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Modernising Victoria's Planning Act

A New Car or a Major Service?

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The Association of Consulting Surveyors Victoria

ACSV represents the private sector of the land surveying profession in this State.

ACSV currently has over one hundred member surveying firms spread across Victoria and these firms stay at the forefront of industry, planning and legislative updates primarily thanks to their membership, monthly newsletter, seminars and training courses run by ACSV.

ACSV takes pride in its ongoing working relationship with industry, government departments such as Land Registry Services (Titles Office) and infrastructure bodies dealing with the provision of land services.

We therefore welcome the opportunity to participate in the reviewing of the Victoria's Planning System and request that our organization be included in the list of bodies consulted for this and any other reviews of planning related matters undertaken by the Department.

A New Car or a Major Service?

It has been said that many town planners do not plan towns because they are too busy dealing with the process of planning control.

There is no doubt that the current planning system has become immensely complicated, burdensome tedious and very, very expensive.

Most applicants would believe it takes too long to process applications and that the system only serves to create uncertainty rather than certainty.

Planners evaluating applications are overloaded with work due to many factors including complexity of the system, their own youth and planning experience, protecting themselves against the vagaries of having their own recommendations overturned by the council they work for or VCAT. This means that they are unwilling to issue opinions to landowners and applicants who look for some guidance when they approach a responsible authority.

The current system is therefore not conducive to development which would seem to be perceived by some planners as the enemy of good planning. In other words – don't change anything. Unfortunately modern society is based on a concept of growth and the needs of increasing populations that require development.

The competition between the two opposing views has spawned many Interest Groups that are now having a major say in planning. Trying to accommodate all these interest groups means the system has inevitably become more complex.

It is our view that when introduced, the VPP's were a well-structured orderly approach to planning. Those of us that remember days when the Uniform Building Regulations guided so much of subdivision design, breathed a sigh of relief when council was finally granted discretion in so many of these matters. The introduction of performance or objective based planning finally provided the flexibility to make sensible decisions.

Unfortunately they were coupled with the amalgamation of councils which resulted in the shedding of staff from a wide range of government authorities and the exit by those taking sizable redundancy packages that resulted in a brain drain from the decision making bodies. Ever since then planners have been searching our system for rules rather than guidelines to provide them with some comfort in decisions they make.

Should we throw the baby out with the bath water or have another go at trying to make the VPP's work?

It is futile creating any new scheme if it is inadequately resourced. Insufficient numbers of planners administering an ever complicated scheme is one of the major reasons contributing to the constipation of the current system. Resourcing is currently inadequate across all levels including VCAT where delays in scheduling hearings are becoming unacceptable.

In the past ten years the surveying profession has undergone considerable self analysis scrutiny by government and reinvention of its regulatory regime and methodology but with one central theme in mind – **“the public interest”**.

We submit that any review of the planning controls should have the same bottom line test - does it serve the public's interest? We believe planning has failed at many levels. It is too expensive, too time consuming, too complex and does not achieve the objective of the Planning and Environment Act.

Despite the above, we think the VPP's can work and that the cost of winding back the system and adding some improvements will be much cheaper than creating a brand new one. The total cost to society is enormous if we purchase a “new car” and everyone has to be trained to learn how to drive it.

State vs. Local Government

An area where the current system has fractured is in the relationship between local government and the ultimate planning authority, - The Minister.

Local council's detest having their decisions overturned by the state. To ensure that a top down approach works the Minister for planning must control the shots otherwise planning decisions degenerate into further anarchy and complexity.

The VPP template has been distorted in the extreme by local government's attempt to place their own stamp on planning schemes including the retention of some very old carry over controls such as Clause 53 in the Yarra Ranges Planning Scheme. This clause is so full of negatives that it is often difficult to work out what exactly is or is not permitted.

Culture

It is our understanding that the SPPF provided the framework for Local Government to establish their own local policies within that umbrella and to implement those policies by the use of planning zones and overlays. The current practice of re-interpreting the policy for every application is wasteful and unnecessary and adds to the cost.

This culture needs to change to gain efficiencies and reduce delays. Only when uncertainty arises should overarching policy need to be re-interpreted otherwise the zones and overlays are not comprehensive enough to reflect and implement policy.

Incorporated Documents

We suggest that incorporated documents should be removed from use and that at best these should only be reference documents. Incorporated documents are adding to the complexity of schemes and duplicate much of what should sit within zoning and overlay controls.

They are also problematic because they fragment the availability of a planning scheme, i.e. they are not available online from the DPCD website and have to be purchased from the relevant council.

Definitions

Responsibility for defining land use terms lies with the State Government. Clauses 70 to 75 of any Planning Scheme create great uncertainty in many instances and lead to poor planning outcomes.

The definition of Restricted Retail Premises is a classic. It only applies to those uses that are covered by the term rather than closely related uses and leads to great angst on the part of people trying to establish responsible businesses in zones such as Industrial 1.

An example of the misfit of this list is typified by the fact that a permit can be granted to use Industrial 1 land for retailing party supplies, camping equipment and household appliances but not a to sell golfing equipment. Because golfing equipment is not listed in the definition column the use defaults to being classified as a shop and is prohibited. The application of current definitions is unworkable and illogical and requires a total overhaul.

173 Agreements, Covenants and Restrictions

Covenants

It is our view that covenants **should not** be part of the planning system. When the planning and environment Act was amended to include them as another level of planning control, it introduced “Private Planning” into the public system. Covenants reserved in transfers of land do not have to pass any public test and are therefore unfair because they escape the scrutiny and reviewing that all other controls must endure before being implemented.

