

OTHER PROCEDURES

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4.1 Certificates of compliance

4.1.1 What is a certificate of compliance?

PEA s. 97N(1)

A certificate of compliance is a document issued by a responsible authority in accordance with Part 4A of the *Planning and Environment Act 1987* (the Act). A certificate of compliance verifies that:

- an existing use or development complies with the requirements of the planning scheme, or
- a proposed use or development would comply with the requirements of the planning scheme.

In either case, the certificate states the facts at the date the certificate was issued.

PEA s. 97N, PE
Regs r. 48, Forms
14, 15

The Act requires that a certificate be in the prescribed form and include prescribed information. Different forms are prescribed. The appropriate form depends on whether the certificate relates to an established use (section 97N(1)(a), Form 14) or a proposed use or development (section 97N(1)(b), Form 15).

A certificate is not a form of development approval. If a use or development complies with the planning scheme, there is no need to apply for a certificate before proceeding. However, a certificate gives some certainty in interpreting a scheme, or in establishing the extent of existing use rights that predate the scheme. It may also be useful to a person other than the developer who needs to rely on it, for example a financial institution lending on the security of the land.

A certificate of compliance issued under Part 4A is not to be confused with either a planning certificate issued under section 199 (which states the provisions of a planning scheme applying to a particular parcel of land) or certification of a plan under Part 2 of the *Subdivision Act 1988*.

4.1.2 How is a certificate of compliance obtained?

An application for a certificate of compliance is made to the responsible authority administering the relevant planning scheme. The Act provides for an application to be accompanied by a prescribed fee.

4.1.3 What must the responsible authority do?

PEA s. 97O

On receiving an application for a certificate, the responsible authority must either issue or refuse to issue the certificate, in accordance with the Act. In the case of a certificate relating to a proposed use or development, the certificate may specify any part of the proposal which would require a permit, or is prohibited.

The responsible authority does not have discretion whether or not to issue a certificate based on whether it supports the proposed use or development, or whether the proposal would have a material effect on the locality. Nor is there any requirement or power to give notice about the application. The certificate must be issued or refused on the basis of the provisions of the planning scheme.

The certificate must be refused if:

PEA s. 97O(4)

- **existing use or development:** any part of the use or development would require a permit or is prohibited. It is helpful to ask the question *'Could what is on the land be established without the need for a permit today if the land was currently vacant and had no existing use rights?'* If the answer is yes, a certificate should be issued.

PEA s. 97O(5)

- **proposed use or development:** the whole of the use or development would require a permit or is prohibited.

If some aspects of a proposal are allowed by the scheme 'as-of-right', while others require a permit or are prohibited, the certificate may specify those parts that are not 'as-of-right'.

A certificate cannot be issued subject to conditions. However, it may need to state the conditions which a proposed use or development would need to conform to in order to comply with the scheme.

4.1.4 What does it mean if a certificate is refused?

If a person's application for a certificate for an existing use or development is refused, they must understand that this does not mean there is anything unlawful about the use of the land. It simply means that if the person wanted to establish that use and development now, a permit would be needed for some aspect of the project or that some aspect of it could not be permitted.

Similarly, if a person's application for a certificate about a proposed use or development is refused, they should not automatically infer that the responsible authority is opposed to the proposal. The responsible authority may be prepared to grant a permit if an application was made.

A certificate indicating parts of the proposal which require a permit will assist a person to make an appropriately targeted application.

4.1.5 Reviews about certificates

A review about a certificate is not about the merits of a proposal. It is essentially to settle the appropriate interpretation of the planning scheme in relation to the existing or proposed use.

PEA s. 97P, PE
Regs r. 49

The applicant for a certificate can ask the Victorian Civil and Administrative Tribunal (VCAT) to review a decision by the responsible authority to refuse a certificate, or its failure to issue a certificate within the prescribed time of 30 days.

VCAT may direct that a certificate must not be issued, or may direct the responsible authority to issue the certificate.

PEA s. 97Q

Any person may request VCAT to cancel or amend a certificate if they believe they have been adversely affected by either a material misstatement or concealment of fact in the application for the certificate, or a material mistake in relation to the issue of the certificate.

After hearing from the person who made the request for cancellation or amendment, as well as the responsible authority, the Minister and the owner and occupier of the land concerned, VCAT can direct the responsible authority to cancel or amend the certificate if it is satisfied that:

- there was a material misstatement or mistake
- the person who made the request was substantially disadvantaged by this
- it would be just and fair to do so.

4.2 Planning certificates

4.2.1 What is a planning certificate?

PEA s. 199

A planning certificate is an official statement of the planning controls that apply to a property. It will set out the zoning details of the land and any relevant overlay controls and exhibited amendments to the planning scheme that affect the land.

