

Local heritage protection provisions in the Planning and Environment Act 1987

Planning Practice Note 95

May 2022

This practice note provides guidance on the local heritage protection provisions in the *Planning and Environment Act 1987* (PE Act).

What are the local heritage protection provisions?

The local heritage protection provisions are contained in section 6B and Division 2A of Part 6 of the PE Act.

Among other things, the provisions enable the regulation or prohibition of development of land on which a heritage building has been unlawfully demolished or fallen into disrepair.

What is a heritage building?

Section 3 of the PE Act defines 'heritage building' as *'...a building which is a place, or forms part of a place, that has been given heritage protection under a planning scheme...'*

A building of local heritage significance is given protection under a planning scheme by including it in the Heritage Overlay (clause 43.01) so local heritage protection provisions in the PE Act only apply to buildings that are included in the Heritage Overlay.

More information local heritage protection, including the Heritage Overlay, is available online at: planning.vic.gov.au/policy-and-strategy/local-heritage-protection

Places of state heritage significance (which are included on the Victorian Heritage Register) are protected under the *Heritage Act 2017*. More information on state heritage is available online at: heritage.vic.gov.au

Under section 3 of the PE Act, a 'building' includes:

- a structure and part of a building or a structure
- fences, walls, out-buildings, service installations and other appurtenances of a building
- a boat or a pontoon which is permanently moored or fixed to land.

Section 6B of the PE Act

Section 6B of the PE Act enables a planning scheme to make provision for additional matters for the purposes of:

- furthering the objectives of planning in Victoria
- deterring persons from unlawfully demolishing heritage buildings or allowing heritage buildings to fall into disrepair
- preventing persons from obtaining a benefit from unlawfully demolishing heritage buildings or allowing heritage buildings to fall into disrepair.



The additional matters that the planning scheme may make provision for are:

- to regulate or prohibit the development of land on which there is or was a heritage building that has:
 - been unlawfully demolished, in whole or in part; or
 - fallen into disrepair
- to require that a planning permit must not be granted for the development of land on which there is or was a heritage building that has been unlawfully demolished, in whole or in part, or fallen into disrepair, unless the development is for or includes:
 - the reconstruction or reinstatement of the building, in whole or in part; or
 - the repair of the building.

Who can amend a planning scheme to include provisions under section 6B?

The Minister for Planning, or a municipal council that has been authorised by the Minister, may prepare an amendment to a planning scheme to make provision for the additional matters set out in section 6B.

What does ‘unlawfully demolished’ mean?

A heritage building is ‘unlawfully demolished’ if it is demolished, in whole or in part, in contravention of the planning scheme, a planning permit or an agreement under section 173 of the PE Act.

What does ‘disrepair’ mean?

The PE Act doesn’t define ‘disrepair’ so this term has its ordinary meaning. Further information about the type of disrepair that section 6B may be appropriate for is provided below.

Does section 6B impose a duty or obligation to maintain a heritage building?

Section 6B does not:

- impose a duty or obligation to maintain a heritage building
- enable a municipal council to require a property owner to carry out maintenance or repair
- enable a responsible authority to take planning enforcement in relation to disrepair.

However, a person who allows a heritage building to fall into disrepair risks having planning scheme controls applied to the land that prohibit or significantly restrict its development. This includes a provision that would prevent the grant of a planning permit for development of the land unless the development is for or includes the reconstruction, reinstatement or repair of the building.

Some municipal councils have local laws that require property owners to maintain their properties to ensure that they do not become unsightly or a hazard to health, safety and property. Action may also be taken under the *Building Act 1993* in relation to an unsafe building.

When should section 6B be used?

Section 6B should only be used when it is appropriate, just and fair to do so, having regard to the facts and circumstances of each individual case and the matters set out in section 6B and section 12(2) of the PE Act.

