

Notices and orders

This updates the previous *Practice Note* 2005-25 issued June 2005.

1. Summary

This Practice Note aims to inform building surveyors on format and procedural matters relative to emergency orders, building notices, building orders, building orders to stop work and building orders for minor work.

It is also intended to assist private building surveyors (PBS) when referring a building order to the Building Commission (the Commission). The Practice Note explains the legislation and the Commission's approach with a referred building order, so that the PBS and the Commission are able to work in a complementary manner to ensure compliance with the legislation.

2. Building surveyors responsibilities

A building surveyor has a pre-eminent role in the building permit system (including enforcement) and must maintain an appropriate professional distance to ensure the system's integrity.

Under the Building Act 1993 (the Act) the municipal building surveyor (MBS) is able to issue emergency orders (section 102), building notices (section 106) and building orders (sections 111, 112 and 113) to bring about compliance and ensure the safety of people and property within Council's municipal district.

A PBS has, except for the ability to issue an emergency order under section 102 of the Act, the same powers to issue a building notice or building order as the MBS, if that PBS has been appointed to carry out a function in respect of the building, land or place under section 76 (see section 107).

Section 115(1) of the Act requires that if a person fails to comply with a building order made by a PBS, the PBS must refer the matter to the Commission and must take no further action in respect of the matter under Part 8. Sub-section (2) requires that the referral must be made within 14 days after the final date for compliance specified in the order.

When a valid building order is referred to the Commission under section 115, the PBS is prohibited from taking any further action in respect of the matter under Part 8. The Commission has

obtained legal advice about the meaning of the word "matter" used in section 115.

The legal advice states that when there is a referral to the Commission pursuant to section 115, the words "*the private building surveyor ... must take no further action in respect of the matter under this Part*" does not mean that the PBS ceases to be the relevant building surveyor (RBS) in respect of the functions for which they were appointed under section 76 of the Act or in respect of the building order that was referred to the Commission.

The reference to a PBS taking no further action in respect of the matter refers to the enforcement of the building order. That is, the word "matter" refers solely to the failure to comply with the building order. The PBS must continue to be responsible for the functions under section 76 for which she/he was appointed.

3. The role of the private building surveyor

Under Part 13 of the Act, a PBS cannot initiate legal proceedings to either prosecute for non-compliance with a building order or to seek orders from the court requiring compliance.

When a building order is referred under section 115, the Commission may direct the PBS (section 198(2) of the Act) to—

- (a) withdraw the building order if it is not valid;
- (b) amend or cancel the building order, if there has been a change in circumstances; or
- (c) issue a new building notice and building order, where the Commission believes that the building order or notice is not valid.

As the RBS for the building order, the PBS is required to amend the building order. Therefore the administrative process of withdrawing, cancelling or amending the building order remains with the PBS.

As the withdrawal, cancellation or amendment of the building order is not the "enforcement" of the order, it does not constitute taking further action in respect of the non-compliance under Part 8.

The PBS must give written notice of the compliance, amendment or cancellation within 7 days of issue to the relevant council, in order to satisfy section 125(2). It is necessary to provide written notice to council so that council can make property information available to prospective purchasers. This written notice is not the enforcement of the building order and is not taking further action in respect of the non-compliance.

If the PBS is notified by the owner under section 120 that the building order has been complied with, the PBS is required to inspect the work and advise the relevant council of the compliance, if that is the case. The PBS should also advise the Commission of compliance. However, if the work has not been fully completed, the PBS can take no further action under Part 8 to bring about compliance (including requiring compliance under section 120(2)(b)). In such circumstances, the PBS should advise the Commission of the status of the work.

Only a valid building order may be referred to the Commission under section 115. Building orders referred under this section are reviewed by the Commission and if found to be invalid, will be returned to the PBS. Under section 111, most common causes of invalidity are:

- ▶ no preceding building notice under section 106;
- ▶ no requirement to do one or more of the matters referred to in sub section 111(3);
- ▶ not addressed to the "owner" of the building/land/place.

4. The role of the Commission

The Commission may bring proceedings for an offence against the Act or Building Regulations pursuant to section 241(3) and/or seek orders from the court under section 253.

