

PROTECTION OF ADJOINING PROPERTY – INFORMATION PACKAGE

Pursuant to Regulation 111 of the Building Regulations 2018 and Part 7 of the Building Act 1993

This note provides general advice in relation to protection of adjoining properties during building/demolition works. This advice sheet should be considered as providing general advice only and owners should obtain site-specific advice, or their own legal advice, where appropriate.

1. Background

The provision of protection works as set out in the Building Act 1993 (the Act) is essential, not only to protect the adjoining property, but also to minimise the risk for the owner of the building site, as the Act places the responsibility for protection of an adjoining property on the owner of the site where building works are taking place.

As part of the Building Surveyor's duties, an assessment must be made as to whether protection works in respect of any adjoining property are required to be provided before and during the carrying out of any building work.

2. When is Protection Required?

The nature and location of the building works may require that measures be taken to prevent damage to adjoining property. This might typically comprise or include "underground" protection and/or "overhead" protection.

3. What is Adjoining Property?

Adjoining property means land (including any street, highway, lane, footway, square, alley and right of way) and buildings or structures (situated on or near the title boundary or in the vicinity of the building/demolition works) which is so situated to the building/demolition work is to be carried out as to be a risk of significant damage from the building work.

4. Insurance Requirements

The Building Act requires that the owner of the land on which building work is to occur must purchase insurance to protect against damage by protection works to adjoining property and liabilities arising out of the building work. The insurance must be in place prior to commencement of the protection works. The required period of insurance is the period of the actual building work plus a period of 12 months after completion. The amount of cover must be agreed between the owner and the adjoining owner. (Disputes can be resolved by the Building Appeals Board.)

Generally, the builder should carry an appropriate form of insurance. It is recommended that any policy seeking to cover protection of adjoining property should be checked to ensure that:-

- the property and the property owners are covered under the policy; and
- the policy covers damage by the proposed protection work to the adjoining property and any liabilities likely to be incurred to adjoining occupiers and members of the public during the carrying out of the building work

It will be necessary to renew the policy as required to ensure that cover remains in place for a period of at least 12 months after completion of the building work.

5. Adjoining Owner

An application can be made to the relevant Council for the adjoining owner address details for the purposes of serving protection works notices. It is crucial to ensure that the correct and current adjoining owner's details are used on the forms.

Quite often, the tenant of an adjoining property isn't necessarily the owner of the particular property. In some circumstances, the tenant occupying the adjoining property may be tenants renting the property and the



protection works notices package may never reach the correct owner of the property. Protection works notice package shall be submitted to adjoining owners as nominated by Council.

6. Building Surveyor Role

The Building Surveyor is to remain as an independent reviewer during protection works and is to be served with a copy of the protection works notices/documentation that is served to the adjoining owners.

Extract from the VBA Practice Note on this topic:- *“The RBS can play a positive role in assisting all parties to reach a successful outcome when protection work is required. But the RBS must take care to ensure that they do not become an advocate for one side or the other.”*

7. Adjoining Owner Agreement is Best Outcome

It is important that communication with the adjoining owners be positive and proactive as building works cannot commence until such time as any required protection works have been agreed to, or determined by the Building Surveyor as being appropriate or (where an adjoining owner has objected) the appeal period of fourteen (14) days has expired.

8. Procedure for Serving Protection Works Notices

Protection notices (Forms 7 & 8) might be served on adjoining owner(s) in the following manner:-

Step 1: Prepare a cover letter to every adjoining owner and include Forms 6, 7 and 8 with the letter. The following matters are suggested for inclusion:-

- State that the letter is fulfilling obligations under the Building Act 1993 relative to protection of adjoining property;
- Mention the adjacent property affected by the work;
- Describe the extent of the proposed building work;
- Describe the work methods to be adopted so that the extent of protection measures proposed can be related to the nature and manner of the proposed building work;
- Mention that a joint owner/adjoining owner condition survey will be carried out on the adjoining buildings (photos, written description of existing conditions, survey, etc.). Enclose a condition survey for agreement if available;
- Reference insurance cover to be put into place. Enclose a copy of the insurance policy for agreement if available;
- State the programme for the protection works and give approximate commencement date and duration;
- List all *“protection works measures”* (as distinct from the work itself) including any temporary hoardings to be erected and confirm that safe building procedures will be adopted to ensure protection of persons and property;
- Particularly mention protection measures which encroach into the adjoining property.

Step 2: Include the following documents as relevant:-

- A copy of the signed Form 6 – Determination that protection works is required issued by the Relative Building Surveyor
- A set of structural drawings (showing bulk excavation, site retention, footings, etc), soil report, computations, architectural drawings (town planning drawings should normally suffice) and details of protection measures proposed;
- Details of any overhead protection measures such as hoarding plans, scaffolding details, catch fans, roof planking plans, etc;



- Completed Form 7, listing all the relevant documents and details. It is important to complete all sections of the form accurately and in full. Reference should be made to title particulars as well as street addresses.
- Three blank copies of Form 8. (Three copies so that one copy can be kept by the adjoining owner, one copy returned to you, and one copy returned to the Relevant Building Surveyor.)
- A copy of the VBA “Approved Statement” must be submitted with the Protection works package.

Step 3: Send the package to each adjoining owner.

- Send a duplicate of the entire package to the Relevant Building Surveyor. Include a declaration to advise documents served and the date and manner of service. (Refer to draft declaration attached.)

Step 4: The adjoining owner should complete and return the Form 8 and copy the Relevant Building Surveyor and keep one for their records.

- If the adjoining owner does not respond within 14 days, it is taken that they have consented i.e. The adjoining owner will be deemed to have consented on the basis of the documents presented to them.

