

Building Permit and Planning Permit Consistency

This updates the previous Practice Note 2006 - 44 issued May 2011.

1. SUMMARY

This Practice Note has been prepared to assist building surveyors to implement the requirements of section 24 of the Building Act 1993 (the Act) and to provide an integrated approach to the operation of the building and planning systems.

It is intended that this integration of the building and planning systems will ensure, so far as possible, that what is permitted to be built by the building permit is consistent with the development permitted by the planning permit.¹

Subsections 24(1)(c) & (d) of the Act provide that a building surveyor must not issue a building permit unless satisfied that – any relevant planning permit or other prescribed approval has been obtained; and the building permit will be consistent with that planning permit or other prescribed approval.²

¹ It must be recognised that carrying out development contrary to the requirements of a planning scheme is an offence under the Planning and Environment Act 1987. Carrying out work contrary to the planning scheme could result in the owner, and the person who carried out the development, being prosecuted under the Planning and Environment Act 1987, or being required to remove development not authorised under the scheme.

² At this stage, no other approvals are prescribed.

If a planning permit is required for the proposed building work, and has not been obtained, the RBS must refuse to issue the building permit until that planning permit is obtained.

In determining whether the proposed building work will be consistent with any relevant planning permit, the RBS should have regard to the requirements of the planning permit, including conditions, commencement and completion dates and endorsed plans.

Minister's Guideline MG/11, sets out requirements for steps to be taken by a municipal building surveyor or private building surveyor to establish whether a relevant planning permit has been obtained and ensuring proposed building work is consistent with the relevant planning permit.

This Practice Note provides additional guidance on how an RBS should establish whether a planning permit is required for proposed building work and, if so, whether the building permit will be consistent with that planning permit.

2. WHY IT IS IMPORTANT TO HAVE AN INTEGRATED APPROACH TO THE OPERATION OF PLANNING AND BUILDING SYSTEMS

Planning schemes set out requirements for use and development of land –

- without the need for a planning permit, provided that conditions specified in the scheme are met; or

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- in accordance with a planning permit, which will usually include conditions.

Conditions are included in planning schemes and permits to ensure that projects:

- will fit into their locality
- will not cause adverse impacts on the environment
- will not adversely affect nearby activities
- will not create traffic hazards

In many cases, the conditions included in a planning permit will have been determined by the responsible authority or the Victorian Civil and Administrative Tribunal (VCAT) as a result of extensive local consultation. These conditions can encompass a locally agreed (or arbitrated) solution to conflicting interests. It is therefore essential that new buildings are built to comply with any specified conditions.

Construction of a building or works without a planning permit (when a planning permit is required), or failure to comply with any requirements in a planning permit or in the planning scheme, is an offence against the Planning and Environment Act 1987. Under section 126 of that Act, a person who uses or develops land and the owner and occupier of the land, are guilty of an offence if land is used or developed in contravention of a planning scheme, planning permit or agreement between the owner and the responsible authority under section 173 of the Planning and Environment Act 1987. Penalties for such an offence are severe – up to 1200 penalty units for an offence, and 60 penalty units for each day during which the contravention continues after a conviction.

The responsible authority or other person affected by a breach may obtain an Enforcement Order from the Victorian Civil and Administrative Tribunal. An Enforcement Order may direct that any breach be rectified – in a serious case, the building could be required to be removed or substantially modified.

Building surveyors should be aware that if they fail to comply with section 24(1)(c) and (d) of the Act a client relying on the building permit may be able to seek significant civil damages through the courts if the resultant building work becomes the subject of prosecution or enforcement action under the Planning and Environment Act 1987.

The Building Practitioners Board (BAB) can also be expected to view seriously any action by a building surveyor to approve building work contrary to these requirements.

3. ESTABLISHING WHETHER A PLANNING PERMIT IS REQUIRED FOR PROPOSED BUILDING WORK

To comply with the requirements of the Act, before issuing a building permit the building surveyor needs to establish whether a planning permit is required to carry out the proposed building work.

One or more of the following steps should be followed, depending on the circumstances of the case, its complexity and the implications of wrongly concluding that a planning permit is not required.

In deciding what steps to take, the building surveyor should take into consideration that responsibility for compliance with section 24 of the Act rests with the building surveyor.

Refer directly to the planning scheme

The provisions of the relevant planning scheme will determine whether or not a planning permit is required for proposed building work. All provisions of the relevant planning scheme must be considered. Guidelines on how to use a planning scheme to determine whether a planning permit is required for proposed building work are outlined in Appendix 1 to this Practice Note.