When the Commission inspects a site following the referral of a building order, the Commission is attending to find out whether the building order has been complied with, before starting enforcement proceedings. The Commission is establishing the

evidence for prosecution purposes and determining whether orders under section 253 should be obtained. In doing this, the Commission is not carrying out the functions of the RBS or a MBS.

Section 199(1)(b) authorises the Commission to carry out the functions of a MBS relating to any matter referred to it by a PBS under Part 8 of the Act. This does not mean that in respect of every referral, the Commission will utilise this power under section 115. The Commission has a number of enforcement mechanisms at its disposal. The Commission has sole discretion to which enforcement mechanism to use.

5. Service of Notices and Orders

Notices are served under section 236 of the Act but it is strongly suggested as has been past practice, that any emergency orders, building notices or building orders also be sent by registered or certified mail.

Where a time is specified for compliance or to show cause, the MBS or PBS must take into account the gravity of the breach and the extent of works required for rectification and allow a "reasonable" time having regard to the circumstances. As the appeal period is 30 days for notices and orders, that period (except for emergency orders) should be used as the general benchmark.

6. Conclusion

It is essential that both the contents and service of emergency orders, building notices, building orders, building orders to stop work and building orders for minor work are absolutely correct. In many cases errors can lead to the downfall when the matter comes before the courts or when the matter is referred to the Commission for further action. Where a building order is referred to the Commission by a PBS under section 115, the Commission will advise the PBS if the building notice and building order is unenforceable and recommend that the process be restarted.

The PBS remains the RBS for carrying out the functions under section 76 for that building project and the RBS in respect of that building order. When

the Commission conducts any inspections regarding the matter, it does so to check whether the order has been complied with and to help it determine whether prosecution and/or court orders under section 253 are warranted. If the Commission decides to bring legal proceedings, it is acting under its own power and is not acting as RBS or MBS. Where building orders are complied with, or must be amended or cancelled, following the input of the Commission, the PBS may be directed to amend or cancel the building order.

If after a building order has been referred to the Commission, there is a change in circumstances which warrants amendment or cancellation of the order (or the issuing of a new order), it is the responsibility of the PBS to take the necessary action.

Depending on the gravity of the matter, the Commission prefers to achieve compliance without issuing a building notice and building order. A PBS or MBS who neglects their responsibilities to achieve compliance places the registration of all parties at risk. Appendix A sets out proforma notices and orders, which have been prepared to give some guidance in the preparation of notices and orders.

Appendix A

Emergency order

Danger to life or property

An emergency order can only be issued by a MBS (not a PBS) who has the authority to deal with urgent safety matters in a timely and efficient manner. An emergency order should be used where, in his or her opinion a danger to life or property exists out of the conditions or use or proposed use of a building, the land on which building work is being or is proposed to be carried out, or a place of public entertainment. An emergency order applies to more limited circumstances than a building notice and building order. In such circumstances, an emergency order should be issued where there is a sense of urgency in the situation and it would not be appropriate to allow for a 30 day "show cause" period. If it is considered necessary to stop building work and order work to be carried out, the MBS should consider issuing an emergency order.

Serving of emergency orders

The emergency order must be served on the owner and the occupier of the building, land or place concerned without delay after it is made in accordance with section 102(2). In relation to land, an emergency order may only be served where it is land on which building work is or is proposed to be carried out.

Building Act 1993 Building Regulations 2006

EMERGENCY ORDER UNDER SECTION 102 OF THE BUILDING ACT 1993

TO: *Name and address of owner*
(The Owner)

AND TO: *Name of the occupier*
(The Occupier)

OF THE: **building/land/place of public entertainment* LOCATED AT **address or location of the building in question.**

WHEREAS:

1. I am the municipal building surveyor of **Council name** and am authorised to make an emergency order under section 102 of the Building Act 1993 ("Act").
2. I inspected the **building/land/place of public entertainment* on **date**.
3. Pursuant to section 102(1) of the Act, I am of the opinion that this Order is necessary because of a danger to life or property arising out of the **condition/use/proposed use of the *building/land/place of public entertainment*.
4. The **reason/s why* this Order was issued **is/are* that:

eg **4.1 the shop front adjoining the street has been damaged by fire and may fall onto the footpath**

