



VMBSG Policy and Procedure for temporary occupation approvals under section 64 of the *Building Act 1993*



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Part A: Overview

1. Purpose of this document

- 1.1 Section 64 of the *Building Act* 1993 (Vic) (**Act**) empowers a municipal building surveyor (**MBS**) or private building surveyor (**PBS**) to approve the temporary occupation of a building for a use outside the use permitted under the existing occupancy permit. It is becoming increasingly common for MBS' to be approached for these types of approvals.
- 1.2 However, the Act gives very little guidance as to the circumstances in which such an approval may be given. The Victorian Building Authority (**VBA**) Practice Note EA-01 issued on 28 June 2021 (replacing the previous Practice Note 75) provides some guidance as to how section 64 should be applied. However that Practice Note EA-01 focusses on the use of buildings under section 64 for emergency accommodation. It does not focus on the other types of use to which a building could be put on a temporary basis¹.
- 1.3 The Victorian Municipal Building Surveyors Group Inc. (**VMBSG**) has prepared this policy and procedure document to assist MBS' in the exercise of the discretion given to the MBS in section 64 to determine applications for temporary approvals. It is drafted for use by MBS' and accordingly does not refer to private building surveyors.
- 1.4 Any determination in respect of an application under section 64 of the Act is the responsibility of the MBS as the case may be.
- 1.5 This document is a guide only. MBS' must exercise their functions under the Act, including determinations under section 64 of the Act, with due care, skill and diligence. MBS' should seek advice if required.

2. Regulatory overview

- 2.1 Section 64 of the Act provides as follows:
- (1) *A person may, with the approval of a municipal building surveyor or a private building surveyor appointed under Part 6, occupy on a temporary basis a building for which there is not or could not be issued an occupancy permit appropriate to the use of the building.*

¹ Both this document and PN EA-01 are guidance documents only. Both documents should be read consistently with the express provisions of the Building Act and regulations, both of which take precedence over guidance documents.

(2) *An approval cannot be given under this section for a use of a building or part of a building if a building permit requires an occupancy permit to be issued for that use of the building or part of a building.*

2.2 Under section 64(1) of the Act, a person may apply to an MBS for an approval to occupy a building on a temporary basis.

2.3 The power under section 64(1) is limited by the terms of section 64(2) of the Act which makes clear that the power to grant temporary occupation is intended to be exercised in respect of a different use to the existing permitted use. Under section 64(2), an MBS cannot grant an approval for a use of a building or part of a building if a building permit requires an occupancy permit to be issued for that use of the building or part of a building.

2.4 That is, where there is a building permit on foot that requires an occupancy permit to be issued for that use of the building, a temporary occupation cannot be approved for that use. For example, approval cannot be given for a person to occupy an unfinished home before the occupancy permit has been issued.

Who can apply?

2.5 Under section 65, an application can be made by or on behalf of the owner of the building concerned. Section 3(1) of the Act defines the 'owner', in relation to a building, as the owner of the land on which that building is situated.

The application process

2.6 Under section 66 of the Act, an application to an MBS must be:

2.6.1 in a form approved by the MBS; and

2.6.2 accompanied by the relevant fee, determined under the *Local Government Act* 1989 (Vic.).

2.7 Under section 67 of the Act, the MBS must decide the application for approval to occupy a building on a temporary basis by:

2.7.1 issuing the approval; or

2.7.2 issuing the approval with conditions; or

2.7.3 refusing the approval.

2.8 Under section 68, the approval must:

2.8.1 be in writing; and

2.8.2 specify any conditions to which it is subject; and

2.8.3 specify the period for which it applies.

2.9 Under section 69, the MBS must notify an applicant in writing of the refusal of approval to occupy a building on a temporary basis, and the reasons for the refusal.

Other relevant provisions applicable to temporary occupation

2.10 Under section 139 of the Act, an applicant may appeal to the Building Appeals Board against:

2.10.1 a decision to refuse to approve the temporary occupation of a building;

2.10.2 the imposition of conditions on an approval (other than a prescribed condition);

2.10.3 the amendment or cancellation of an approval; or

2.10.4 a failure within a reasonable time to decide an application to issue, amend or cancel an approval.

2.11 Under section 70, an MBS may amend an approval issued under Part 5 of the Act where:

2.11.1 the owner applies for that amendment; or

2.11.2 if the amendment is otherwise necessary in the public interest.

Where an amendment is applied for by an owner, the application requirements in sections 66 to 69 of the Act must again be complied with.

2.12 Under section 71, the MBS may cancel an approval issued by them if the approval was obtained by fraud or misrepresentation.

2.13 Under section 74, Council must:

2.13.1 keep a register of all temporary approvals and amendments; and

2.13.2 make the register available for inspection during normal office hours by any person.

2.14 Under section 75 and regulation 202(2) of the *Building Regulations 2018* (Vic.)**(Regulations)**, Council must keep documents relating to a temporary approval for 3 years after the earlier of the end of the period for which the temporary approval applies; or the temporary approval is cancelled.

