# PLANNING AND ENVIRONMENT DIVISION GUIDELINEs CANCELLATION & AMENDMENT OF PERMITS (*SECTIONS 87 & 89 PLANNING AND ENVIRONMENT ACT 1987*)

## INTRODUCTION

Division 3 of the *Planning and Environment Act 1987* establishes a procedure by which the Tribunal can cancel or amend a permit. The Act sets out:

* The circumstances in which a permit can be cancelled or amended;
* The persons who may apply for the cancellation or amendment of a permit;
* Specific limitations on the Tribunal’s power to cancel or amend a permit; and
* Matters about which the Tribunal must be satisfied before it can cancel or amend a permit.

These matters have been described as hurdles which must be crossed before the Tribunal can decide whether or not the permit should be cancelled or amended on the planning merits of the case. An applicant for cancellation or amendment of a permit must first cross these hurdles and then must also demonstrate that the permit should be cancelled or amended on its planning merits.

The purpose of these guidelines is to explain this procedure so that a person making submissions in an application of this type can address all the issues relevant to the application, i.e. both the hurdles and the merits.

These guidelines apply to applications for cancellation or amendment of a permit by a permit holder, responsible authority or referral authority under section 87 of the *Planning and Environment Act* 1987 or by a non-permit holder under section 89 of the Act. They do not apply to applications for the amendment of a permit by a permit holder under section 87A of the Act.

## IN WHAT CIRCUMSTANCES CAN A PERMIT BE CANCELLED OR AMENDED

An application can be made to the Tribunal to cancel or amend a permit if there has been:-

### A material mis-statement or concealment of fact relating to the application for permit;

Example: A setback is incorrectly dimensioned on a plan which, if correctly shown, may have led to a different decision.

### A material mistake in relation to the grant of the permit;

Example: The responsible authority misconceives the orientation of a site overshadowing effects of a proposed building, in a situation where a correct assessment may have led to a different decision.

### A material change in circumstances occurring since the grant of a permit;

Example: A use is permitted adjacent to a residential use, when later scientific advances demonstrate that the use is not safe in such a location.

### A substantial failure to comply with the conditions of the permit;

Example: The persistent and significant failure to comply with permit conditions which may indicate that the permit-holder is unwilling or incapable of complying with the permit conditions.

### A failure to give notice of an application for permit;

Example: A responsible authority fails to advertise an application for permit which should have been advertised, or fails to advertise the application to particular person who may suffer material detriment even though the application was otherwise advertised.

### A failure of the responsible authority to refer an application to a referral authority; or a failure of the responsible authority to follow the requirements of a referral authority.

Example: A responsible authority fails to refer an application for permit as required by the Act or Planning Scheme, or fails to impose conditions required by a referral authority or fails to refuse an application when the referral authority objects to the application.

**Note**: These examples are for illustration only and do not describe the wide variety of situation which might satisfy these mandatory circumstances.

## WHO CAN APPLY TO CANCEL OR AMEND A PERMIT

The Planning and Environment Act does not allow just anyone to apply to cancel or amend a permit.[[1]](#footnote-1)

The persons or organisations who can apply are:-

* The Responsible Authority usually the local council;
* The owner or occupier of the land;
* A person who reasonably believes he or she should have been given notice of an application and was not given notice.[[2]](#footnote-2)
* A referral authority
* A person who objected or was entitled to object who reasonably believes he or she has been adversely affected by:[[3]](#footnote-3) -
  + - * 1. a material mis-statement or concealment of fact relating to an application for permit;
        2. a material mistake in relation to the grant of a permit;
        3. a substantial failure to comply with conditions.

The Tribunal may refuse to consider an application to cancel or amend by such a person if the application was not made as soon as was practicable in the particular circumstances of the case.[[4]](#footnote-4)

## WHAT LIMITATIONS APPLY TO THE POWER TO AMEND OR CANCEL PERMITS

The Planning and Environment Act provides that the Tribunal cannot cancel or amend a permit in a variety of circumstances including:[[5]](#footnote-5)

* The permit is for the construction of a building or works, and the construction or works are completed.
* The permit is for other development, and the development is substantially carried out; or
* The permit is for subdivision or consolidation of land and the plan has been registered under the *Subdivision Act 1988*.

## WHAT THE TRIBUNAL MUST CONSIDER

In addition to the matters the Tribunal ordinarily considers in planning applications, the Act provides that in applications to cancel or amend a permit by non-permit holders (i.e. persons other than the responsible authority, the owner or occupier of the land or the referral authority), the Tribunal must consider[[6]](#footnote-6):

* if there was a failure to give notice, whether or not the person could reasonably have been expected to have become aware of the application in time to lodge an objection;
* whether or not the person was substantially disadvantaged by the issue of the permit; and
* whether or not it would be just and fair in the circumstances of each case to cancel or amend the permit.

