Reference Group On Decision-making Processes

November 2002

Report 2
Substitution and

Amendment of Plans

Foreword

This is the report for Project 2 of the Reference Group on Decision-making Processes appointed by the Minister for Planning to analyse specific issues and provide advice about improvements to aspects of the Victorian planning system.

As required by its terms of reference, the Reference Group has looked at the issue of substitution and amendment of plans for planning permits.

The terms of reference required the Reference Group to prepare draft guidelines that assist decisions about amended plans. The Group would like to make clear that the substitution and amendment of plans is but one small part of the planning permit system. The Reference Group considers, that while guidelines will be useful and should be prepared, other aspects of the permit process warrant adjustment in order to address this issue. A wider range of recommendations has therefore been made than is specifically sought by the terms of reference.

The Group recognises that the ability to refine plans during the planning process is a component of the planning system that can assist better planning outcomes. However, it is firmly of the view that the system should be designed to encourage better quality applications at the point where they are determined by the responsible authority. Put simply, there should be disincentives to the submission of ill-conceived, poorly prepared or ambit claim applications.

The report suggests that changes are required to foster better quality applications at the front end of the process. In this regard, the Reference Group is unanimous. There are differences of view, however, about the manner in which applicants should be able to seek changes to plans following a decision by council. Local government representatives on the Reference Group believe that other than only minor changes, any request to substitute or amend plans should be the subject of a fresh application and be required to re-run the planning process. Others believe that only proposals that represent a transformation should be so treated, and although the system should continue to provide an opportunity for plan improvement, new incentives should be created to get plans of proposals into their final form before a council decision is made.

As a reflection of these differences in view, the Reference Group has outlined alternative approaches to the issue which it believes should be put to the broader planning community for discussion. It is common to all approaches however, that the report's major thrust of achieving better quality applications before they are decided upon by a council is a most worthwhile goal and that VCAT, when called upon to assess a proposal on review should assess a proposal not substantially different than that considered by the council.

On this project the Reference Group met on five occasions and a workshop was held involving a number of industry, professional and community bodies. Again the Reference Group was ably assisted by Department of Infrastructure officers Michelle Croughan and Peter Allen, and Municipal Association of Victoria consultant David Rae.

David Whitney
Chair
Reference Group on Decision-making Processes

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1.0 FINDINGS AND RECOMMENDATIONS

The Reference Group acknowledges and understands the frustrations of both councils and communities that arise when proposals that are the subject of review at VCAT are substantially different to those that were considered by the responsible authority.

Whether or not these applications are ambit claims or whether modifications sought are genuine attempts to overcome concerns, the Reference Group believes that wherever possible the opportunity for plan refinement should occur at the front end of the planning permit process rather than prior to a VCAT hearing. If this were to happen then as a matter of greater equity, VCAT would be reviewing decisions about proposals that were not substantially different to those being considered by councils.

The Reference Group considers that:

- 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 having the final plan being the plan assessed by council.

The findings and recommendations of the Reference Group are framed to respond to the terms of reference which ask that particular regard be given to: improving statutory processes and provisions; encouraging and documenting best practice and professional development and training.

1 IMPROVING STATUTORY PROCESSES AND PROVISIONS

FINDING	RECOMMENDED ACTION	BY
The Reference Group considers that the ability to amend plans during the planning application process can be beneficial as improvements can be made that lead to better planning outcomes.	9. An ability to amend plans at appropriate stages of the permit process should be retained.	
Many changes sought at VCAT would not be necessary if the plans were well-resolved at the outset and an opportunity is created to revisit plans in light of council and objector concerns before a council decision is made.	10. Optional approaches to address the perceived problem should be put to the planning community for consultation. The Status Quo Option Produce a guideline about what constitutes a 'transformation' and/or a 'Guideline Judgment' as recommended in Action 13 in *Report 1: Using and Interpreting Local Policy*. Introduce a fee, equivalent to the planning application fee, for the substitution of plans at VCAT. The Gatekeeper Option Introduce a 'gatekeeper' role for responsible authorities in determining whether plans should be substituted at VCAT.	DOI Local government MAV

FINDING	RECOMMENDED ACTION	BY
	The Revision Request Option Introduce a new process that enables councils to offer applicants an additional formal opportunity (a Revision Request) to revise plans before the council's decision is made. The final decision should then be made on the basis of the best possible plans The new process should include an opportunity for re-notification. The model delegations recommended in Action 12 of *Report 1: Using and Interpreting Local Policy* should include the ability for planning officers to make the offer for revision.	

