

General Review Where Contractor Proceeds Without a Building Permit

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Summary

OAA Membersⁱ who provide general reviewⁱⁱ services where construction proceeds without a building permit do so in violation of the *Building Code Act* and in contravention of the [Regulation](#) under the [Architects Act](#).

Background

From time to time, the Ontario Association of Architects (OAA) receives inquiries pertaining to performing general review services during construction in the absence of a building permit.

Under the laws of the Province of Ontario, it is required that during construction, general review will be provided (except where exempted by the *Architects Act*) both by a member (acting pursuant to a client/member contract) and by a building official (acting pursuant to the *Building Code Act*). In combination, the two professionals provide two sets of eyes acting independently of each other in reviewing construction for general conformity with plans and specifications that formed the basis for issuance of a building permit.

This basic principle is undermined in circumstances where a building permit is not in place. The factual circumstances may break down into three sorts of situations:

1. No application has been made for a building permit, and no permit has been issued. The municipality in effect is not on notice of the construction.
2. An application has been made for the building permit and the building official is aware of the pending application, and building department staff attends the site to conduct inspections.
3. An application is pending, but the building official declines to become involved in the inspection process pending issuance of the permit.

In situations 1 and 3 above, a member who proceeds to provide general review services may reasonably be considered to have breached the Regulation under the *Architects Act* by acquiescing in a contravention of a provincial law, namely the *Building Code Act*.

Even though this scenario may be perceived to be common practice in some areas, by continuing to provide services under such circumstances the member is placing themselves in a situation where substantial liability may be incurred through civil action for participating in an illegal act, either directly or indirectly. It is not possible to carry out general review in accordance with the performance standards, as to do so requires a determination that the building is being constructed in general conformity with the documents that formed the basis for the issuance of the building permit and, as the permit has not been issued, there are no such documents.

One municipality sent a letter to consultants who chose to ignore the absence of a building permit and who attended the site to review the work. This letter is reproduced below with the author's permission.

There have been several occasions recently, where it has come to our attention that on-site review of construction, for which a permit has not been issued, has been performed by a professional engineer. This is of significant concern because, as a professional with special knowledge, it appears that an engineer should ensure that there is a permit before proceeding. The Building Code Act 1992, Section 8(1), reads as follows:

No person shall construct or demolish a building, or cause a building to be constructed or demolished in a municipality unless a permit has been issued therefore by the Chief Building Official.

In addition, Section 1. of the Building Code Act contains the following definition:

'construct' means to do anything in the erection, installation, extension, or material alteration or repair of a building and includes the installation of a building unit fabricated or moved from elsewhere and 'construction' has a corresponding meaning;

Pursuant to the above, on-site review by an engineer would be deemed as 'construction' and therefore should not be undertaken unless a permit has been issued.

In this regard, please be advised that if legal action is initiated under the Building Code Act in future, as a result of construction without a permit on a project, then charges will also be laid against any person, company, or engineer, who has undertaken the on-site review of the construction on that project.

We trust this will not be necessary and look forward to your future cooperation.

In providing general review in the absence of a building permit, the member may well be motivated by their perception of the public interest. However, the public interest is best served by construction under the watchful eyes of both the member and the building official in accordance with the building legislation in Ontario. The member's motivation may be no defense to the allegation that they are "acquiescing" in the contravention of the law.

In some circumstances, a member may be subjected to coercion by a client to attend the site regardless of the absence of a building permit citing it to be the member's duty to fulfil the contractual obligations relative to site review.

Contract law operates such that contracts neither anticipate nor require parties to participate in illegal activities. Construction without a building permit is arguably in this category.

OAA Council, the OAA Discipline Committee, and legal counsel to the OAA have all reviewed this issue of a member providing general review services on a project without a building permit being in violation of the Regulation under the *Architects Act*.

Procedure

1. The OAA Standard Form of Contract, Document 600, current version contains a provision for the member to suspend services related to general review in the event that construction proceeds in the absence of a building permit. If your contract with your client does not contain such a provision, add a clause to provide for the right of the member to suspend general review services if construction proceeds without a building permit and without the chief building official dispatching building officials to the site.
2. Ascertain whether a building permit has been issued prior to attending the site to perform general review services.
3. If a permit has not been issued, determine from the building official whether the official intends to dispatch inspectors to conduct inspections in the usual and customary ways. If the municipal inspector will be conducting the inspections, record your findings and commence general review, so advising the owner and building official.
4. If the building inspectors will not be directed to attend the site, advise the owner that you will not be able to conduct general review services until a permit is issued or until the building official agrees to send the building inspectors to the site.
5. Advise the owner and constructor of ramifications of continuing construction without a building permit.

ⁱ **OAA Member:** Every person licensed by the Ontario Association of Architects is a member of the Association, subject to any term, condition, or limitation to which the licence is subject. R.S.O. 1990, c. A.26, s. 5 (1).

ⁱⁱ **General Review:** in relation to the construction, enlargement, or alteration of a building, means an examination of the building to determine whether the construction, enlargement, or alteration is in general conformity with the design governing the construction, enlargement, or alteration, and reporting thereon; ("examen de conformité") from *Architects Act*

References

Architects Act, R.S.O. 1990, c. A. 26

Regulation 27, R.R.O. 1990, O. Reg 27

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