Part B: Exercise of discretion to approve a temporary occupation

3. For what types of uses can an approval be given for temporary occupation?

3.1 Section 64(1) gives to an MBS the power to approve a temporary occupation for a particular purpose. However, the words in Division 3 of Part 5 of the Act don't impose any limitation on the types of temporary uses of a building for which approval may be given. Accordingly, the Act leaves the decision of whether to approve the proposed temporary use within the discretion of the MBS.

3.2 It is common for applications to be made for temporary approvals in humanitarian or emergency circumstances, such as:

3.2.1 emergency or crisis accommodation or shelter in the event of a disaster (such as a flood, fire, earthquake, etc.);

3.2.2 accommodation for the homeless, particularly in cold winter months; or

3.2.3 use of the building for medical treatments or quarantine.

3.3 However, given the broad discretion under the Act, the MBS' power to approve temporary occupation is not limited to approving temporary building uses for humanitarian or emergency purposes.

3.4 The only limitations that exist in section 64(1) and 64(2) as to the type of use to which a building could be put temporarily are that:

3.4.1 the use must be 'temporary' (see paragraph 4 below);

3.4.2 the use is one which the current occupancy permit either does not permit or could not permit; and

3.4.3 there must not be a building permit in force that requires an occupancy permit for that use. That is, the temporary approval cannot be used as an 'early entry' mechanism for an incomplete building.

3.5 This means that approval for temporary use could be given by an MBS in respect of a proposed temporary use that is not for emergency or humanitarian purposes but could be for commercial purposes, so long as the occupation is a temporary one and the MBS is otherwise satisfied as to safety and amenity considerations (see paragraph 5 below). For example, an empty office building could be used as a 'pop-up' retail store in appropriate

circumstances. However, the nature of the intended use may assist in determining whether or not the use is genuinely 'temporary' (see paragraph 4.7 below).

4. When will an occupation be 'temporary'?

- 4.1 Section 64(1) empowers an MBS to approve the 'temporary' occupation of a building. Accordingly an MBS should be satisfied that the proposed use is only a temporary use. However, the term 'temporary' is not defined in the Act.
- 4.2 Some other Australian jurisdictions also permit the temporary occupation of buildings. Of those other jurisdictions, only Tasmania has specified a period for temporary approvals, being a period that does not exceed 36 months² and not more than one period of temporary approval in respect of a building in any 36-month period.
- 4.3 The meaning of "temporary" as it appears in section 64 of the Act has not been considered by any Victorian court or tribunal. However, courts have held that the word 'temporary', as it appears in other legislation, should be given its ordinary meaning, having regard to the context in which it appears.

Ordinary meaning of 'temporary'

- 4.4 In ordinary terms, "temporary" means lasting for a limited time; provisional; not permanent; or lasting only a short time³. Whether a proposed use is 'temporary' as that word is ordinarily understood will depend on the context. An applicant might be able to demonstrate that the proposed use will not be permanent, in that it will end by a specific date, but the period of proposed occupation is sufficiently lengthy that it could not objectively be regarded as 'temporary' as that word is understood. For example, a proposed use of a building for specific purpose for a period of 5 years, after which it will revert to the current use, is not a permanent use in that it is not a use that will continue for the lifespan of the building, but neither will it fall within the common understanding of a 'temporary use'.

Context of the Act and the Regulations

- 4.5 The word temporary, as it appears in section 64, must, as well as taking into account the ordinary meaning of the word, be interpreted in the context of the Act and the Regulations more generally. Relevantly:
- 4.5.1 section 40 of the Act provides that a person must not occupy a building in contravention of the current occupancy permit; and

² Section 232(3)(c) *Building Act* 2016 (Tas.).

³ www.dictionary.com.

- 4.5.2 regulation 229 of the Regulations provides that a person must not change the use of a building unless the building complies with the requirements applicable under the Regulations in respect of the new use.
- 4.6 Section 64 effectively provides an exception to those requirements where a changed use is only temporary. Accordingly, where a proposed 'temporary' use is of sufficient length that it would be appropriate and possible for the applicant to follow the usual process for a change of use, then the use is not 'temporary' for the purpose of section 64.
- 4.7 The nature of the proposed use may be relevant in determining whether or not the circumstances bring the proposed use outside the usual change of use provisions. For example, if the proposed use must commence quickly because it is brought in response to an emergency such as a fire or flood, this lends weight to the conclusion that the use is 'temporary' even if it is foreshadowed that the proposed use might need to continue for some time.

Can a 'temporary' use be annual or seasonal?