9. General Notes

- a. Once protection documentation is finalised, the owner must send:
 - The entire package of protection documents to each adjoining owner; and
 - A duplicate copy of the entire package of documents (including a declaration if completed, and one copy of each owners covering letter and Form 7 and Form 8) to the Relevant Building Surveyor.
- b. Serving of documents may be by the following means:-
 - Delivery in person (11. Declaration of service required); or
 - Regular mail (11. Declaration of service required); or
 - By Express Post (declaration of service required and/or keep a register of Australia Post confirmation of delivery receipts for each and every owner).
 - By Registered Mail. (Note that although recommended by the VBA, this process requires that the adjoining owner go to the Post Office and collect the documents in order to be deemed served adjoining property owner. Therefore the 14 day response time period does not start until the owner has been served the notices and collected them).
- c. For adjoining property comprising multiple strata titles, it is suggested that one set of complete documents be served on the Owners Corporation Agent(s) and that the cover letter, Forms 7 and 8 and a copy of all other documents be sent to each and every registered owner of the common property and each individual strata unit. If reduced scale documents or electronic documents are served on individual owners, it is recommended that the owners be advised that larger scale hard copy documents are available for viewing from the Owners Corporation Agent.
- d. Under the Building Act, each adjoining owner will have 14 days from the date of receipt to return a Form 8 notice either:-
 - agreeing to the proposed protection work; or
 - disagreeing with the proposed protection work; or
 - requesting further information to enable the proposal to be considered by the Relevant Building Surveyor.



- e. If the adjoining owner does not respond, he or she will be deemed to have agreed to the proposed protection work.
- f. Where the adjoining owners agree or are deemed to have agreed, the builder can proceed with the building and protection works.
- g. If an adjoining owner disagrees or requests further information, the Relevant Building Surveyor must examine the proposal for protection work and determine if it is appropriate. The Relevant Building Surveyor must notify the owner and the adjoining owner in writing of the determination. The determination will set the required nature and type of protection work to be carried out. There are rights of appeal to the Building Appeals Board if either party is not satisfied with the determination of the Relevant Building Surveyor. Following a determination by a Relevant Building Surveyor, there is a 14 day period during which a party can lodge an appeal. Building and protection work relevant to the determination cannot commence until the period for lodgement of an appeal expires. If an appeal is lodged, work cannot commence until the appeal has been determined by the Building Appeals Board.
- h. Section 93 of the Building Act requires the owner to arrange for appropriate insurance that meets the following specifications:-
 - the owner is named in the policy;
 - the policy covers the protection works 12 months after completion; and the policy is for an amount agreed between the owner and the adjoining owner;
 - the policy covers the protection works 12 months after completion;
 - the policy specifically covers against damage to adjoining property; and
 - the insurance must be in place prior to commencement of the protection works.

10. Disclaimer

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1. Steve Watson & Partners is not responsible for the accuracy of the information contained herein.
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Encl. Form 7 & 8
Declaration

11. DECLARATION OF SERVICE OF PROTECTION NOTICES

To The Relevant Building Surveyor

I,being the owner/agent (owner or agent)

of (insert location of proposed building work)

do solemnly and sincerely declare as follows:-

- 1. Pursuant to Regulation 111 of the Building Regulations 2018 (“the Regulations”), I am required to provide protection for adjoining property.
- 2. In accordance with Section 84 of the Building Act 1993 (“the Act”), I served protection details on all adjoining owner/s of adjoining property situated at:

..... (address of adjoining property)

3. The details served comprised:-

- (a) a notice in accordance with Form 7 of the Regulations and three copies of Form 8; and
- (b) prescribed* details of the proposed building works as at the date of the notice; and
- (c) prescribed * details of the proposed protection works setting out the nature, location, time and duration of the protection works; and
- (d) other prescribed* information.

4. These documents were served by (insert how served) on (insert date on which served).

5. A full copy of all documents and prescribed * details and information is attached to this declaration.

12.

Signature:

Date:

Print Name:

* Prescribed details and information means the relevant details set out in Form 7 and any other information set out in Form

FORM 7 – PROTECTION WORKS NOTICE

Building Act 1993, Building Regulations 2018, Regulation 113

To

Adjoining owner:

Postal Address:

Postcode

Relevant building surveyor:

Postal Address:

Postcode

Contact Person:

Telephone

Adjoining owner's Property Details [*the adjoining property*]

Owner:

Address

Lot/s

LP/PS

Volume

Folio

Crown Allotment

Section

Parish

County

Municipal District

From

*Owner/*Agent:

Name of owner [*insert full name*]:

*ACN/*ARBN:

Postal address:

Postcode

Contact person:

Telephone

Owner's Property Details

Address

Lot/s

LP/PS

Volume

Folio

Crown Allotment

Section

Parish

County

Municipal District

*Name of agent

*ACN/*ARBN

Postal Address

Postcode

Contact Person:

Telephone

NOTICE

In accordance with section 84 of the **Building Act 1993**, I give notice of my intention to carry out the following building work on my property and request your agreement to the proposed protection work which affects your adjoining property

Details of proposed building work

[*insert details including details about damage etc. that may be caused to adjoining property*]

NOTICE			
In accordance with section 84 of the Building Act 1993 , I give notice of my intention to carry out the following building work on my property and request your agreement to the proposed protection work which affects your adjoining property			
Details of proposed building work			
[<i>insert details including details about damage etc. that may be caused to adjoining property</i>]			

Details of proposed protection work

[insert the nature, location, time and duration of the proposed protection work, including the extent to which access to the adjoining property will be required for the purpose of undertaking the proposed protection work]

Information about protection of an adjoining owner under the Building Act 1993 in relation to proposed protection work

In accordance with section 92 of the Building Act 1993, at any time after this notice is given to the adjoining owner, the relevant building surveyor must make available to the adjoining owner, on request, for inspection, without charge, any plans, drawings and specifications of the proposed building work in the possession or control of the relevant building surveyor. The relevant building surveyor's name and contact details are on page 1 of this notice.

