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Reg No A0036067S (Vic)

Response to "Better Decisions Faster"
A discussion paper (August 2003)

SOS welcomes and strongly supports measures to streamline and simplify planning procedures wherever possible to achieve high standard and timely outcomes.

> We want a process which is ***efficient, fair, transparent, clear, consistent*** and which inspires confidence.

We are however opposed to any proposal which compromises the rights and input of residents or the community generally in the name of efficiency. The Option C2 in BDF, which was immediately withdrawn, is a gross example of such a proposal.

To maintain balance and transparency, ongoing scrutiny of all phases of the planning application approval process is vital. The introduction of any new procedures which turn out not to provide transparency or good planning outcomes will only be counter productive and work in opposition to the aims of this review process.

> Unfortunately the thrust of many of the options proposed is to reduce the opportunity for input by residents and other community involvement and we strongly object to that approach.

The BDF report identifies a number of problems currently being experienced. It must be remembered that we are dealing with the biggest and longest building boom for decades and that if and when this subsides many of the problems will evaporate. Meanwhile, long timeframes, poorly prepared applications, permits required in too many cases, policy confusion, inconsistent decisions and difficulty in amending planning schemes are the areas of concern highlighted in the report.

What's missing from the BDF report?

SOS believes many of these problems could be significantly reduced if the system was simply more strictly enforced, i.e. if non compliant applications were rejected until they met local and state policy; if clearer direction through the use of mandatory planning controls were established in the planning schemes; if enforcement with serious repercussions for non-compliance was the rule rather than the exception and if VCAT's role, with respect to hearing planning appeals was modified so that it made determinations only as to whether Councils had acted properly, not acting as a second (duplicate) and inconsistent planning assessor.

The most important reform, which is not addressed by the BDF document, is empowering the responsible authority to reject applications that do not comply with local policy.

We argue that properly constituted local policy which has been given ministerial assent through incorporation into the planning scheme should not be subject to arbitrary change at VCAT.

The other important reform is giving greater definition to local policy. Time and again councils will, particularly through DDO's, establish mandatory limits on height, setbacks etc only to have statements such as MUST replaced by SHOULD or ENCOURAGE.

These open ended statements encourage confusion, ambiguity and result in subjective judgements that are the root cause of costs and delays in the system. A more prescriptive planning system should be implemented to remove ambiguity and give proper assent to the intent of state and local policy. Neighbourhood character as mandated within RESCODE can only be re-inforced by prescribed controls. Without such prescription neighbourhood character will be continually compromised to the point where change becomes destructive.

Greater prescription should also result in fewer applications requiring a permit. However, this should only apply if all conditions are met.

To improve the functionality of the planning system, particularly with respect to VCAT, it is best to ensure that local policy is properly constructed, taking account of state policy framework, to deal with applications and then allow such policy to decide the application. Only when the responsible authority has failed to take heed of the policy should an appeal be allowed to proceed.

Put simply, if the application complies then a permit should issue. If it doesn't then the permit shouldn't. Remove the shades of grey from the system and planning decisions will be BETTER AND FASTER.

Specifically, with reference to the first part of the Whitney Report (Local Policy), as indicated above, we agree with the overall conclusion of the Reference Group that the current system should not be abandoned or structurally changed but instead refined and improved to address the weaknesses, namely the need for greater levels of consistency and certainty in decision-making, more guidance in balancing policies, clarification of the status of policies outside of planning schemes in decision-making and improved quality and clarity of both State and local policy.

But we do not agree with the Reference Group that throwing more resources at VCAT will help much - it may reduce time delays but by definition it cannot address the fundamental weaknesses listed above.

We agree that the current balance in the system has gone too far in favour of flexibility and performance-based controls to the detriment of certainty. From the experience of residents it seems obvious that the solution is to improve certainty for all parties by reducing flexibility and the present wide use of discretion by both councils and VCAT which just fuels the appeals process. The simplest and fairest way to achieve more certainty, while still fulfilling valid planning objectives, is to make basic Rescode amenity standards mandatory, as well as adherence to local neighbourhood character and overlay guidelines and schedules, as already mentioned.

The Reference Group's solution - to provide a greater level of precision in policy statements - will simply compound the problem further if they are still to be subject to the exercise of discretion and debate.

In this context, while balancing policy in decision-making could be improved by amending Section 7(4) of the P&E Act 1987 to provide extra criteria for balancing and prioritising policies, there are more important sections of the P&E Act that need amending, including s52(1A), s54, s58.