2 ENCOURAGING AND DOCUMENTING BEST PRACTICE

FINDING	RECOMMENDED ACTION	BY
The planning system would be better served if refinements to plans occurred at the front end of the process rather than at VCAT.	1. Time and resources should be concentrated at the front end of the application process.	All
All the relevant information needed should be available to applicants before preparing an application.	2. The council should make all information on application requirements readily accessible to applicants.	Local government
	3. Applicants should establish the application requirements prior to serious design preparation.	Applicants
	4. Council should have systems in place to facilitate pre-application discussions and provide access to senior planning officers at convenient times for more complex proposals.	Local government
	5. Where applicants have submitted a good quality application, further information requests should be quickly provided if needed. Further information letters should be clear, informative and clearly articulate the deficiencies of the application.	Local government
Pre-lodgement certification is a means of facilitating better applications.	6. Councils should consider implementing pre-lodgement certification systems.	Local government DOI MAV
There is a lack of reliable statistics about the planning system, particularly about the amendment of plans.	7. Systems to collect such data on a regular basis should be developed.	DOI Local government MAV

3 PROFESSIONAL DEVELOPMENT AND TRAINING

FINDING	RECOMMENDED ACTION	BY
Greater rigour is required to ensure that applications, when submitted, are site responsive, sensitive to neighbours, accurately presented and respond to relevant planning scheme requirements.	8. Peak bodies should take responsibility for informing and training members about what constitutes acceptable standards for an application.	MAV, BDAV, PIA, RAIA, PCA, VPELA etc.

2.0 INTRODUCTION

2.1 Establishment of the Reference Group

Following representations from the Inner South Metropolitan Mayors Forum and others about the operation of various aspects of the planning decision-making process, the then Minister for Planning, the Hon. John Thwaites MP, established a Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

The Reference Group was established under the auspices of the Continuous Improvement Program, a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The implementation of recommended improvements will be managed through this program.

The members of the Reference Group are:

David Whitney - Chair

Catherine Dale - MAV nominee

Julian Hill - MAV nominee

Richard Horsfall - VCAT

Ian Lonie - Victorian Environmental & Planning Law Association(VPELA)

Ian Marsden - VCAT

Rob Spence - MAV

George Ward - Planning Institute of Australia (PIA)

Judge Michael Strong (VCAT) and Mark Bartley (VPELA) attended on behalf of their respective organisations on a number of occasions. Bruce Phillips (local government) and Jeanette Rickards (VCAT) also contributed to the Reference Group for this project.

The Committee was supported by DOI and MAV:

Michelle Croughan - DOI Project Manager

Peter Allen - DOI

David Rae - MAV Consultant

2.2 Terms of reference

The terms of reference are attached in the appendix. The Reference Group is required to consider three projects. Each project has a specific brief set out in the terms of reference.

In considering all the projects, the Reference Group is required to have particular regard to the need for action in relation to:

- ß improving statutory processes and provisions
- ß encouraging and documenting best practice
- ß professional development and training.

Project 2

This report responds to Project 2: *Substitution and Amendment of Plans*.

The terms of reference for this project highlight the perceived inconsistency about the circumstances and criteria which should reasonably be applied when plans are sought to be changed.

The Reference Group is required to:

'Prepare appropriate draft performance or decision making guidelines that assist decisions about changes to plans. Recommend an appropriate format for publishing the guidelines (such as a Planning Practice Note).

2.3 Other contributors

A facilitated workshop was held on 11 June 2002 to inform the Reference Group. Participants included:

- Representatives from local government, including Boroondara, Moreland and Port Phillip
- VCAT
- Save our Suburbs
- Property Council of Australia
- VPELA
- MAV

The outcomes of the workshop were reported to the Reference Group.

3.0 WHAT ARE THE CONCERNS?

The Inner South Metropolitan Mayors Forum has expressed the following concerns in relation to the substitution and amendment of plans:

- *That the practice of substituting plans at VCAT, particularly where substantive changes are proposed, is undermining the role of councils in the decision making process. That is, it encourages the submission of 'ambit claims' and results in poorly resolved applications at the outset.*
- *That some applicants have formed the opinion that the system now 'allows', if not 'encourages', the submission of amended plans, provided that the notice requirements in relation to the Practice Note have been adhered to.*

The facilitated workshop identified further issues in relation to the substitution and amendment of plans:

- The practice of amending plans (whether during the course of the application or at VCAT) often requires the assessment of the application two or three times placing an additional strain on councils.
- A perception that the substitution of plans at VCAT shifts the debate from the fundamentals of policy compliance to plan specifics.
- There is the danger that proper notice may not be given of amendments to plans.
- Changes to plans may impact upon persons that were not original objectors.

4.0 THE CURRENT RULES

4.1 Background

This chapter outlines the points at which amendment can be made to an application or a permit and the legislative requirements that apply under current processes. Before doing this is it important to provide some context to the discussion. Councils, generally, are both the planning and responsible authority in relation to their municipality.

Within Victoria, local government deals with about 45,000 planning permit applications annually. This equates to about 1125 applications per metropolitan council and about 400 per rural council each year.

The right to an independent review of council decisions, which applies to both applicants and objectors, is set down in the *Planning and Environment Act* 1987. The Victorian Civil and Administrative Tribunal (VCAT) is the body that provides the independent review function. VCAT decides the merits of the application on the basis of the planning scheme and submissions put before it. VCAT makes a new decision on the proposal.

VCAT deals with about 3,300 cases annually. This represents about 6% of the planning permit applications dealt with by councils each year. There is an annual average of 59 VCAT applications for review for each metropolitan council compared with an average of five for each rural council.