Covenants can also contradict the very planning scheme they are subject to. A prime example of this contradiction exists on a considerable number of land parcels in the Industrial 2 Zone of South Dandenong where covenants reserved in transfers prevent the very nuisance industry types that the planning scheme is trying to preserve for that area. The domain of covenants created between private land owners should remain in that domain and if parties are aggrieved they can take their own civil action to enforce them.

173 Agreements

There is a desperate need to modify the scope of 173 agreements that have become increasingly popular as a planning tool and perhaps symptomatic of an underlying inadequacy of the planning system. They are often overused because of a reluctance by responsible authorities to enforce planning permits. The problem would seem to be one of visibility. Planning permits are filed and stored by councils in archives that are difficult to retrieve. 173 agreements are used to bring to the notice of land owners controls that could simply remain in planning permits. The use of 173 agreements and restrictive covenants for that matter as notification tools is very common and demonstrate that some other mechanism is need to solve this problem.

Plans of subdivision are the most common vehicle for creating new plots of land and are often seen by authorities as the only means to convey a message to new land owners that obligations run with their land.

We believe that 173 agreements are unnecessarily complex and full of redundancies that duplicate other legislation and documentation. To be efficient they should be in forms similar to permit application forms that carry all the essential information and are not burdened with eight pages of legal jargon to implement the intention of one simple sentence or paragraph. 173 agreements are now expensive, time consuming to produce and too narrowly focused.

Very often a referral authority requires the securing of a control and the only means at their disposal is a 173 agreement. Councils should not have to be involved in such agreements when they might have no interest at all but become an essential party because of the way this section of the Planning and Environment Act is structured.

We recommend that a new instrument be provided that allows any authority to have an agreement with a land owner that can be registered on the title.

Restrictions

While it is recognized that restrictive covenants have the same meaning as covenants under Section 88 of the Transfer of Land Act they have become too narrow in their scope by virtue of the fact that they have to be negative. The true test of a restrictive covenant is that if an owner can sit on their property and do nothing, then the restriction is valid. Although a restriction cannot be positive and require an owner to do something this is often the desired outcome in a successful planning solution.

What is needed is a **Contract in Gross** that can be recorded on a plan of subdivision in simple form. Contracts in Gross would have parallels to Easements in Gross in which the dominant tenement is an authority and does not need to be the owner of land. The parties to the contract would necessarily include the owner and then any other public authority or authorities with an interest.

The nature of the contract could be positive, negative or both and not necessarily involve a responsible authority. The word "Contract" has been deliberately chosen to convey this meaning.

Legislation would need to be amended to provide a head of power for the creation of such contracts.

Use of a Contract in Gross would be cheap flexible and not unduly delay a development. We strongly urge DPCD to support this concept.

Objections

In many instances the establishment of development plans and perhaps the introduction of the new residential zones will provide clarity of direction and establish certainty for developers but aggrieve objectors where third party review rights are waived.

As permit applications require more comprehensive documentation to support the request, it is apparent that objections do not have to meet similar criteria to be considered. Consequently objections that are totally irrelevant can hamper the progress of an application.

There are many examples that spring to mind including one from the owner of a property north of the subject land who objected on the basis that their property would be overshadowed. Other silly examples include neighbours objecting to the development of land that they used as a playground and picnic area and simultaneously dobbing themselves in to the act of trespass.

Rightly or wrongly these objections have been accepted and have held up projects needlessly. If there was a compliance test of relevance the frivolous objection would not be considered. Section 57 2A of the P & E Act needs expanding and strengthening to deal with these kinds of issues.

Planning Scheme Amendments

Greenfield developments are now being dealt with more efficiently by the use of Urban Growth Zones and Precinct Structure Plans. However there are many infill sites within the UGB that need site specific amendments to maximize their use.

It is our view that the amendments are best dealt with by DPCD (The Minister) and not councils for several reasons:

- Amendments need the permission of the minister to proceed in the first place
- Decisions on zoning should be made by the Minister to reflect government policy e.g. Melbourne 2030 and Melbourne @ 5 million.
- Local councils are too heavily influenced by parochial issues rather than implementing planning policy
- There are no review rights so that council decisions are beyond scrutiny and contest.
- Objectors can thwart a worthy proposal

The expansion of the metropolitan area is only serving to take pressure off inner urban development instead of further developing populated areas and utilizing existing infrastructure.

Interaction with other legislation

The introduction of the Aboriginal Heritage Act has added another level of complexity and delay to the planning process. We make no comment on the purpose of the Aboriginal Heritage Act itself or the regulations except to note that Section 52 of the Act places a big restriction on the processing of applications where a CHMP is required. It is not clear why a CHMP has to be approved before a planning permit can be issued for a development. Time is killing the profitability of projects because of the need for CHMP's and the inordinate delay and expense in achieving one.

There would seem to be no reason why the need for a CHMP could not be a permit requirement. That way certainty that a development could proceed can be established albeit with the caveat that it might be affected by the outcome of an approved CHMP.

Conclusion

ACSV applaud the review of planning and reiterate our view that the public interest should be paramount in considering any change. This extends to the consideration of any new name for the Planning and Environment Act which we believe to be unnecessary unless it is indeed a new piece of legislation. Name changes provide little public benefit of themselves and only eat into the public purse.

This submission could have provided more extensive comment had we been notified of the review rather than stumbling across it by accident. We understand that committees have already been formed and question whether the formation of these groups is premature given that a decision has not been made whether we are to have a New Car or a Major Service.

ACSV would welcome the opportunity to participate and comment further as the review progresses.

Roger Green on behalf of

The Association of Consulting Surveyors Victoria