

Attn. Proper Officer  
MN Builder Pty Limited (ACN 165 156 178)  
Level 8, 91 Phillip Street  
PARRAMATTA NSW 2150

Via email: [andy@mnbuilders.com.au](mailto:andy@mnbuilders.com.au)

8/04/2022

# Stop Work Order

## Section 89 of the *Design and Building Practitioners Act 2020*

MN Builder Pty Limited (ACN 165 156 178) (**MN Builder**) is issued with this Stop Work Order (the **Order**) in relation to a mixed use building located at 52 McFarlane Street, Merrylands, NSW 2160, 239 Merrylands Road Merrylands and 245 Merrylands Road, Merrylands, NSW 2160 (Lot 2, DP1271537) (the **Development**).

MN Builder is required to ensure all work at the Development stops by **5.00 p.m. on 8 April 2022**.

Please read the Stop Work Order carefully and comply with the conditions; and also make the Development site safe.

Failure to comply with this Order is an offence and may result in criminal proceedings.

### Background

1. The Department of Customer Service (the **Department**) administers the *Design and Building Practitioners Act 2020* (the **Act**).
2. The Development, which comprises of Building A and Building B, is located at 52 McFarlane Street, Merrylands, NSW 2160, 239 Merrylands Road Merrylands and 245 Merrylands Road, Merrylands, NSW 2160 (Lot 2, DP1271537) (the **Site**).
3. The Development is a Class 2/5/6/7a/7b/9b/10a mixed use building (the **Building**) where work has commenced.
4. On 5 April 2022, a Notice of Intention to issue the Order, including a draft copy of the Order, was served on MN Builder.

## Power to Stop Work

5. Under section 89(2) of the Act, the Secretary of the Department or her authorised delegate may order a person carrying out building work, professional engineering work or specialist work (**the Work**) or the owner of the land on which the Work is being carried out to ensure that work stops at the Site if the Secretary forms the opinion that the Work is, or is likely to be, carried out in contravention of this Act and in a manner that could result in:
  - a. Significant harm or loss to the public or occupiers or potential occupiers of the building to which the work relates; or
  - b. Significant damage to property.
6. I, David Chandler, NSW Building Commissioner, am a duly authorised delegate of the Secretary for the purposes of section 89 of the Act.

## Requirements of the Act

7. Under section 4 of the Act, Building Work relevantly means work involved in, or involved in coordinating or supervising work involved in, the construction of a building of a class or type prescribed by the regulations for the purposes of this definition. Clause 12 of the *Design and Building Practitioners Regulation 2021* (the **Regulations**) states that a building is prescribed for the purposes of section 4 of the Act if the building, or part of the building, is a class 2 building.
8. Under section 5(1) of the Act, a regulated design is a design that is prepared for a building element for building work, a design that is prepared for a performance solution for building work (including a building element), or any other design of a class prescribed by the regulations that is prepared for building work
9. Under section 6(1)(a) of the Act, a building element includes:
  - a. the fire safety systems for a building within the meaning of the *Building Code of Australia* (the **BCA**);
  - b. waterproofing;
  - c. an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it (including but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams);
  - d. a component of a building that is part of the building enclosure;
  - e. those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the BCA;
  - f. other things prescribed by the regulations for the purposes of this section.
10. Under A2.2(1) of the BCA, a Performance Solution is achieved by demonstrating compliance with all relevant *Performance Requirements* or the solution is at least *equivalent* to the relevant *Deemed-to-Satisfy Provisions* under the BCA.
11. Under section 8(1)(a) of the Act, a design compliance declaration means a declaration in the form and manner prescribed by the Regulations as to whether or not a regulated design prepared for building work complies with the requirements of the BCA.