Although councils are required to note in their planning register when changes to an application are made there is no means of collating this information in a consistent format. Likewise there are no collated statistics on the number of occasions on which amendments to applications are made at VCAT, or more specifically the number of times plans are substituted.

VCAT members estimate plans are substituted for about 25-30% of applications before VCAT. Estimates from local councils are of the same order and suggest that amended plans are substituted at VCAT about 33% of times. Therefore, about 2% of all permit applications have, or seek to have, plans amended at VCAT after the decision by council. VCAT members also state that in most cases no party objects to the substitution of plans.

4.2 The Planning and Environment Act 1987

There are three stages during assessment of a planning permit application at which a responsible authority may consider the amendment of plans.

STAGE OF APPLICATION	PLANNING & ENVIRONMENT ACT
Before giving notice of an application	s50(1) With the agreement of the applicant and after giving notice to the owner, the responsible authority may make any changes to an application that it thinks necessary before notice of the application is first given under section 52 including –
	(a) a change to the use and development mentioned in the application; and
	(b) a change in the description of the land to which the application applies.
As a condition of permit.	s62(2) The responsible authority may include any other condition that it thinks fit including –
	(i) A condition that plans, drawings or other documents be prepared by the applicant and lodged with the responsible authority for approval before the use or development or a specified part of its start
	(j) A condition requiring changes to be made to any plan or drawing forming part of the application for the permit

STAGE OF APPLICATION	PLANNING & ENVIRONMENT ACT
After the issue of a permit	s62(3) The responsible authority may approve an amendment to any plans, drawings or other documents approved under a permit if – (a) the amendment is consistent with – (i) the planning scheme currently applying to the land; and (ii) the permit; and (b) the amendment will not authorise anything that would result in a breach of a registered restrictive covenant. s71(1) A responsible authority may correct a permit issued by the responsible authority if the permit contains – (a) a clerical mistake or an error arising from any accidental slip or omission; or (b) an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the permit. s72 The owner of land, or a person with the consent of the owner, may ask the responsible authority in writing to amend a permit which applies to the land. s73(1) The responsible authority may amend the permit if it is satisfied that the amendment – (a) does not change the effect of any condition required by the Tribunal; and (aa) does not change the effect of any condition required by a referral authority unless this is acceptable to the relevant referral authority; and (b) does not adversely affect the interests of a relevant referral authority, or is acceptable to the relevant referral authority; and (ba) is consistent with the planning scheme currently applying to the land the subject of the permit; and (c) will not cause an increase in detriment to any person; and (d) does not change the use for which the permit was issued other than a minor change to the description of the use. s72(2) The responsible authority must not amend the permit if the amendment of the permit would authorise anything which would result in a breach of a registered restrictive covenant.

4.3 The Victorian Civil and Administrative Tribunal Act 1998

There are three mechanisms that enable an application before VCAT to be amended.

STAGE OF HEARING	VCAT ACT
As a condition of permit.	s51(1) In exercising its review jurisdiction in respect of a decision, the Tribunal – (a) has all the functions of the decision maker
As a direction	s80(1) The Tribunal may give directions at any time in a proceeding and do whatever if necessary for the expeditious or fair hearing and determination of a proceeding.
Make any amendment to an application	S127(1) At any time, the Tribunal may order than any document in a proceeding be amended. (2) An order under sub-section(1) may be made on the application of a party or on the Tribunal's own initiative. c64(2) Schedule 1 At any time in a proceeding to which this clause applies the Tribunal may make an amendment it thinks fit to the application for the permit, works approval or licence the subject of the proceeding. Without limiting the generality of sub-clause 2, the Tribunal may make an amendment to an application for a permit under the Planning and Environment Act 1987 – (a) as to a use or development different from the use or development mentioned in the application; (b) as to the land to the use or development of which the application relates. s130(1) A power of the Tribunal to make an order or other decision includes a power to make the order or decision subject to any conditions or further orders that the Tribunal thinks fit. S130(2) Conditions or further orders may include – (c) a condition or order that a party give notice of the proceeding, order or decision to any person specified by the Tribunal.

VCAT provides a framework for the consideration of amended plans through the *Planning and Environment List Practice Note (No. 1)* (see Appendix 2). Clause 11 of the Practice Note includes a requirement to serve, at least, 20 business days prior to a hearing:

- a copy of any amended plans and a written statement of the changes to any party to the proceeding.
- notice of amended plans, an application to be joined as a party and a written description of the changes to any objector to or person notified of the permit application not a party to the proceeding.

Anecdotal evidence from VCAT and councils suggests that the number of occasions in which plans are substituted at VCAT has not noticeably changed since the inclusion of Clause 11 in the Practice Note in October, 2001. All parties have the opportunity to oppose a substitution of plans, to amend their grounds of objection, to seek adjournments or further time to prepare their case, and if not already a party, apply to become a party.

5.0 GOOD APPLICATIONS FROM THE START

The starting point for discussion on substitution and amendment of plans should be the quality of the initial planning permit application.