If the proposed protection work is agreed to by the adjoining owner or determined as being appropriate by the relevant building surveyor under section 87(1) of the Building Act 1993 or by the Building Appeals Board under section 141 of the Building Act 1993 (as the case requires), the owner must—

- (a) before the commencement of any protection work—
 - (i) ensure that a contract of insurance is in force in accordance with section 93 of the Building Act 1993 against damage by the protection work to the adjoining property and other liabilities described in that section; and
 - (ii) make a full and adequate survey of the adjoining property in accordance with section 94 of the Building Act 1993; and
- (b) pay to an adjoining owner all costs and expenses necessarily incurred by the adjoining owner in assessing proposed protection work and in supervising the carrying out of protection work in relation to an adjoining property in accordance with section 97 of the Building Act 1993; and
- (c) compensate an adjoining owner or an adjoining occupier for inconvenience, loss or damage suffered by the adjoining owner or adjoining occupier in connection with the carrying out of protection work in accordance with section 98 of the Building Act 1993 or an order of the Building Appeals Board under section 159 of that Act.

Signature

Signature of *owner/*owner's agent

Date

** Delete if inapplicable*

FORM 8 – PROTECTION WORK RESPONSE NOTICE

Building Act 1993, Building Regulations 2018, Regulation 114

To

*Owner/*owner's agent:

Postal Address:

Postcode

Address of owner's property on which building work is to be carried out

Address

Relevant building

surveyor:

Postal Address:

Postcode

From

*Adjoining owner/*adjoining owner's agent

Postal Address:

Postcode

Contact person:

Telephone

Address of my adjoining property

Address

Postcode

Response from adjoining owner

In accordance with section 85 of the **Building Act 1993**, I am responding to the notice served on me by the owner under section 84 of that Act and—

- (a) agree to the proposed protection work
- (b) disagree with the proposed protection work
- (c) request the following further information

Signature

Signature of *owner/*owner's agent

Date

** Delete if inapplicable*

+ Tick if applicable

This updates the previous Practice Note-20-2017 issued September 2017.

Purpose

The purpose of this practice note is to provide guidance to building practitioners on the protection work process.

Background

An owner is entitled to carry out building work on their land. However, sometimes that work has the potential to cause damage to adjoining property. Processes for the protection of adjoining property from the risk of significant damage are provided for under the Building Act 1993 (the Act).

Examples of when adjoining property can be affected are when building work involves excavations, changes to footings, where the building work is adjacent to boundary walls, and where there is a risk of building materials or equipment falling across boundaries during the construction process.

The Act provides that where there is a risk of significant damage to adjoining property from building work, the adjoining owner must be consulted about proposed work or other actions that will be undertaken to protect their property.

The relevant building surveyor (RBS) plays a central role in overseeing the consultation process and ensuring that proposed protection work is adequate. The independence of the RBS is critical to their role in the process.

There are mechanisms for owners and adjoining owners to appeal to the Building Appeals Board against decisions of the RBS. The BAB can also determine disputes between owners and adjoining owners about protection work matters.

Protection work provisions and definitions

Requirements relating to protection of adjoining property are contained in Part 7 of the Act and Division 1 of Part 7 of the Regulations.

The following terms are defined in the Act:

Adjoining owner

The owner of an adjoining property.

Adjoining property

Land (including any street, highway, lane, footway, square, alley, and right of way) situated in relation to the site on which building work is to be carried out, so as to be at risk of significant damage from that building work.

Building Appeals Board

The Building Appeals Board (BAB) under Part 10 of the Act.

Owner

In relation to a building, means the owner of the land on which the building is situated.

Protection work

Work that may include, however, is not limited to:

- ☐ Underpinning, including vertical support, lateral support, protection against variation in earth pressures, ground anchors and other support for the adjoining property;
- ☐ Shoring up of the adjoining property (which may include retaining walls and bored piers);
- ☐ Overhead protection for adjoining property;
- ☐ Other work designed to maintain the stability of adjoining property or to protect it from damage from building work;
- ☐ Any work or use of equipment necessary for the provision, maintenance and removal of work referred to above,

- ☐ whether or not the work or equipment is carried out or used on, over, under, or in the air space above the land on which the building work is, or is to be carried out, or the adjoining property.

Common types of protection work include:

- ☐ retaining walls;
- ☐ bored piers;
- ☐ a gantry or other overhead barriers to prevent material from falling on a roof or other part of the adjoining property;
- ☐ propping of party walls or common walls;
- ☐ underpinning of existing footings.

The distinction between protection work and building work

Protection work is work to protect an adjoining property. It can be done on an adjoining property or on the building site where the building work is occurring, or both. Where protection work needs to be done on the adjoining property, the Act allows for access to the adjoining property to undertake the required protection work (section 95 of the Act).

Building work is the work being done that gives rise to the need for protection work. Building work can only be done within the boundaries of the building site for which a building permit is issued.

Sometimes building work is designed in a way which requires access to adjoining property to carry out the building work. For example, building materials may need to be lifted onto the building site with a crane that must swing over adjoining property; or the preferred construction of masonry walls on boundaries is to construct or finish them from outside the property boundary of the building site.

Where the construction process requires access to the building site via an adjoining property, this is not protection work. The protection work process does not entitle an owner to access an adjoining property to undertake building work. Access to an adjoining property to conduct building work must be arranged by agreement with the owner of the adjoining property.

