

PRACTICE NOTE 43-2018

This updates the previous Practice Note 2014-43 issued April 2014.

Purpose

Sections 29A and 29B of the Building Act 1993 (the Act) specify the requirements that need to be considered in relation to the demolition of buildings.

The provisions:

- require the report and consent of the relevant responsible authority in relation to certain applications for a building permit for demolition; and
- enable the suspension of certain applications for a building permit for demolition, pending amendment of planning schemes.

The Building Regulations 2018 (the Regulations) also prescribe the following:

- a time limit for a responsible authority to respond; and
- a fee for applications for report and consent.

This practice note describes how a building surveyor should:

- decide whether an application needs to be referred to the responsible authority for report and consent;
- refer applications which require referral; and
- deal with applications if the responsible authority advises that:
 - the planning authority has asked the Minister for exemption from certain notice requirements in preparing a planning scheme amendment which would require that a permit be obtained for that demolition; or

- a request has been made to the Minister to prepare such an amendment without notice.

How to determine whether a report and consent is required

The report and consent of the relevant responsible authority under the *Planning and Environment Act 1987* (usually the relevant council) will be required for an application for a building permit for demolition, if:

- the proposed demolition, together with any other demolition completed or permitted within the period of 3 years immediately preceding the date of the application would together amount to the demolition of more than half the volume of the building as it existed at the date of the first building permit to be issued within that period for the demolition of any part of the building; or
- the demolition is of any part of a facade of a building if that facade faces the street.

Both the volume test and the facade test should be applied when considering whether report and consent of the relevant responsible authority is required.

For the purposes of this requirement, facade and street are defined in section 29A(3) of the Act.

Facade means—

- an external wall, including any veranda, balcony, balustrade or architectural feature attached to or forming part of an external wall; or
- a part of a roof; or

- a chimney –

that faces a street and at least part of which is visible from the street it faces;

Street includes road, highway, carriageway, square and court.

Lanes, footways, rights of way and driveways are not included. This ensures, for example, that the demolition of part of a building facing a side or rear lane is not subject to report and consent unless it meets the volume test.

Where a building faces two streets (such as a building on a corner block), the demolition of any part of either facade facing either street is subject to report and consent.

While vegetation, fences and other structures may partially obscure a building from the street, as long as part of the facade can be seen from the street, demolition will require report and consent. If a building is totally obscured from the street, demolition of its facade will not require report and consent. It is intended that a relevant building surveyor should consider reasonable vantage points in the facing street to determine visibility. These may include, but are not limited to, the view from a driveway where it meets the street, or the footpath on the opposite side of the street.

Demolition is not defined in the Act or the Regulations. For the purpose of sections 29A and 29B of the Act, ‘demolition’ is to be widely interpreted to include any work involving permanently removing part of an existing building. Some alterations may involve some form of demolition, for example:

- removing a redundant chimney;
- removing part of a building to make way for an addition.

These forms of ‘demolition’ are to be referred to the responsible authority only if they meet the criteria of the tests set out in section 29A of the Act, as described above.

Any application for a building permit where proposed alterations entail demolition work will require report and consent of the relevant responsible authority, if the proposed demolition meets the criteria set out in either the volume or the facade test.

Schedule 3 to the Regulations exempts certain building work from the need for a building permit subject to certain conditions. Removing old materials and replacing them with materials commonly used for the same purpose such as non-structural repair of roof cladding, wall cladding, or windows are examples. Refer to Appendix One – Demolition Procedures flow chart.

What if a planning permit is required for the proposed demolition?

To comply with the requirements of section 24 of the Act, the building surveyor will need to establish whether a planning permit is required for demolition. A Heritage overlay in the planning scheme generally provides that a planning permit is required for demolition.

If the planning scheme provides that a planning permit is required to demolish a building or part of a building, and that permit has not been obtained, then in accordance with section 29A(2) of the Act, the responsible authority must refuse its consent to an application for a building permit to demolish a building. Further, issuing a building permit without a required consent would be a breach of section 24 of the Act. Section 24 of the Act also covers a situation where a planning permit is required for the proposed demolition and has not been obtained, or a planning permit has been obtained but the proposed building permit would not be consistent with that permit.

The building surveyor should explain the situation to the applicant, and suggest that the application for the building permit be withdrawn and a planning permit for the proposed demolition be sought.

This will save the applicant from the delay and cost of an application for a report and consent that cannot be granted.

The same procedure should be adopted where a planning permit is required for demolition work but has not been obtained even if a planning permit has been obtained to use and develop the site.

The Act requires that even if a planning permit has been granted for demolition, the building surveyor must refer an application for demolition to the responsible authority for its report and consent. This is to allow the responsible authority to ensure that the demolition proposed in an application for a building permit is exactly the same as that permitted by the planning permit. In this case, the responsible authority must not refuse its consent to the application.

What should be included in an application to the responsible authority for Report and Consent?

An application for report and consent should be made on the recommended form, accompanied by a copy of the full application for a building permit. It is helpful to include any plans and photographs which enable the responsible authority to readily appreciate the nature of the demolition work. If only part of a building is being demolished, a plan which clearly indicates the extent of the proposed demolition, together with a plan indicating the extent of demolition which has taken place within the previous three years, will also assist the responsible authority.