The Reference Group considers there are clear benefits to focusing on the front-end, including shorter timeframes for the consideration of applications, greater chance of approval, fewer applications for review and cost savings. Specifically, the submission of good quality applications is likely to result in a reduction in the need for the amendment of plans during the planning process, including at VCAT. A willingness on behalf of both applicants and councils to work together to produce better applications may also assist to reduce tensions between local governments, residents and the development industry.

In order to achieve high quality applications there must be:

- ß easy access for applicants to planning schemes, application requirements and associated documentation such as heritage and neighbourhood character studies. The use of council websites for this purpose is helpful.
- ß the ability for applicants to consult with the planning department of a council at a reasonably senior level prior to submission of an application, particularly for more complex matters.
- ß a good understanding of the site, consideration of the impacts of the proposed development and a site responsive design.
- ß knowledge and demonstrated comprehension of the relevant State and local policy applying to a development.

The Reference Group suggests that councils can facilitate the preparation of high quality applications through access to information and that applicants should appropriately arm themselves with this information prior to submitting their application.

A particularly useful mechanism for improving access to information and ensuring quality applications upfront is the pre-lodgement certification of permit applications by external parties. A pilot program with the City of Glen Eira has been successful and a wider roll-out of this program to councils is encouraged.

It is also incumbent upon peak bodies, such as the Building Designers Association of Victoria, Master Builders Association of Victoria, Planning Institute of Australia (Victorian Division) and Royal Australian Institute of Architects (Victorian Chapter), to assist by encouraging their members to achieve appropriate professional standards for all applications when submitted.

FINDING	RECOMMENDED ACTION		BY
The planning system would be better served if refinements to plans occurred at the front end of the process rather than at VCAT.	1.	Time and resources should be concentrated at the front end of the application process.	All
All the relevant information needed should be available to applicants before preparing an application.	2.	The council should make all information on application requirements readily accessible to applicants such as on Council's website	Local government Applicants
	3.	Applicants should establish the application requirements prior to serious design preparation.	Local government
	4.	Council should have systems in place to facilitate pre-application discussions and provide access to senior planning officers at convenient times for more complex proposals.	

FINDING	RECOMMENDED ACTION	BY
	5. Where applicants have submitted a good quality application, further information requests should be quickly provided if needed. Further information letters should be clear, informative and clearly articulate the deficiencies of the application.	Local government
Pre-lodgement certification is a means of facilitating better applications.	6. Councils should consider implementing pre-lodgement certification systems.	Local government DOI MAV
There is a lack of reliable statistics about the planning system, particularly about the amendment of plans.	7. Systems to collect such data on a regular basis should be developed.	DOI Local government MAV
Greater rigour is required to ensure that applications, when submitted, are site responsive, sensitive to neighbours, accurately presented and respond to relevant planing scheme requirements.	8. Peak bodies should take responsibility for informing and training members about what constitutes acceptable standards for an application.	MAV, BDAV, PIA, RAIA, PCA, VPELA etc.

6.0 OPTIONS TO IMPROVE

6.1 Principles

This chapter explores three options for process improvement that could be applied to the treatment of amendments to plans.

There are a number of reasons why plans are sought to be changed, either during or after the assessment of the application. These include:

- to respond to suggestions or concerns of council or objectors
- as a result of specialist professional advice
- changing client requirements or cost restrictions
- to correct unintended errors

In considering how the amendment of plans should be treated in the planning permit process, the Reference Group believes the following principles should be applied:

- applications should be in their best and final form as soon as possible in the process, preferably before submission
- time and resources should be concentrated and expended at the front end of the permit process, to ensure the submission of best quality applications
- transformation of a proposal should not occur and VCAT should consider a proposal that is not substantially different to that considered by the responsible authority
- there should be disincentives for substituting plans at VCAT where there has been no substantive effort to improve the application before the council's decision.

FINDING	RECOMMENDED ACTION	BY
The Reference Group considers that the ability to amend plans during the planning application process can be beneficial as improvements can be made that lead to better planning outcomes.	9. An ability to amend plans at appropriate stages of the permit process should be retained.	

There is an argument that amendments to plans seek to address the concerns of Council and objectors and that the planning system will lose an important element of flexibility if amendments cannot be made at any time during the review process. The cost to all stakeholders of repeat applications is avoided and the Planning and Environment Practice Note ensures adequate opportunity for assessment, consultation and decision-making prior to the hearing.

Conversely, it can be argued that the ability to substitute plans at VCAT creates an opportunity to exploit the process by bypassing council and having substantial amendments considered by VCAT. As long as this opportunity is freely available, there is reduced incentive to get the application right before the council decision, and what may be efficient for an individual application is creating inefficiency for the permit process as a whole.

The options outlined below acknowledge this conundrum. They are not necessarily mutually exclusive and a combination of the options could be applied.

None of the options seek to remove the ability to amend plans at any stage during the planning process. The Reference Group accepts that amendment to plans can allow the achievement of improved planning outcomes and that there should not be unnecessary impediments to reasonable changes.