- 4.8 The Act is silent on the question as to whether a temporary approval can be given on a recurring basis, such as annually or seasonally. The VBA, in Practice Note EA-01 suggests that an MBS may consider that an approval for temporary occupation is not appropriate where it occurs on a repetitive annual basis, in that a change of the use of the building may be a more appropriate option.
- 4.9 As set out in paragraphs 4.5 to 4.7 above, the test for the MBS in deciding whether a proposed use is genuinely 'temporary' is to decide whether the duration and purpose of the use are such that it would be open to and more appropriate for the building owner to apply for a permanent change of use.
- 4.10 The fact that there may have been prior applications for temporary occupation of the building on the same basis in the past, or that the application foreshadows a recurring temporary accommodation will be relevant to deciding that question. However, it won't necessarily be the sole factor in arriving at an answer. It is conceivable that a building could be used temporarily on a recurring basis but that use remains 'temporary' in that:
- 4.10.1 for the vast majority of the time, the building is used for its original permitted purpose;
 - 4.10.2 the temporary use occurs only for a limited period; and
 - 4.10.3 it isn't known whether the temporary use will recur in the future or not.

5. Safety and amenity considerations

- 5.1 There is nothing in the Act that requires an MBS to specifically take into account factors relating to safety and amenity when deciding whether to approve an application for temporary use of a building. However, an appropriate exercise of discretion by an MBS involves a consideration of relevant matters and the safety and amenity of occupants and visitors to the building is a relevant matter. This consideration applies both to the question of whether the temporary use should be approved and also to the question of whether there are any conditions that should be imposed on an approval.
- 5.2 This doesn't mean that the requirements in the Building Code of Australia applicable to the proposed use must be complied with. Rather, it involves a more general assessment of what safety and amenity provisions might reasonably be appropriate in the circumstances, and whether those provisions can be met.

Relevant factors in assessing safety and amenity

- 5.3 The factors that are relevant to assessing safety and amenity will vary, depending on the nature of the proposed temporary use of the building and on the existing features of the building and the MBS should give consideration to what factors might be relevant in each application. However, set out below are the sorts of factors that will frequently be relevant to consider:
- 5.3.1 the number of occupants and the frequency of occupation;
 - 5.3.2 the nature of that occupation, including:
 - (a) whether the building will be used as accommodation;
 - (b) whether the occupation is limited to a use during normal business hours or outside those hours;
 - (c) the nature or background of the occupants or visitors to the building under the proposed use; and
 - (d) whether the activities involved in the proposed use of the building involve any inherent or obvious risk;
 - 5.3.3 the geographic location of the building;
 - 5.3.4 whether there are any particular features of the building that could pose a particular risk to the proposed occupants or to a subset of them;

- 5.3.5 whether supervision or monitoring of the building is proposed and if so, whether there will be constant supervision or only for certain periods;
- 5.3.6 whether the essential safety measures (**ESMs**) currently in use in the building have been properly maintained and will be sufficient for the proposed use;
- 5.3.7 whether the current smoke detection and alarm and fire suppression devices in the building are sufficient (particularly if the proposed temporary use is for overnight accommodation);
- 5.3.8 whether there is artificial lighting installed to assist in the event of an evacuation;
- 5.3.9 whether, if part of the proposed temporary use is for cooking or preparation of food, there are appropriate fire safety measures, such as fire blankets;
- 5.3.10 whether the means of egress to an exit, exit signage, pathways of travel and exit doors are appropriate for the proposed use;
- 5.3.11 whether if the proposed temporary use involves overnight accommodation, there is sufficient access to sanitary facilities;
- 5.3.12 whether, if the proposed temporary use has been permitted previously, any conditions imposed were complied with.

6. Occupation of a part of a building

- 6.1 Under the Act, a 'building' includes 'part of a building'⁴. This means temporary approval can be sought for occupation of part of a building, while other parts of the building are not subject to the temporary approval.
- 6.2 Where an application relates to only part of a building, MBS' should ensure that both the application and any approval given clearly delineates the part of the building that is to be temporarily occupied.
- 6.3 In considering an application for temporary occupation of part of a building, MBS' will need to consider the impact of the proposed temporary occupation on the existing use of, or activities in, the remaining parts of the building. In particular, MBS will need to consider whether temporary occupation of a part of a building is safe when considering the use of the other parts of the building, and whether any conditions on the temporary occupancy should be imposed which minimise any risks which may arise from that use.

⁴ Section 3(1) *Building Act* 1993.

Part C: Procedure for temporary approvals

7. The application form

- 7.1 The application must be in a form approved by the MBS. If this requirement is not met, ask for the application in the approved form. If not complied with within 14 days, the application can be refused, with a reason being provided to the Applicant.
- 7.2 The application must be accompanied by the relevant fee⁵. If this requirement is not met, ask the applicant to pay the fee. If not complied with within 14 days, the application can be refused, with a reason being provided to the Applicant.

8. Check applicant details

- 8.1 An application may only be made by or on behalf of the owner of the building concerned⁶.
- 8.2 The application must be accompanied by a certificate of title.
- 8.3 The applicant must match the owner of the building identified in the certificate of title. Where the owner is a company or trust, the application must be accompanied by a document purporting to be an authorisation by the director and/or secretary of the company or the trustee of the trust to make the application.
- 8.4 Where the application is made by someone on behalf of the owner, the application must be accompanied by a document authorising the applicant to make the application on behalf of the owner. This will usually be a letter with the owner's signature.
- 8.5 Where the application form includes owner and/or representative details, those sections must be completed and signed. If any of these requirements are not met, ask the applicant to rectify the application. If not complied with within 14 days, the application can be refused, with a reason being provided to the Applicant.