How long do responsible authorities have to provide Report and Consent?

Responsible authorities are required under regulation 34 of the Regulations to provide the report and consent within 15 business days. The 15 business days start from receipt of a copy of the application by the responsible authority from either the relevant building surveyor or the applicant.

The day the request is lodged is not included in the 15 business days.

What if a responsible authority fails to respond within 15 days?

In accordance with clause 6A of Schedule 2 to the Act, the relevant building surveyor may proceed to decide an application without a report from the responsible authority if the report is not supplied within the prescribed time of 15 business days.

After this time, a reporting authority is deemed to have consented to the application, except in the circumstances of section 29A(2) of the Act, where a planning permit is required for the demolition but has not been obtained. In that case, the reporting authority is taken to have refused its consent.

If a responsible authority does not respond within the prescribed time, it is therefore essential to establish whether a planning permit is required for the demolition and if so, whether it has been obtained. The application can then be decided by the RBS in accordance with the deemed consent or refusal of the reporting authority.

The relevant building surveyor may seek advice about whether a planning permit is required for the proposed demolition. Refer to Minister's Guideline MG-11 – Building Permit and Planning Permit Consistency and Practice Note 44 – Building Permit and Planning Permit Consistency, for guidance about establishing whether a planning permit is required or has been obtained.

Suspension of application for a building permit for demolition

If during the prescribed time for report and consent:

- the relevant planning authority applies to the Minister for Planning for an exemption from the requirement to give notice (section 20(1) of the

Planning and Environment Act 1987) about an amendment to the planning scheme to the effect that the relevant building may not be demolished or externally altered except in accordance with a permit under the planning scheme; or

- the Minister for Planning is asked to make an amendment to the effect that the relevant building may not be demolished or externally altered except in accordance with a permit under the planning scheme,

the responsible authority must give written notice to the relevant building surveyor without delay.

The building surveyor must then suspend the application for a demolition permit. At this point the prescribed time within which the relevant building surveyor must decide the application for a permit ceases to run (that is, the application ‘time clock’ is stopped).

If the Minister agrees to exempt a planning authority from the notice requirements of the *Planning and Environment Act 1987* in accordance with these provisions, or amend the planning scheme as requested, the Minister will advise the relevant planning authority / responsible authority of this decision.

The responsible authority must without delay give written notice to the relevant building surveyor if any of the following occur:

- withdrawal of the request by the planning authority for exemption from notice, or of the application for an amendment by the responsible authority to the Minister;
- refusal by the Minister of the request by the planning authority for exemption, or the Minister’s refusal of an application for an amendment to the planning scheme;
- coming into operation of an amendment to the planning scheme

having the effect of requiring that a planning permit be obtained to demolish or alter the building;

- lapsing of an application for an amendment to the planning scheme.

On receipt of any of these notices, the time within which the relevant building surveyor must decide an application for a permit recommences.

If the planning scheme is amended so as to require that a planning permit must be obtained for demolition in relation to the land on which the building is located, the responsible authority must refuse consent to the application, and a building permit for demolition may not be issued until such planning permit is issued and subsequently report and consent is obtained.

Places included on the Victorian Heritage Register

Section 28(4) of the Act requires that the report and consent of the Executive Director under the *Heritage Act 2017* must be obtained for an application to demolish or alter a building which is on the Victorian Heritage Register. No fee is prescribed under the Regulations for this report and consent.

Generally, places which are on the Victorian Heritage Register are included in a Heritage overlay of the relevant planning scheme. No planning permit is required under this overlay to develop a heritage place which is included on the Register if either:

- a permit for the development has been granted under the *Heritage Act 2017*; or
- the development is exempt under section 92 of the *Heritage Act 2017*.

A planning permit may still be needed under other provisions of the planning scheme – for example, to carry out development for a use in section 2 of the zone table – but these other controls do not usually control demolition.

Even if an application relates to a place on the Victorian Heritage Register, the requirements of section 29A of the Act to refer certain applications involving demolition work to the responsible authority must still be complied with.

Fee for report and consent

The Act requires that when a copy of the application for report and consent is forwarded to the responsible authority under section 29A, it be accompanied by the prescribed fee. The prescribed fee will also apply where an applicant applies directly for the report and consent. The maximum fee that the reporting authority can charge is prescribed under regulation 36(1).

There is no fee for an application for report and consent made under section 28(4) of the Act to the Executive Director under the *Heritage Act 2017* in relation to places included on the Victorian Heritage Register.

Forms

In order to facilitate responses from responsible authorities, it is recommended that relevant building surveyors and relevant responsible authorities use the following forms:

Form A: *'Request under section 29A of the Building Act 1993 for report and consent on proposed demolition'* (for building surveyors to refer a matter for report and consent).

Form B: *'Response under section 29B(1) of the Building Act 1993 to a request for report and consent to proposed demolition'* (for responsible authorities to use when notifying a building surveyor of the result of a referral for report and consent).

Form C: *'Notification of result of proposed amendment to Planning Scheme section 29B(3) of the Building Act 1993'* (for responsible authorities to use when notifying building surveyor of outcome of application to the Minister for an amendment to the planning scheme).

Further information

Refer to VBA website for relevant forms.

Want to know more?

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

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Appendix One

Demolition procedures flow chart