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Submit a property inquiry form to the municipal council

A building surveyor may make an inquiry to the relevant municipal council using the Referral to Relevant Council form as attached. This form asks the council whether a planning permit is required for the proposed work. This is not part of the prescribed information that must be supplied in accordance with regulation 326 of the Regulations, but many councils are prepared to supply this information in straight-forward cases. A council cannot be expected to answer this question unless the referral contains enough information about the land and the proposed work to allow it to make an informed assessment of the situation.

If the council is not prepared to give this advice in response to an inquiry using this form, the building surveyor will need to take other steps to establish whether a planning permit is required for the proposed work.

Consult with the Relevant Responsible Authority

An officer familiar with the planning scheme should confirm whether a particular project:

- does not require a planning permit (this may be subject to certain conditions being met); or
- requires a planning permit; or
- is prohibited by the planning scheme

If a building surveyor relies on such advice, it is important to note –

- the officer's name;
- the officer's position;
- the date on which the advice was given;
- the details of the building work proposed (this may include reference to specific plans discussed); and
- details of the advice given, including any qualifications on that advice, such as conditions which must be complied with or matters which must be considered to the satisfaction of the responsible authority.

Detailed notes of any discussion should be made at the time of the discussion, and agreed between the building surveyor and the officer who gave the advice. Notes will have greater value in the case of any later dispute if signed and dated by the officer who gave the advice as well as by the building surveyor.

These notes should be kept with the building permit documentation.

Obtain independent professional advice

A building surveyor can obtain advice from a person qualified and experienced in reading planning schemes – for example, a solicitor with experience in planning matters, a planning consultant, or another building surveyor with appropriate qualifications and experience. There is no system of registration for planning consultants. A building surveyor who intends to rely on advice needs to ensure that the person is appropriately qualified and has professional indemnity insurance. A building surveyor should choose a source of professional advice carefully, remembering that the responsibility for compliance with section 24 of the Act remains with the building surveyor.

Obtain a Certificate of Compliance from the Responsible Authority

A Certificate of Compliance is a document issued under Part 4A of the Planning and Environment Act 1987 which states that either –

- an existing use or development of land complies with the requirements of the planning scheme at the date of the certificate; or
- a proposed use or development (or part of a use or development) of land would comply with the requirements of the planning scheme at the date of the certificate.

The second point (section 97N(1)(b) of the Planning and Environment Act 1987) is the provision relevant to a building surveyor attempting to establish whether a proposed

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project may be undertaken without the need for a planning permit. A Certificate of Compliance is the most definitive statement that a particular building project may be undertaken without a planning permit at the date of the certificate. The responsible authority would require full details including appropriate plans of what is proposed. There is a prescribed fee for an application for a Certificate of Compliance. In responding to an application for a Certificate of Compliance referred to in section 97N(1)(b) in respect to proposed use of land, or building or other work, the responsible authority:

- may specify in a Certificate any part of the use or development which would require a planning permit or is prohibited under the planning scheme at the date of the Certificate; and
- must refuse to issue a certificate if the whole of the use or development would require a planning permit or is prohibited under the planning scheme.

An applicant for a Certificate of Compliance may apply to VCAT for review if a Certificate is not issued within 30 days or if a Certificate is refused (Refer to Planning and Environment Act 1987, section 97P(1)). However, if the application for a Certificate is refused on the ground that a planning permit is required; the building surveyor should advise the client to apply for a planning permit.

4. DETERMINING WHETHER THE PROPOSED BUILDING PERMIT WILL BE CONSISTENT WITH THE PLANNING PERMIT

If a planning permit is required for the proposed building work, and has been obtained, the relevant building surveyor (RBS) should obtain copies³ of the following:

³ The building surveyor or applicant should endeavour to obtain a copy of the documentation from the owner, or other person who obtained the permit. Only if the owner or other person cannot provide this documentation should the responsible authority be asked to provide a copy.

The planning permit;
The plans endorsed by the responsible authority as part of that planning permit; and

- Any documents referred to in the planning permit (including plans, reports, drawings, plans of subdivision or agreements under section 173 of the Planning and Environment Act 1987).

In determining whether the building permit will be consistent with the planning permit, the RBS should –

1. compare the plans lodged with the application for the building permit with those plans endorsed by the responsible authority as part of the planning permit and any documents referred to in the planning permit that have a direct bearing on the proposed building permit, to ensure that they are consistent; and
2. confirm that all planning permit conditions relevant to the building permit that are required to be completed prior to commencement of the development have been complied with.

