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DRAFT PRACTICE NOTE – PNPE9:

AMENDMENT OF PLANS AND APPLICATIONS

Comment by Save Our Suburbs, Inc (Vic) - May 2011

SUMMARY OF RECOMMENDATIONS

* **Substitution of amended plans for DAs should be limited,**
* **Fees should also be introduced for substituting amended plans**
* **Introduction of some component of judicial review to VCAT decisions**
* **Amendment of s60 P&E Act to establish pre-eminence of local policy, supported by a ministerial directive to VCAT**
* **More prescriptive guidelines in planning schemes**

Save Our Suburbs agrees with the draft practice note to the degree that it will allow councils, referral authorities and objectors more time to assess changes to plans. There is already evidence that objectors are having trouble finding professional advice in time for matters in both the Major Cases List and the Short Cases List.

We also agree with the statement in the draft practice note preface that:
The ability to apply for amendments should not be used to increase the scale or intensity of a proposal or to introduce significant new aspects that have not been considered by the responsible authority or primary decision-maker at first instance.

However, the proposed extended timeline is a minor improvement in comparison with other much more urgent changes that are required to the protocol for submitting amended plans at VCAT for development applications (DAs).

Much greater restriction on the ability to submit amended plans and tighter adherence to planning scheme policy by VCAT are both required to improve not only planning outcomes but the overall operation of the whole DA assessment process.

Unfortunately the practice note draft repeats the simplistic assumption that amended plans improve planning outcomes. The preface states:
"....The practice of amending plans is part of an iterative process to ensure that a proposal will produce acceptable outcomes in terms of the decision guidelines of clause 65....The ability to amend plans in a proceeding for review saves the time and resources of responsible authorities, permit applicants and objectors by enabling improvements to be made to a proposal without a new application being required whenever changes are proposed. It introduces certainty to the planning and environmental approval process.

While this is obviously correct as far as it goes, it ignores the wider context - that the mere availability of the amended plan option encourages ambit claims. Statistically, developers know they have a better chance of getting a non-compliant DA approved at VCAT than at council.

This conclusion is supported by a variety of evidence.

Firstly, it is intuitively obvious. Plans are invariably amended to address various degrees of non-compliance with planning guidelines as highlighted by councils or objectors or usually both. So if amended plans are deemed necessary by a permit applicant at this late stage of the DA process (typically a month before a final VCAT hearing), why weren't they presented earlier at the council stage of the process to meet the same council and objector concerns?

Clearly there is some advantage to the developer (statistically at least) to submit amended plans at the VCAT stage, not when the DA is still before Council.

Secondly, an independent source that came to a similar conclusion was the Reference Group on Decision-making Processes in the planning system, established in 2002 by then Planning Minister John Thwaites. Members included the MAV, VCAT, the Planning Institute of Australia (PIA) and the Victorian Planning and Environmental Law Association (VPELA). David Whitney was the Chair.

The Group was required to review and report on three specific areas:
1 Using and interpreting local policy
2 Substitution of amended plans
3 Enforcement methods

The three major conclusions of the second Whitney Report were:
The focus should be on improving the quality of initial applications submitted so as to avoid the implications of ambit claims and to reduce the likelihood of significant changes to plans being needed.
Councils need a clear framework within which they can legitimately and efficiently consider amended plans.
There should be disincentives to substitution of plans at VCAT, so as to create greater incentives to the final plan being the plan assessed by council.

Whitney recommended that a fee be introduced, equivalent to a planning application fee, for the substitution of plans at VCAT. It also suggested a 'gatekeeper' role for responsible authorities in determining whether plans should be substituted at VCAT.

The conclusions of the first Whitney Report on local policy are also relevant to the issue of amended plans because VCAT frequently fails to uphold local policy, which is often one of the main factors that enables compromised DAs to receive a permit disallowed at the council stage of the process. On this point, Whitney recommended among other things that s60 P&E Act be amended to establish a hierarchy of matters for consideration that clearly highlight the pre-eminence of the planning scheme.

This sentiment was echoed by the August 2006 Carbines Report on "Cutting Red Tape in Planning" which noted that councils and residents want more weight on local planning policy in VCAT decisions:

"This is appropriate if the local policies are consistent with State policy or provide local expression of how State policy will be delivered on the ground."

Carbines recommended that the Minister for Planning make a formal statement clarifying the relationship between State and local policy, reinforcing the importance of local policy in planning decisions.

The above conclusions of Whitney and Carbines in relation to adherence to local policy concur with the comments of the Hon. Deirdre O'Connor about merits reviews by administrative tribunals (*"Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium" The Hon. Justice Deirdre O'Connor. 2000 National Administrative Law Forum - Sunrise or Sunset? Administrative Law in the New Millennium, June 2000*).

O'Connor pointed out that an administrative tribunal must be careful to exercise discretionary power in accordance with the terms and purpose of the relevant legislation and with due regard for government policy, including regard to any ministerial or departmental directions or guidelines.