However, the Reference Group is strongly of the view that the council should be the primary decision maker and that negotiated outcomes should occur before the council decision is made. In this way, VCAT on review should be considering a proposal not substantially different to that considered by the council.

6.2 The 'status quo' option

This option recognises that the number of applications where plans are changed at VCAT is in fact comparatively small (25-33% of applications before VCAT and about 2% of all permit applications).

The substitution and amendment of plan would continue as provided for in existing legislation but greater clarity as to what changes would constitute a 'transformation' would be provided to ensure that such changes do not occur.

The Reference Group notes that the ability to consider a 'different' application than that considered by the responsible authority exists in the VCAT Act in Clause 64 Schedule 1.

VCAT has, as a matter of practice limited the exercise of discretion to amend plans by applying the considerations set out in *Addicoat v Fox [1975] 347*. This case related primarily to the exercise of discretion in the imposition of conditions by the Tribunal however it has also been applied consistently as a principle in decision making for the substitution of plans. The principle is:

> *'….a power to grant a permit subject to conditions authorises the responsible authority to grant a permit for a use or development which differs from the use or development the subject of the application for a permit, provided that the difference is not so radical as to enable it to be said, viewing the matter broadly and fairly, that to grant a permit on the supposed conditions would not be to grant the permit applied for with modifications, but to grant a different permit. This is plainly a matter of degree, and indeed it is almost one of impression. In my view, the changes made may be considerable without necessarily bringing it about that the permit granted is a different as opposed to a modified permit. Whether more may be countenance by way of limiting the development or use, as opposed to extending it, before the point is reached at which alteration ceases to be modification and becomes transformation, is a question which I find it unnecessary to decide.'*

The principle could be further explored in a guideline and perhaps also through a guideline judgment. The concept of guideline judgments was raised in *Report 1: Using and Interpreting Local Policy* and would further promote consistent decision-making at VCAT. Clarification of those circumstances in which the changes are so substantial that a new application should be submitted would be of assistance to both responsible authorities and VCAT and act as a disincentive to applicants seeking to 'bypass' council for a decision.

The local government representatives of the Reference Group felt there may be some value in attempting to define major and minor amendments to plans and to provide a framework of choices around this. The transformation test has been presented as an option in preference to a major/minor test because it is already acknowledged in case law and within the planning community and there is a firm basis for defining the term in any guideline or guideline judgment.

This option has the advantage that it is familiar and requires no procedural or legislative change. It also acknowledges the fact that the issue of plan substitution is not universally acknowledged to be a major problem despite the fact that it proves, on occasion, to be a matter of serious concern to some councils and residents. This option also acknowledges that in most instances parties do not oppose plan changes and that such changes are usually for improvement to plans and better planning outcomes.

Its drawbacks are that it may not be seen as addressing the perceived problem and that some applicants will still seek to submit their final plans to VCAT.

As a consequence, a disincentive could be introduced by way of fees, equivalent to the initial application fee, for the substitution of plans at VCAT. Amended plans usually require the reassessment of plans, for example in accordance with the provisions of clause 54 & 55 of planning schemes, resulting in an additional workload. This may also require plans to be considered in a council meeting, with associated administrative costs. Directing the payment of the fee back to the responsible authority may help to reduce the burden experienced by councils in any reassessment of plans.

6.3 The 'gatekeeper' option

This option would require that both VCAT and the responsible authority consent before any change to plans could be considered after the decision by the responsible authority. This consent would be exercised by a delegated officer to avoid unnecessary delay.

The advantage of this option is that it should overcome council concern about VCAT considering proposals substantially different to those considered by councils.

Its disadvantage is that it may require fundamental legislative change to administrative review procedures likely to impact on the statutory and common law rights to procedural fairness. This issue arises because VCAT currently discharges it powers and functions, similarly to a Court, in accordance with the principle of procedural fairness. That is, all parties to a hearing have the opportunity to express their view about any amendment to the application, including the substitution of plans. To implement this option would be to constrain other parties in a manner that may not be justifiable. This issue will need to be examined before this option can be considered for implementation.

6.4 The 'revision request' option

The reality of the planning application process is that, until a permit applicant has a clear and definite statement of a council's position, the applicant is unlikely to offer concessions unless there is a good prospect of success. At present this point is often after a formal decision has been made, whether by delegation or at a council meeting.

This situation exists, in part, because of the absence of a formal framework in the *Planning and Environment Act 1987* to consider amendment to plans after notification. While conditions on planning permits often achieve the same ends, a decision is made on the basis of the original plans. There is also no formal opportunity for re-notification although this may sometimes occur in practice. In contrast the *Victorian Civil and Administrative Act 1998* enables VCAT to consider an application that is different through amendment after notification.

It may be beneficial to create a formal opportunity to adjust plans after advertising but before the council decision. Outlined on the next page is a flowchart of a possible process that would:

- Create a point, at which council can review an application, set out its requirements for adjustments, provide copies of objections and referral authority responses and invite the applicant to submit amended plans that address council's concerns. This notice would be provided by a delegated officer to ensure that applications are not unreasonably delayed by having to go to two council meetings.
- Provide an opportunity for the applicant to formally respond (via a revision request) and amend the plans in response to the identified issues.
- The opportunity could be provided for council to determine whether any additional detriment would be caused by the amended plans and whether any further notification was necessary.
- 'Stop-the-clock' from between the notice to the applicant and the fulfilment of any notification requirements, so that the application could be improved without penalty to the responsible authority's statutory decision time.
- Allow the final decision to be made on the basis of the amended plans.