The relevant building surveyor's assessment of consistency between the building permit and the relevant planning permit should include (but not be limited to): -

- a) the height, area, form and configuration of the proposed building work or any part of the building work;
- b) the location of the proposed building on the land, including setbacks from boundaries; the location of windows, doors, and privacy screens;
- c) any conditions of the planning permit that have specific construction requirements or that require specification construction details; and
- d) the proposed use of the building work.

5. WHAT IF THE RBS IS UNSURE WHETHER THE PROPOSED BUILDING WORK IS CONSISTENT WITH THE PLANNING PERMIT?

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If the RBS is not sure whether the proposed building permit will be consistent with the relevant planning permit, he/she should, before deciding the application for the building permit, seek a written report confirming consistency or identifying any inconsistency between the planning permit and the proposed building permit from any one of the following:

- the responsible authority (in most cases, the relevant council);
- an appropriately qualified and experienced planning consultant; or
- an architect experienced in planning matters.

As is the case in determining whether a planning permit is required for a particular building project, the primary responsibility for determining whether or not a proposed building permit is consistent with a planning permit rests with the RBS. The appropriate step to be followed or source of advice in any case to resolve doubt must be determined by the building surveyor depending on the circumstances of the case, including the implications of acting on a wrong assessment of the planning permit requirements.

If the RBS seeks such a written report before issuing a building permit, a copy of the report should be provided to the relevant council with the building permit documentation within 7 days of issuing the building permit.

6. HOW DOES THE BUILDING SURVEYOR RESOLVE MINOR INCONSISTENCIES BEFORE ISSUING A BUILDING PERMIT?

If the building surveyor proposes to issue a building permit which incorporates minor inconsistencies with the planning permit and which do not breach planning permit requirements relating to the four points noted in section 4 of this Practice Note, the building surveyor should provide written advice to the

responsible authority on the nature and extent of those inconsistencies⁴.

The building surveyor should obtain confirmation from the responsible authority that construction of the building in accordance with the proposed building permit would not breach the requirements of the Planning and Environment Act 1987. If this confirmation cannot be given, the building surveyor should, before issuing a building permit, advise the client to resolve the inconsistency. Appropriate steps which may be taken include:

- Modify the building plans to ensure that they are consistent with the planning permit.
- Ask the responsible authority to modify the plans endorsed as part of the planning permit. Most planning permits provide to the effect that development must be in accordance with endorsed plans, but provide that the responsible authority may agree to amend the plans. Amendment to the endorsed plans, without actually amending the planning permit, will cover many situations of minor variation from the plans endorsed at the time the planning permit was issued. Responsible authorities will usually agree to minor variations to endorsed plans, provided that the changes do not increase impacts on adjoining properties or have other adverse effects.
- Ask the responsible authority to make a minor amendment to the planning permit, in accordance with sections 72 to 76 of the Planning and Environment Act 1987.
- Apply for a new planning permit.

⁴ Providing this information to the responsible authority does not affect, or meet the requirement, to supply the information when forwarding the relevant council a copy of the permit as required by section 30 of the Building Act 1993.

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- Apply to VCAT in accordance with sections 87 – 92 of the Planning and Environment Act 1987 to vary the planning permit. While possible under that Act, such action is appropriate only in special cases, and should be initiated only after consultation with the responsible authority. The use of expert legal and planning advice is strongly recommended.

WHAT IF THE BUILDING PERMIT NEEDS TO BE AMENDED?

The provisions of the Act apply to an amended building permit in the same way as to a new permit being issued. If a building surveyor proposes to amend a permit, it is important to check that the permit as amended will be consistent with the requirements of a relevant planning permit and does not otherwise breach the planning scheme. The steps described above to ensure consistency, and to resolve potential inconsistency, are equally applicable to amendments to building permits.