4.2 The verandah over the footpath is in danger of collapsing

NOW THEREFORE TAKE NOTICE THAT:

5. The **Owner/Owner and Occupier* **is/are* required within **hours/days/weeks** of the service of this Order to:

5.1 *evacuate the *building/land/place of public entertainment;*

5.2 *not conduct or not to allow the conduct of a public entertainment;*

5.3 *immediately cease to conduct a public entertainment;*

5.4 *stop the building work;*

5.5 *carry out the following building work or other work to make the *building/land/place of public entertainment safe:*

5.5.1 (detail required works for compliance)

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5.6 carry out the following building work or other work to secure the * building/land/place of public entertainment from access:

5.6.1 (detail required works for compliance)

AND TAKE FURTHER NOTICE THAT:

6. This Order prohibits the occupation of the *building/place of public entertainment/the use of the building/place of public entertainment for public entertainment for the \ period of **time** from the serving of this Order.

DATED THIS DAY OF 200

Municipal Building Surveyor
Council
Address

NOTES

1. Duration of Emergency Order

Subject to sub-section 103(2) of the Act, an emergency order remains in force until it is complied with or it is cancelled by the municipal building surveyor under section 105 or the Building Appeals Board under section 142 of the Act.

2. Cancellation of Emergency Order

The municipal building surveyor may cancel an emergency order by written notice given to the owner and to the occupier of the building, land or place of public entertainment concerned if the order was made in error or the circumstances giving rise to the making of the order have changed (section 105).

3. Penalty for failure to comply

A person to whom an emergency order is directed must comply with that order [penalty:100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate] pursuant to section 118 (1).

4. Appeals to the Building Appeals Board

Under section 142(3) an owner of a building or land may appeal to the Building Appeals Board against a decision to serve an order and a failure within a reasonable time, or refusal, to cancel an order. In accordance with section 146 of the Act and regulation 1601 of the Regulations the prescribed appeal period is 30 days from the date of this notice.

* or in *italics* delete words or phrases not applicable
bold italics insert words

Building notice

Serving of building notices

A building notice is a "show cause" notice which requires the recipient to give the MBS /PBS reasons why he or she should not issue a building order. It requires the owner to do, or not to do, certain things in respect of that person's land or building, giving the recipient an opportunity to make representations to the MBS /PBS before further action occurs.

A building notice may (currently) only be served on an "owner".

Subject to section 107, a MBS or a PBS may serve, or cause to be served, a building notice on the owner of a building, land on which building work is being or is proposed to be carried out, or a place of public entertainment (see definition in section 3 of the Act). Building notices may not be served in relation to land unless building work is being or is proposed to be carried out on the land.

It is essential that the building notice and any subsequent building order are consistent. If the building order contains additional requirements which the owner was not given notice of under the building notice, then the validity of those additional requirements may be challenged. The exception is where the RBS modifies the requirements of the building order in response to the representations made by the owner.

Representations by owner

A fundamental aspect of the building notice procedure is that the owner may make representations to the relevant building surveyor about matters contained in the notice (section 109). The manner of making those representations must be specified in the notice.

A building order under section 111 should not be issued until the end of the "show cause" period identified in the preceding notice issued under section 106.

A building notice should, as a general rule, allow at least 30 days for the owner to show cause due to the 30 day appeal period.

Cancellation of building notices

The building surveyor may cancel a building notice if he/she considers it appropriate to do so after considering any representations made under section 109.

Building Act 1993 Building Regulations 2006

BUILDING NOTICE UNDER SECTION 106 OF THE BUILDING ACT 1993

TO: *Name and address of owner*
(The Owner)

OF THE: **building/land/place of public entertainment* LOCATED AT **address or location of the building in question.**

WHEREAS:

