

Practice Note 25 – 2017

Notices and Orders

Issued September 2017

This updates the previous Practice Note 25-2016 issued December 2016.

1. PURPOSE

This practice note aims to inform building surveyors on format and procedures 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) referring a building order to the Victorian Building Authority (the VBA). It explains the legislation and approach for a referred building order to ensure 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.

2. BUILDING SURVEYORS RESPONSIBILITIES

A building surveyor has a significant 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 of their municipal district has the same powers to issue a direction to fix (DTF), building notice or building order as the MBS, except for the ability to issue an emergency order under section 102 of the Building Act 1993 (the Act). 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.

The RBS needs to assess the circumstances that require action and determine whether it is appropriate to issue a DTF for building work, a building notice or order, or in the case of an emergency order, referral to the relevant MBS. Section 118A of the Act specifies that building notices and orders are to be only issued when it is clear that the direction will not be complied if a DTF was issued or where it is not possible or not appropriate to issue a DTF.

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 must take no further action in respect of the enforcement of the referred matter under Part 8 – Enforcement of Safety and Building Standards. Subsection (2) requires that the referral must be made within 14 days after the final date for compliance specified in the order.

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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 as per section 118 of the Act.

3. THE ROLE OF THE PRIVATE BUILDING SURVEYOR

The Act does not provide a power for a PBS to initiate legal proceedings to either prosecute 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 of the Act, the VBA may recommend that the PBS —

- withdraw the building order if it is not valid; or
- amend or cancel the building order, if there has been a change in circumstances; or
- reconsider the matter and if appropriate issue a new building notice and building order.

The administrative process of withdrawing, cancelling or amending the building order is not the enforcement of the order and therefore remains the responsibility of the PBS. These processes are not considered as taking further action in respect of the non-compliance referred under section 115 of the Act.

The PBS must give written notice to the relevant Council of the compliance, amendment or cancellation of a building notice or order within 7 days of issue, to satisfy section 125(2) of the Act. It is necessary to provide this information so that Council can provide accurate property information which may be requested under regulation 326 of the Building Interim Regulations 2017 (the Regulations).

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, 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) of the Act. 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 of the Act will be considered for enforcement. Those reviewed by the VBA and 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 under section 106;
- premature referrals; i.e. the time permitted for making representations or completing the building work have not yet expired;
- incorrect owner details provided and not addressed to the owner of the building/land/place of public entertainment;
- the inspection was not conducted in accordance with the legislation;
- not referring to the correct year of publication when listing the Act, Regulations, NCC or standards;
- references to incorrect sections of the Act that do not relate to the process;
- the work described is not building work, i.e. obtaining an engineer's report. Note that a building order may require testing of a material or an inspection of a building, land or place by specified person within a specified time;
- not cancelling a building notice or building order before issuing a new one;
- details provided are too general;
- the inspection was undertaken months or years before the issue of the building notice; and

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- 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 903, 904 and 905 of the Regulations.

4. THE ROLE OF THE VBA

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

An authorised person, as per the definition under section 37 of the Act can give an oral DTF to the builder or the person in charge of the building work and a written DTF 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 whether the building order has been complied with. 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 always carrying out the functions of an MBS.

It should be noted that section 205N (1)(b) of the Act authorizes the VBA to carry out the functions of an 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 that the VBA will utilize this power.

5. SERVICE OF NOTICES AND ORDERS

Documentation issued under Part 8 of the Act must be served in accordance with section 236 of the Act. If question arises to whether the method of service will be effective for that situation, it is recommended that consideration be given to methods 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 be 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 to 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 1601 of the Regulations.

6. 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 an order to be unenforceable should the matter come before the courts or referred to the VBA for further action.

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Where a PBS refers a building order to the VBA under section 115 of the Act, the VBA will advise the PBS if the building notice and/or building order is unenforceable and recommend that the process be recommenced.

The PBS remains the RBS for carrying out the functions under section 76 of the Act for that building work and 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 take necessary action.

Refer to Appendices A-E for further guidance for preparing building notices and orders.

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
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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, there is a danger to life or property out of the condition or use or proposed use of a building, or 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 limited circumstances compared to a building notice and building order. An emergency order should be issued where there is a sense of urgency in the situation and it would not be 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 of the Act.

An emergency order must also contain the prescribed information specified under regulation 903 of the Regulations.

Refer to VBA website for an example of a standard template for an emergency order.

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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 A 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 requirements of the Act or the 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 904 of the Regulations. Refer to VBA website for an example of a standard template for a building notice.

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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.

REPRESENTATIONS 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 NOTICES

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 A BUILDING ORDER UNDER SECTION 111

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.

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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 1601 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 standard template for a building order can be obtained from the VBA website.

SERVING OF A BUILDING ORDER UNDER SECTION 111

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 905 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 A BUILDING ORDER UNDER SECTION 111

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. As per regulation 906(2) of the Regulations a decision must be made within 14 days and as per section 116(4) of the Act the RBS must 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 orders to stop building work

BUILDING ORDERS TO STOP BUILDING WORK – SECTION 112

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 standard template for a building order to stop building work can be found on the VBA website.

APPENDIX E

Building orders for minor work

WORK OF A MINOR NATURE – SECTION 113

The RBS must first form an opinion that the building work, protection work, or work required by the Regulations which they intend to order is of a minor nature. The RBS should consider all the circumstances and the context of each case.

For example, something could 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 the RBS is not required to issue a building notice or otherwise notify the owner of such order before issuing the order for minor work.

A building order for minor work may require building work, protection work or other work required by the Regulations to be carried out.

If a building order for minor work is deemed required, it must be served on the owner of a building, land on which building work is being or is proposed to be carried out or a place of public entertainment.

Before issuing a building order for minor work on an owner it is important to consider section 118A of the Act and whether a DTF issued to the builder would be more appropriate.

When preparing 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.

A building order for minor work must also comply with section 114 of the Act and regulation 905 of the Regulations.

If a building order for minor 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 standard template for a building order for minor work can be found on the VBA website.