9. Check the building details

- 9.1 Approval cannot be given for a use of a building if a building permit requires an occupancy permit to be issued for that use of the building or part of a building⁷.

⁵ The fee is determined by the local council in accordance with the *Local Government Act 2020*, or determined by the private building surveyor if the application is made to a PBS.

⁶ Section 65 *Building Act 1993*.

⁷ Section 64(2) *Building Act 1993*.



- 9.2 Check permit documents to ensure this exclusion does not apply. That is, whether there is a building permit which requires an occupancy permit for the proposed use of the building or part of the building. If the exclusion applies, the application should be refused, with a reason being provided to the applicant.
- 9.3 The building profile should be documented, by reference to the application form and accompanying documents and Council records, including size, class, construction type, construction material, ingress and egress points, amenities, disability access and emergency equipment.

10. Assess the application

- 10.1 What is the proposed use (e.g. emergency or crisis accommodation, shelter for the homeless, medical or pandemic related accommodation, etc)?
- 10.2 If the proposed use or occupation includes specialist requirements such as medical equipment or specific building material, the MBS will need to consider whether the application is appropriate for that use.
- 10.3 What is the proposed duration of the temporary occupation (e.g. a number of days, weeks, months or years)? The MBS should consider, in the context of all of the information provided, whether the occupation can properly be described as temporary.
- 10.4 Have any applications for temporary approval in respect of the building concerned been made before? If there have been prior approvals, consider whether further temporary approval is appropriate, or a change of use should be required. There is no prescribed number of prior approvals which are relevant, but the nature of the application may warrant refusal where a number of prior temporary approvals have been granted.
- 10.5 How many occupants are expected, and how frequently might they stay?
- 10.6 Will the building be monitored or supervised while occupied as accommodation? Supervision may be important for fire, health, safety and access requirements, and may be necessary depending on the use of the building. The MBS should consider whether there will be constant supervision, or only for certain periods during the day or night.
- 10.7 What are the essential safety measure (**ESM**) requirements for a building of this type used in accordance with the proposed use? Consider what usual ESM requirements would apply in similar circumstances, and determine what would be appropriate in the circumstances.
- 10.8 If an application for temporary approval has been made in respect of the subject building before, have ESM requirements been complied with in respect of the building previously? If

previous requirements have not be met or maintained, the MBS may refuse approval on this basis, providing a reason for refusal to the Applicant.

- 10.9 Consider what specific fire safety or amenity features might be required and whether they are already contained in the building. This could include:
- 10.9.1 are suitable and compliant smoke detection and alarm devices fitted in each room used for sleeping?
 - 10.9.2 where battery operated smoke alarms are installed, do they comply with applicable standards?
 - 10.9.3 are there enough smoke detection and alarm devices fitted for the size of the rooms used for sleeping?
 - 10.9.4 is compliant artificial lighting installed to assist in the event of an evacuation?
 - 10.9.5 is there a compliant fire blanket available for emergency application to an area of the building utilised for the cooking or preparation of food?
 - 10.9.6 is there a direct means of egress to an exit for each part of the building used for sleeping?
 - 10.9.7 is the further part of the sleeping area not more than 20.0m from an exit providing direct egress to a road or open space?
 - 10.9.8 is there illuminated exit signage and are the pathways for travel to exits unobstructed?
 - 10.9.9 is there a compliant type of portable fire extinguisher provided?
 - 10.9.10 are all exit doors compliant?
 - 10.9.11 is there access to personal hygiene, kitchen, laundry and sanitary facilities having regard to the objectives of the relevant parts of Part F of the BCA as it applies to an accommodation building?
 - 10.9.12 is there suitable access to the building and to parts of the building including sanitary facilities, having regard to the *Disability Discrimination Act 1992* and *Disability (Access to Premises – buildings) Standards 2010*?

11. Conditions on temporary occupation approval

11.1 Consider **general conditions**. These may include:

- 11.1.1 placing the temporary approval in a conspicuous place;
- 11.1.2 staying within the limit of occupants;
- 11.1.3 compliance with local laws;
- 11.1.4 maintaining supervision requirements;
- 11.1.5 maintaining hygiene and sanitary requirements;
- 11.1.6 maintaining ESM requirements; and
- 11.1.7 maintaining access, ingress and egress requirements.

11.2 Consider conditions which would enable a temporary approval to be granted notwithstanding that a compliance matter may not be met. These should be included as a specific condition (see below).

11.3 Consider **specific conditions**. These may include:

11.3.1 **site-specific conditions** – this may include any necessary conditions which enable the temporary approval to take place, or any conditions which are necessary for the particular site. For example:

- (a) access to hygiene and sanitary facilities;
- (b) conditions specific to the municipality, taking into account matters such as bushfire or flood zones;
- (c) conditions in respect of noise or nuisance at certain times of the day or night;
and
- (d) conditions specific to the type of building, including ventilation, heating, cooling, lighting or other similar matter.