12. Under section 19 of the Act, a building practitioner must not, except with reasonable excuse, carry out any part of building work for which a regulated design is to be used unless the practitioner has obtained a design from a registered design practitioner for the work and a design compliance declaration for the design from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates, and the declaration states that the design complies with the requirements of the BCA and other applicable requirements prescribed for the purposes of section 8(1) of the Act.
13. Under section 107(2)(e) of the Act, the regulations may make provision with respect to the lodging of copies of designs and compliance declarations electronically or otherwise with the Department or another person approved by the Minister.
14. Under section 107(2)(f) of the Act, the regulations may make provision with respect to the notice to registered practitioners of matters affecting the circumstances when compliance declarations are to be provided.
15. Under clause 16 of the Regulations, for the purposes of section 107(2)(e) of the Act, a building practitioner must provide the following documents to the Secretary in the approved way before commencing building work:
  - a. copies of the construction issued regulated designs for the building work,
  - b. copies of the design compliance declarations, made by a suitably authorised registered design practitioner for each of the construction issued regulated designs.
16. The Dictionary to the Regulations relevantly defines the following terms:

*'approved way'* as lodgement on the NSW planning portal or, if the registered practitioner is unable to access the portal, provision of the document to the Secretary

*'construction issued regulated design'* as a regulated design for which a design compliance declaration is provided that:

  - (a) contains the necessary detail to produce building work that would achieve compliance with the BCA, including detail specifying –
    - (i) the proposed dimensions of the completed building, and
    - (ii) the characteristics and materials comprising the proposed building, and
    - (iii) the location of the building elements and systems proposed to be built, and
  - (b) can be used by a building practitioner to carry out the work in accordance with the regulated design and the BCA.

### **Work Undertaken at the Development**

17. On 30 September 2021, Cumberland City Council (the **Council**) issued Building Information Certificate No. HBC2021/0292 (the **BIC**) which retrospectively authorised the following building work undertaken at the Development:
  - Shoring Stage 1 (90%);
  - Bulk excavation, Building A/B only;
  - Pad Footings, Building A/B (60%);
  - Stormwater Drainage, Building A only; and
  - Building A Basement Slab only.
18. On 16 November 2021, Mr Steven Saad of Certified Building Specialists (the **Principal Certifier**) issued Construction Certificate No. COA014A1 (**CC1**) authorising basement drainage, concrete structural elements in basement levels up to and including basement 1 slab for Building A and part of Building B, excluding all other associated building and development works and the works

referenced in the BIC. CC1 specifically stated that there were no fire safety measures associated with the Construction Certificate.

19. On 16 March 2022, the Principal Certifier issued a Written Directions Notice (the **WDN**) under section 6.31 of the *Environmental Planning and Assessment Act 1979* requiring works to cease at the Development until an updated BIC is approved by the Council.
20. On 22 March 2022 and 29 March 2022, authorised officers of the Department conducted inspections of the Development.
21. During the inspections, authorised officers made the following observations of Building A and Building B at the Development:
  - Slab floors of basements 1, 2, 3 and 4 of Building A were constructed;
  - Construction of Stormwater Drainage for Building A and Building B of the Development was completed;
  - Construction of Pad Footings for Building A of the Development was completed;
  - Construction of Pad Footings for Building B of the Development was commenced ;
  - Construction of Shoring for Building A and Building B of the Development had commenced;
  - Bulk Excavation for Building B had commenced; and
  - Construction of floor slabs for two storeys (ground and first floor) and core walls for lift shafts (up to level 4) for Building A of the Development was completed.

### **Construction Issued Regulated Designs and Design Compliance Declarations**

22. Records held on the NSW Planning Portal indicate that no Construction Issued Regulated Design (**CIRD**) and Design Compliance Declaration (**DCD**) have been provided to the Secretary via the NSW Planning Portal in respect of the following:
  - a. any building work above basement level 1 in relation to Building A;
  - b. the performance solution required for the fire safety system in basement levels 1, 2, 3 and 4 of Building A;
  - c. any building work with respect to Building B.
23. Records held on the NSW Planning Portal by the Department further indicate that:
  - a. The architectural CIRDs for the 'structure only' for the four basement levels of Building A do not contain the necessary detail to produce building work that would achieve compliance with the BCA;
  - b. The CIRDs in relation to structural engineering and drainage for the four basement levels of Building A do not contain the necessary detail to produce building work that would achieve compliance with the BCA.