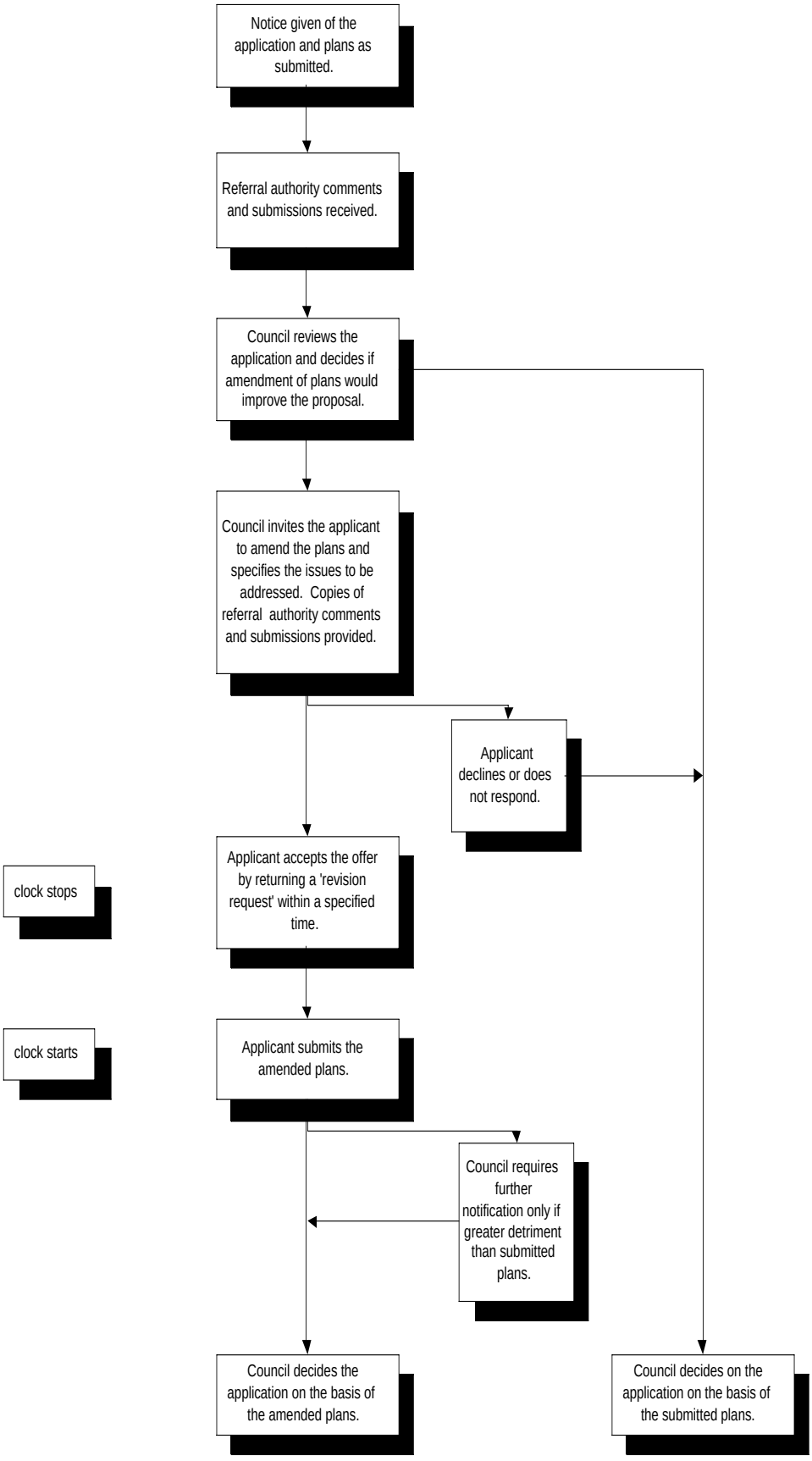
Its advantages however are that it would allow council to consider an amended plan that more accurately reflects the proposal that was being determined. Council would make decisions on final plans and councils and VCAT would be considering the same final proposal.

This is not really a new process. It simply provides a formal procedure for an already common informal practice. In addition it may assist to reduce the number of applications going to VCAT.

The disadvantage of this option is that it would require legislative change and could be seen to place an added burden on councils by adding an extra 'loop' in the application process. This has potential implications for the workload of planners.

It may also be possible, with this model that an applicant amends plans in good faith in order to respond to the planning officer's concerns and council refuses the application.

Possible 'revision request' process



If this option were pursued, a priority listing system could also be introduced at VCAT to fast track review hearings in the case of applications that have followed the 'revision request' process before the council decision.