11.3.2 **use-specific conditions** – this may include any necessary conditions for the proposed use of the building. For example:

- (a) that the building only be used for a specified purpose for which the temporary approval is issued; and
- (b) that the building is not used for any specified or other purpose that may render the temporary approval inappropriate.

11.4 Consider other conditions which may not be specific to the temporary approval process of the MBS, but which are nevertheless necessary for the health and safety of occupants.

These may include:

11.4.1 compliance with any government directives, including in respect of Coronavirus Covid-19 restrictions in place from time to time;

11.4.2 security matters to enable safe occupation during the temporary approval;

11.4.3 adequate provision being made for privacy;

11.4.4 adequate provision being made for comfort; and

11.4.5 any insurance which should be in place for occupation of a public place.

12. Form of approval

12.1 Approval for temporary occupation of a building must⁸:

12.1.1 **be in writing** – the temporary approval should take the form similar to that of an occupancy permit, so that it can be displayed or accessed readily;

12.1.2 **specify conditions** (if any) to which it is subject – any conditions considered relevant for the temporary approval must be documented in the temporary approval; and

12.1.3 **specify the period** for which it applies – the period must be finite so as not to render the approval permanent or ongoing without further assessment by the building surveyor.

12.2 A temporary approval can take any written form. It is recommended however, that it adopt a similar format to that of Form 16⁹. Form 16 is not a prescribed form for a temporary approval, and so need not be followed strictly, but provides a good starting point for the structure and substance of the temporary approval.

12.3 The temporary approval must list each of the conditions (if any) to which it is subject.

12.4 The temporary approval must specify the period for which it applies. It is recommended that this includes:

12.4.1 the date the approval starts;

⁸ Section 68 *Building Act* 1993.

⁹ Form 16 in Schedule 4 to the *Building Regulations* 2018.

- 12.4.2 the date the approval ends; and
- 12.4.3 the dates and times the approval is on force (if not at all times between the start and end dates).

13. Record keeping

- 13.1 An MBS should keep records relevant to the temporary approval. The MBS must give a copy of the temporary approval or amendment, plans, and any other documents submitted with the application to Council¹⁰.
- 13.2 These documents must be given to Council **within 7 days** after the issue or amendment of the temporary approval¹¹.
- 13.3 In addition, the MBS must also provide the documents prescribed by the regulations¹². These relevantly include¹³:
 - 13.3.1 a determination or order of the Building Appeals Board;
 - 13.3.2 a determination of the relevant building surveyor that a performance solution complies with a performance requirement of the BCA together with any computations or reports relied on by the relevant building surveyor in making the determination;
 - 13.3.3 any document required by the relevant building surveyor under clause 2(1) of Schedule 2 to the Act.
- 13.4 These documents must be given to Council **within 7 days** after the issue or amendment of the temporary approval¹⁴.

14. Amendments and cancellations

- 14.1 A temporary approval **may be amended**:
 - 14.1.1 on an application by the owner, or on the owner's behalf – the procedures at paragraph 8 should be followed if the owner or agent differs to the original application.

¹⁰ Section 73(1) *Building Act* 1993 requires that the relevant building surveyor give to the relevant council a copy of that permit or approval or amendment and any plans and other documents lodged with the application for the permit or approval or amendment.

¹¹ Section 73(1) *Building Act* 1993.

¹² Section 73(1A) *Building Act* 1993.

¹³ Regulation 203 *Building Regulations* 2018.

¹⁴ Regulation 204 *Building Regulations* 2018.

- 14.1.2 if the amendment is necessary in the public interest.
- 14.2 An application for an amendment of a temporary approval must be made in the same way as an application for the temporary approval, and the same procedures must be followed for an application for an amendment to a temporary approval as they are for an application for temporary approval¹⁵.
- 14.3 For an amendment, the MBS should issue the temporary approval with the necessary amendments made (noting the amendments) rather than issuing a new temporary approval. Where a new temporary approval is necessary, the MBS should cancel the previous approval and issue the new temporary approval.
- 14.3.1 See paragraph 18 for more information about amendments in the public interest.
- 14.4 A temporary approval **may be cancelled**:
- 14.4.1 if the approval was obtained by fraud or misrepresentation.
- 14.4.2 See paragraph 19 for more information about fraud and misrepresentations.
- 14.5 A notice of cancellation is not required to be in any approved form. However, it is recommended that the cancellation:
- 14.5.1 **be in writing** – in the form of a letter or notice to the owner;
- 14.5.2 **provide reasons** – it is important to include the grounds on which the cancellation has been made;
- 14.5.3 **specify the date it takes effect** – this will usually be the date the notice is served on the owner;
- 14.5.4 **specify the effect of the cancellation** – that is, that the temporary approval is no longer in place and the building can no longer be occupied in accordance with that approval. Any illegal occupation is an offence and penalties apply¹⁶; and
- 14.5.5 **be served on the owner**¹⁷.

