

PRACTICE NOTE 25-2018

This updates the previous Practice Note-25-2017 issued September 2017.

Purpose

This Practice Note aims to inform building surveyors on format and procedural matters regarding, emergency orders, building notices, building orders, building orders to stop work and building orders for minor work.

It is also intended to assist private building surveyors (PBS) when referring a building order to the Victorian Building Authority (the VBA). The Practice Note explains the legislation and the VBA's approach to a referred building order, so that the PBS and the VBA can work in a complementary manner to ensure compliance with the legislation.

This practice note is not an exhaustive document that covers every requirement of the related processes and therefore further reference to the relevant legislation is recommended prior to the taking of any statutory actions.

Building Surveyors Responsibilities

A building surveyor has an important role in the building permit system (including enforcement) and must maintain an appropriate professional distance to ensure the system's integrity.

A PBS or municipal building surveyor (MBS) acting as a PBS outside their municipal district has the same power to issue a direction to fix (DTF), building notice or building order as the MBS, The MBS only has power to issue an emergency order under section 102 of the Building Act 1993 (the Act)

within the MBS's municipality. This is provided that the building surveyor has been appointed to carry out a function in respect of the building, land or place under section 76 of the Act (see section 107), therefore acting as the relevant building surveyor (RBS).

Under the Act the MBS has the ability: -

- to make an emergency order (section 102);
- to give a direction to fix (section 37A) (*if acting as the RBS*);
- to serve a building notice (section 106); and
- to make a building order (sections 111, 112 and 113) to bring about compliance; and ensure the safety of people and property within Council's municipal district.

Where non-compliance is found on the building site the RBS must determine whether it is appropriate to issue a DTF Building Work, notice or order, or referring a matter of danger to life or property to the local MBS to consider the issue of an emergency order.

An MBS acting as a PBS is not empowered to issue an emergency order.

Section 115(1) of the Act requires that if a person fails to comply with a building order made by a PBS, the PBS must refer the matter to the VBA and take no further action in respect of the matter. The referral must be made within 14 days after the final date for compliance specified in the order.

The PBS does not cease to be the (RBS) regarding the functions for which they were appointed under section 76 of the Act or in respect of the building order that was referred to the VBA. The PBS continues to be responsible for the functions for which they were appointed.

The reference to a PBS taking no further action in respect of the matter refers to the enforcement of the building order. That is, the word "matter" refers solely to the failure to comply with the building order.

The role of the Private Building Surveyor

The Act does not provide power to the PBS to initiate legal proceedings for prosecution for non-compliance with a building order or to seek orders from the court requiring compliance.

When a building order is referred under section 115 the VBA may direct the PBS (section 205M(1) of the Act) to—

- withdraw the building order if it is not valid;
- amend or cancel the building order, if there has been a change in circumstances; or
- consider the matter and if appropriate issue a new building notice and building order or
- carry out his or her functions under the Act or Regulations

The administrative process of withdrawing, cancelling or amending the building order remains with the PBS.

As the withdrawal, cancellation or amendment of the building order is not the "enforcement" of the order, it does not constitute taking further action in respect of the non-compliance referred under section 115 of the Act.

The VBA must give the RBS written notice of the intention to give a direction and that an

opportunity exists for a submission to be made to the VBA.

The PBS must give written notice to the relevant council of the compliance, amendment or cancellation of the notice or order within 7 days of issue, to satisfy section 125(2) of the Act. It is necessary to provide written notice to council so that council can make property information available to prospective purchasers under regulation 51 of the Building Regulations 2018 (the Regulations). This written notice is not the enforcement of the building order and is not taking further action in respect of the non-compliance.

If the PBS is notified by the owner that the building order has been complied with under section 120 of the Act, the PBS is required to inspect the building work and advise the owner, the relevant council and the VBA of the compliance, if that is the case.

However, if the work has not been fully completed, the PBS can take further action under Part 8 to bring about compliance (including requiring compliance under section 120(2)(b)). In such circumstances, the PBS must advise the VBA of the status of the work.

Only valid building orders referred to the VBA under section 115 will be considered for enforcement. Building orders referred under this section are reviewed by the VBA and if found to be unenforceable, will be returned to the PBS, the most common causes of invalidity are:

- a building notice that does not comply with circumstances specified in section 106;
- premature referrals; i.e. the time permitted for making representations or completing the building work in the have not yet expired;
- incorrect owner details provided or not addressed to the "owner" of the building/land/place,

- the inspection was not conducted by the RBS personally;
- not referring to the year of publication when listing Act, Regulations, NCC or standards;
- references to sections of the Act that do not relate to the process;
- the work described is not building work, such as obtaining an engineer's report. Note, a Building Order may require testing of a material
- not cancelling a Building Notice or Building Order before issuing a new one;
- Building Notice too general and not provided for in s 106;
- the inspection was undertaken months or years before the issue of the Building Notice; and
- directions to owners are confusing, ambiguous or badly worded.

