

Appeal proceedings in respect of Decisions made under Part 7 of the Building Act 1993 (Protection Work)

PRACTICE NOTE 8B - 2021

1. This practice note provides guidance in respect of appeal proceedings in relation to appeals against;
 - a. A determination of the relevant building surveyor made under s 87(1) of the Act as to the appropriateness of the proposed protection work, which may be appealed to the Board under s 141(a) of the Act;
 - b. A declaration of the Authority made under s 89(1) of the act that declares that emergency protection work is required in respect of an adjoining property, which may be appealed to the Board under s 141(b) of the Act;
 - c. A failure, within a reasonable time, or refusal to make that determination or declaration noted at para 1.a and 1.b above, which may be appealed to the Board under s 141(c) of the Act; or
 - d. A request by the relevant building surveyor under s 87(2) for the owner to give more information, which may be appealed to the Board under s 141(d).
2. This practice note should be read in conjunction with [Practice Note 8A \(2021\) – Dispute and Compensation proceedings in respect of Part 7 of the Building Act 1993 \(Protection Work\)](#).
3. In any proceeding, having regard to the rules of natural justice, the Board may at its discretion vary the operation of a practice note by direction or order.
4. This practice note has been approved by the Chairperson of the Building Appeals Board.

Word	Definition
Act	<i>Building Act 1993</i>
Regulations	<i>Building Regulations 2018</i>
Board	Building Appeals Board
Owner	The owner of the building site required to carry out protection work.
Adjoining owner	The owner of the adjoining property, '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.' ¹
Appeal proceeding	A proceeding of the board consisting of an appeal application.
Applicant in an appeal proceeding	The owner or adjoining owner who makes an appeal to the Board under s 141 of the Act.
Respondent in an appeal proceeding	The decision maker of the decision against whom

¹ *Building Act 1993*, s 3(1)

	the Applicant appeals under s 141 of the Act.
Interested Party	A person who would be directly and immediately effected by the outcome of the proceeding.
Directions	Orders of the Board made as to the future conduct of the appeal proceeding.
Expert Witness	A person who has specialised knowledge based on the person's training, study and/or experience.
RBS	Relevant building surveyor
Authority	Victorian Building Authority

Background

5. Part 7 of the Act lays out the process and governs what is required when it is determined by the RBS that protection work is required.
6. Under Division 1 of Part 10 of the Act (s 141), the Act provides that an appeal may be made to the Board in respect of certain decisions made under Part 7, which are set out at para 1.a. of this practice note.
7. A decision under appeal does not take effect unless the decision is affirmed by the Board.

Who may appeal and what are the time periods by which you must appeal?

8. An owner or adjoining owner may appeal the decision but must do so by no later than:
 - a. In the case of an appeal against a determination under s 87(1) of the Act as to the appropriateness of protection work – 14 days after the day the owner and the adjoining owner is given notice of the determination; or
 - b. In the case of an appeal against a declaration made under s 89(1) of the Act for emergency protection work to be carried out – 30 days after the day the owner or adjoining owner is given notice of the declaration; or
 - c. In the case of an appeal against a failure, within a reasonable time, to make that determination or declaration – 60 days after the request was made to make that determination or declaration; or
 - d. In the case of an appeal against a refusal to make that determination or declaration – 30 days after the day notification is given of the refusal; or
 - e. In the case of an appeal against a request made under s 87(2) of the Act to give more information – 14 days after the day the owner is requested to give that information.

Fast track appeals

9. Any party to the appeal proceeding may apply to have the proceeding fast tracked.
10. The fast track application must be in writing and be accompanied by the prescribed fee.²
11. A fast track application will be listed for a directions hearing, at which time the Board will decide whether the proceeding is to be fast tracked.
12. The applicant of a fast track application should provide reasons and may provide any evidence in support of why the appeal proceeding should be fast tracked.
13. Guidance on what factors the Board considers relevant in a fast track application can be found in the following determination of the Board - [Simonotti & Anor v Kingston City Council \[2021\] VBAB 135](#).
14. If the fast track application is granted directions will be made by the Board providing a truncated timetable for steps required to be taken in the proceeding.

What documents should the Applicant file with the Board and provide to the other parties to the proceeding?