¹⁵ Section 70(4) *Building Act* 1993 requires that sections 66 to 69 apply (with any necessary amendments) to an application for an amendment of a temporary approval, as if it were an application for approval. That is, the application must be in the required form and accompanied by the fee; the MBS must decide the application; the amended approval must take the same form as the temporary approval; and reasons for refusal are to be given.

¹⁶ Section 40(1) *Building Act* 1993.

¹⁷ Section 236 *Building Act* 1993 provides the methods of service. In some circumstances, service can be effected by email. However, it is recommended that the methods for service under the Act be followed and an email be sent in addition, if desired.

15. Refusal

- 15.1 The MBS must provide reasons in writing where an application for temporary approval is refused¹⁸.
- 15.2 An application for approval to occupy a building on a temporary basis **must** be refused in the following circumstances:
- 15.2.1 the application is not in a form approved by the MBS (if any); or
 - 15.2.2 the application is not accompanied by the required fee¹⁹.
- 15.3 If one of these reasons for refusal apply, the MBS should provide **short reasons** that the application was refused on this basis. Preferably, the MBS should provide the owner an opportunity to remedy the application before refusing. Refer to paragraph 7.
- 15.4 An application for approval to occupy a building on a temporary basis **may** be refused if the MBS is not satisfied that a temporary approval can be given in the circumstances.
- 15.5 The MBS can consider that any one or more requirements have not been met which would render the building appropriate and safe to occupy on a temporary basis, and that conditions cannot be imposed which would allow temporary occupation.
- 15.6 A notice of refusal should include:
- 15.6.1 a brief explanation about the temporary approval system and its intended application;
 - 15.6.2 the reason or reasons why temporary approval cannot be given, referring to particular statutory requirements where relevant;
 - 15.6.3 the reason or reasons conditions cannot be imposed which would permit temporary occupation;
 - 15.6.4 that the owner can submit a new application, if they wish, but that any new application should address the reasons for refusal; and
 - 15.6.5 a brief statement that the owner can appeal the decision under section 139 of the *Building Act* 1993, and provide the Building Appeals Board contact details.

¹⁸ Section 69 *Building Act* 1993.

¹⁹ Section 66 *Building Act* 1993.



16. Appeals

16.1 An owner may appeal to the Building Appeals Board against²⁰:

16.1.1 a refusal to approve the temporary occupation of a building;

16.1.2 the imposition of conditions on an approval (other than a prescribed condition);

16.1.3 the amendment or cancellation of an approval; or

16.1.4 a failure within a reasonable time to decide an application to issue, amend or cancel an approval.

16.2 It is important to provide clear reasons why an application was refused, for any subsequent appeals to the Building Appeals Board.

²⁰ Section 139 *Building Act* 1993.

Part D: Considerations for amendment or cancellation

17. Amendments to approvals on an application by or on behalf of the owner

- 17.1 Under section 70(1)(a) of the Act, an MBS can amend an approval on an application by or on behalf of the owner of the building or land concerned.
- 17.2 Any application for an amendment to a temporary approval should be made in the same way and follow the same process as described in the procedures. It is important that the MBS assess the implications of any amendment to the temporary approval.
- 17.3 In some circumstances, it may be appropriate for an MBS to expedite the amendment process or consider a more limited number of matters before amending an approval. This will generally be available where the amendment is in respect to a minor or administrative nature.

18. Amendments to approvals if necessary, in the public interest

- 18.1 Under section 70(1)(b) of the Act, an MBS can amend an approval if the amendment is necessary in the public interest.
- 18.2 What is “in the public interest” will involve a number of considerations, including who the public is, what interest or interests are concerned (i.e. the facets of the public interest), and the weight or importance to be given to competing interests so that a public interest can be ascertained and served.
- 18.3 There is no definition of what is “in the public interest” in the Act. What is required when making a decision in the public interest is a discretionary, value judgment to be made by the MBS with reference to relevant factual matters as they impact upon the public, or groups within the public, beyond the interests of the owner or those for whom the temporary use is intended to assist.
- 18.4 That is, the MBS must consider whether it is in the public interest to amend a temporary approval when having regard to the objects of the Act, the health and safety of occupants, any risk to occupants or the public generally, and any other considerations the MBS considers relevant.

19. Cancellation of approvals for fraud or misrepresentation

- 19.1 Under section 71 of the Act, an MBS can cancel an approval if the approval was obtained by fraud or misrepresentation.
- 19.2 Fraud and misrepresentation are intentional dishonest acts. They may be contrasted with unintentional errors or omissions which are not intended to deceive or mislead.
- 19.3 Proving fraud or misrepresentation can be a difficult exercise for an MBS to undertake. It is not necessary for an MBS to prove fraud or misrepresentation to any particular degree (e.g. beyond reasonable doubt). However, there needs to be sufficient evidence available to support that conclusion as being objectively reasonable.
- 19.4 The Act does not require that an MBS must provide the owner an opportunity to be heard if they are considering amending or cancelling an approval. However, given that a decision to amend or cancel an approval can be appealed by the owner to the Building Appeals Board, it would be prudent for the MBS to:
- 19.4.1 give the owner a reasonable opportunity to be heard on the question of whether the approval should be amended or cancelled; and
 - 19.4.2 provide a reason to the owner clearly identifying why the amendment or cancellation has been made.