It is prudent for an owner to discuss proposed building work with adjoining owners and reach agreement about any access that may be required before finalising their application for a building permit. If a building permit is issued and access required over, or on, adjoining property cannot be agreed, the building design may need to be changed and a variation to the building work may be required. This can cause delays and frustration.

Fences and protection work

Building work on boundaries may involve the demolition of walls which give rise to the requirement for a new fence between properties. Work may also involve the construction of new walls on boundaries which requires the removal of an existing fence.

The removal and replacement of fences is not protection work and is subject to the Fences Act 1968. More information about rights and obligations of owners under the Fences Act can be found at

<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/civil+law/fencing+law+in+victoria>

Overview of the role of the RBS

The role and responsibilities of the RBS in relation to protection work are summarised as follows:

- ☐ To determine whether protection work is required as part of the assessment of a building permit or at any time during the construction phase when it becomes apparent that protection work may be required;
- ☐ To document their determination that protection work is required;
- ☐ To review protection work notices exchanged between the owner and the adjoining owner;
- ☐ To assess whether the proposed protection work is adequate;
- ☐ To create the required records relating to the above actions throughout the process
- ☐ To lodge documents with the relevant council as required by section 30 or 73 and regulations 44 or 203;
- ☐ To participate in any appeals or other

proceedings before the BAB as required;

- ☐ To monitor the carrying out of the protection work at mandatory inspections or at any other time as required and take any necessary action if there is any danger to life or property;
- ☐ To act independently at all times to assist owners and adjoining owners through the process.

When is protection work required?

Protection work is only required when the RBS determines that it is necessary (regulation 111).

When assessing an application for a building permit, the RBS must consider whether protection work is required.

Some building practitioners think that protection work is required based on a general rule such as 'a one metre rule'. The perception is that anytime building work occurs within 1 metre of a boundary protection work is required.

This type of approach is simplistic. No two developments are the same and protection work must be determined on a case by case basis.

Regulation 112 sets out the matters the RBS must consider in determining if protection work is required. They are:

- ☐ the allotment plan provided with the application for building permit under regulation 25 or 26;
- ☐ specifications that describe materials and methods to be used in the proposed building work;
- ☐ any demolition required as part of the proposed building work;
- ☐ any excavation required as part of the proposed building work;
- ☐ any proposed building work in relation to party walls and retaining walls;
- ☐ the nature and likely extent of any damage or other adverse effect on the stability or otherwise of any adjoining property that may be caused by the proposed building work;
- ☐ any certificate under section 238 of the Act from a registered building practitioner in

the category of engineer, class of engineer (civil), certifying that the structural design of the building work complies with the Act and Regulations;

- ☐ any other matter the RBS considers relevant.

Other matters the RBS should consider are soil reports, local soil conditions, sloping sites, the location of drains or other underground services, proposed methods for ensuring stability of excavations (such as battering or 'hit and miss' methods).

"Adjoining property" as defined in the Act refers to property being put at risk of 'significant damage' from building work.

The term 'significant damage' is not defined in the Act. When considering whether there could be 'significant damage' to adjoining property the RBS should have regard to potential damage to buildings, driveways, paving, gardens, other structures and to potential soil subsidence on the adjoining land.

Documenting a determination to require protection work

The RBS's determination to require protection work must be set out using Determination that Protection Work is Required (Form 6) in Schedule 4 to the Building Regulations (regulation 111(4)).

Within 7 days of making the determination, a copy of the Form 6 must be provided to the applicant for the building permit and, if the applicant is not the owner, the owner (regulation 111(5)).

Protection work notices

Having decided that protection work is required, the RBS sets in motion a process that provides both the owner and adjoining owner with certain rights and obligations under the legislation. It is critical that the administrative process is carried out correctly for those rights to be exercised.

The process is summarised as follows:

- ☐ section 84 of the Act requires the owner to serve the adjoining owner with a notice in the form of Protection Work Notice (Form 7) (regulation 113);

- Section 85 of the Act requires the adjoining owner to respond to the owner’s notice in the form of a Protection Work Response Notice (Form 8) notice (regulation 114);
- ☐ the RBS must consider the Form 7 and Form 8 and determine whether the proposed protection work is appropriate (section 87(1));
- ☐ if agreement has not been reached between the owner and adjoining owner, the RBS must follow the procedure in section 87 before making a determination.

Independent role of the RBS

The RBS acts as an independent decision maker in the protection work process.

The RBS must not prepare the Form 7 for the owner or ‘approve’ the proposed protection work before the notice is given to the adjoining owner.

The RBS should discuss the reasons for requiring protection work with the owner or their agent, so they can formulate the proposed protection work and provide the details required in the Form 7.

If there has been no response to the Form 7 notice from the adjoining owner, the RBS must satisfy themselves that the adjoining owner has been properly served. Section 236 sets out ways in which notices may be served under the Act. The RBS should ask how the notice was served and consider contacting the adjoining owner to make sure they have received the Form 7 notice.

If the adjoining owner agrees to the protection work, the RBS must not assume that the proposed protection work is appropriate. The RBS must review the proposed protection work, satisfy themselves that:

- ☐ the work is actually protection work; and
- ☐ it is appropriate to protect the adjoining property, and
- ☐ make a decision on whether to approve the building permit.

If the RBS is not satisfied with the proposed protection work, they should refuse to issue the building permit until a revised proposal is made.

