



www.sos.asn.au
G.P.O. Box 5042
Melbourne 3001

Victorian Planning System Ministerial Advisory Committee

Review of the Victorian Planning System:

Submission by Save Our Suburbs, Inc (Vic)

August 2011

Ian Wood, President SOS
Ann Birrell, SOS Committee

Introduction

Save Our Suburbs is a voluntary organisation, established in the 1990s by Melbournians interested in town planning and building policies in Victoria.

This submission is based on professional experience, a review of the literature and public commentary. It is also based on extensive community feedback. In the last two weeks, for example, we received 19 requests for assistance and advice. Requests come from every suburb of Melbourne; involve a variety of developments and also some significant failures of policy and process. Home owners often face a David-and-Goliath battle against well-resourced stakeholders, resulting in bitter disillusion and substantial individual financial and personal loss.

These requests to SOS represent a wide spread community concern with planning and echo the recent findings of the Productivity Commission Report on benchmarking that:

60% of Victorians perceive that developers have too much influence over getting their development approvedⁱ.

More accountable and transparent planning controls are needed if the community is to have confidence that the system is fair and based on consideration of the public interest.

Planning reform should seek to efficiently maximise compliance with planning policy for all applications submitted for assessment. Policies are needed to manage sustainable urban growth, provide effective transport solutions and maintain residential amenity.

The M2030 Audit confirmed that the M2030 policy had failed to meet many of its goals: in directing residential growth; in activity centre structure planning; public transport investment and guidance for policy prioritisation.

These failures suggest that unregulated private development cannot deliver outcomes that prioritise community benefit.

The Victoria Planning system has many positive attributes, including:

- **Democratic process:** Government, Ministers and Council accountable and can be voted out
- **Local decision making:** Council and community who are best informed also oversee decisions that affect them most
- **Rights of Notice, Review and Appeal and Third party objector rights:** wherever discretionary planning decisions are involved, notice and appeal rights must apply for fair process, better decisions and community oversight
- **Public access to VCAT:** limited costs orders, people friendly setting, not unduly legalistic
- **Public access to documents:** some transparency: publication of decisions, reports
- **Public reporting of planning cases:** there are no reports of EPA/pollution cases

However, we suggest that the Government must address the following urgent town planning priorities for the democratic, sustainable development of Melbourne and Victoria.

1. Develop a functioning City Plan for Melbourne

The Government needs to instigate a transparent comprehensive public deliberative consultation process to develop a City Plan for Melbourne that is ‘owned’ by its citizens and that can function to guide development.

The *WA Planning Commission Summary Report on Community Engagement*ⁱⁱ and *Grattan Institute’s second Cities program report is Cities: Who Decides?*ⁱⁱⁱ provide models and reasoning for a transparent, comprehensive, public, deliberative, consultation process:

The report investigates decision making in eight of the world’s most successful cities, and asks what governance arrangements accompanied their broad-based improvement. Every city has a different story, but among these differences a number of common themes emerged. These included the importance of public engagement, consistent strategic direction, cross-sectoral collaboration, and regional cooperation.^{iv}

See also the SOS summary document on *Community Consultation in Planning & Development*.^v

2. Revise scheme to incorporate sustainability and ESD

Climate change, including more extreme weather events; the rising price of oil and population growth emphasise the need for comprehensive assessment and long term planning.

Sustainability in general needs to become a prime focus of the Planning and Environment Act 1987 (*the PE Act*), adequately and specifically defined and reflected in policy priorities. Passive solar design should be a key focus of design in Rescode and the PE Act.

The PE Act needs to be amended so that authorities are required to protect the environment, not just consider the environment. Some impacts need to be prevented.

The Climate Change Act 2010 needs to be amended and integrated with planning. Victoria's weak EIS process and Environment Effects Act 1978 also need amendment so that all developments are subject to a comprehensive, transparent, independent assessment of all impacts.

3. Measure and recognize the environmental, social and health benefits of trees to the urban environment

Trees are major urban infrastructure assets. The value of green open space, mature trees and vegetation needs to be measured and protected in planning schemes.