1. I am the [private building surveyor appointed in respect of the building/land/place to carry out functions] [municipal building surveyor of insert Council name] and am authorised to cause a building notice to be served under Division 2 of Part 8 of the Building Act 1993 ("Act").
2. I inspected the **building/land/place of public entertainment* on **date**.
3. Pursuant to section 106 of the Act, I am of the opinion that:
 - 3.1 *building work has been carried out on the *building/land/place of public entertainment without a building permit required by the Act;*
 - 3.2 *building work has been carried out on the *building/land/place of public entertainment in contravention of the building permit issued for the building work, being permit number dated date, in that:*
 - 3.2.1 particulars of building work**
 - 3.3 *building work has been carried out on the *building/land/place of public entertainment in contravention of the Act in that:*

eg 3.3.1 (contrary to section number)
 - 3.4 *building work has been carried out on the *building/land/place of public entertainment in contravention of the Building Regulations in that:*

eg 3.4.1 (contrary to Regulation number)
 - 3.5 *the use of the *building/place of public entertainment contravenes the Act in that:*

eg 3.5.1 (occupied as a Class 6, contrary to section number)
 - 3.6 *the use of the *building/place of public entertainment contravenes the Building Regulations in that:*

eg 3.6.1 (occupied as a Class 6, contrary to regulation number)

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3.7 *the *building/place of public entertainment is unfit for occupation or use as a place of public entertainment;*

3.8 *the *building/land/place of public entertainment is a danger to the life, safety or health of any member of the public or of any person using the *building/land/place of public entertainment in that:*

3.8.1;

3.9 *building work at *building/land/place of public entertainment is a danger to the life, safety or health of members of the public or of any person using the *building/land/place of public entertainment in that:*

3.9.1;

3.10 *the *building/land/place of public entertainment is a danger to other property, being the land/building located at address or location in that:*

3.10.1;

3.11 *building work at the *building/land/place of public entertainment is a danger to other property, being the land/building located at (address or location), in that:*

3.11.1;

4. The above **is/are* the **reason/s* why this Notice was issued.

NOW TAKE NOTICE THAT:

5. You are required to SHOW CAUSE in writing within **days/weeks** of the date of service of this Notice :

5.1 *Why the occupation of the *building/place of public entertainment should not be prohibited;*

5.2 *Why the use of the *building/place of public entertainment for public entertainment should not be prohibited;*

5.3 *Why you should not evacuate the *building/land/place of public entertainment;*

5.4 *Why you should not carry out the following building work in relation to the *building/land/place of public entertainment;*

5.5 *Why you should not evacuate the *building/land/place of public entertainment and carry out the following building work:*

5.5.1;

5.6 *Why you should not carry out the following protection work in relation to the *building/land/place of public entertainment;*

5.6.1;

5.7 Why you should not carry out the following work required by the Building Regulations in relation to the *building/land/place of public entertainment

5.7.1; (nominate the regulation and the work it requires to be carried out).

DATED THIS DAY OF 200

Private Building Surveyor/Municipal Building Surveyor
Company/Council
Address

NOTES

1. Representations by owner and cancellation of Notice

Under section 109 of the Act an owner may make representations to the relevant building surveyor about the matters contained in the building notice. Any representations are to be made in writing to the relevant building surveyor before the end of the show cause period. The relevant building surveyor may cancel a building notice under section 110 of the Act if he/she considers it appropriate to do so after considering any representations made under section 109.

2. Building order

Subject to section 107 of the Act, the municipal or private building surveyor may make a building order under section 111 after the end of the time allowed for making representations.

3. Appeals to the Building Appeals Board

Under section 142(1) an owner of a building or land may appeal to the Building Appeals Board against a decision to serve a notice and a failure within a reasonable time, or refusal, to cancel a notice. In accordance with section 146 of the Act and regulation 1601 of the Regulations the prescribed appeal period is 30 days from the date of this notice.

* or in italics delete words or phrases not applicable
bold italics insert words

Building Order

Serving of building orders

A building order under section 111 may only be served following the serving of a building notice and only after the expiry of the time given to the owner in the notice for making representations to the RBS. Building notices may only be served on a current owner, similarly a building order may only be served on a current owner. The building order is the mechanism by which the relevant building surveyor may require the current owner of the building to do any one or a combination of things set out in section 111(3).

It is essential that the building notice and building order are consistent. If the building order contains additional requirements which the owner was not given notice of under the building notice, then the validity of those additional requirements may be challenged. The exception is where the relevant building surveyor modifies the requirements of the building order in response to the representations made by the owner.