Using section 6B in relation to disrepair

Given that the PE Act does not impose a duty or obligation to maintain a heritage building to any particular standard, section 6B should only be used in relation to disrepair if the building’s condition has deteriorated to the point that:

- the building is structurally unsound and its demolition, in whole or in part, has become necessary; or
- it is beyond reasonable repair; or
- there is significant risk of irreparable damage to the building’s heritage significance.

Section 6B should not be used in relation to:

- disrepair that is not a risk to the building’s heritage significance, for example:
 - disrepair that is superficial, cosmetic or can be readily repaired (such as peeling or faded paint, or corroded roof cladding)
 - disrepair of non-heritage elements such as service installations and other appurtenances (where this disrepair does not pose a risk to heritage elements)
- ‘non-contributory’ buildings (for example, buildings with no heritage significance included in a Heritage Overlay that applies to an area or precinct).



Matters that should be considered when deciding whether to use section 6B in relation to disrepair include:

- the purposes set out in section 6B(1)
- the nature, extent and circumstances of the disrepair
- the building's condition at the time it was given heritage protection under the planning scheme
- if the building is a dwelling and was the owner's principal place of residence when it fell into disrepair, whether the disrepair was a result of the owner's financial inability to maintain or repair it
- the planning history of the building and the land, including previous applications to demolish the building
- steps taken by the municipal council to notify the owner of the disrepair, or the need for maintenance or repair
- steps taken by the owner to secure, maintain or repair the building
- if the building has been damaged as a result of fire, vandalism or natural disaster, whether the owner took steps to reasonably ensure the building was:
 - secured and protected against the risk of damage before the damage occurred
 - stabilised and repaired after the damage occurred.

What provision of the *Victoria Planning Provisions* will be used?

The Specific Controls Overlay (clause 45.12) will be used for the purposes of section 6B.

The Specific Controls Overlay can, among other things, override other provisions of the planning scheme to prohibit or restrict the development of the land, or require development to be carried out in a particular manner, in accordance with a document incorporated into the planning scheme.

When would it be appropriate to require the reconstruction, reinstatement or repair of the heritage building?

A decision to require the reconstruction, reinstatement or repair of the heritage building as part of an approved development of the land will depend on the nature and extent of damage and the heritage significance of the building.

In some circumstances the reconstruction or reinstatement of a building may not be appropriate and other measures may be required to recognise its former significance.

Can section 6B be used even if there is not a current application to develop the land or demolish the heritage building?

The planning scheme may be amended at any time for the purposes set out in section 6B(1), even if there is not a current application to demolish the heritage building. An application to develop another part of the heritage place or to subdivide the land may also trigger consideration of section 6B.

Division 2A of Part 6 of the PE Act

Division 2A includes provisions that enable the Governor in Council to make an Order that prohibits the use or development of land under the PE Act and the *Building Act 1993* for a period of up to 10 years.

An Order can only be made if a person has been found guilty of an offence under section 126 of the PE Act in relation to the unlawful demolition of a heritage building or part of a heritage building.

An Order may declare that the land must not be:

- developed or continue to be developed; or
- developed or continue to be developed, except as specified in the Order; or
- must not be used, except as specified in the Order.

Unless the Order specifies otherwise, the effect of an Order is:

- a planning permit granted, or building permit issued, before the Order took effect is of no force or effect
- a responsible authority (usually the relevant municipal council) must refuse to grant a planning permit in relation to the land
- a relevant building surveyor must refuse a building permit in relation to the land.

An Order does not prevent the making or operation of an emergency order under Division 1 of Part 8 of the *Building Act 1993*.



Who may request the Governor in Council to make an Order?

Only the Minister for Planning can recommend the Governor in Council make an Order.

When will the Minister for Planning make a recommendation to the Governor in Council?

The Minister will only make a recommendation in circumstances that are appropriate, just and fair, having regard to the fact and circumstances of each individual case.

How will the public know an Order has been made?

An Order must be published in the Victoria Government Gazette.

The planning scheme may also be amended to apply the Specific Controls Overlay to the land with an incorporated document that reflects the terms of the Order.

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