

Building Practice Note PW-02: Protection Work Process

This Practice Note provides guidance to building practitioners about the protection work process under Part 7 of the Building Act 1993 (the Act) and Division 1 of Part 7 of the Building Regulations 2018 (the Regulations).

The context below provides guidance on:

- Protection work - introduction
- Distinction between protection work and building work
- Entry on adjoining property
- Responsibilities of the RBS in relation to protection work
- Protection work notices
- Independence of the RBS
- Notice of determination under section 87 of the Act - Form 9
- Requiring protection work after work has commenced
- Other administrative responsibilities of the RBS
- Dispute resolution relating to protection work

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
- **Adjoining property** – Land (including any street, highway, lane, footway, square, alley, and right of way) which is so situated in relation to the site on which building work is to be carried out as to be at risk of significant damage from the building work.
- **AS** – Australian Standard
- **BAB** – Building Appeals Board
- **BCA** – Building Code of Australia Volume One and Two
- **MBS** – Municipal Building Surveyor
- **RBS** – Relevant Building Surveyor
- **Protection work** – permanent or temporary 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 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.
- **Regulations** – Building Regulations 2018
- **Section** – section of the Building Act 1993

Protection work - introduction

An owner is entitled to carry out building work on their land. 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 due to building work.

Adjoining property can be affected when—

- building work, particularly if close to the boundary, consists of excavations, site cuts, changes to footings or demolition work;
- there are existing buildings, retaining walls or other structures near the boundary on an adjoining property;
- there is a risk of building materials or equipment falling across a boundary 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 and actions that will be undertaken to protect their property.

The 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.

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, or other building elements on adjoining property;
- Underpinning of existing footings on adjoining property.

The role and responsibilities of the owner and the adjoining owner in the protection work process are summarised in the VBA Protection Work Approved Statement.

Distinction between protection work and building work

Protection work

Protection work is the work undertaken to protect an adjoining property from the risk of significant damage caused by the building work. It can be done on an adjoining property or on the property where the building work is occurring, or both. Where protection work needs to be done on the adjoining property, section 95 of the Act allows for access to the adjoining property to undertake the required protection work.

Building Work

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 property for which a building permit is issued.

The RBS must ensure this distinction is understood by all parties. A misunderstanding could lead to dispute, liability for costs, building delays and frustration.

Significant damage

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 soil subsidence on the adjoining land and potential damage to buildings, driveways, paving, gardens, trees and other structures or land.

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 boundary 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 obtained at:

<https://www.justice.vic.gov.au/fencing-law-in-victoria> .

Entry on adjoining property

Accessing a building site using an adjoining property

Sometimes building work is designed in a way which requires access to adjoining property in order 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 recommended that an owner, designer and builder discuss proposed building work with the adjoining owner and reach agreement about any access that may be required before finalising the design and applying 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 altered and a variation to the building work may be required.

Carrying out of survey or protection work

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 under section 94 and any required protection work. Before entry, the adjoining owner must be given 24 hours notice, unless another time frame is 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 a survey or protection work does not apply to entry for any other purpose, such as carrying out of building work.

Responsibilities of the RBS in relation to protection work

The responsibilities of the RBS in relation to protection work include, but are not limited to, the following:

- Determine whether protection work is required as part of the assessment of a building permit application or at any time during the construction phase when it becomes apparent that protection work may be required;
- Document their determination that protection work is required;

- Review protection work notices exchanged between the owner and the adjoining owner;
- Assess whether the proposed protection work is adequate;
- Create the required records relating to the above actions throughout the process;
- Lodge documents with the relevant council as required by section 30 or 73 and regulations 44 or 203;
- Participate in any appeals or other proceedings before the BAB as required;
- 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;
- Act independently and to assist owners and adjoining owners through the process.

Protection work is only required when the RBS determines that it is required under regulation 111. The requirement must be assessed on a case-by-case basis. Regulation 112 sets out the matters the RBS must consider in determining if protection work is required. Other matters the RBS should consider are soil reports, local soil conditions, site slope, the location of drains or other underground services, proposed methods for ensuring stability of excavations, such as battering or 'hit and miss' methods.

When the RBS determines that protection work is required, the RBS should consider whether there needs to be inspections of the building work relating to protection 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. Practice Note 69 provides more information on mandatory notification stages and inspection of building work.