FINDING	RECOMMENDED ACTION	BY
Many changes sought at VCAT would not be necessary if the plans were well-resolved at the outset and an opportunity is created to revisit plans in light of council and objector concerns before a council decision is made.	10. Optional approaches to address the perceived problem should be put to the planning community for consultation. The Status Quo Option Produce a guideline about what constitutes a 'transformation' and/or a 'Guideline Judgment' as recommended in Action 13 in *Report 1: Using and Interpreting Local Policy*. Introduce a fee, equivalent to the planning application fee, for the substitution of plans at VCAT. The Gatekeeper Option Introduce a 'gatekeeper' role for responsible authorities in determining whether plans should be substituted at VCAT. The Revision Request Option Introduce a new process that enables councils to offer applicants an additional formal opportunity (a Revision Request) to revise plans before the council's decision is made. The final decision should then be made on the basis of the best possible plans The new process should include an opportunity for re-notification. The model delegations recommended in Action 12 of *Report 1: Using and Interpreting Local Policy* should include the ability for planning officers to make the offer for revision.	DOI Local government MAV

7.0 CONCLUSION

The Reference Group believes that councils should be the primary decision makers on planning applications and that as a matter of principle, proposals considered on review by VCAT should not be substantially different to those considered by council.

However, the Reference Group believes that in the interests of achieving the best possible planning outcomes, there needs to be some ability to amend plans throughout the planning process.

In the Reference Group's opinion the problems perceived to exist will be largely reduced if applications are in the best and final form prior to a council decision. The time and resources expended by all parties is best spent at the front end of the process to ensure better quality applications.

The Reference Group has outlined three possible options for action, including the development of guidelines as envisaged by the terms of reference, to address the issues raised. There are different views among the Reference Group about which is the most appropriate option. The options are not mutually exclusive and other options may be possible. The Reference Group therefore considers these options should be put to the broader planning community for consultation and comment and to stimulate discussion before any changes to the planning permit process occur.

On the issue of the need to get better quality applications at the front end of the process, however, the Reference Group is unanimous in its views.

Appendix 1

CONTINUOUS IMPROVEMENT PROGRAM

Reference Group on Decision-making Processes

Terms of Reference

Purpose

Following representations from the Inner South Metropolitan Mayors Group and others about the operation of various aspects of the planning decision-making process, the Minister for Planning, the Hon. John Thwaites MP, has established this Reference Group to analyse specified issues and provide advice about what improvements can be made to the planning system or other processes to deliver better process performance and better planning outcomes.

Background

The Continuous Improvement Program (CIP) is a joint DOI and MAV initiative that promotes improvements in the operation of the planning system. The Reference Group is established under the auspices of the CIP and the implementation of recommended improvements will be managed through that program.

Methodology

The Reference Group will comprise representatives from the MAV, the VCAT and the Royal Australian Planning Institute (Victorian Division) (RAPI).

Specific projects are identified for the Reference Group's consideration and a project brief provided for each issue. The Reference Group should analyse the issue identified, including examining case studies, consulting stakeholders, analysing data or other means as the Reference Group thinks appropriate. The Reference Group should, respond to any matters specified in the project brief, identify any problems in relation to the issue and recommend appropriate actions to address the issue, including evaluating options where alternative options are available.

In considering issues, the Reference Group should have particular regard to the need for action in relation to:

- improving statutory processes and provisions
- encouraging and documenting best practice
- professional development and training.

Delivery

The advice of the Reference Group must be delivered in a short written report, delivered within the time frame specified in the project brief. Administrative support will be provided to the Reference Group by the Planning Systems Unit of DOI.

Hon. John Thwaites MP

Minister for Planning

PROJECT 1: USING AND INTERPRETING LOCAL POLICY

Background

A recent decision by the Supreme Court in *Glen Eira City Council v. Gory* has highlighted different views about how policy in schemes, particularly local planning policy, should be used and interpreted.

Issue

To operate effectively, policy in planning schemes must be given appropriate weight when decisions are made, must be clear in its intent and be able to be applied in a realistic way. The Gory decision has raised uncertainties about these issues that need to be resolved.

The task

Examine the issues raised by Glen Eira in relation to the Gory decision and the consequent advice from the Victorian Government Solicitor, consider the intended role of policy in the statutory planning system as expressed in relevant documentation associated with the introduction of the new format schemes and recommend any actions needed to ensure that the statutory role of policy in schemes can be effectively implemented. An opportunity must be given to the City of Glen Eira and to VCAT to make a submission to the Reference Group.

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 2: SUBSTITUTION AND AMENDMENT OF PLANS

Background

It is common practice for development plans to be changed during the consideration of a planning application. This can happen either during the consideration of the application by the responsible authority or at any hearing at VCAT. VCAT has issued a Practice Note that sets out the procedural arrangements that apply when plans are sought to be changed at a VCAT hearing.

Issue

There is perceived inconsistency about the circumstances and criteria which should reasonably apply when plans are sought to be changed. Decision-making by all parties would benefit from clearly articulated performance or decision-making guidelines that assist decisions about when changes can be considered to be 'minor' and when additional notice or consultation is appropriate. Suitable guidelines would also potentially discourage the practice of including 'ambit claims' in applications.