### **Submissions by MN Builder**

24. MN Builder were invited to provide submissions to the Department relating to the Order by 5:00 pm, 7 April 2022. Submissions were received by 7 April 2022 from MN Builder.
25. The Submissions acknowledge that the requirement to have proper CIRDs for construction of Building A and Building B (and indeed for the entire project) at the Development and to have those documents lodged with the Secretary are essential to ensure the integrity of the Building and its use and the future safety of its occupants.

26. The Submissions further state:

- a. The Council issued the BIC and work was performed in accordance with the BIC. However, it is submitted that the work under the BIC is completed and compliant with the BCA and, in those circumstances, will not cause significant damage to the Building.
- b. The Principal Certifier issued CC1 for 'structure only', which works have been completed and are compliant with the BCA. The completed work will not cause significant damage to Building.
- c. Work has been completed as per the WDN requirements for only WHS requirements on structural elements of the building as required to ensure the safety, protection and integrity of the works.
- d. MN Builder have in their possession the CIRDs for building work above basement level 1 in relation to Building A and Part Building B. These CIRDs will be uploaded to the NSW Planning portal once directed by the Principal Certifier.
- e. MN Builder was not aware of the requirement to provide a performance solution for the fire safety system in basement levels 1, 2, 3 and 4 of Building A. It is submitted that MN Builder was not made aware of the requirement by their consultants (including design practitioners) and by their Principal Certifier of the requirement to provide that performance solution. Furthermore, MN Builder has submitted a performance solution to Fire & Rescue NSW for the fire safety systems for the basements 1, 2, 3 and 4 of Building A and Part Building B.
- f. MN Builder does not agree that the CIRDs in relation to structural engineering and drainage for the four basement levels of Building A and Part Building B do not contain the necessary detail to produce building work that would achieve compliance with the BCA.

### Grounds for issuing this Order

27. Based on the information set out above and taking into account the matters raised in the submissions, I consider that the CIRDs and DCDs for any Building Works for basement level 1 and above for Building A and for Building B have not been provided to the Secretary in the approved way before building work commenced. This is a contravention of:
- a. **Clause 16 of the Regulations:** a building practitioner must provide the Secretary in the approved way before commencing building work copies of the construction issued regulated designs for the building work and copies of the design compliance declarations, made by a suitably authorised registered design practitioner for each of the construction issued regulated designs.
28. Furthermore, I consider that carrying out the building works for the basements 1, 2, 3 and 4 of Building A and Building B in the absence of CIRDs and DCDs dealing with fire safety systems, which are a required regulated design, is a contravention of:
- a. **Section 19 of the Act:** A building practitioner must not, except with reasonable excuse, carry out any part of Building Work for which a regulated design is to be used unless (a) the practitioner has obtained a design from a registered design practitioner for the work and a design compliance declaration for the design from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates and (b) the declaration states that the design complies with the requirements of the BCA
29. In relation to the performance solution for non-compliances with the deemed to satisfy provisions

of clauses D1.0, D1.4 and D1.5 of Volume One of BCA 2019, I disagree with the view that a regulated design and a design compliance declaration can be provided at a later stage.