As Justice McClellan (Chief Judge, NSW Land & Environment Court) stated in 2003:

There are many reasons why such a merit review process is appropriate. However, its continuing legitimacy rests on consistency of decision-making in accordance with identified principles…. As Sir Gerard Brennan said in Drake "inconsistency (of decision making) is not merely inelegant, it brings the process of deciding into disrepute."

However, VCAT has a reputation for not always upholding policy, particularly local policies even though they have been incorporated into planning schemes with formal state assent. Together with the perceived bias of some Members, this has led to a widespread lack of community respect for the Tribunal, at least in planning.

O'Connor also explained that the 1970s Kerr Committee believed that the new administrative or merits review system would lead decision makers to be more careful in their decisions and would stimulate administrative efficiency, but it failed to give detailed consideration to the impact that merits reviews might have on the quality of public administration.

It is true that administrative law remedies can theoretically improve government decision making by increasing openness and transparency and providing feedback on its performance. However, as the two reports on Land Use Planning by the Victorian Auditor-General in Dec.99 and May 08 found, many aspects of the permit assessment process at the local council level are seriously compromised, despite decades of merits reviews. It is obvious that without external pressure to require change, the administration of DA processes by councils will not improve. Constant VCAT "feedback" has clearly made little difference to the quality of council DA procedures.

The former head of VCAT, Justice Stuart Morris, has also commented on judicial versus merits reviews:
"Judicial review…would have the tendency to embarrass local councils and councillors, by putting the spotlight on their methods instead of on the merits of the decision." ("Inherent Conflicts in the Planning System": Urban Development Institute of Australia (Vic) 4.5.07)

But isn't this called accountability? Isn't the whole point of the justice system to encourage transparency and compliance, not just intervene to correct individual decisions without addressing existing procedural flaws that will continue to produce those poor decisions?

It is intuitively obvious that if a developer knows he will not be able to amend plans except at the council stage of the DA process, he will ensure that the DA is as compliant as possible during its passage through council. This process itself will be more rigorous and consistent if all parties know that any significant departure from process or policy would result in an appeal to VCAT which would scrutinize the way Council assessed the proposal, not the planning merits of the matter.

This approach would oversee and strengthen the processes and policies councils use to assess development applications, and result in more complete and compliant DAs which in turn would be easier and quicker to assess, leading to greater certainty and efficiency and fewer VCAT appeals.

Instead, VCAT ignores the need to safeguard the integrity of council processes and hears cases on their planning merits as a replacement Responsible Authority, in some cases overturning incorporated local policy in favour of general state urban consolidation guidelines.

This increases delays and uncertainty for all parties, with the rider that of course, amending plans will increase the certainty that the developer will get their permit.

It also makes a mockery of the claim by former Planning Minister Rob Hulls that councils and their communities must work to develop these local policies if they want to have some control over their own neighbourhoods.

Residents pay for all this in the form of direct costs for professional representation at VCAT and indirectly through rates and taxes for the operation of the council and VCAT planning process. It also indirectly costs the whole community in the form of lost revenue due to the tax-deductibility of developers' planning and legal expenses.

It is also inappropriate that individual objectors thus have to play the role of enforcing the planning system. To be effective in achieving more balanced planning outcomes they have to challenge developers at VCAT where they are often out-gunned by QCs and expert witnesses.

Finally, we note the public statement by former VCAT President Justice Bell in The Age, 12 August 2009 when he was considering how best to respond to public concern about inconsistent decisions and perceived personal bias among VCAT Members.

One option he mentioned was to recommend that the Government make planning schemes more prescriptive and less general:
"I would be disturbed if we had become a default state planning tribunal: if, for example, the power of amendment is being abused by developers such that they are not presenting their true case to council and are saving it for VCAT….. If you're concerned about consistency, if you're concerned about decisions seen to be subjective, then those are met by altering the balance in favour of more prescriptive standards."

It is intuitively and statistically obvious that ambit claims are encouraged by the present operation of the planning system and that these cases take up a disproportionate amount of resources on their way through the DA assessment process.

Hence there is a need for a combination of consistent adherence to planning scheme policy (particularly local policy), limitations on the substitution of amended plans at VCAT, and the addition of at least some component of judicial review (as in enforcement cases), where VCAT has the power to require rectification by one or more parties.

This should include councils so that deficiencies in process revealed through the hearing process should result in repercussions that would drive improvements in council procedures and in the quality of permit applications.

We also support other related recommendations of the Whitney and Carbines Reports, such as the introduction of a fee (similar to a new DA fee) for substitution of amended plans (if allowed); amendment of s60 P&E Act to establish the pre-eminence of the planning scheme; and a formal Ministerial Directive clarifying the relationship between State and local policy that reinforces the importance or even the pre-eminence of incorporated local policy in planning decisions.

We suggest that the above reforms be recommended to the Attorney-General for consideration by the Government and the Parliament in the interests of achieving a fairer, cheaper and more efficient planning system.

Ian Wood
SOS President
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