PROTECTION WORKS PROCESS

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.