

4. Other Procedures

4.1 Certificates of compliance

4.1.1 What is a certificate of compliance?

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). This provides for two types of certificate:

- PEA s. 97N(1)(a) ■ a certificate stating that an existing use or development of land complies with the requirements of the planning scheme
- PEA s. 97N(1)(b) ■ a certificate stating that a proposed use or development (or part of 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 of the certificate.

PEA s. 97N, PE Regs
r. 33, 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 9) or a proposed use or development (section 97N(1)(b), Form 10).

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 is made to the responsible authority. In some schemes (particularly in the metropolitan area) the responsible authority is not responsible for issuing certificates under section 199 of the Act. An application for a certificate of compliance is made to the responsible authority administering the scheme generally, not the authority for issuing certificates under section 199. The Act provides for an application to be accompanied by the 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)

- in the case of an *existing* use or development, any part of the use or development would require a permit or is prohibited under the scheme. 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)

- in the case of a *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. 34

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 a formal document which sets out some procedural information and:

- a description of the provisions of the planning scheme shown on the scheme maps which apply to the land
- a description of any amendment to the scheme maps, available for inspection under the Act, which applies to 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 does not provide the detail of all provisions of the scheme that might apply to the land, but only describes the provisions shown on the planning scheme maps (which is the zone and any overlay that applies 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. This is usually the responsible authority that administers the scheme except in most parts of the metropolitan area, where the Minister for Planning is the responsible authority for issuing planning certificates.

An application for a planning certificate can be made over the Internet by opening www.land.vic.gov.au and following the Titles, Plans and 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.

Further information about obtaining planning certificates is available by contacting the Land Information Centre, level 10, 570 Bourke Street, Melbourne or by phone (03) 8636 2831.

4.3 Building permit applications for demolition of buildings

Sections 29A and 29B of the *Building Act 1993* (and related amendments to 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.

4.3.1 When is a report and consent required?

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 calculation of the volume, and unroofed areas should not be included. Internal demolition not reducing the volume of a building should not be included in calculation of the volume.

4.3.2 How long do responsible authorities have to provide a report and consent?

Responsible authorities are required under Building Regulation 2.5 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 working 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.

If a responsible authority does not respond within the prescribed time, it is therefore essential to establish whether a planning permit is required for the demolition and, if so, whether it has been obtained. The building surveyor should normally have already established the situation before applying for report and consent. The application can then be determined in accordance with the deemed response.

4.3.4 Request to Minister to introduce a planning scheme amendment

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 for a permit must be decided.

The guidelines set out in Planning Practice Note *Ministerial Powers of Intervention in Planning and Heritage Matters* will apply to any request to the Minister for a planning scheme amendment under section 20(4) of the Act.

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.

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 refusing 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.

The time within which the building surveyor must decide an application for a permit recommences when any of these notices are received.

If the planning scheme is amended so as to require that a planning permit must be obtained for demolition in relation to the land on which the building is located, the responsible authority must refuse consent to the application. A building permit for demolition cannot be issued until a planning permit is obtained.