APPLICATION FORM

TEMPORARY OCCUPANCY APPROVAL

Building Act 1993, Section 66

Building Regulations 2018

0. APPLICATION TYPE

This application is: A new application An amendment to an existing approval - No:

1. COUNCIL DETAILS

Municipal Building Surveyor		[Municipality]			
Postal address	[insert]	Suburb	[insert]	Postcode	[insert]
Office address	[insert]	Suburb	[insert]	Postcode	[insert]
Phone	[insert]	Email	[insert]		

2. WHO IS MAKING THE APPLICATION?

Is the application being made by the owner or an agent? Owner¹ (complete section 3) Agent² (complete section 3 and 4)

3. APPLICANT DETAILS

Type of Applicant	<input type="checkbox"/> Individual	<input type="checkbox"/> Company	<input type="checkbox"/> Partnership	<input type="checkbox"/> Other
Name				ACN
Contact name			Position	
Address			Suburb	Postcode
Phone	Mobile		Email	

4. AGENT DETAILS²

Name			Contact Name		
Address			Suburb	Postcode	
Phone	Mobile		Email		

A document demonstrating the person is authorised by the Applicant to make the application must be attached

5. PROPERTY DETAILS

Number	Lot	Street / Road		
Volume	Folio	Suburb	Postcode	

A register search statement (certificate of title) must be attached

6. BUILDING DETAILS

Building Number / Name / Description	
Building classification(s)	
Current use(s)	

7. PROPOSED TEMPORARY USE

The proposed temporary use applies to: The whole of the building Part of the building

Does the temporary use include people sleeping at the Property? No Yes

Proposed use(s)

Provide details of the nature of the proposed temporary use(s) of the building or parts of the building for which this application is made



8. PROPOSED PERIOD OF OCCUPATION FOR TEMPORARY USE (Periodic)							
Start date				End date			
Days of occupation	<input type="checkbox"/> Mon	<input type="checkbox"/> Tue	<input type="checkbox"/> Wed	<input type="checkbox"/> Thu	<input type="checkbox"/> Fri	<input type="checkbox"/> Sat	<input type="checkbox"/> Sun
Start time							
End time							

Fill in all fields, or if continuous occupation, provide details in the section below

9. PROPOSED PERIOD OF OCCUPATION FOR TEMPORARY USE (Continuous)	
Start date and time	End date and time

10. NUMBER OF OCCUPANTS	
Expected maximum number of occupants of the building at any given time (including staff)	

11. OCCUPATION TO BE SUPERVISED							
Will occupation be supervised?	<input type="checkbox"/> No		<input type="checkbox"/> Yes				
Supervised days	<input type="checkbox"/> Mon	<input type="checkbox"/> Tue	<input type="checkbox"/> Wed	<input type="checkbox"/> Thu	<input type="checkbox"/> Fri	<input type="checkbox"/> Sat	<input type="checkbox"/> Sun
Start time							
End time							
Name of person who will undertake supervision			Qualifications/Training				
Contact Address				Suburb			Postcode
Phone				Email			

12. ANY ADDITIONAL SUPERVISOR DETAILS		
Name		Qualifications/Training
Name		Qualifications/Training

Insert additional rows as required

13. SANITARY FACILITIES							
Existing or new / temporary	Location	Female / Male / Unisex / Disabled / Other	No. Closet fixtures	No. Urinals	No. Wash basins	No. Showers	Disability utilities
<input type="checkbox"/> Ex. <input type="checkbox"/> Temp.							
<input type="checkbox"/> Ex. <input type="checkbox"/> Temp.							
<input type="checkbox"/> Ex. <input type="checkbox"/> Temp.							

Insert additional rows as required

14. DANGEROUS OR UNSAFE AREAS ³		
Are there any dangerous or unsafe areas within the building?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Location and nature of dangerous areas		

15. EXITS AND PATHS OF TRAVEL	
How many exits are available to all habitable ⁴ areas?	
What are the maximum travel distances? (attach diagram)	
Are exit doors compliant and maintained?	
Are exits illuminated?	<input type="checkbox"/> No <input type="checkbox"/> Yes

16. FIRE SAFETY



Are there any essential safety measures (ESMs)? ⁵	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Have ESMs been maintained?	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> N/A
Is there an emergency management and evacuation plan in place? <i>(attach plan)</i>	<input type="checkbox"/> No	<input type="checkbox"/> Yes
List all existing firefighting equipment <i>(type and location)</i>		
List any additional firefighting equipment <i>(type and location)</i>		
Are all smoke detectors fully functional?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Is there artificial lighting in the event of an emergency?	<input type="checkbox"/> No	<input type="checkbox"/> Yes

17. KITCHEN AREAS		
Are any kitchen areas available?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Is fire safety equipment provided to kitchen areas?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
If yes, provide details		

18. DISABILITY ACCESS		
Is the building accessible for people with disabilities?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
If yes, provide details		
If no, can access be given?		