If you have a technical enquiry please email:

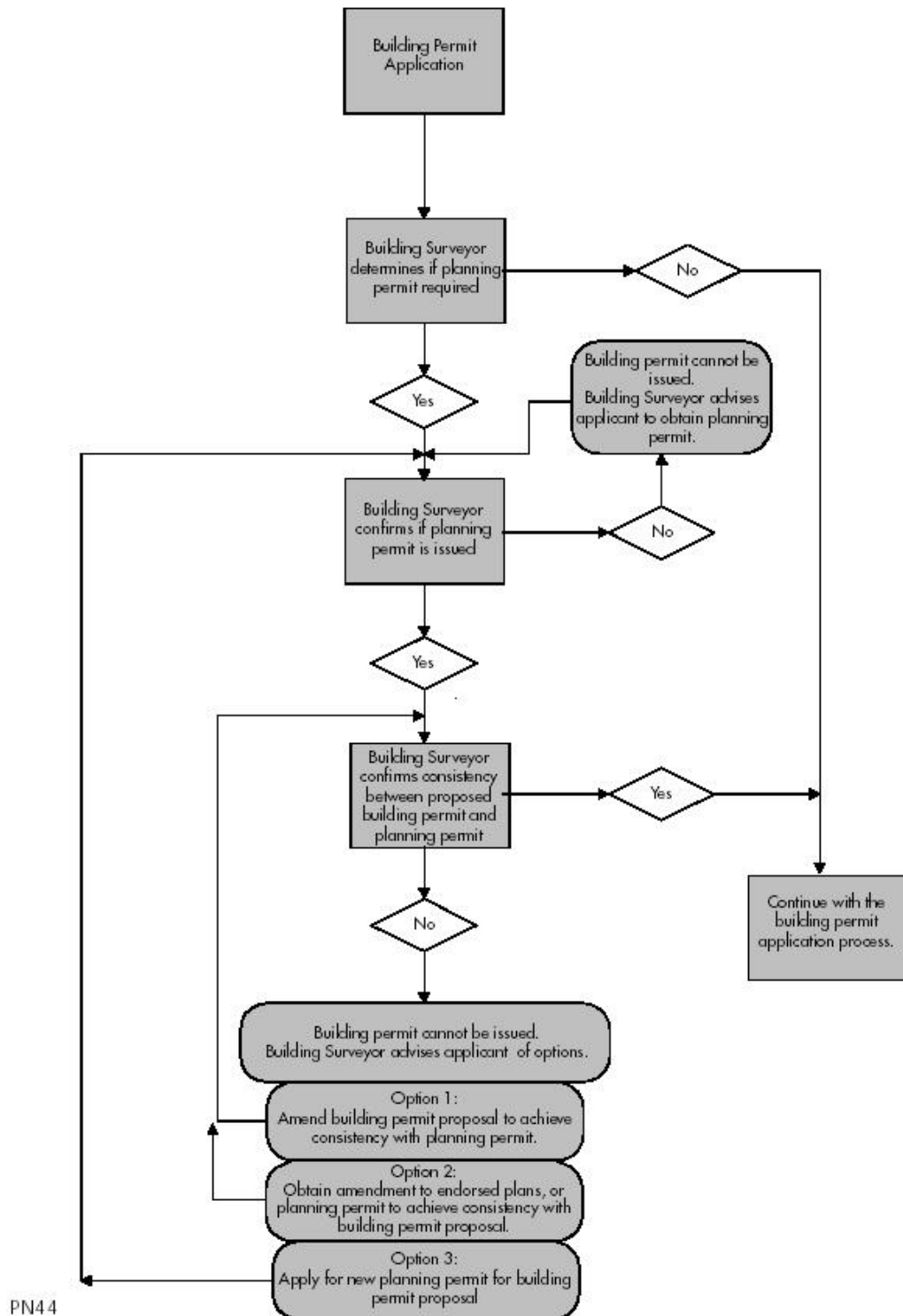
technicalenquiry@vba.vic.gov.au or phone

1300 815 127

Victorian Building Authority

733 Bourke Street Docklands VIC 3008

Diagram 1
The process for ensuring consistency between planning and building permits



APPENDIX 1

How to find out from a planning scheme whether a planning permit is required for proposed building work

Despite efforts to standardise and simplify planning schemes, they remain quite complex documents, and a building surveyor may need to obtain expert assistance either from officers of the responsible authority (usually the council), or from another consultant, in interpreting the scheme requirements. It is often not difficult to establish that a permit is required for proposed building work; it is more complex to establish definitively that a permit is not required.

In some cases a permit for work will not be required under the planning scheme, provided certain conditions are met. If the conditions are not met, a permit will be needed, or the work could be prohibited.

1. The structure of planning schemes

All planning schemes in Victoria have a similar structure. Generally, each planning scheme covers a municipality, and is administered by the responsible authority, usually the municipal council.

Maps indicate the zone which applies to any parcel of land. In addition to the zone, one or more overlays may also apply.

The meaning of each zone and overlay is set out in the text of the planning scheme. Clauses 31 to 37 set out the zones, and Clauses 41 to 45 set out the overlays. Refer to the contents at the beginning of the scheme to readily see which clause refers to the relevant zone and overlays.