When drafting enforcement action under Part 8 of the Act, it is important that in addition to the observation of circumstances and requirements of relevant sections of the Act, that all building notices and orders also include the prescribed information detailed in regulations 177, 179 and 181 of the Regulations. The Regulations also provide the form of the notice or order in regulations 178, 180 and 182.

The Role of the VBA

The VBA may bring proceedings for an offence against the Act or the Regulations pursuant to section 241(3) and/or seek orders from the court under section 253.

An authorised person as defined under section 37 of the Act can give an oral DTF to a builder or the person in charge of the building work. A written direction can only be given to the builder.

When the VBA inspects a site following the referral of a building order, the VBA is attending to find out whether the matter relates to a life safety issue, or the building

order has been complied with before starting enforcement proceedings. The VBA is establishing the evidence for prosecution purposes and determining whether orders under section 253 should be obtained. In doing this, the VBA is not carrying out the functions of the RBS or a MBS.

Section 205N (1)(b) authorises the VBA to carry out the functions of a MBS relating to any matter referred to it by a PBS under Part 8 of the Act. This does not mean that in respect of every referral, the VBA will utilise this power.

Service of Notices and Orders

Documentation issued under Part 8 of the Act must be served in accordance with section 236 of the Act. It is recommended that consideration be given to the method of service; i.e. service of an emergency order prohibiting occupation of a building may be served by putting the order in a conspicuous location of the building, however, consideration should also be given to serving the order to the owner and/or occupier of the building.

Calculation of the period to determine the date to take further actions should be considered as per section 44 of the Interpretation of Legislation Act 1984. The method of service will influence the calculated period; for example, service by delivering the document to the person will use the following day to begin the calculation however sending the document by post should consider section 49 of the Interpretation of Legislation Act 1984 to determine the start of the calculation period.

Where a building notice or order is to be served on an owner of a lot affected by an owners' corporation, it may be served on an owners' corporation. The owners' corporation is then required to pass on a copy of the notice or order to any affected lot owner. Section 251A of the Act allows an owners corporation to provide

representations under Part 8 of the Act, to authorize a person to carry out work required under a building order. Where the building notice and/or order is served in accordance with section 236(4C) of the Act, the owners corporation must comply as if it were the owner.

When determining the specified period allowed for compliance or to show cause, the MBS or the PBS must consider the gravity of the breach and the extent of work required for rectification. Consideration must also be given to section 146 of the Act in relation to the effect of decisions under appeal and the relevant appeal period in accordance with regulation 271 of the Regulations (30 days).

Summary

It is essential that both the contents and service of, emergency orders, building notices, building orders, building orders to stop work and building orders for minor work are correct. Errors can cause the order to be unenforceable should the matter come before the courts or be referred to the VBA for further action

Where a building order is referred to the VBA by a PBS under section 115, the VBA will advise the PBS if the building notice and building order is unenforceable and recommend that the process be recommenced.

The PBS remains the RBS for carrying out the functions under section 76 for that building project as the RBS in respect of that building order.

If the VBA decides to commence legal proceedings, it is acting under its own power and may not be acting as MBS.

Where building orders are complied with, or must be amended or cancelled, following the request of the VBA, the PBS may be directed to amend or cancel the building order.

If after a building order has been referred to the VBA, there is a change in circumstances which warrants amendment or cancellation of the order (or the issuing of a new order), it is the responsibility of the PBS to inform the VBA.

Appendix A-E provides a link to proforma notices and orders, which have been prepared to give some guidance in the preparation of notices and orders.

Further Information

Want to know more?

If you have a technical enquiry, please email technicalenquiry@vba.vic.gov.au or call 1300 815 127.

Victorian Building Authority
733 Bourke Street Docklands VIC 3008

www.vba.vic.gov.au

Appendix A

Emergency Orders

Danger to Life or Property

An emergency order can only be made by a MBS (not a PBS) who has the authority to deal with urgent safety matters in a timely and efficient manner. An emergency order should be used where, in their opinion a danger to life or property exists out of the conditions or use or proposed use of a building, the land on which building work is being carried out or is proposed to be carried out, or a place of public entertainment. An emergency order applies to more limited circumstances than a building notice and building order. In such circumstances, an emergency order should be issued where there is a sense of urgency in the situation and it is not appropriate to allow for a show cause period.