## SUBMISSIONS AT THE HEARING OF THE APPLICATION

The document ‘Planning and Environment Division Guideline - Submissions in Hearings’ provides general guidance on the preparation of submissions in planning applications. You should adapt these to the particular circumstances of this type of application.

Submissions in relation to applications to cancel or amend a permit are usually in two parts.

1. Submissions must address the question of whether or not the Tribunal has the power to cancel or amend the permit having regard to the limitations imposed upon the exercise of that power by the *Planning and Environment Act 1987*. These limitations are essentially the hurdles described above. Then;
2. Submissions must argue whether or not the permit should be cancelled or amended having regard to the planning merits of the contentious aspect of the permit.

In relation to the first of these parts of your submission should address: -

* whether or not the circumstances in which the Tribunal may amend or cancel a permit exist;
* whether or not the applicant is a person who may apply for the cancellation or amendment of a permit, and the application has been made as soon as practicable;
* whether or not there are specific limits on the Tribunal’s powers to cancel or amend a permit; and
* whether or not there are matters about which the Tribunal must be satisfied.

Your submission must then go on to address the planning merits of the case.

A submission may be made orally, in writing or both. It is of great assistance if your submission is in writing. There should be sufficient copies of written submissions for the sitting Member(s) and all parties (usually six copies are sufficient). The copies are distributed at the hearing. Where appropriate, the submission should be supported by visual material, such as locality plans, photographs and/or plans of the site and the surrounding area, and the location of the applicant’s properties. If your submission is of any length, the pages, sections and/or paragraphs should be numbered for easy reference during the course of the hearing.

## OTHER RELATED ISSUES

### Orders to Stop Development

Orders to stop development are intended for urgent cases. They enable existing circumstances to be maintained pending the hearing of a request to cancel or amend a permit.

The Tribunal will fix a time and place for the hearing of the application for the order to stop development and notify the parties by way of an order. At the hearing of an application for an order to stop development, all parties will have an opportunity to be heard.

If you apply for a stop order, you will be required to give an undertaking as to damages. If the Tribunal ultimately decides that the request for cancellation or amendment of the permit should not be granted, and the Tribunal decides that any person has suffered loss or damage as a result of the making of the order to stop development then you will be required to compensate that person for the loss and damage suffered and ordered to pay the amount assessed by the Tribunal.

The Tribunal may, if appropriate, order that no development be carried out or constructed on the land until the application for cancellation or amendment of a permit is decided.

### Compensation

If a permit is neither amended nor cancelled, and an order was made stopping development, then the responsible authority or the person accepting liability for any loss or damages resulting from the stopping of development is liable for such loss or damages.

The responsible authority is, in some circumstances, liable for loss or damages if a permit is cancelled or amended as a result of the responsible authority’s error.

### Costs

All persons appearing in an application are normally responsible for their own costs. Costs are rarely awarded and it is only in exceptional circumstances that the Tribunal will award costs. However, costs may be awarded if the application to cancel or amend the permit is found to be unjustified. For more information about costs, see the VCAT webpage.

Applications for cancellation and amendment of permit

If you wish to apply for the cancellation or amendment of a permit, you should use the form that is available on the VCAT website. The form assists you to make sure that your application complies with the Act and Regulations.

### Other ways a permit holder may amend a permit

A permit holder may seek to amend a permit in several different ways that are not available to non-permit holders. They include:

* An application to amend a permit that was issued at the direction of VCAT under section 87A of the *Planning and Environment Act* 1987.
* By way of secondary consent i.e. amending the endorsed plan(s) (or altering the use or development shown on the endorsed plan(s)) with the consent of the responsible authority under a condition of the permit which allows such amendment.[[7]](#footnote-7)
* An application to amend the permit under Division 1A of the *Planning and Environment Act* 1987.[[8]](#footnote-8)

## More information

For more information, consult VCAT’s Practice Note – *PNPE3 Cancellation & Amendment of Permits and Stop Orders*.

1. *Planning and Environment Act 1987* sections 87(3) and 89 [↑](#footnote-ref-1)
2. *Planning and Environment Act 1987* section 89(1)(a) [↑](#footnote-ref-2)
3. *Planning and Environment Act 1987* section 89(1)(b) [↑](#footnote-ref-3)
4. *Planning and Environment Act 1987* section 89(3) [↑](#footnote-ref-4)
5. *Planning and Environment Act 1987* sections 88 and 91(5) [↑](#footnote-ref-5)
6. *Planning and Environment Act 1987* section 91(3) [↑](#footnote-ref-6)
7. See *Westpoint Corporation PL v Moreland CC* [2005] VCAT 1049 for a useful discussion of the scope for secondary consents. [↑](#footnote-ref-7)
8. The procedures for applications under Division 1A of the Planning and Environment Act 1987are similar to those which apply to the original permit application. [↑](#footnote-ref-8)