Dr Greg Moore's research examines the value of trees: that the value should be measured and they should be preserved; that urban trees cost benefit is about 1:6; that between 1993 and 2000 Balwyn lost 7% and Richmond 2% of cover; and that increasing green space by 10% reduces surface temperatures by 4C. He highlights aesthetic, wildlife, biodiversity, temperature decrease, water retention, reduced wind speeds, carbon sequestered, electricity savings, GHG emissions saved, water saved, financial savings including the prolonged life of asphalt. ^{vi}

These should include minimum standards for the incorporation of adequate growing space for crown trees. See also UK and other Australian references. ^{vii}

4. Strengthen "Best Value" requirements, ensure greater community engagement with councils, reflect community feedback

The M2030 Audit ^{viii} pointed to the need for improved KPIs to deliver more transparency and accountability. The Best Value requirements in the Local Government Act, particularly on community consultation and performance review need to be strengthened.

Since the PE Act was introduced, council amalgamations and performance-based planning schemes have been introduced. This meant less democracy (dramatically fewer councillors per ratepayer) so community consultation was stressed in the Local Government Act in the late 90s (Best Value, etc). Under Best Value, councils are supposed to have responsive consultation processes in place that cover all their service areas. The 6 Best Value principles clearly apply to existing as well as proposed policies and services, and principles 2, 3 and 5 are particularly relevant to planning issues:

- 2 *All Council services must be responsive to the needs of its community*
- 3 *A Council must achieve continuous improvement in its community services*
- 5 *A Council must develop a program of regular consultation with its community in relation to its services*

Best Value needs to be more strongly legislated for in the Local Government Act but also reinforced by the PE Act. There must be statutory requirements for mandatory performance and outcome based KPIs on councils.

5. Strengthen the role of 3rd Party notice and appeal rights

Wherever discretionary planning decisions are involved, 3rd party notice and appeal rights apply a transparent oversight of the process. Rights must be preserved and extended to all areas, including business zones. Notice and review rights cannot be limited to the adjoining and opposite properties. Many developments impact the surrounding area for a considerable distance. Non residential uses, such as super-markets and medical or childcare centres, should require a permit in a residential zone

and not be exempt from parking requirements.

Support by former VCAT head Justice Morris for notice and appeal rights is predicated on 3 principles:

- better local democracy and governance
- improved planning outcomes through better scrutiny of applications
- greater scrutiny and transparency, which discourages corruption.^{ix}

The objection process produces superior scrutiny of applications because residents have a vested interest. In our experience, objectors provide a vital quality control function because council planners often don't have the time or motivation to do more than a cursory compliance check.

Furthermore, per Morris J:

The New South Wales Independent Commission Against Corruption has identified the fact that third parties generally cannot challenge decisions of councils in relation to development proposals as a factor, which makes the New South Wales system highly susceptible to corrupt practice. ... There is no reason to be complacent, but Victoria's record over the last 20 years concerning corruption in local government has been fundamentally different than that in New South Wales.^x

6. Introduce more clarity and certainty in statutory planning

The combination of delegated discretionary decision-making, large financial investments and increasingly complex planning controls has given us a planning permit and appeal process that is too uncertain, takes too long and is overly cumbersome, unfair and dysfunctional.

Some elements of the new format planning schemes have become overly complex, are unclear and are not adequately achieving their original intent ... VAGO (2008)^{xi}

[Residents] ... are particularly disillusioned by false sense of security that the wording of planning policies engenders once they realize the actual lack of protection afforded by these clauses because of their non-specific wording and optional (discretionary) nature. Morris (2005)^{xii}

The pendulum has swung too far ... the level of flexibility outweighs the desirable degree of certainty which is sought by the development industry, the community and their elected representatives ... Whitney (2002)^{xiii}

The community can not afford the huge ongoing costs, delays and uncertainties of reviews of non-compliant DAs. Taxpayers foot the bill for the assessment and review process many times over, collectively through rates, state and federal taxes, including tax deductibility and individually through personal expenditure as objectors.