If a PBS identifies a situation that may require the issue of an emergency order they should immediately notify the relevant MBS.

Where an emergency matter is brought to the attention of an MBS, the powers of entry provided in Part 13 of the Act allow an authorised person to enter a building or land without a search warrant at any time if the safety of the public or the occupants is at risk, or an emergency order under Part 8 of the Act already applies to the building or land.

Under section 124 of the Act, an MBS may request the assistance of a police officer in evacuating a building, land or place of public entertainment in accordance with an emergency order. Police may also provide assistance in removing persons from a building, land or place of public entertainment in or on which the MBS is carrying out work or taking any action in accordance with an emergency order.

Preparation of an Emergency Order

When preparing an emergency order, it is important to ensure that all the correct information is provided, particularly when specifying the reasons for the issue of the order.

An emergency order may:

- direct an owner or occupier to evacuate a building or land or a place of public entertainment and subsequently also direct any person to vacate a building or land or a place of public entertainment within a specified time or times;
- prohibit a person from entering, using or occupying, a building or land or a place of public entertainment unless permitted by the MBS;
- require an owner or occupier of a building or land or place of public entertainment not to conduct, not to allow or immediately cease public entertainment;
- require the ceasing of building work, or require the carrying out of building work or other work necessary to make a building, land or place safe or to secure it from access;
- require an owner to cause an inspection to be conducted by a specified person within a specified time;
- require an owner to cause specified materials used in a building or place to be tested by a specified person within a specified time.

Due to the nature of emergency orders, significant consideration must be given to the specified period in which compliance is to be obtained. This will vary pending the matters under consideration but must comply with section 105A for an Emergency Order under section 103 of the Act.

An emergency order must also contain the prescribed information specified under regulation 177 of the Regulations.

Refer to schedule 4 form 10 of the regulations for the form of an emergency order.

Serving of Emergency Orders

The MBS must cause an emergency order to be served on the person to whom it is directed without delay after it is made, and a copy of that emergency order must also be provided to any PBS appointed to perform a function in relation to that building, land or place to which the order relates. In relation to land, an emergency order may only be served where it is land on which building work is or is proposed to be carried out.

An emergency order referred to in section 103 of the Act 'Orders to vacate' may be served on a person by putting the order in a conspicuous position on the building, land or place of public entertainment to which it applies; see section 236 of the Act for precise details and for the serving of emergency orders under section 104.

Duration of Emergency Orders

An emergency order requiring an owner or occupier to evacuate or any other person to vacate a building, land or place of public entertainment must specify a period, not exceeding 48 hours for the duration of that order. Where the emergency condition is considered as ongoing, an emergency order may also prohibit any person from entering, using or occupying a building, land or a place of public entertainment unless permitted by

the MBS, also for a period not exceeding 48 hours.

However, this 48-hour period may be extended by the MBS by issuing a building notice to show cause why entry into, or the use or occupation of, the building or place that is subject to the order should not be prohibited, prior the end of the 48-hour period. By issuing this building notice the emergency order may remain in force for up to 14 days.

Subject to section 105A of the Act, an emergency order remains in force until it is complied with or it is cancelled by the MBS or the Building Appeals Board.

Appendix B

Building notices

General

A building notice is commonly referred to as a 'show cause' notice which allows an owner of land and/or a building the opportunity to make representations to the RBS before further action occurs.

Subject to section 107 of the Act, an MBS or a PBS appointed to carry out a function under section 76 of the Act may cause a building notice to be served on the owner of a building or land on which building work is being or is proposed to be carried out, or a place of public entertainment.

Building notices can only be served in relation to land upon which building work is being or is proposed to be carried out on that land.

It is essential that the building notice and any subsequent building order are consistent. If the building order contains additional requirements which the owner was not given notice of under the building notice, then the validity of those additional requirements may be challenged. An exception to this is where the RBS modifies the requirements of the building order in response to the representations made by the owner.