PEA ss. 199(2),
200

A planning certificate must contain the prescribed information about the effect of the relevant planning scheme on the land at the date of the certificate in accordance with the Act. A planning certificate will not provide the details of all planning scheme provisions that might apply to the land.

PEA s. 200

A certificate is conclusive proof of the facts set out. Any person acting on the basis of a certificate who suffers financial loss because of an error in the certificate may recover damages.

4.2.2 Obtaining a planning certificate

Any person can apply for a certificate. The application must be made to the responsible authority for issuing certificates.

The planning scheme states at Clause 61.01 who is responsible for issuing a planning certificate.

PE (Fees) Regs
r. 11

Where the Minister for Planning is responsible for issuing a planning certificate an application for a certificate can be made online via www.landata.vic.gov.au and following the Titles, and Property Certificates links. You will need to supply:

- either your contact details, or your login identification (if you are a registered user)
- information about the property or properties in question
- your credit card details for the purchase of the certificate or certificates.

4.3 Building permit applications for demolition of buildings

Sections 29A and 29B of the *Building Act 1993* (and related provisions of Schedule 2 of that Act):

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

A 'report and consent' is the process under the *Building Act 1993* for consulting with and obtaining the approval of a specified authority for certain building works. It is required for a range of building related matters including for proposals to build over an easement, build in a flood-prone area and for certain demolitions.

4.3.1 When is a report and consent required for building demolition?

In relation to the planning system, demolition (amongst other matters) requires report and consent under the building system.

BA s. 29A

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

- the proposed demolition, together with any other demolition completed or permitted within three years immediately preceding the date of the application, amounts to the demolition of more than half the volume of the building as it existed at the date the first building permit was issued within the demolition period for any part of the building; or
- the demolition is of any part of a building's facade facing the street.

Parts of a building that are covered by a roof should be included in calculating the volume, and unroofed areas should not be included. Internal demolition not reducing the volume of a building should not be included in calculating the volume.

The Victorian Building Authority's practice note *PN-57-2014 – Report and Consent* provides more detailed information about the report and consent process.

4.3.2 How long does a responsible authority have to provide a report and consent?

A responsible authority is required under Building Regulation 307 to provide the report and consent within 15 business days. The 15 days start when the responsible authority receives a copy of the application from either the relevant building surveyor or the applicant. The day the request is lodged is not included in the 15 business days.

4.3.3 Failure of responsible authority to respond within 15 days

In accordance with Clause 6A of Schedule 2 to the *Building Act 1993*, the building surveyor may proceed to decide an application without a report from the responsible authority if one is not supplied within the prescribed time of 15 business days.

After this time, a reporting authority is deemed to have consented to the application, except in the circumstances of section 29A(2) of the *Building Act 1993*, where a planning permit is required for the demolition but has not been obtained. In that case, the reporting authority is deemed to have refused its consent.

It is essential for a building surveyor to establish whether a planning permit is required for the demolition and, if so, whether it has been issued. In the case of a responsible authority not responding within the prescribed time, the application can be determined using the decision on the planning application as the deemed response.

4.3.4 Request to Minister to introduce a planning scheme amendment

BA s. 29B

If during the prescribed time for report and consent:

- the relevant planning authority applies to the Minister for Planning for an exemption from the requirement to give notice (section 20(1) of the Act) about an amendment to the planning scheme (this amendment would be to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme), or
- the Minister for Planning is asked to make an amendment to the effect that the relevant building may not be demolished or externally altered, except in accordance with a permit under the planning scheme

the responsible authority must notify the relevant building surveyor accordingly within the 15 business day period.

The building surveyor must then suspend the application for a demolition permit, effectively freezing the time in which the application must be decided until after the planning scheme amendment is resolved.

4.3.5 Approval of planning scheme amendment

If the Minister:

- agrees to exempt a planning authority from the notice requirements of the Act in accordance with these provisions, or
- agrees to amend the planning scheme as requested

the Minister will advise the relevant planning authority or responsible authority of this decision.

BA s.29B

The relevant building surveyor will also be advised that the Minister has agreed to the proposed planning scheme amendment and the suspension of the application for a building permit for demolition will continue until the planning scheme is amended.

The application for a building permit for demolition cannot be approved unless a planning permit is granted.

The responsible authority must advise the relevant building surveyor if any of the following occur:

- withdrawal of the request by the planning authority for exemption from notice, or the application by the responsible authority to the Minister for an amendment
- refusal by the Minister of the request by the planning authority for exemption or the Minister's refusal of an application for an amendment to the planning scheme

- an amendment to the planning scheme coming into operation and having the effect of requiring that a permit be obtained to demolish or alter the building
- lapsing of an application for an amendment to the planning scheme.

BA s. 29A(2)

If the planning scheme is amended that gives the effect of requiring a planning permit for demolition of a building, the responsible authority must refuse consent to any application under section 29A of the *Building Act 1993* until a planning permit is obtained.