Regulation 113 provides that the Form 7 prepared by the owner must contain detailed

information about the proposed protection work including:

- ☐ the determination of the RBS set out in the Form 6;
- ☐ 3 copies of the Form 8 notice (or, if the adjoining owner consents to receiving the information electronically, 1 copy);
- ☐ a statement in the form approved by the Authority that explains the protection work process;
- ☐ plans and specifications with sufficient detail to show how the proposed building work will affect the adjoining property;
- ☐ plans and specifications with sufficient detail to show how the proposed protection work will protect the adjoining property;
- ☐ an allotment plan complying with regulation 25(1)(d).

If the RBS is not satisfied that the prescribed information was provided in the Form 7, including that the proposed protection work is not detailed adequately in plans and specifications provided with the Form 7, the RBS should request additional information. The RBS should also require the owner to revise the Form 7 and re-serve it on the adjoining owner.

Where the adjoining owner disagrees with the proposed protection work, or requires more information, the RBS must take the actions set out in section 87 of the Act.

If a request for information is made by the adjoining owner, the RBS must consider if the request is reasonable; and if it is:

- ☐ make a request to the owner for that information; and
- ☐ provide the information to the adjoining owner.

If the RBS considers the request for information is not reasonable, they should advise the adjoining owner of that decision in writing including the reasons for that decision. The RBS can then make any other inquiries they think fit (section 87(3)) and proceed to make their determination under section 87(1).

Making a determination

The determination made must be in the form of Notice of Determination under section 87 of the Act (Form 9).

The RBS must give a copy the Form 9 notice to the owner and adjoining owner.

The notice may be given by:

- ❑ sending by ordinary post;
- ❑ delivering the notice to the person;
 - leaving the notice at the person's address with a person aged 16 years or over, and apparently residing at that address; or
- ❑ by email or facsimile, but only if the person receiving the determination has agreed in writing to accept service via email or facsimile.

When protection work has been required as part of a building permit, the RBS should consider whether there needs to be inspections of the building work in addition to the prescribed mandatory inspections. If inspections are appropriate, the RBS can put conditions on the building permit that require the builder to call for inspections at specified stages of the work

(Refer to Practice Note 69-2018 on mandatory notification stages and inspection of building work).

Appeals against a section 87 determination

The owner or adjoining owner have 14 days from the day after a determination under section 87 has been given to **both** the owner and the adjoining owner to lodge an appeal against the determination with the BAB.

If the RBS's determination is challenged by an appeal to the BAB, then the RBS should provide the BAB with whatever evidence and/or information as necessary or requested by the BAB.

The RBS must not act as an arbiter where there is disagreement between the owner and an adjoining owner. If there is a dispute between the parties the RBS should refer the parties to Part 10 of the Act regarding their appeal rights and ability to have a dispute considered by the BAB.

Requiring Protection Work after works have commenced

There may be situations where damage to adjoining property is not foreseen based on the building permit application but circumstances change making protection work necessary. This can occur when there are unexpected site conditions or where the builder does not follow the building permit.

The swift and effective action of the RBS is critical when the need for protection work arises unexpectedly during construction.

In these cases, the RBS should inspect the site without delay and determine whether protection work is required. The RBS may need to issue a direction to fix (Part 4), or stop the building work from proceeding and/or require work to make the site or adjoining property safe (Part 8).

A building order to stop building work can be issued by the RBS where the building work contravenes the Act or Regulations, or is a danger to life, safety or health of a person, or affects the support of an adjoining property (section 112).

It is not appropriate to issue a building order to stop building work where the owner has failed to comply with administrative provisions contained in sections 93-100 of the Act.

If the RBS issues a building order to stop building work, they may exempt any part of the work from the building order if it is in the interests of safety or security of the building; the public; or to prevent a nuisance (section 112(6)). If an exemption is given under section 112(6), this can allow urgent work to be carried out. However, the RBS should only require works necessary to make the site and any adjoining property safe and stable. The RBS should then promptly make a determination that protection work is required (recording this in a Form 6) so that the protection work process can be followed.

The RBS must inform the MBS immediately if they consider that the condition of the site presents an emergency. Upon being notified, the MBS or their delegate will inspect the site, immediately assess the situation and determine if an emergency order should be made, or other action should be taken.

Other administration for the RBS

The RBS must lodge any determination that protection work is required (Form 6), any protection work notice (Form 7), any protection work response notice (Form 8), and any notice of determination made under section 87 (Form 9), with the building permit under section 30 (regulation 44(1)(d)-(g)) and with the occupancy permit under section 73 of the Act (regulation 203(e)-(h)).

Once a notice of intention to commence the carrying out of building work is given, the RBS must make available to the adjoining owner, on request and at no cost, drawings and specifications of the proposed building work refer to section 92.

Obligations of the owner

The obligations of the owner in relation to protection work are summarised as follows:

- ❑ to provide adequate information about the proposed building works to the RBS in the building permit application;
- ❑ where protection work is required by the RBS, to prepare the Form 7 notice;
- ❑ to serve the Form 7 notice on the adjoining owner, with the prescribed documents under regulation 113, having regard to section 236 of the Act;
- ❑ to provide any additional information requested by the RBS;
- not to undertake any building work giving rise to the requirement for protection work until—
 - the adjoining owner has agreed to the protection work;
 - the matter is determined by the RBS;
 - any appeal is determined by the BAB (section 88(1)).
- to only carry out work in accordance with the agreement, the RBS's determination or the determination of the BAB (section 88(2));
- ❑ to arrange insurance cover for the protection work before any protection work commences in accordance with section 93 of the Act;
- ❑ to arrange for a survey of the adjoining property before any protection work

commences in accordance with section 94;

- ❑ to ensure that the record of survey is signed or otherwise acknowledged as an agreed record of the condition of the adjoining property before the commencement of protection work;
- ❑ to provide compensation to the adjoining owner for necessarily incurred costs and expenses, inconvenience, loss or damage (section 97 and 98);
- ❑ to serve the adjoining owner and the RBS with a complete set of plans, drawings and specifications showing the protection work undertaken no later than 2 months after the protection work is completed (section 101).