Time period in order

An owner has certain rights of appeal in relation to the serving of a building order under section 142(2). According to section 146 of the Act, any decision in respect of which there is a right of appeal does not take effect until the end of the prescribed appeal period of 30 days (regulation 1601(d)). Therefore the time period in the order should not, as a matter of practice, be less than 30 days.

Building Act 1993 Building Regulations 2005

BUILDING ORDER UNDER SECTION 111 OF THE BUILDING ACT 1993

TO: **Name and address of owner**
(The Owner)

OF THE: **building/land/place of public entertainment* LOCATED AT **address or location of the building in question.**

WHEREAS:

1. I am the [private building surveyor appointed in respect of the building/land/place to carry out functions] [**municipal building surveyor** of **insert council name**] and am authorised to make a building order under section 111 of the Building Act 1993 ("Act").
2. I inspected the **building/land/place of public entertainment* on **date**.
3. A building notice dated **date** was served on you and any representations made by you have been considered.
4. I am of the opinion that insufficient cause has been shown by the Owner and that for the reasons set out in the building notice the making of this Order is warranted.

NOW THEREFORE TAKE NOTICE THAT:

5. *The occupation of the *building/place of public entertainment is prohibited.*
6. *The use of the *building/place of public entertainment for public entertainment is prohibited.*
7. *You are required to evacuate the *building/land/place of public entertainment within **hours/days/weeks** of the date of service of this Order.*
8. *You are required to carry out the following *building work/protection work/work required by the Building Regulations within **days/weeks** of the date of service of this Order:*
 - 8.1
9. *You are required to carry out the following program of building work/protection work/work required by the Building Regulations within **days/weeks** of the date of service of this Order.*

9.1
DATED THIS DAY OF 200



Practice Notes

Private Building Surveyor/Municipal Building Surveyor
Company/Council
Address

Notes

1. Duration of Building Order

A building order remains in force, and if amended, remains in force as amended, until it is complied with or it is cancelled by the relevant building surveyor or the Building Appeals Board pursuant to section 117 of the Act.

2. Amendment or Cancellation of a Building Order

If there is a change in circumstances after the service of a building order, the owner may request the relevant building surveyor to amend or cancel the order pursuant to section 116 of the Act.

3. Penalty for failure to comply

A person to whom a building order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate] pursuant to section 118 (1).

4. Appeals to the Building Appeals Board

Under section 142(2) an owner of a building or land may appeal to the Building Appeals Board against a decision to serve an order and a failure within a reasonable time, or refusal, to cancel an order. In accordance with section 146 of the Act and regulation 1601 of the Regulations the prescribed appeal period is 30 days from the date of this order.

* or in *italics* delete words or phrases not applicable
bold italics insert words



Building order to stop building work

Serving of building orders to stop building work

A MBS and subject to section 107, a PBS, may make a building order that requires the “owner” or “other person” apparently in charge of the site on which building work is carried out, to stop building work (section 112). A building order to stop work may be made without first serving a building notice. In order to issue the building order to stop work the building surveyor issuing the order must be of the opinion that any of the circumstances set out in section 112(2) exist.

Depending on the circumstances, some work on a building site may be able to continue. The contravention, danger or affect may only relate to a limited part of the building work. In such circumstances, subject to Section 107, the PBS or MBS, may only require specific building work to cease. In these circumstances, the building work which is required to stop should be clearly identified in the building order.

If, in addition to requiring certain building work to stop, it is also necessary to require remedial work, or work to make the site safe, a building order for minor work may (if the work required is of a minor nature) be issued at the same time as the order to stop work. This would enable these works to be carried out.

An MBS has the further option of dealing with the matter by way of emergency order if appropriate.

If the building order to stop work requires all building work on site to cease, no building work may be carried out other than work required under a building order (Section 111).