These sections should be tightened up to allow the Responsible Authority to reject unsatisfactory applications (i.e., those that seriously conflict with Rescode, overlays or other Planning Scheme requirements, especially the amenity guidelines that we stated above should be mandatory). These cases could not be appealed to VCAT because they would not have been formally assessed before being refused, thus entailing a fresh application. However, as with the BDF recommendation on incomplete applications, we acknowledge that in fairness the act of rejection should be appealable. Under these circumstances we say the only two remedies open to VCAT would be to uphold the Council decision to reject, or direct the Council to accept the application.

S60 should also be amended to require that Responsible Authorities MUST consider all the issues listed in S60(b) as well as s60(a), It seems self-evident that social and economic impacts, and local guidelines or planning scheme amendments adopted by a council or the Minister, MUST be considered as well as comments by objectors and referral authorities - otherwise there would seem little point in wasting time with public consultations and panel hearings to adopt such amendments in the first place.

Any such formally adopted changes to a planning scheme must also be given priority by VCAT, otherwise the present "ambit claim" regime will just be perpetuated, where some developers file applications with no real intention of obtaining a permit via a council but simply as a necessary first step to having their application heard de novo by VCAT as an authority which at present usually gives considerably more weight to the urban consolidation thrust of the SPPF than to local policies and planning scheme amendments, even when these have been through the panel process and been subsequently approved by the Minister.

Another aspect to this "dual track" system which undermines planning standards is the tendency of VCAT to approve retrospective permit appeals which involve failure to meet standards such as those relating to vehicle access and turning circles. This sends a signal to councils that there is no point in insisting that this sort of external standard be met in the first place.

Changes are also required to the Building Act (s11) and the Building Regulations (part 4.2) to correct the present anomaly whereby if a provision of a planning scheme regulates the siting of buildings, any building regulation which also regulates that matter must be complied with in addition; yet under regulation 4.2, this does not apply if a planning permit is required and the planning scheme regulates the same matter.

This means that when an assessment by a council planner fails to adequately consider a Rescode siting requirement (eg a wall or fence height or setback, adequate vehicle access), the building regulations covering the same issues cannot be invoked to correct the situation. The only remedy at present is for an objector, if there is one, to appeal the whole case to VCAT.

The purpose of changes suggested under BDF should be re-oriented. We disagree that the BDF initiatives should encourage Councils to 'lead' rather than to 'administer' development approval decisions. Without some mandatory guidelines (as discussed above) this would mean that Councils would be expected to use more discretion and be less accountable than they are now. This is moving in the wrong direction.

For applicants the message should be that not only more work upfront **but compliance with SPPF, LPPF and Rescode guidelines** will lead to a shorter and more efficient process and increased likelihood of a favourable outcome.

Specific Comments on some of the options offered in the report

Lodgement

A1 – Whilst SOS agrees some pre-lodgement expert assistance will help provide complete applications we oppose any formal process which will have the result of diminishing the council's role as decision maker. We also believe the applicants who most need it are the ones least likely to be prepared to pay for it. Furthermore where is the additional expertise to provide the service to come from as the report already acknowledges that there is a major shortage of trained planners?

Making Rescode amenity standards mandatory would achieve much the same efficiency but with far less time and effort and with more certainty. Also, with regard to possible future enforcement, the "fully documented information certification" stage right at the start of the application process should include fully-dimensioned plans.

A2 – Agree (see above)

A3 – Agree.

Information assessment

B1 – Agree.

Notification

C1 – Whilst we see good reasons for councils to be more consistent with each other in terms of their notification practices, we oppose the view that less notification should be required. The system should be transparent from the beginning and the opinion of all stakeholders is relevant. In our experience when a delegated party is given the power to determine what may or may not be detrimental to a potentially effected party, outcomes are frequently not ideal. Lack of experience, lack of attention to detail, lack of time for proper assessment and lack of concern in relation to potential detriment all too often lead to bad outcomes for innocent bystanders and the community as a whole. Councils might now 'excessively notify' because they want to avoid problems later which could have been avoided.

Experience has also shown that it is often residents/objectors who detect errors and inconsistencies in planning applications that planning officers have missed.

The development industry often complains about vexatious objectors. In our view this is not a significant issue in reality because people really don't have the time or need the confrontation except in situations that genuinely deserve opposition. Confrontation is in fact one of the real problems with the system that would be good to remove.