The task

Prepare appropriate draft performance or decision-making guidelines that assist decisions about changes to plans. Recommend an appropriate format for publishing the guidelines (such as a Planning Practice Note).

Timetable

A report and recommendations should be delivered within four months of this project being initiated.

PROJECT 3: ENFORCEMENT METHODS

Background

Enforcement of planning matters can be made via either VCAT or the Magistrate's Court. The enforcement provisions of the *Planning and Environment Act 1987* have recently been documented in *Using Victoria's Planning System.* The 2002 PLANET training program will include a seminar on enforcement run in conjunction with the Planning Enforcement Officers Association.

Issue

There is a perception that enforcement through VCAT is predisposed to normalising the matter or reviewing the merits rather than terminating the unlawful activity. Concern has also been expressed about other matters such as the relative costs of the two approaches, exposure of councils to damages claims, lack of ability to enforce determinations and other matters.

There is a need to:

- ensure that users understand the differences between the two approaches and best practice in the use of each method.
- identify any shortcomings of either approach and suggest ways in which these might be addressed.

The task

1. Recommend any additional methods for promoting understanding of best practice in the use of the existing enforcement provisions of the *Planning and Environment Act 1987* and other legislation.
2. Document and review identified shortcomings of the VCAT and Magistrate's Court options and recommend ways in which these might be addressed.

The Reference Group should take into account the views of the Planning Enforcement Officers Association and any other party it considers relevant

Timetable

A report and recommendations should be delivered within six months of this project being initiated.

Appendix 2

Clause 11 of VCAT Planning and Environment List Practice Note (No 1)

11. AMENDMENT OF PLANS

NOTE: Clause 11 came into effect on 1st October 2001 and applies to all proceedings in the Planning and Environment List commenced on or after 1st September 2001 pursuant to the Planning and Environment Act 1987.

11.1 If, in a proceeding in the Planning and Environment List, a Permit Applicant seeks to amend any plans in a permit application or before the Tribunal the Permit Applicant must:

(a) at least 20 business days prior to any date set for the hearing of the proceeding

(i) file with the Tribunal and serve on all other parties to the proceeding and the Responsible Authority the following documents:

- a *Notice of Application to Amend Plans* in the form of Form A to Schedule 3 of this Practice Note with the relevant details completed;
- a clearly readable, scaled copy of the amended plans;
- a statement in writing describing the changes from the previous plans.

(ii) unless the Tribunal otherwise orders, serve on any objector to or person notified of the permit application who is not a party to the proceeding, the following documents:

- a *Notice of Application to Amend Plans* in the form of Form A to Schedule 3 of this Practice Note with the relevant details completed;
- **a form of *Application to be Joined as a Party and Statement of Grounds* in the form of Form B in Schedule 3 of this Practice Note with the relevant details completed;**
- a statement in writing describing the changes from the previous plans.

(b) promptly after such service, file with the Tribunal a Statement of Service or other evidence of service satisfactory to the Tribunal.

11.2 Any objector to or person notified of the permit application may request a Permit Applicant making a plans amendment application to supply a copy of the amended plans. Upon receipt of such a request, whether oral or in writing, the Permit Applicant must supply to the person making the request within 7 days a clearly readable scaled copy of the amended plans.

11.3 Within 10 business days of receipt of notice of a plans amendment application the Responsible Authority or any person so notified (or entitled to be notified) may:

(a) if the person is a party to the proceeding, file with the Tribunal a written objection to the plans amendment application setting out the reasons for the objection;

(b) if the person is not a party to the proceeding, file with the Tribunal

(i) a written application to be joined as a party to the proceeding pursuant to Section 60 of the *Victorian Civil and Administrative Tribunal Act 1988;*

(ii) a Statement of Grounds, as required by Clause 56, Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*;

(iii) a written objection to the plans amendment application, setting out the reasons for the objection;

(c) file with the Tribunal a written request for the adjournment of any hearing listed for the proceeding in order to give the person sufficient time to consider the changes to the plans;

(d) file with the Tribunal a written application for directions in relation to the plans amendment application including directions that further notice of the plans amendment application be given.

11.4 Any such objection, application or request must be delivered or posted to the Permit Applicant (or the representative of the Permit Applicant) and the Responsible Authority prior to such objection, application or request being filed with the Tribunal as required by Clause 11.3 hereof.

11.5 A Statement of Service or other evidence of service satisfactory to the Tribunal of the documents authorised or required to be served pursuant to Clauses 11.3 and 11.4 hereof must be filed with the Tribunal promptly after such service.

11.6 The Tribunal either on its own initiative or on application by any person may:

- ß adjourn any hearing fixed for the proceeding to enable any objection, request or application under Clause 11.3 to be dealt with,
- ß fix a date for a hearing to consider the plans amendment application,
- ß join any objector or person notified of the permit application as a party,
- ß direct that the plans amendment application be dealt with at the commencement of the hearing of the proceeding, or
- ß make such other order as it thinks fit.