Building Act 1993 Building Regulations 2006

BUILDING ORDER TO STOP BUILDING WORK UNDER SECTION 112 OF THE BUILDING ACT 1993

TO: **Name and address of (owner or other person)**
(The Owner or other person)

OF THE: **building/land/place of public entertainment* LOCATED AT **address or location of the building in question.**

AT WHICH BUILDING WORK IS BEING CARRIED OUT:

AND TO ANY OTHER PERSON TO WHOM THIS ORDER IS DIRECTED

WHEREAS:

1. I am the [private building surveyor appointed in respect of the building/land/place to carry out functions] [**municipal building surveyor of insert council name**] and am authorised to make a building order under section 112 of the Building Act 1993 ("Act") that requires an owner or other person to stop building work.
2. I inspected the building work at the **building/land/place of public entertainment* on **date**.
3. This order may be made without first serving a Building Notice.
4. Pursuant to section 112(2) of the Act, I am of the opinion that the building work at the **building/land/place of public entertainment*;
 - 4.1 *contravenes the Act, in that:*
 - 4.1.1, *contrary to section*
 - 4.2 *contravenes the Building Regulations in that:*
 - 4.2.1, *contrary to regulation*
 - 4.3 *is a danger to the life, safety or health of members of the public or any person using the *building/land/place of public entertainment, in that:*
 - 4.3.1
 - 4.4 *is a danger to other property, being the *land/building located at address or location in that:*
 - 4.4.1
 - 4.5 *affects the support of the adjoining property located at address or location, in that:*
 - 4.5.1
5. The above **is/are* the **reason/s* why this Order was made.

Building order for minor work

Work of a minor nature

The building surveyor must first form an opinion that the building work, protection work, or work required by the regulations which he or she proposes to require to be done is of a minor nature. To do this, the building surveyor must first determine whether the work is of a “minor nature”. The RBS should consider all the circumstances and the context of each case. For example, something could be considered to be minor work on a development because of the comparative costs, size, extent or importance of that building work against the overall development.

The advantage of using this order is that a building surveyor is not required to issue a building notice or otherwise notify the recipient of such order before issuing the order for minor work.

Serving of building order

Section 113 does not say upon whom this type of building order may be served, or against whom it may be issued. However, general principles require orders to carry out work (as opposed to ceasing work) to be served upon the owner of the land or building as generally only the owner has a legal right to do that work.

Building Act 1993 Building Regulations 2006

BUILDING ORDER FOR MINOR WORK UNDER SECTION 113 OF THE BUILDING ACT 1993

TO: *(Name and address of recipient)*
(The Recipient)

OF THE: **building/land/place of public entertainment LOCATED AT address or location of the building in question.*

Whereas:

1. I am the [private building surveyor appointed in respect of the building/land/place to carry out functions] [**municipal building surveyor** of **insert council name**] and am authorised to make a building order under section 113 of the Building Act 1993 ("Act").
2. I inspected the **building/land/place of public entertainment* on **date**
3. Pursuant to section 113 of the Act, I am of the opinion that the work required to be carried out under this Order is of a minor nature.
4. This Order may be made without first serving a building notice.
5. The **reason/s* why this Order was issued **is/are* that :

5.1

NOW THEREFORE TAKE NOTICE THAT:

6. You are required to carry out the following **building work/protection work/work required by the Building Regulations*:

6.1
7. The above work is to be carried out within days/weeks of the service of this Order.

DATED THIS DAY OF 200

Private Building Surveyor/Municipal Building Surveyor
Company/Council
Address

NOTES

1. Duration of Order

A building order remains in force, and if amended remains in force as amended, until it is complied with or it is cancelled by the relevant building surveyor or Building Appeals Board pursuant to section 117 of the Act.

2. Amendment or Cancellation of Order

If there is a change in circumstances after the service of a building order, the owner may request the relevant building surveyor to amend or cancel the order pursuant to section 116 of the Act.

3. Penalty for failure to comply

A person to whom a building order is directed must comply with that order [penalty: 100 penalty units in the case of a natural person and 500 penalty units in the case of a body corporate] pursuant to section 118 (1).

4. Appeals to the Building Appeals Board

Under section 142(2) an owner of a building or land may appeal to the Building Appeals Board against a decision to serve a building order and, a failure within a reasonable time, or refusal, to cancel a building order. In accordance with section 146 of the Act and regulation 1601 of the Regulations the prescribed appeal period is 30 days from the date of this building order.

* or in *italics* delete words or phrases not applicable
bold italics insert words