Entry on adjoining property

Section 95 of the Act provides the owner or an agent of the owner with the ability to enter the adjoining owner's property to carry out a survey and any required protection work. Before entry, the adjoining owner must be given 24 hours' notice, unless another time frame as agreed by the parties. Entry on the adjoining property for this purpose is available between the hours of 8am and 6pm.

The right of entry to carry out protection work does not apply to entry for any other purpose, such as carrying out of building work. Entry for that purpose will require agreement between the builder and adjoining owner.

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

Approved Statement

This statement is approved by the VBA for the purposes of regulation 113(1) of the Building Regulations 2018.

Purpose

The purpose of this statement is to provide adjoining owners with information about—

- ☐ the operation of the protection work process under the *Building Act 1993* (the Act) and the *Building Regulations 2018* (the Regulations); and
- ☐ the procedure for the resolution of disputes relating to protection work.

Protection work provisions and definitions

Requirements relating to protection of adjoining property are contained in Part 7 of the Act and Division 1 of Part 7 of the Regulations.

The following terms are defined in the Act:

Adjoining owner

The owner of an adjoining property.

Adjoining property

Land (including any street, highway, lane, footway, square, alley, and right of way) situated in relation to the site on which building work is to be carried out, so as to be at risk of significant damage from that building work.

Building Appeals Board

The Building Appeals Board (BAB) under Part 10 of the Act.

Owner

In relation to a building, means the owner of the land on which the building is situated.

Protection work

Work that may include, however, is not limited to:

- ☐ Underpinning, including vertical support, lateral support, protection against variation in earth pressures, ground anchors and other support for the adjoining property;
- ☐ Shoring up of the adjoining property (which may include retaining walls and bored piers);
- ☐ Overhead protection for adjoining property;
- ☐ Other work designed to maintain the stability of adjoining property or to protect it from damage from building work;
- ☐ Any work or use of equipment necessary for the provision, maintenance and removal of work referred to above,
- ☐ whether or not the work or equipment is carried out or used on, over, under, or in the air space above the land on which the building work is, or is to be carried out, or the adjoining property.

Part 1: Operation of the protection work process

An owner is entitled to carry out building work on their land. However, sometimes that work has the potential to cause damage to adjoining property. The Act provides a process for the protection of adjoining property from the risk of significant damage.

Examples of when adjoining property can be affected are when building work involves excavations, where the building work is adjacent to boundary walls, and where there is a risk of building materials or equipment falling across boundaries during the construction process.

Common types of protection work include:

- ☐ Retaining walls;
- ☐ Bored piers;
- ☐ A gantry or other overhead barriers to prevent material from falling onto a roof or other part of the adjoining property;
- ☐ Propping of party walls or common walls;
- ☐ Underpinning of existing footings.

The relevant building surveyor (RBS) plays a central role in the protection work process, determining whether protection work is required, overseeing the consultation process and ensuring that proposed protection work is adequate. The independence of the RBS is critical to their role in the process.

The Act provides that where protection work is required, the adjoining owner must be consulted about proposed work or other actions that will be undertaken to protect their property.

There are mechanisms for owners and adjoining owners to appeal to the Building Appeals Board against decisions of the RBS. The BAB can also determine disputes between owners and adjoining owners about protection work matters. Further information about resolution of disputes is provided in Part 2 of this statement.

The distinction between protection work and building work

Protection work is work to protect an adjoining property. It can be done on an adjoining property or on the building site where the building work is occurring, or both. Where protection work needs to be done on the adjoining property, the Act allows for access to the adjoining property to undertake the required protection work (Act, section 95).

Building work is the work being done that gives rise to the need for protection work. Building work can only be done within the boundaries of the building site for which a building permit is issued.

The protection work process does not entitle an owner to access an adjoining property to undertake building work. Access to an adjoining property to conduct building work must be arranged by agreement with the owner of the adjoining property.

Overview of the role of the RBS

The role and responsibilities of the RBS in relation to protection work are summarised as follows:

- ❑ To determine whether protection work is required as part of the assessment of a building permit or at any time during the construction phase when it becomes apparent that protection work may be required (Regulations, regulations 111-112);
- ❑ To document their determination that protection work is required (Regulations, regulation 111);
- ❑ To review any protection work notices exchanged between the owner and the adjoining owner;
- ❑ To assess whether the proposed protection work is adequate;
- ❑ To create the required records relating to the above actions throughout the process;
- ❑ To lodge documents with the relevant council (sections 30 or 73; regulations 44 or 203);
- ❑ To participate in any appeals or other proceedings before the BAB as required;
- ❑ To monitor the carrying out of the protection work at mandatory inspections or at any other time as required and take any necessary action if there is any danger to life or property;
- ❑ To act independently at all times to assist owners and adjoining owners through the process.

When is protection work required?

Protection work is only required when the RBS determines that it is necessary (regulation 111).

Regulation 112 sets out the matters the RBS must consider in determining if protection work is required. They are:

- ❑ the allotment plan provided with the application for building permit under regulation 25 or 26;
- ❑ specifications that describe materials and methods to be used in the proposed building work;
- ❑ any demolition required as part of the proposed building work;
- ❑ any excavation required as part of the proposed building work;
- ❑ any proposed building work in relation to party walls and retaining walls;
- ❑ the nature and likely extent of any damage or other adverse effect on the stability or otherwise of any adjoining property that may be caused by the proposed building work;
- ❑ any certificate under section 238 of the Act from a registered building practitioner in the category of engineer, class of engineer (civil), certifying that the structural design of the building work complies with the Act and Regulations;
- ❑ any other matter the RBS considers relevant.

