

When a Permit Goes Bad

Imagine this scenario: A homeowner hires you to build an addition, and with permit in hand, you order the materials, hire subs, and start work. At the first inspection, with the foundation poured and the framing up, the code inspector says: "Nice foundation. Nice framing. But you're too close to the rear lot line. Our code requires that residences be no less than 20 feet away from the rear property line and you're within 15 feet. You've got to lose 5 feet of building there." And then he shuts you down.

Along with creating a very bad day, this situation raises several legal questions: Does the building permit offer you any protection, and if not, why weren't you told about the setback requirement when you applied for the permit? Can you talk the authorities into reducing the setback? If not, who's going to pay for redoing that foundation and framing?

A Permit, Not a Guarantee

We'll start with the permit questions. Unfortunately, a building permit does not give you any protection in this situation. A building permit is only permission to start work, not a guarantee that your project will meet all the requirements of the local zoning code. If it were, you wouldn't need follow-up inspections or occupancy permits — you could just get the permit, build the building, and move in.

Most permitting agencies will warn you if your proposed job doesn't meet all the relevant requirements, but sometimes they miss a violation and issue a permit anyway. It might have been that the sketch didn't make it clear the project violated an ordinance, or it might have been that the person who issued the permit just plain didn't realize there was a violation. Unfortunately, the reason doesn't matter: If the job doesn't meet code, the permit won't save you. So what's the solution to this

problem?

Try a Variance

Before you do anything else, consider asking for a variance. Most local zoning boards have a body authorized to grant permission to vary from the code of ordinances. Not every violation falls within their area of decision making, but this particular example — a building too close to the lot line — would, as would many other typical jobs that push the envelope of what local building and zoning ordinances allow.

To get a variance, most jurisdictions require that you demonstrate one or both of the following:

First, you'll need to show that there's something so unique about your project that the code shouldn't be applied to it. For example, you could argue that the property line backs on land that will almost certainly never be used.

Second (or alternatively), you'll have to show that following the code to the letter would create a hardship on you or your client that it would not cause to somebody else. For instance, it may be that your client is confined to a wheelchair and needs the addition located where it is so he can easily get from his car into his house.

The fact that you'll have to spend money to correct your mistake usually does not qualify for a hardship variance, by the way. It won't hurt to ask, though, especially if the fees for applying for a variance aren't too high.

How rigorously the standards are enforced and just how difficult it will be to get a variance depends on how strict your local authority is. Some boards are fairly generous, allowing most anything that meets the spirit or broad objectives of the ordinance in question; others defend the letter of the ordinance fiercely. But asking for a variance is usually worth a try. Local zoning boards typically have a great deal of autonomy,

and if you beg and plead enough, they may feel sorry for you.

Who Pays?

If you can get a variance, great — problem solved. If you can't get a variance, however, you will be facing the ugly question of who will pay for tearing out that part of the addition that protrudes into the setback area (or for some other code violation). Now would be a good time to call your lawyer, because the answer will vary depending upon the laws in your area, the terms of your contract, and the circumstances of your particular situation. A lot will depend on who drew up the plan and, to a lesser extent, who obtained the permit.

Most of the time, the general contractor is responsible for meeting code requirements. However, if you are working from an architect's plan and the plan includes site placement, and you have a warranty from the architect about the suitability of the plan, the architect should be held responsible.

Likewise, if you are working from a plan the homeowner gave you and insisted you follow, if the homeowner warranted his plan to you as suitable, and if the homeowner obtained the building permit, then the homeowner was, in effect, acting as his own general contractor and it is probably the homeowner's problem.

This is not a black-and-white issue, however. If you actually have to go into court, the judge may cast a critical eye on situations where "the expert" (that's you) protects himself with a warranty from the "nonexpert" (that's the homeowner). Such a judge would be asking questions like: Who wrote this contract? Did the homeowner fully understand that he was warranting the suitability of his plan? You can't really depend on a court to back you here.

Finally, the worst situation you could be in is that you were the gen-

eral contractor working with a plan that you designed for the homeowner, executed under a contract that you wrote. You'll almost surely get stuck with the tab in this case.

A Stitch in Time

Obviously, the best solution to this problem is to not have it in the first place. There are two things you should do to prevent such situations.

First, when you write your contract, consider just how much authority and knowledge you actually have before you accept the responsibility for meeting "all local laws." Depending upon the situation, better contract language would give you responsibility only for meeting the requirements of the building code. Particularly if there is an architect or designer involved, or if a knowledgeable customer is giving you a plan to build from, your contract language should pass on appropriate compliance responsibility to the logical parties. You don't want to abdicate your rightful responsibility

(a court probably wouldn't let you, anyway), but you do want to place responsibility where it is due so that you don't get stuck by default with something someone else should have taken care of. Just keep in mind that in any dispute, the burden of proof will probably be on you, as general contractor, to prove that responsibility for complying with a given requirement rests with someone other than yourself.

Second, do your homework before you seek a permit. Look at the project and the site (not just the plan) to determine the areas of regulation that may affect it. Check for legal restrictions you may have to meet beyond those in your building code. These may be restrictions commonly set locally, such as building setbacks, building height restrictions, or limitations on the size and placement of auxiliary buildings. Or these may be restrictions or requirements that apply at state and federal levels, such as accessibility requirements, asbestos or

lead concerns, or special rules relating to historically significant buildings or to environmental features such as rivers or wetlands. As a builder or remodeler, you should be familiar enough with such issues to know when to check for trouble.

Exercise extra caution whenever you're working in a new zoning jurisdiction. Sit down with local building officials and talk to them before you start. But remember that while a well-informed building official or permitting agency can be a big help, the issuance of a permit does not guarantee that the job will meet code. You should either know the code or consult with someone who does. ■

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