There are insufficient guidelines or requirements to guide the use of discretion to prevent it being used in an ad hoc way just to speed up assessments by meeting developer demands. This is the main reason why discretionary decision-making automatically puts a lot of the responsibility for compliance onto local residents, the only parties with a strong vested interest in compliant development. This is an unfair and discriminatory burden upon those who happen to live near the site of a non-compliant development proposal.

SOS would like to see more certainty by making most key discretionary controls mandatory - ie, overlays, Rescode and local policy. Rescode is crucial because it covers amenity and is one of the few policies with actual standards, but local policy must also be mandatory because it is the only set of instruments that modifies Rescode.

Furthermore, the lack of definition of planning terms and weighting also causes uncertainty and inefficiency. Terms such as 'must have regard to', 'should be consistent with' need to be standardised and defined. We need more prescription to provide all parties with certainty and to effectively guide development to appropriate locations.

7. Introduce an element of judicial review; improve function and fairness at VCAT

The New South Wales Land and Environment Court has a combined merits and judicial review jurisdiction. This could play an important role in Council oversight and improve certainty. The current process of Supreme Court Review is also expensive and slow.

The aim of reforms should be to encourage developers to 'get it right' with their applications from the start, rather than having them effectively re-designed on their way through the process of obtaining a permit.

There is little incentive to stop developers substituting amended plans at VCAT, developer double dipping, with the substitution of amended plans, after Council and objector resources have been exhausted.

There is also a problem of failure to 'pick up' deliberate but un-requested changes that some less scrupulous developers introduce on plans for endorsement after a permit has been granted. These unauthorized deliberate additions result in inconsistencies within plans and between plans and permits, which make subsequent enforcement problematic. There must be provision to legally and automatically remedy such changes introduced by stealth so that when incorrect or fraudulent plans are endorsed they can be easily corrected. The onus needs to be on developers to avoid fraudulent or careless accidental changes to endorsed plans.

VCAT expert witness procedure needs amendment. Options include witnesses to be engaged directly by VCAT and ban witnesses with personal professional links to a party.

VCAT should also be conducting its own prosecutions for breaches of s36 (misleading the Tribunal). It seems that this provision has yet to be used!

See SOS Submissions to VCAT Review 2010, 2008 ^{xiv}

8. Local Policy to be read as refinement of State Policy

The practice of VCAT to read down the role of local policy has created a culture of confusion and disregard of local policy across the planning system. The PE Act must be amended to recognise and prioritise local policy as refinements to general state policy and for local policy to take priority over state policy at both VCAT and council.

Local policy is developed at great expense by councils in response to local conditions specifically to modify general or default state policy. Local policies are only incorporated if approved by the Department and the Minister.

9. No further expansion of the Urban Growth Boundary

The UGB should not be regarded as a land bank, which can be altered whenever the Government is under pressure to release more cheap peripheral land or it is politically useful for a particular Minister or MP.

There should be a permanent limit to the expansion of the city, to protect arable and rural land, protect air quality and to make provision for adequate transport and infrastructure. The UGB must be protected through state-wide planning controls and bind individual decision-makers.

10. Require disclosure of all political donations above \$1000 and make donations to political parties from property developers illegal

Recent press reports on the failure to report political donations by property developers have 'highlighted the confluence of money, political candidates, lobbyists and property developers, especially in outer areas where re-zoning of green wedge land can be controversial'.^{xv}

Victoria has weak electoral and donations reporting laws. The government needs to act to restore integrity to planning. A good start would be to limit and control political donations by developers, as other states have done.

11. Planning Enforcement

Complaints reveal widespread lack of enforcement. Furthermore, small scale action against individuals provides no deterrence in current planning enforcement legislation.

Councils need a simplified enforcement procedure, not the current confusing and ineffective dual approach of Magistrates Court (usually for fines for building breaches) and VCAT (for restoring compliance).

