the Provisional Development Plan Consent (PDPC), there is a clear obligation on the private certifier to make sure that the documentation for PBRC is for the same project that has received PDPC. However, as council issues the PDPC, the council staff are often in a better position to appreciate the extent to which an inconsistency could be 'significant'. Accordingly most councils also check for consistency in order to ensure the appropriateness of the original planning consent as a basis for issuing a development approval. [Advisory Notice 28/03, Consistency between Planning and Building Consents, deals with this matter in more detail.](#)

When issuing the development approval the relevant authority only needs to determine that a valid PBRC and PDPC are in place.

SUPPLY OF INFORMATION

When a private certifier issues the PBRC they must, under Section 93 (b) of the Act, provide any information that may be prescribed. Regulation 92 (2) details all the prescribed information including documents and other information lodged by the applicant.

Also under Section 93 (b) the relevant authority (i.e. the council) is entitled to request the supply of further information. In order to verify that the PBRC is valid it would be proper for a council to request:

- Evidence that the levy under the *Construction Industry Training Fund Act* has been paid.
- Where the builder is known (i.e. a contract has been entered into), a copy of the certificate of insurance for building indemnity insurance under the *Building Work Contractors Act*.

. Where a council receives a PBRC from a private certifier without the above CITF or Indemnity Insurance Certificate (if the builder is known) it should:

- Issue the development approval only after it is satisfied that the certified PBRC is valid.
- Promptly advise the private certifier of any additional information required.
- If there are conditions on the consent regarding the supply of information on these matters, the information should be supplied prior to the issue of a development approval and council should not issue a development approval until it is satisfied that they have been dealt with .

Of course, where the builder is not known then the Indemnity Insurance Certificate is required at the time of the notice of commencement of building work, in which case the council only requires evidence of the CITF payment for a valid consent.

Further, Regulation 92 (2)(a) requires two copies of the plans, drawings, specifications and other documents and information lodged by the applicant, to be stamped or otherwise endorsed with the private certifiers consent. Where such documentation is bound to form a set that cannot be separated (such as a bound specification or set of drawings) then the front page only needs to be stamped or endorsed (signed) in a manner that identifies the private certifier. Every other individual loose page, drawing, letter, copy of an e-mail etc., that forms part of the application receiving consent should be similarly stamped or endorsed by the private certifier. Regulation 47 requires council practices to be similar (where the council is the relevant authority) so that in every instance the information that forms part of the application, covered by the consent, can be clearly understood by the applicant and by anyone requiring access to the consent in the future (such as for legal action).

USE OF SECTION 53A

The authorised functions of the private certifier under Regulation 89 include the powers of a relevant authority, under Section 53A, for requiring the upgrading of a building. The decision to require upgrading rests with the relevant authority (or a private certifier exercising the powers of a relevant authority) so a council must assume that the private certifier has considered whether or not to exercise those powers when it receives the PBRC. It is not appropriate for a council to also invoke Section 53A on the same

application as it could then be assumed that council has checked the private certifiers use of all the other authorised functions and that no other matters have been overlooked. If council is unsure whether the private certifier has considered Section 53A (presumably because of some obvious matter of concern), it would be appropriate for council to query whether the application of Section 53A in relation to the matter had been considered. Nevertheless council must still proceed to issue the development approval based on the private certifiers certified PBRC.

RESPONSIBILITY FOR BUILDING RULES ASSESSMENT

Anything that constitutes an assessment of the work against the Building Rules is the responsibility of the council, or the private certifier, who undertakes the assessment.

Conditions should only be placed on a PBRC to resolve minor issues of compliance.

Conditions should not require what would be, in effect, an on-site assessment of the work against the Building Code of Australia (e.g. the inclusion of blanket clauses such as *'the disabled toilet is to be constructed in accordance with AS 1428'* when there are no details on the application). There is a strong legal argument that such conditions are unlawful as a full assessment of the proposed work has not been undertaken. The onus would be on the building surveyor who undertook the assessment to demonstrate how they were able to assess (and approve) the application when necessary information was missing. It could be argued that by using such conditions the assessing building surveyor is entering into the design of the proposed work. The information should either be provided with the application for a proper assessment, or, the applicant should seek to have the project staged.

Similarly, building surveyors undertaking assessments often place conditions on consents that require the submission of further information for approval (such as roof truss calculations). There is a strong legal argument that such conditions are also unlawful and the onus would be on the building surveyor who undertook the assessment to demonstrate how they intended to assess the proposed work. Relying on the submission of further information without an application may not be adequate. Again, the information should either be provided with the application for a proper assessment, or, the applicant should seek to have the project staged so that the work can be included in an application and given formal approval.

Further information

Department of Transport and Urban Planning

Planning SA

136 North Terrace Adelaide
GPO Box 1815 Adelaide SA 5001
Telephone: 8303 0600
www.planning.sa.gov.au/building_policy/

Contact:

Don Freeman, Manager or
Building Policy Branch
Level 3, 136 North Terrace Adelaide SA
Telephone: 8303 0602

ISSN: 1443-8038