

Building Practice Note DE-01: Demolition of Buildings - Section 28 and 29A

This Practice Note provides guidance on sections 28, 29A and 29B of the Building Act 1993 (Act) relating to an application for a building permit to demolish a building.

The content below provides guidance on:

- Determining whether a report and consent is required
- When a planning permit is required for proposed demolition
- What should be included in an application to the responsible authority for report and consent?
- How long does the responsible authority have to respond?
- What if a responsible authority fails to respond within 15 days?
- Suspension of application for a building permit for demolition
- Places included on the Victorian Heritage Register
- Fee for report and consent

Abbreviations & Definitions

The abbreviations and definitions set out below are for guidance only. They are not intended to vary those set out in the Building Act 1993 (the Act) or the Building Regulations 2018 (the Regulations).

- **Act** – Building Act 1993
- **PEA** – Planning and Environment Act 1987
- **RBS** – Relevant Building Surveyor
- **Regulations** – Building Regulations 2018
- **Section** – section of the Building Act unless indicated otherwise

Introduction

Section 28 of the Act requires the report and consent of the Executive Director under the Heritage Act 2017 to be obtained to an application to demolish or alter a building which is on the Victorian Heritage Register.

Sections 29A and 29B of the Act:

- require the report and consent of the responsible authority under the Planning and Environment Act 1987 (PEA) 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 Regulations also prescribe:

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

When considering an application for a building permit to demolish a building, the RBS must take the following actions:

- decide whether an application needs to be referred to the responsible authority for report and consent;
- refer an application which requires referral; and
- suspend consideration of the application if the responsible authority provides written notice that:
 - an application has been made to the Minister for exemption from certain notice requirements in preparing a planning scheme amendment which would require a planning permit to be obtained for that demolition; or
 - a request has been made to the Minister to prepare such an amendment without notice.

Determining whether a report and consent is required

Prior to the demolition of a building, it is essential to obtain the report and consent of the responsible authority under the PEA (usually the relevant council) to an application for a building permit, 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 (section 29A(1)(a)); or
- the demolition is of any part of a facade of a building if that facade faces the street and is at least partly visible from the street it faces (section 29A(1)(b)).

Both the volume test and the facade test should be applied when considering whether report and consent is required. For the purposes of this requirement, facade and street are defined in section 29A(3) of the Act, as follows:

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, carriage way, 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 under section 29A(1)(a).

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, if part of the facade can be seen from the street, demolition will require report and consent.

For example, if a building is totally obscured from the street, demolition of its facade will not require report and consent. It is intended that the RBS 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, 'demolition' is interpreted to include any work involving permanent removal of 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.

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.

Under Schedule 3 – Exemptions for building work and buildings of the Regulations, certain building work is exempted from the need for a building permit subject to certain conditions. For example, 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.

When a planning permit is required for proposed demolition

To comply with the requirements of section 24 of the Act, the RBS 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 also 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 the building. Further, issuing a building permit would be a breach of section 24 if—

- a required consent has not been obtained
- 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 RBS 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 first. 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 RBS 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 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?

It is critical that an application for report and consent should be made on the council recommended form, accompanied by a copy of the full application for a building permit. It is helpful to include plans that include existing and proposed works and any photographs which enable the responsible authority to readily assess the nature of the demolition work.

For example, 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 assist the responsible authority.

How long does the responsible authority have to respond?

A responsible authority is required under regulation 34 to respond to an application, or referral, for report and consent within 15 business days after receipt of a copy of the application by the responsible authority from either the relevant building surveyor or the applicant. This prescribed time ensures that there is a timely response.

The 15-business day period does not include the day the request is lodged, a Saturday, Sunday or any day that is a public holiday throughout Victoria.

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

If there is no response within the prescribed time, it is recommended that the responsible authority is contacted to ascertain the reason for delay.

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, the responsible authority is deemed to have consented to the application, except where a planning permit is required for the demolition but has not yet been obtained. In that case, the responsible authority is taken to have refused its consent.

If a responsible authority does not respond within the prescribed time, it is 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 responsible authority.

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

Suspension of application for a building permit for demolition

If, during the 15-business day period for consideration of an application 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 PEA) 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.

This may occur, for example if a building is considered to have architectural significance.

On receipt of a notice from the responsible authority, the RBS must suspend consideration of the application for the demolition permit in accordance with section 29B(2). At this point, the prescribed time within which the RBS must decide the application for a permit under regulation 35 ceases to run.

If the Minister agrees to exempt a planning authority from the notice requirements of the PEA in accordance with these provisions, or amend the planning scheme as requested, the Minister will advise the planning authority / responsible authority of this decision.

The responsible authority must without delay give written notice to the RBS 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 written notices, the time within which the RBS must decide an application for a permit recommences.

If the planning scheme is amended 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 must not be issued until such planning permit is issued and subsequently report and consent is obtained.

Places included on the Victorian Heritage Register

Heritage buildings may be included in the Victorian Heritage Register for their protection if they are considered significant to the history and development of Victoria.

Section 28(4) requires that the report and consent of the Executive Director under the Heritage Act 2017 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 also 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 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 a report and consent.

The maximum fee that a responsible authority can charge for consideration of report and consent under section 29A is prescribed under regulation 36(1) as 5.75 fee units.

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.

Related Documentation

- Building Act 1993
- Heritage Act 2017
- Minister's Guideline MG-11 – Building Permit and Planning Permit Consistency
- Planning and Environment Act 1987
- Victoria State Government value of prescribed fee units: <https://www.dtf.vic.gov.au/financial-management-government/indexation-fees-and-penalties>
- Victorian Heritage Register: <https://heritagecouncil.vic.gov.au/heritage-protection/register/>

Contact Us

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

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