19. SPECIALIST EQUIPMENT, FACILITIES etc.⁶		
Is any specialist equipment proposed to be used?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Could any specialist equipment pose a risk to occupants?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
If yes, provide details		

20. PREVIOUS APPROVALS		
Have any temporary occupancy approvals been provided for this building before?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
If yes, provide the date(s) of all previous temporary occupancy approvals		
<i>Insert details of the duration and nature of each prior temporary occupancy approval</i>		

21. ADDITIONAL COMMENTS (Optional)

22. DECLARATION
I, _____, am authorised to apply for this temporary occupancy approval. I do so to the best of my knowledge and understand that it is an offence under section 246 of the <i>Building Act 1993</i> (Vic) to knowingly make any false or misleading statements or provide any false or misleading information under that Act.

23. SIGNATURE OF APPLICANT	DATE	/ /
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24. APPLICATION FEE
The fee for lodging this application is \$ insert . Payment can be made to insert payment details

Privacy collection
[insert privacy collection notice/statement or link to website]



LIST OF DOCUMENTS WHICH MUST BE INCLUDED WITH THIS APPLICATION

Register search statement (certificate of title)	<input type="checkbox"/>
Letter or other document of authority to make the application (where agent, representative or on behalf of body corporate, partnership or trustee applicant)	<input type="checkbox"/>
Where an application is made on behalf of a company or trustee, a copy of a recent company extract or trust deed	<input type="checkbox"/>
Evidence of relevant supervisor qualifications or training	<input type="checkbox"/>
Detailed plans showing floor layout, the part of the building for which the application is made, location of hygiene and other facilities, maximum travel distances for paths of travel from sleeping facilities, location of fire services and any other relevant features	<input type="checkbox"/>
Emergency management and evacuation plan	<input type="checkbox"/>
Copy of most recent Annual Essential Safety Measure Report (AESMR)	<input type="checkbox"/>

NOTES

1.	<p>The Applicant for this application must be:</p> <ol style="list-style-type: none"> the individual owner of the land; or a director of a company, partner of a partnership, trustee of a trust, or an authorised agent or representative on its behalf; or an authorised agent or representative of the owner. <p>An 'owner' has the same meaning as in the <i>Building Act 1993</i>, and without limiting that definition, means, in relation to the land as the case may be, the person(s) who is registered or entitled to be registered as proprietor of an estate in fee simple in the land; the person(s) who is the owner of the fee or equity of redemption; the Minister administering the <i>Crown Land (Reserves) Act 1978</i>; or the Minister or public authority that manages or controls the land.</p>
2.	<p>An 'agent' or representative is someone authorised to make the application on behalf of the owner. A letter or other document of authority must be provided with this application.</p> <p>Pursuant to Section 248 of the <i>Building Act 1993</i> (Vic), a person must not act on behalf of an owner of a building or land for the purpose of making any application unless the person is authorised in writing by the owner to do so. Penalties apply.</p>
3.	<p>'Dangerous or unsafe areas' may include any area of the building or property that may pose a danger to the life, health or safety of an occupant, such as areas with electricity generators, dams, open flames (excluding kitchen areas), unsafe heights etc, including any areas where dangerous activities may be carried out at the building. Consideration should be given to whether an area may be unsafe for children as well as adults.</p>
4.	<p>A 'habitable area' is any area used primarily for sleeping.</p>
5.	<p>'Essential Safety Measure' (ESM) has the same meaning as in the <i>Building Regulations 2018</i>, and without limiting that definition, includes any item that is required by or under the Act or Regulations to be provided in relation to a building or place of public entertainment.</p> <p>'Maintenance determination' and 'maintenance schedule' also have their corresponding meanings in the <i>Building Regulations 2018</i>.</p>
6.	<p>'Specialist equipment' and 'specialist facilities' includes any technical or professional equipment, tools, materials or the like used for the provision of services or activities including, without limitation, quarantine, medical treatment, detention, or the like.</p>
7.	<p>Pursuant to Section 246 of the <i>Building Act 1993</i> (Vic), a person must not knowingly make any false or misleading statements or provide any false or misleading information under that Act. Penalties apply.</p>
8.	<p>The application fee is non-refundable regardless of whether the application is approved or refused.</p>
9.	<p>If any details in respect to this application change after it is submitted but before the application is determined, you must advise Council as soon as possible by sending an email to [insert] or calling [insert].</p>
10.	<p>Applicants are not required to provide all information and documents at the time the application is lodged. However, Council may not be able to determine an application without some or all of the required information, and the application may be refused or delayed unless further information is provided.</p>
11.	<p>Once completed, this form and all attachments should be provided to Council. See details at section 1.</p>