The RBS's determination to require protection work must be set out in the form of a Determination that Protection Work is Required (Form 6 in Schedule 4 of the Regulations). Within 7 days of making the determination, the RBS must give a copy of the Form 6 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 owner is then required, under the section 84 of the Act, to serve the adjoining owner and the RBS with a notice in the form of a Protection Work Notice (Form 7) with accompanying documents set out in regulation 113, including sufficient detail to show how the proposed building work will affect the adjoining property and how the proposed protection work will protect the adjoining property, as well as three copies of the Protection Work Response Notice (Form 8) and the VBA Protection Work Approved Statement, which explains the protection work process.

Section 85 of the Act requires the adjoining owner to respond to the owner's Form 7 notice within 14 days of being served the notice. The response must be in the form of a Protection Work Response Notice (Form 8) (regulation 114). An adjoining owner who fails to respond in the required time is taken to have agreed to the proposed protection work under section 85(2) of the Act.

If the adjoining owner's response agrees to the proposed protection work, the Form 8 notice is only required to be given to the owner. If the adjoining owner agrees or is taken to have agreed, the owner may proceed to carry out the protection work after obtaining any required permits or approvals (section 86).

If the adjoining owner's response disagrees with the proposed protection work or requires more information to be given to enable the proposal to be considered by the RBS, a copy of the Form 8 notice must be given to both the owner and the RBS.

Independence 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 inform the owner or their agent of the reasons for requiring protection work, so they can formulate the proposed protection work and provide the details required in the Form 7 notice to the adjoining owner. The RBS should provide advice to the owner or adjoining owner, if necessary, to ensure that the protection work process is followed correctly.

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 with the notice. 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 and satisfy themselves that:

- the work is actually protection work; and
- it will provide appropriate protection to the adjoining property, and
- if so, make a decision on whether to approve the building permit.

If the RBS is not satisfied with the proposed protection work, the RBS must refuse to issue the building permit until a suitable 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, the RBS should request additional information. The RBS should also require the owner to revise the Form 7 notice and re-serve it on the adjoining owner. Serving of a revised Form 7 notice results in recommencement of the 14 day period (not including service time) for the adjoining owner to respond.

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 the 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).

Notice of determination under section 87 of the Act - Form 9

On receipt of a Form 8 notice from the adjoining owner disagreeing with the proposed protection work, or requiring more information to be given, the RBS must consider the Form 7 and Form 8, including the adjoining owner's comments (if any) and determine whether the proposed protection work is appropriate (section 87(1)). If agreement has not been reached between the owner and adjoining owner, before making a determination on whether the owner's proposal for protection work is appropriate or not, the RBS must follow the procedure set out in section 87.

The determination made by the RBS under section 87 of the Act must be in the form of a Notice of Determination Under Section 87 of the Act (Form 9 notice). The RBS must give a copy of the Form 9 notice to the owner and adjoining owner.

The notice may be given by:

- sending by ordinary post (allow for delivery time);
- 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.

The owner or adjoining owner have 14 days after the day 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 work has commenced

There may be situations where damage to adjoining property is not foreseen based on the building permit application, but changed circumstances on-site make protection work necessary. This can occur when there are unexpected site conditions or where the builder does not follow the building permit documentation. 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 of the Act) or stop the building work from proceeding or require work to make the site or adjoining property safe (Part 8 of the Act). A building order to stop building work can be issued under section 112 of the Act 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.

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; in the interests of the safety or health of 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.

To safeguard life safety and building standards, the RBS has the discretion to take other enforcement action under Part 8 of the Act, including the issue of a building notice, a building order or a building order – minor work.

If the RBS is not the MBS, they 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 should inspect the site, immediately assess the situation and determine if an emergency order should be made, or other action be taken.

Other administrative responsibilities of the RBS

The RBS must give to the council 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, if issued after the building permit has been issued, with the occupancy permit under section 73 of the Act (regulation 203(e)-(h)).

In accordance with section 92 of the Act, at any time after notice of intention to commence the carrying out of building work is given, the RBS 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.

Dispute resolution relating to protection work

The RBS must not act as an arbiter where there is disagreement about protection work between the owner and an adjoining owner. If there is a dispute between the owner and the adjoining owner, the RBS should refer the parties to the BAB (www.buildingappeals.vic.gov.au) to have the matter considered under Part 10 of the Act. Further information about resolution of protection work disputes between an owner and adjoining owner is provided in the VBA Protection Work Approved Statement.

Related Documents

- Building Practice Note 69 Mandatory notification stages and inspection of building work
- Building Act 1993
- Building Regulations 2018
- Fences Act 1968
- Protection Works Forms (Forms 6, 7, 8 and 9
- VBA Protection Work Approved Statement:

Version History

- Version 2.0, published 28 June 2021, supersedes Practice Note 20: Protection work process

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