The definition of 'adjoining property' refers to property being put at risk of 'significant damage' from building work. The term 'significant damage' is not defined in the Act. When considering whether there could be 'significant damage' to adjoining property the RBS should have regard to potential damage to buildings, driveways, paving, gardens, other structures and to potential soil subsidence on the adjoining land.

Protection work notices

Having decided that protection work is required, the RBS sets in motion a process that provides both the owner and adjoining owner with certain rights and obligations. It is critical that the administrative process is carried out correctly for those rights to be exercised.

The process is summarised as follows:

- ❑ the owner must serve the adjoining owner with a notice in the form of the Protection Work Notice (Form 7) (section 84, regulation 113);
- the adjoining owner must respond to the owner's notice in the form of a Protection Work Response Notice (Form 8) (section 85, regulation 114);
- ❑ the RBS must consider the Form 7 and Form 8 notices and determine whether the proposed protection work is appropriate (section 87(1));
- ❑ if agreement has not been reached between the owner and adjoining owner, the RBS must follow the procedure in section 87 before making a determination.

Regulation 113 provides that the Form 7 notice prepared by the owner must contain detailed information about the proposed protection work including:

- ❑ the determination of the RBS set out in the Form 6;
- ❑ 3 copies of the Form 8 notice (or, if the adjoining owner consents to receiving the information electronically, 1 copy);
- ❑ a statement that explains the protection work process (this statement);
- ❑ plans and specifications with sufficient detail to show how the proposed building work will affect the adjoining property;
- ❑ plans and specifications with sufficient detail to show how the proposed protection work will protect the adjoining property;
- ❑ an allotment plan complying with regulation 25(1)(d).

Independent role of the RBS

The RBS acts as an independent decision maker in the protection work process.

The RBS must not prepare the Form 7 notice for the owner or 'approve' the proposed protection work before the notice is given to the adjoining owner.

If there has been no response to the Form 7 notice from the adjoining owner, the RBS should satisfy themselves that the adjoining owner has been properly served. Section 236 sets out ways in which notices may be served under the Act.

If the adjoining owner agrees to the protection work, the RBS must not assume that the proposed protection work is appropriate. The RBS must review the proposed protection work, satisfy themselves that:

- ❑ the work is actually protection work; and
- ❑ it is appropriate to protect the adjoining property, and
- ❑ make a decision on whether to approve the building permit.

If the RBS is not satisfied with the proposed protection work, they should refuse to issue the building permit until a revised proposal is made.

If the RBS is not satisfied that the prescribed information was provided in the Form 7 notice, including that the proposed protection work is not detailed adequately in plans and specifications provided with the Form 7 notice, the RBS should request additional information. The RBS should also require the owner to revise the Form 7 notice and reserve it on the adjoining owner.

Making a determination under section 87

Where the adjoining owner disagrees with the proposed protection work, or requires more information, the RBS must examine the proposal for protection work and determine the appropriateness or otherwise of the work under section 87 of the Act.

If a request for information is made by the adjoining owner, the RBS must consider if the request is reasonable; and if it is:

- ☐ make a request to the owner for that information; and
- ☐ provide the information to the adjoining owner.

If the RBS considers the request for information is not reasonable, they should advise the adjoining owner of that decision in writing including the reasons for that decision. The RBS can then make any other inquiries they think fit (section 87(3)) and proceed to make their determination under section 87(1).

The determination made under section 87 must be in the form of Notice of Determination Under Section 87 of the Act (Form 9).

The RBS must give a copy of the Form 9 notice to the owner and adjoining owner (section 87(4)) in accordance with section 236 of the Act.

Appeals against a section 87 determination

The owner or adjoining owner have 14 days from the day after a determination under section 87 has been given to both the owner and the adjoining owner to lodge an appeal against the determination with the BAB.

Requiring Protection Work after works have commenced

There may be situations where damage to adjoining property is not foreseen when the building permit is issued, but circumstances change making protection work necessary. This can occur when there are unexpected site conditions or where the builder does not comply with the building permit.

If the adjoining owner is concerned about damage to their property they should contact the RBS or the MBS (particularly if emergency protection work may be necessary). Contact details for the RBS are provided on a Form 6 determination, a Form 7 notice and are required to be displayed on the allotment for the duration of the building work (regulation 41(2)).

In these cases, the RBS should inspect the site without delay and determine whether protection work is required. The RBS may need to issue a direction to fix (Part 4), or stop the building work from proceeding and/or require work to make the site or adjoining property safe (Part 8).

A building order to stop building work can be issued by the RBS where the building work contravenes the Act or Regulations, or is a danger to life, safety or health of a person, or affects the support of an adjoining property (section 112).

A building order to stop building work is not appropriate where the owner has failed to comply with administrative provisions contained in sections 93-100 of the Act.

If the RBS issues a building order to stop building work, they may exempt any part of the work from the building order if it is in the interests of safety or security of the building; the public; or to prevent a nuisance (section 112(6)). If an exemption is given under section 112(6), this can allow urgent work to be carried out. However, the RBS should only require works necessary to make the site and any adjoining property safe and stable. The RBS should then promptly make a determination that protection work is required, using Form 6, so that the protection work process can be followed.

The RBS must inform the municipal building surveyor (MBS) immediately if they consider that the condition of the site presents an emergency. Upon being notified, the MBS or their delegate will inspect the site, immediately assess the situation and determine if an emergency order should be made, or other action should be taken.