Preparation of building notice

When preparing a building notice, it is important that all the information provided is accurate. Specific attention needs to be given to the detailing of the circumstances that gave rise to the requirement to issue the building notice. Such circumstances include:

- building work having been carried out on the building, land or place without a building permit or contrary to what was approved under the building permit;

- building work which contravenes Regulations;
- the use of a building or place which contravenes the Act or the Regulations;
- safety or emergency services, installations or equipment have not been maintained in accordance with the occupancy permit and the Regulations;
- the building or place is unfit for occupation or for use as a place of public entertainment;
- the building, land or place or building work on the building, land or place is a danger to the life, safety or health of any member of the public or of any person using the building, land or place or to any property.

When requesting the owner to show cause, the following queries may be offered pending the matters in contention:

- why entry to, or the use or occupation of the building, land or place should not be prohibited;
- why the owner should not evacuate the building;
- why the owner should not carry out building work, protection work or work required by the Regulations in relation to the building, land or place.

Detail should be provided in relation to specifying the particulars of work that has been carried out or work that is required to be carried out. The VBA recommend that these be numbered in sequence.

When specifying the period in which the show cause response must be provided, the RBS must reflect on the magnitude of the matters under consideration and note that an appeal to the Building Appeals Board may be lodged against:

- the decision to serve a building notice; or
- the failure within a reasonable time, or refusal to cancel a building notice.

A building notice must also contain the prescribed information specified under regulation 179 of the Regulations. Refer to schedule 4 form 11 of the regulations for the form of a building notice.

Serving of a building notice

A building notice may only be served on an owner or an “owners corporation”. Serving on the owners’ corporation is taken to be service on the owner. A building notice referred to in section 108(1) of the Act may be served on the owner by putting the notice in a conspicuous position on the building, land or place of public entertainment to which it applies as per section 236(4A) and (4B) of the Act. A building notice referred to in section 108(1A) of the Act may be served in accordance with other relevant provisions of section 236 of the Act.

Representation by owner

A fundamental aspect of the building notice procedure is that the owner may make representations to the RBS regarding matters contained in the notice as per section 109 of the Act. The manner of making those representations must be specified in the notice.

When the RBS receives representation from the owner within the specified time they must consider and decide whether the representation is acceptable. This determination must be made within a reasonable time.

An owner has rights of appeal to the Building Appeals Board under section 142(1) of the Act in relation to the serving and cancellation of a building notice.

Cancellation of building notice

The RBS may cancel a building notice if considered appropriate to do so after considering representations made under section 109 of the Act.

Appendix C

Building Orders

General

A building order under section 111 of the Act may only be served following the serving of a building notice and only after the end of the period given to the owner in the notice for the provision of representations to the RBS.

If an appeal is lodged with the Building Appeals Board under section 142(1)(a) or (b) of the Act within the prescribed appeal period, then under section 146(1) of the Act the building notice will not take effect until affirmed on appeal. Therefore, if a valid appeal is lodged against the building notice, escalation to a building order under section 111 of the Act should not be considered until the appeal is determined.

The building order is the mechanism by which the RBS may require any one or a combination of matters set out in section 111(3) to (7) of the Act to be carried out.

It is essential that the building notice and building order are consistent. If the building order contains additional requirements which were not specified under the building notice then the validity of those additional requirements may be challenged. The exception is where the RBS modifies the requirements of the building order in response to the representations.

Preparation of building order

When preparing a building order, it is important that all the correct information is provided particularly when specifying the building work or the protection work that is required to be carried out. The VBA suggest that these be numbered in sequence. A statement relating to the failure to provide sufficient representations to the preceding building notice should be included.

A building order under section 111 of the Act may:

- direct an owner or occupier to evacuate a building or land or a place of public entertainment within a specified time or times and subsequently where this order is given, direct any person to vacate a building or land or a place of public entertainment within a specified time or times;
- prohibit any person from entering, using or occupying a building, land or a place of public entertainment for a specified period unless permitted by the MBS;
- direct the owner of a building, land or a place of public entertainment to carry out building work, protection work or other work required by the Regulations in relation to the building, land or place;
- require the owner of a building or land or a place of public entertainment to cause an inspection of that building, land or place to be conducted by a specified person within a specified time;
- require the owner of a building or a place of public entertainment or a builder to cause specified material used in that building or place to be tested by a specified person within a specified time.

As per section 119 of the Act, the RBS should consider any works ordered and whether they will necessitate a building permit or compliance with the Regulations. If a building permit or a specific level of compliance is determined as being required, these must be specified as conditions in the building order and all conditions must be met for compliance to be achieved.

Rights of appeal in relation to the serving of a building order are specified under section 142(2) of the Act. Consideration should be given to the effect of decisions under appeal specified by section 146 of the Act and to any appeal period specified in regulation 271 of the Regulations.