30. It is my view that the structure being the basement floor slabs as depicted in the architectural design must comply with all relevant deemed-to-satisfy provisions of the BCA including D1.0, D1.4 and D1.5 before the building work can commence or alternatively a regulated design for the performance solution and a design compliance declaration for such a performance solution must be provided before the building work comprising the construction of the four basement floor slabs can commence. It is an incorrect interpretation and application of the BCA to only require a regulated design of the floor slabs for the basement levels for structure to comply with Part B1 Structural provisions only of Volume One of the BCA and not apply the relevant deemed-to-satisfy provisions of Part D1 Provision for escape i.e., clauses D1.0(a)(i) and D1.4 and D1.5 of Volume One of the BCA 2019 which also apply to the floor slabs of the basement levels.
31. I therefore consider that a failure to have CIRDs and DCDs for performance solutions for fire safety systems of Building Elements for the basements 1, 2, 3 and 4 of Building A and part of Building B, including, but not limited to, access and egress and provisions of escape via exits, are key elements for the Development. The proper performance of these Building Elements is critical to the safety and integrity of the Development that is under construction. In particular exits must be provided from a building to allow occupants to evacuate safely, with their number, location and dimensions being appropriate to the travel distance, the number, mobility and other characteristics of occupants and the function or use of the building.
32. I consider that engaging in building work on the basis of designs which do not contain the necessary detail to produce building work that would achieve compliance with the BCA also represents a risk of significant harm or loss to the occupiers or potential occupiers of the Building.
33. In my opinion, the requirement to have proper CIRDs for construction of Building A and Building B at the Development and to have those documents lodged with the Secretary are essential to ensure the integrity and resilience of the Building and its use and the future safety of its occupants. In addition, failure to address those matters now may lead to a potential need for further designs, variations and rectification work later.
34. Accordingly, I consider that the contraventions of the Act and regulations could result in significant harm or loss to the public users, as well as occupiers or potential occupiers of the Building.
35. While I am aware that there is a WDN in place which requires a further BIC to be obtained from the Council, I consider that it is likely once that BIC has been obtained that work will recommence on the site. I note that this is the second time a BIC has been required for the Development. In my opinion, further work is likely to be undertaken in the absence of proper CIRDs and DCDs for Building Works and/or without those requirements being made available to the Secretary in the approved way.
36. I acknowledge that MN Builder has submitted that works outside those of BIC No. 2 will not recommence at the Development until such time a *CC4 for Structure only Level 3 to Level 5 for Building A* and *CC13 for Structure only Level 3 to Roof for Building B* is obtained. However, I consider that providing the required CIRDs and DCDs for Building Works is central to ensuring the integrity of the Building and its use and the future safety of its occupants.
37. I have considered all of the circumstances. I accept that the Order may have financial consequences for MN Builder and I give this consideration moderate weight. However, the cost to MN Builder must be balanced against the risk of non-compliant work and potential harm to the occupiers or potential occupiers of the Building and their interests in having the building constructed in a manner which is compliant with the BCA.
38. Considering these potential consequences, I give greater weight to the seriousness of the failure

to adhere to the correct BCA, and I find that it is appropriate, in the exercise of my discretion, to require MN Builder Pty Limited to stop work

**Direction to ensure Building Work stops**

39. I, David Chandler, Order MN Builder Pty Limited (ACN 165 156 178) to ensure that the Building Work at the Development stops by 5 pm on 8 April 2022.

**Duration of this order**

40. This order remains in force until it is revoked by the Secretary or their authorised delegate or the period of twelve months from the day on which the order takes effect ends.

A handwritten signature in black ink, appearing to read 'David Chandler', with a long horizontal flourish extending to the right.

**David Chandler**  
**Building Commissioner**  
**NSW Fair Trading Department of Customer Service**

**Notes**

- It is an offence to fail to comply with this order. The maximum penalty for a company is 3,000 penalty units and in addition, for every day the offence continues, 300 penalty units. For and individual the maximum penalty is 1,000 penalty units and in addition, for every day the offence continues, 100 penalty units.
- You may appeal to the Land and Environment Court against this order pursuant to s 90 of the Act within 30 days of the notice of the order being given. Lodging an appeal does not stop the order taking effect, unless directed by the Court.