15. To avoid delay, the Applicant should file³ with the Board and provide to the other parties the following documents:
 - a. [A completed application](#).
 - b. A copy of a recent title search of the owner's property and of the adjoining owner's property.⁴

- c. Authority to act form (if a representative is acting on the Applicant's behalf).⁵
- d. A document specifying the nature of the proceeding, the grounds for commencing the proceeding and the relief sought.⁶
- e. Form 6 – Determination that Protection Work is Required;
- f. Form 7 – Protection Work Notice (inclusive of all documents provided with the Form 7);
- g. Form 8 – Protection Work Response Notice;
- h. Form 9 – Notice of Determination under Section 87 of the Act (if a Determination was made).
- i. The date, method and evidence of service of the matters in items 15. (e) and (f) above.

What additional documents should the Applicant file with the Board and provide to the other parties to the proceeding?

16. In an appeal against a declaration of the Authority made under s 89(1) of the Act, the Applicant must provide a copy of the declaration;
17. In an appeal against a refusal to make a determination under s 87(1) of the Act or a declaration under s 89(1), the Applicant must provide evidence of the request to make that determination or declaration and evidence of the refusal;

² The application form to fast track an appeal can be located here - [Fast track application form](#)

³ Filing with the Board can be effected by emailing the Board's registry at: registry@buildingappeals.vic.gov.au

⁴ These may be obtained at the [Land data website](#)

⁵ [Authority to Act form](#)

⁶ [A Statement of Contentions may be used for this purpose and if filed with the Application form may help to shorten the duration of the proceeding.](#)

18. In an appeal against a request by the relevant building surveyor under s 87(2) for the owner to give more information, the Applicant must provide evidence of that request.

Directions

19. Upon an appeal being filed with the Board a case number is assigned to the proceeding.

20. After the assessment of the proceeding, Directions are made by the Board or in more complex proceedings a directions hearing will be first listed before the Board's Chair, Deputy Chair or a member of the Board who will hear from the parties and then make directions.

21. If there are other persons who may be directly and immediately affected by the outcome of the proceeding, an order may be made to join those persons to the proceeding as Interested Parties.

22. The Directions also set time limits for the filing of submissions and evidence, which may support or oppose the appeal before the Board.

23. Other parties may be disadvantaged if you do not comply with the time limits set out in any Directions or Orders. If you require more time to comply, you should notify the Registrar and the other parties as soon as possible.⁷

24. If the time limits for filing material are not strictly observed, the Board may decide to:

- a. Not have regard to the material filed beyond the time limit; or

- b. Adjourn the hearing and order that any wasted costs incurred by any of the other parties are paid by the party that has failed to comply with the time limits.

The Hearing

25. The hearing proceeds as either:

- a. A 'paper hearing', where the appeal is considered on the material that has been filed with the Board by the parties; or
- b. An 'oral hearing', where, in addition to written submissions and evidence filed with the Board, the parties or their representatives have an opportunity to appear before the Board (remotely or in-person). At the hearing, the Board is usually constituted by a panel of three Board members.

26. The hearing is in the nature of a re-hearing de novo and, in addition to its other powers, the Board has all the powers of the decision-maker in relation to the decision under appeal.

27. The Board may consider matters not raised before the decision under appeal was made.

28. The Board may inform itself in any manner it thinks fit.

29. The Board is not bound by any rule or practice as to evidence, however, it is bound by the rules of natural justice.

⁷ [Applications for orders in the proceeding and Consent orders requests are located here on the Board's website](#)

Expert Evidence

30. In some appeal proceedings, expert evidence may assist in supporting the Applicant's appeal or the Respondent's and Interested Party's response to the appeal.
31. If an expert is retained, regard should be had to Practice Note 5 – Expert Evidence.⁸
32. You should ensure that the author of any expert report or other expert material filed with the Board is available to appear at the hearing and answer questions asked by the parties to the proceeding or by the Board.

The Determination

33. After the hearing, the panel will consider the submissions and the evidence and hand down a determination, which may contain reasons for the determination.
34. The determination may;
 - a. affirm the decision under appeal;
or
 - b. quash the decision under appeal;
or
 - c. vary the decision under appeal; or
 - d. set the decision under appeal aside and
 - i. substitute the Board's own decision; or
 - ii. remit the decision to the decision-maker for reconsideration in accordance with any directions or recommendations that the

Board considers appropriate.

35. The decision under appeal does not take effect unless the Board affirms the decision.
36. The Board may also make any ancillary or incidental orders that it considers necessary to give effect to its determination.
37. Unless the Board determines otherwise, a party to a proceeding must bear his, her or its own costs.
38. If the Board does determine otherwise, the determination may include any order as to costs that the Board considers is just.

⁸[Practice Note 5 \(2020\) - Expert Evidence](#)