

Regulatory reform suggestions arising from the McCrae landslide

MERG wishes to offer this submission in response to the invitation from the Board of Inquiry to examine regulatory matters and provide its suggestions as to what might be considered by the Board of Inquiry when making its final report.

Most of the suggestions we are making relate to our experience as affected and nearby residents in relation to the landslide and the actions of regulators.

The Municipal Building Surveyor

The Municipal Building Surveyor (MBS) assumes a key position of authority under the Building Act and can to our understanding make the following Orders.

1. A General Building Order, can direct the owner or occupier to evacuate, prohibit entry or use of a building or require specific building work to be carried out.
2. A Building Order for Minor Works if the work is minor and can be completed in a short time frame.
3. A Stop Works Order
4. An Emergency Order if there are building issues that pose a risk to life or property and immediate action is required.

The McCrae Evacuated Residents Group (MERG) is concerned about how the powers of an MBS are exercised especially the nature and timing of General Building Orders to undertake works on buildings and the processes used. The experience of the use of emergency orders by the MBS is also considered.

MERG Members understand that the MBS is limited to making orders related to buildings and has no authority to make orders relating to land management.

Orders under the Building Act in McCrae have included ones to not inhabit properties or to undertake works to make safe.

Problems have included:

- Poor consultation with the home owners.
 - A requirement to “show cause” within 7 days was made by the MBS, but the representatives of the home owner were given to understand that there would be no immediate repercussions if they did not show cause. Subsequently after the show cause period had elapsed the council advised that they required the immediate works to be undertaken and not wait until the Board of Inquiry had concluded its investigations and reported.
- Requiring or proposing work that is principally related to land to involve work on buildings
 - Filling of displaced land is to include filling up to the foundations of the house, presumably to justify the building element of the order
- The lack of information or evidence supporting the need for work or action under an order.
 - Usually no explicit reason is formally stated or provided. MERG has for example asked on multiple occasions for a copy of a decision on which an order is based and the risk assessment or considerations leading to the

- decision. None has ever been provided with the MBS advising that he does not have time to record decisions and reasons.
- Requests under FOI have been delayed and not considered within the proper timeframes.
 - An order or a proposed order to make the land safe on one property for building works to possibly occur on another property have not been accompanied by reasonable explanations or advice.
 - It seems possible that the MBS and Council may pre-empt the findings of cause for the landslide and is asking for residents to do remediation works well in advance of considerations by the Board of Inquiry.
 - No consideration given to the capacity of home owners to undertake work let alone wait for findings of the Board of Inquiry
 - For example, one home owner is in residential aged care and does not have the capacity to plan or manage the works
 - Short time-frames related to the completion of work and possible extraneous reasons for decisions
 - The reasons for the immediate nature of works are not apparent especially as the Board has not had hearings on causation or remediation let alone reported.
 - There is a view that possible decisions regarding the urgent removal of the house at 3 Penny Lane is because it is an eyesore or it has become a tourist attraction, or it may pose a risk to pedestrians or motorists on Point Nepean Rd. In any of these cases no evidence is provided to support the reason or the required time frame for possible decisions.
 - The extent of the fines that may arise if work is not completed on time.
 - The extent of the fines is set in legislation (in this case \$88,000) which appears in some instances to be disproportionate to the cost of works.
 - Orders to vacate properties in January were not consistent with the orders or understanding of the Incident Controller, the SES; nor were they issued in a timely manner or with any consideration for affected residents.
 - Orders made by the acting MBS in January had little regard to the determinations of the SES as to houses that needed to be evacuated.
 - The SES with other authorities such as VicRoads had assessed which residents needed to be evacuated on the day of the second landslide.
 - Subsequently several residents were allowed to return to their properties as the SES redrew the affected area,
 - The Acting MBS then provided Emergency orders and Building Notices on a wider group of properties with effect of midday but without clearing this action in advance with the Incident Controller, the SES.
 - Subsequently with the assistance of the Police the MBS and associates late at night having finally consulted with the SES peremptorily ordered some residents to immediately evacuate with no notice and little regard to their individual circumstances.
 - MERG residents have been subject to vague and contradictory decisions and advice from the MBS leading them to have no confidence in any decisions or actions. Too often there is little rationale given for decisions or actions.
 - For example after advising residents that they would not be allowed to return home for some time unless they paid for their own professional risk assessment, suddenly after ten homes were robbed there was an overnight

decision without clear explanation that properties would be colour coded as to risk and some residents allowed to return.

To address these issues we suggest that the following amendments are made to the regulatory framework and processes.

1. Orders must be accompanied by a statement of reasons setting out why the works or actions are required
2. There is a clear statement of the expected outcome of any required building works
3. The outcome of the works must relate to the building impacted by the order
4. The orders do not stipulate how an order is to be undertaken, only what outcome is required.
5. If the MBS considers the work is urgent, the reasons for its urgency and for the stipulated time frame must be stated
6. Fines related to failing to comply with the Order need to be cognisant of the capacity of the owners to undertake the work (means tested) and the cost of the works.
7. The MBS of a council needs to be cognisant of the impact of orders on a property owner, ensure that proper notice is given, and that as appropriate especially in emergency circumstances wider Council resources are organised to support residents.
8. Council and its MBS needs in emergency circumstances respect the roles of other regulatory agencies and not seek unilaterally to usurp the powers for example of an emergency site controller without appropriate and timely consultation
9. MERG supports a review of the Building Act and powers of the MBS. Too often the MBS may make arbitrary decisions with the Council CEO or Council itself having no power to review or restrict the decision making. This could be done quickly by recommending that the current review of the powers of MBS officers in respect to POPE (Place of Public Entertainment) permits be extended to consider their powers overall and their limits in regard to their employers, Councils.