2. Reading zone provisions

Each zone has a Table of uses, divided into three sections: These set out:

In Section 1, uses for which no permit is required provided any conditions in the Table are met. If the conditions are not met, the use usually requires a permit.

In Section 2, uses which may be carried on if a permit is granted. There may be conditions; if these are not met, the use is prohibited. In Section 3, uses which are prohibited in the zone.

These Tables must be read in conjunction with the definitions included in the Scheme (Clauses 71 to 74, particularly the land use terms in Clause 74).

In some zones (for example, all the Residential zones) a permit is required to construct a building or carry out works for a use in Section 2 of the Table. In other cases (generally, Business and Industrial zones), a permit is required to construct any building or carry out any works, even for a use which is in Section 1 of the Table. In other cases (for example, Rural zones) there are more specific requirements. In each zone, check the sub-clause headed "Buildings and works".

While the basic requirements of each zone are uniform between planning schemes, many zones also include a Schedule. The Schedule sets out provisions which are specific to the particular planning scheme.

It is important to note that land must not be developed unless the land as developed can be used in accordance with the scheme. (Clause 61.05). Constructing a building is one form of "development" (Planning and Environment Act 1987 Section 3, definitions).

3. Reading overlay provisions

The requirements of any overlay apply in addition to those of a zone. Commonly, an overlay will provide that a permit is required to

construct a building or carry out works.

It may then set exemptions to this. Some requirements or exemptions specific to a particular locality may be in a Schedule to the overlay. Any Schedule must be read in the context of the standard provisions.

The Heritage overlay provides that a permit is required for many forms of building work which would not otherwise be controlled by the planning scheme – in particular, to demolish or remove a building, to internally alter a building if the Schedule identifies the building as one to which internal alteration controls apply, and for certain painting and decoration works.

4. Other parts of the planning scheme

There are also provisions relating to specific uses listed in Clauses 51 to 52.30. Only some of these are relevant to buildings, but if you have an application which relates to one of these uses, check the relevant clause.

Some schemes include land in a Schedule to Clause 52.03, Specific sites and exclusions. In the unusual case of an application on a site affected by such a Schedule, refer carefully to the provisions of the Clause and Schedule, and any plans referred to.

Certain buildings and works do not require a permit unless a permit is specifically required under the zone or overlay provisions. Some of those most likely to be relevant to building work are:

- A fence
- A temporary shed or temporary structure for construction purposes

The internal rearrangement of a building or works provided the gross floor area of the building, or the size of the works, is not increased Repairs and routine maintenance to an existing building or works

The full list is set out in Clause 62.02.

A permit is not required for the demolition or removal of a building or works unless a permit is specifically required for demolition or removal (Clause 62.05). A permit is specifically required for such on land in a Heritage overlay. (refer Practice Note 2011-43)

1. Other approvals under the planning scheme

Some provisions of planning schemes allow land to be used or developed without the need for a permit, provided that specified matters are carried out to the satisfaction of the responsible authority. If this requirement is not met, work may need a permit under the scheme, or may be prohibited.

In these cases, the building surveyor may ask the responsible authority if the specified matters have been or will, if work is carried out in accordance with submitted plans, be to its satisfaction. There is a prescribed fee (currently \$102) for determining whether a matter has been done to the satisfaction of the responsible authority.

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FORM

*RESPONSE FROM RELEVANT COUNCIL

To Relevant Council.....

PROPERTY DETAILS

Number:..... Street/Road:..... City/Suburb/Town:.....
Lot/s:..... LP/PS:..... Volume:..... Folio:.....
Crown Section:..... Parish:..... County:.....
Allotment:

Brief Description of Proposed Building Work/Proposed Use of Land including plan
.....

Yes	No			Specified flood level	...AHD
Flood prone land					
Termite area					
Alpine area					
Bushfire prone area					
Designated land uncontrolled overland drainage					
Is a planning permit required for the building work/use				Further Information required	<input type="checkbox"/>
If a planning permit is required has it been obtained				If yes	Permit No.....

Street type: Declared Road Other

Storm water drainage – point of discharge

Storm water details	Rear	Side
Offset		
Diameter		
Depth		

Additional information:.....
.....

Council Co-ordinating Officer/Contact:.....

FROM (RETURN TO)

Relevant building surveyor/Contact:.....

Postal Address:..... Postcode:.....

Fax No:..... Phone No.:.....

*This form modifies the form included in Practice Note