The notion that applicants can obtain 'neighbours consent' off their own bat is ludicrous. In most cases that SOS is aware of, incomplete, factually incorrect and/or biased information is usually provided to neighbours by applicants whose goal is understandably to promote their own interests. Often, statements signed by neighbours etc. are tendered at VCAT and are rightly treated with misgivings.

It is a flawed democratic argument to say that the amount of time taken to deal with the concerns of potentially effected parties justifies the removal of some of those rights. The time taken to notify neighbours and read their objections can not be seen as a major obstacle. Furthermore the report itself recommends mediation.

The fact that residents' objections are not always presented in a particularly technical or sophisticated way is something which just has to be accepted given the one off nature of an objection. Perhaps some suitable guidelines could be required to be given to objectors to help them focus on the main issues as is being proposed for applicants.

C2 – Withdrawn. The implications of this proposal send very negative and undemocratic messages.

E3 – Whilst a short permit process sounds good it needs to be specified exactly when this could be workable. Again the process would have to be transparent and who could and should be the delegate is important. Would the effect of fast tracking more minor applications really only have the effect of putting the bigger applications further down the track? Again the opportunity to object should not be lost be there any chance of detriment or second rate outcome.

E4 – As well as improving the quality of local policies their status must be improved and they must be required to be taken into consideration. **This must occur whether a VCAT member happens to agree with the policy or not**. Ways to incorporate and quickly update local policies desperately need to be introduced.

E5 – This idea probably has merit but there may be pitfalls. Model reports would have to be assessed and tested by all councils before being imposed.

E6 – Councils have developed delegation processes according to their own experience and judgement. This should continue to be the case and should reflect the attitude of the local community and what experience shows. Many examples of problems with decisions made under delegated authority do occur, often for the reasons sited above under C1. Councillors are not looking for unnecessary extra work but are elected to understand the sensitivity of issues and respond in a balanced way with the overall benefit for the municipality as a determinant. The reasons as to why councillors decisions sometimes differ from those of council officers needs to be directly addressed not avoided by removing democratic rights and consequent responsibilities from councillors. The introduction of mandatory basic amenity standards would go a long way to removing differences between council planning staff and elected councillors on the planning merits of an application, yet another example of the greater certainty and reduction in complexity that mandatory amenity standards would result in.

E7 – An environment needs to be created which fosters clarity and honesty. Applicants must feel confident about what is likely to be acceptable and to provide plans from the beginning which are realistic. The less time wasted by council staff, neighbours and others on plans which are later altered when this could have been avoided, the better. A process that entrenches the idea that applicants can have their applications massaged by council officers is fundamentally flawed. Amending the Planning and Environment act to allow Councils to reject non compliant applications will encourage the applicant to "get it right first time".

E8 – Similar arguments to those above apply re transparency. We do not want loopholes to be created where opportunities for applicants to make changes through a back door exist. 'Minor' changes often turn out to be quite significant down the track and the record in retrospective correction is woeful.

Review

F1 – The effect of this proposal is to re-inforce VCAT's role in the planning process rather than diminish. We are therefore fundamentally opposed to this measure. There should be no opportunity for VCAT to effectively amend planning schemes by making such guideline judgements.

F2 – Action definitely needs to be taken to reduce the acknowledged 25-30% of applications involving substitution of plans at VCAT. Why not legislate to prevent a practice which only wastes a lot of people's time and encourages ambit claims This would also cause otherwise recalcitrant developers to submit reasonable applications in the first place and thus reduce the number of cases flowing through to VCAT. REMOVE rather than REDUCE the practice of substitution of plans.

F3 – Whilst this statement may be useful to focus on areas of disagreement, an application must still be looked at as a whole and considered in that context. All implications of any changes made to achieve agreement must be considered in light of the whole application.

F4 – The same arguments as for F3 apply.

Monitoring

G1 – Supported if adequately resourced.

G2 – Again this is a good idea but would require additional resources.

Enforcement

H1, H2 and H3 are all fully supported and very much needed.

We observe that this is a proper role for VCAT to assume. More attention needs to be given to enforcement including powers to enter sites etc. Once a culture of acceptance that non-compliance will be treated harshly exists a lot of time and heartache will be saved. Transparency will also be achieved. Currently cheating is actually being encouraged as retrospective action to right wrongs is rarely taken and fines etc. difficult to enforce. Enforcement work is demoralizing and again a strong position will save time and bad outcomes once developers realise non-compliance is not worth it.