Overview of role of the owner

The role and responsibilities of the owner in relation to protection work is summarised as follows:

- ② to provide adequate information about the proposed building work to the RBS in the building permit application;
- ② where protection work is required by the RBS, to prepare the Form 7 notice in accordance with the prescribed requirements in regulation 113, including sufficient detail to show how the proposed building work will affect the adjoining property, and sufficient detail to show how the proposed protection work will protect the adjoining property from those effects;
- ② to serve the Form 7 notice, with documents set out in regulation 113(1) including 3 copies of the Form 8 Protection Work Response Notice (or, if the adjoining owner consents to receiving the information electronically, 1 copy), on the adjoining owner having regard to section 236 of the Act;
- ② to provide any additional information requested by the RBS;
- not to undertake any building work giving rise to the requirement for protection work until—
 - the adjoining owner has agreed to the protection work;
 - the matter is determined by the RBS;
 - any appeal is determined by the BAB (section 88(1)).
- to only carry out work in accordance with the agreement, the RBS's determination or the determination of the BAB (section 88(2));
- ② to carry out emergency protection work if required by the VBA under section 89;
- ② to arrange insurance cover for the protection work before any protection work commences in accordance with section 93 of the Act;
- ② to arrange for a survey of the adjoining property before any protection work commences in accordance with section 94;

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- ❓ Sign, or otherwise acknowledge as agreed, a record of the condition of the adjoining property, or refer a dispute to the BAB. The record of survey must be signed and agreed to by all parties before protection work can commence.
 - ❓ to provide compensation to the adjoining owner for necessarily incurred costs and expenses, inconvenience, loss or damage (section 97 and 98);
 - ❓ to serve the adjoining owner and the RBS with a complete set of plans, drawings and specifications showing the protection work undertaken, no later than 2 months after the protection work is completed (section 101).

Absent or incapable adjoining owner

If the adjoining owner cannot be found or is incapable of acting, the owner may apply to the Minister for the appointment of a suitable person to act as agent of the adjoining owner during their absence or incapacity (sections 90 and 91).

An adjoining owner may revoke the appointment of an agent by the Minister but that revocation does not affect the validity of the agent's actions before the revocation.

Overview of role of the adjoining owner

The role and responsibilities of the adjoining owner in relation to protection work is summarised as follows:

- to respond to a Form 7 notice served by an owner, within 14 days of service, by—
 - giving the owner, a Form 8 notice agreeing to the proposed protection work; or
 - giving the owner and the RBS, a Form 8 notice disagreeing to the proposed protection work or requesting more information to enable further consideration by the RBS;

An adjoining owner who fails to respond in the required time is taken to have agreed to the proposed protection work.

- ❓ may inspect at no cost, drawings and specifications of the proposed building work in the possession of the RBS once a notice of intention to commence the carrying out of building work is given (section 92).
- ❓ consider the insurance cover for the protection work proposed by the owner, and agree, or refer a dispute to the BAB (section 93).
- ❓ accompany, or arrange for an agent to accompany, the owner or their agent on a survey of the adjoining property (section 94).
- ❓ sign, or otherwise acknowledge as agreed, a record of the condition of the adjoining property, or refer a dispute to the BAB. The record of survey must be signed and agreed to by all parties before protection work can commence.
- provide access to the owner or the owner's agent to the adjoining property, after not less than 24 hours notice, or other notice as agreed between the parties, to carry out the survey of the adjoining property, or to carry out the protection work (sections 95 and 96).
- ❓ assess proposed protection work, and supervise the carrying out of protection work. Costs and expenses necessarily incurred by the adjoining owner must be paid by the owner, as agreed between the parties, or as determined by the BAB (section 97).

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- ❑ may apply to the VBA for a declaration that emergency protection work is required (section 89).
 - ❑ receive from the owner, a complete set of plans, drawings and specifications showing the protection work undertaken, no later than 2 months after the protection work is completed (section 101).

Entry on adjoining property

Section 95 of the Act provides the owner or an agent of the owner with the ability to enter the adjoining owner's property to carry out a survey and any required protection work. Before entry, the adjoining owner must be given 24 hours notice, unless another time frame as agreed by the parties. Entry on the adjoining property for this purpose is available between the hours of 8am and 6pm.

The right of entry to carry out protection work does not apply to entry for any other purpose, such as carrying out of building work. Entry for that purpose will require agreement between the builder and adjoining owner.

Part 2: Procedure for the resolution of disputes relating to protection work

A dispute between the owner and the adjoining owner relating to protection work may be referred to the BAB under Part 10 of the Act. The RBS must not act as an arbiter where there is disagreement between the owner and an adjoining owner.

If the owner and an adjoining owner do not agree about—

- ❑ how or when emergency protection work required by declaration under section 89(1) of the Act is to be carried out (section 151);
- ❑ the nature of cover to be provided under a proposed contract of insurance under section 93 of the Act, or about the amount to be insured under the contract (section 152);
- ❑ how or when a survey of the adjoining property is to be carried out under section 94, or about the adequacy of the survey (section 153);
- ❑ the costs and expenses necessarily incurred by the adjoining owner in supervising protection work under Part 7 of the Act (section 154);
- ❑ any other matter under Part 7 of the Act, and the BAB does not have jurisdiction to deal with the matter under any other provision of Part 7 (section 155),

either of them may refer the matter to the BAB.

An adjoining owner may also apply to the BAB under section 159 of the Act for an order determining the amount of compensation for inconvenience, loss or damage suffered during the carrying out of protection work under Part 7 of the Act.

The application process, application form, fee, hearing procedure and other details relating to referral of a dispute, or an application for a compensation order, to the BAB are set out on the BAB website at www.buildingappeals.vic.gov.au.

Further Information

Further information about the protection work provisions of the Act and Regulations is available on the VBA website, www.vba.vic.gov.au.