Note that an appeal under section 142(2)(a) of the Act to the Building Appeals Board against the making of a building order prohibiting the occupation of a building or place does not stay the operation of the decision under appeal if the order was made following the making of an emergency order in respect of the same matter.

A building order must contain the prescribed information specified under regulation 181 of the Regulations. Refer to schedule 4 forms 12, 13, and 14 of the regulations for the form of building orders.

Serving of building order

The RBS must cause a building order to be served on the person to whom it is directed without delay after it is made. It must comply with the requirements of both section 114 of the Act and regulation 181 of the Regulations.

Service of documentation must be in accordance with section 236 of the Act. A building order referred to in section 111(3) or (4) may be served on a person by putting the order or notice up in a conspicuous position on the building, land or place of public entertainment to which it applies.

Cancellation of building order

An owner who is required to comply with a building order may if there is a change in circumstances after the service of the order, request the RBS to amend or cancel the building order. Section 116(4) of the Act requires the RBS to inform the owner in writing without delay of their decision.

A building order remains in force, and, if amended, remains in force as amended, until it is complied with or it is cancelled by the RBS or the Building Appeals Board.

Appendix D

Building order to stop building work

Building order to stop building work

A RBS may make a building order that requires the “owner” or “other person” apparently in charge of the site on which building work is carried out, to stop building work under section 112 of the Act. A building order to stop work may be made without first serving a building notice. To issue the building order to stop work the RBS must believe any one or more of the circumstances set out in section 112(2) of the Act exist, these are:

- a contravention of the Act or the Regulations;
- a danger to the life, safety or health of any member of the public or any person using the building, land or place or to any property;
- that work has affected the support of any adjoining property.

Depending on the circumstances some work on a building site may still be able to continue. Section 112(5) of the Act allows building work to be carried out in relation to:

- compliance with an order under section 111 of the Act in relation to the building work;
- compliance with a direction to fix building work;
- building work exempted by the building surveyor under section 112(6) of the Act.

As specified in the last point above, the RBS may exempt some building work from the building order to stop work. For this to occur the RBS must determine that the exempted work is required for one or more of the following:

- it is in the interests of the safety or security of the building, land or place on which the building work is being carried out;
- it is in the interests of the safety or health of any member of the public;
- it is required to prevent a nuisance to members of the public or occupiers of nearby properties.

If the RBS is exempting building work from the operation of the building order to stop work, this work must be clearly identified in that building order.

If the building work to be carried out does not meet one of the requirements of section 112(6) it should not be exempted nor allowed to be carried out until the building order to stop work is cancelled.

An MBS has the further option of dealing with the matter by way of emergency order if appropriate. If the building order to stop work requires all building work on site to cease, no building work may be carried out other than work required by a building order under section 111 of the Act or a DTF.

It is not appropriate to issue a building order to stop building work merely where compliance with the administrative provisions for protection work contained in sections 93-101 of the Act have not been complied with.

When preparing a building order to stop work it is important to specify the particulars of the non-compliant building work or work causing detriment and why the work must stop. The VBA suggests that these be numbered in sequence.

Building orders to stop work must also comply with section 114 of the Act and regulation 905 of the Regulations and may be served on an owner or other person.

If a building order to stop work issued by a PBS is not complied with, section 115 of the Act is applicable and the matter should be referred to the VBA.

A building order must contain the prescribed information specified under regulation 182(2) of the Regulations. Refer to schedule 4 form 13 of the regulations for the form of building orders.

APPENDIX E

Building Order for minor work

Work of a Minor Nature

The building surveyor must first form an opinion that the building work, protection work, or work required by the regulations which he or she proposes to require to be done is of a minor nature. To do this, the building surveyor must first determine whether the work is of a minor nature. The RBS should consider all the circumstances and the context of each case.

For example, something could be considered to be minor work on a development because of the comparative costs, size, extent or importance of that building work against the overall development.

The advantage of using this order is that a building surveyor is not required to issue a building notice or otherwise notify the owner of such order before issuing the order for minor work.

Serving of building order

Section 113 does not say upon whom this type of building order may be served, or against whom it may be issued. However, general principles require orders to carry out work (as opposed to ceasing work) to be served upon the owner of the land or building as generally only the owner has a legal right to do that work.

Completing the building order for minor works

When completing a building order for minor works it is important that all the correct information is provided particularly when specifying the building work or the protection work that is required to be carried out. The VBA suggests that these be numbered in sequence.