The focus should be not only on compliance but ensuring that enforcement targets those who breach the Act or the planning scheme, not subsequent land owners. The perpetrator should be required to undertake restorative work as well as being fined. S126 should be amended if necessary to allow such prosecution of builders and developers.

12. Proper process for the introduction of Code Assess

Decisions on the "appropriate types" of applications and the pre-set criteria must be made with transparent public consultation. If there is still to be any discretionary decision-making involved, there must be community oversight - ie, residents rights to object and appeal. If a decision can be flawed enough to warrant an applicant appeal, then it can certainly be flawed enough to warrant 3rd party appeals and oversight

See also SOS VCAT PNPE09 submission^{xvi}, SOS P&E Act Review Submission^{xvii}

13. Footnote

It is of concern that the body conducting this planning review is the one which received criticism in the VAGO reports on land use planning and local government performance reporting. The review

should not have been conducted “in-house” - given the planning crisis the state faces, it would have been more appropriate and more productive for the review to have been conducted by an independent body.

It is also of concern that independent planners, community and environment representatives have not been included on the committee.

It is difficult even for the most intelligent and well informed to be able to step outside their own area of expertise, perspectives and community of values. The Government and Department weaken the value and reputation of their work by failing to involve the wider community.

References

- i Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments, Productivity Commission p420
<http://www.pc.gov.au/projects/study/regulationbenchmarking/planning>
- ii WA Planning Commission 2006: Perth Coastal Planning Strategy - Community Engagement Program Summary Outcomes Report (5.0 MB) www.planning.wa.gov.au/Publications/859.aspx
- iii & iv Grattan Institute’s second Cities program report, Cities: Who Decides?
http://www.grattan.edu.au/pub_page/report_cities_who_decides.html
- v SOS Community Consultation in Planning & Development (2010) Ian Wood
<http://www.sos.asn.au/node/185>
- vi Urban Trees: Worth More than They Cost, Dr Greg Moore
<http://www.aila.org.au/lapapers/papers/trees/Moore-UrbanTreesWorthMoreThantheyCost.pdf>
- vii Benefits of Urban Trees — Urban Forestry South
<http://www.urbanforestrysouth.org/resources/collections/benefits-of-urban-trees/>
Tree Benefits UK www.naturewithin.info/UF/TreeBenefitsUK.pdf
Space for new trees in planning <http://treelogic.com.au/facts/2011/06/where-is-the-space-for-new-trees/>
Decline of trees in planters limited soil root zone volumes and poor soil
<http://treelogic.com.au/facts/2011/06/you-just-can%E2%80%99t-keep-a-plant-in-a-pot-forever/>
- viii Melbourne 2030 Audit
<http://www.dpcd.vic.gov.au/planning/plansandpolicies/planningformelbourne/planninghistory/melbourne-2030-audit>
- ix, x & xii Third Party Participation in the Planning Permit Process, Stuart Morris
<http://www.austlii.edu.au/au/journals/VicJSchol/2005/5.pdf>
- xi Victoria’s Planning Framework for Land Use & Development, Auditor-General’s Report (2008)
http://www.audit.vic.gov.au/reports_publications/reports_by_year/2008/20080507_land_use_and_devt.aspx

xiii Reference Group on Decision making Process, Victorian Government, Whitney (2002)
<http://www.dpcd.vic.gov.au/planning/publicationsandresearch/reports-and-consultation-documents>

xiv SOS Review of the Planning and Environment Act 1987 Ian Wood (2009)
http://www.sos.asn.au/files/SOS-PEA_Submission.pdf

SOS Submission on VCAT Reform, Ian Wood (2010)
<http://www.saveoursuburbs.org.au/node/199>

xv

Libs face fund-raiser probe (The Age, 15/8)
<http://www.theage.com.au/victoria/libs-face-fundraiser-probe-20110814-1it4v.html>

xvi & xvii SOS Comment on PNPE09, Ian Wood, (2010)

<http://www.sos.asn.au/sites/default/files/images/SOS%20Comment-PNPE9.pdf>