

## Address by Dr Paul Mees

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### **“Alternatives to Victoria’s farcical planning system”**

I’ve been asked not to talk about transport at all and I’ll do my best there but, at least for any of you who know me, that may be a little difficult. I also thought I ought to talk about plagiarism since I notice it’s one of the sponsors of today’s conference along with the Victorian Local Governance Association. Plagiarism might be a good place to start because around the time that some of you were here at the equivalent gig to this two years ago, I just was in the process of getting published a paper on Melbourne 2030 in which I set out my own view, which was that essentially it was the same as the Kennett government’s “Living Suburbs” strategy. The only substantive difference was the binding and compulsory and parliamentarily-approved nature of the urban growth boundary, which was something that the Green Wedges Coalition had managed to have inserted in the policy.

Lindsay Neilson, the then secretary, and still the secretary, of the Department of Sustainability and Environment, subsequently wrote a response to my article in which he *inter alia* suggested that the urban growth boundary wasn’t part of 2030 and I thought, “Oh well, there you go, I rest my case”. As far as the rest of it’s concerned, you can get my article on the Save Our Suburbs website - very technologically literate people have put it there and I actually called it “Patterson’s Curse” as a kind of backhanded tribute to the secretary of the Department of Infrastructure under the late and lamented Kennett Government.

But it does seem to me that there’s much more in common between Melbourne 2030 and what went before it than people have generally understood. And I think the reason for that is essentially because it reflects in its underlying sense the same underlying planning philosophy. And it’s a planning philosophy that was introduced by the Kennett Government, although in some respects aspects of it predate the Kennett Government as well. And it’s really that underlying philosophy and alternatives to it that I wanted to talk to you about.

I thought perhaps a nice lead-in was provided by the question that the challenge, if you like, that the minister posed to us and that Miles Lewis then re-posed to the opposition spokesman - whether you feel that he answered it or not is up to you, I suppose - is “If you’re not going to propose the kind of approach to dealing with urban growth that Melbourne 2030 proposes, what *are* you going to propose?” Well it seems to me that that’s not as difficult a question to answer as you would think.

A couple of years ago, the Planning Institute shipped over here the former mayor of the City of Vancouver. He was also the former chair of the Metropolitan Council (yes, they do have a metropolitan council there) and it is in fact comprised of elected people (and the world hasn’t come to an end!). And he was subsequently a premier of the Province of British Columbia, as they call it over there. And he was invited over here basically by the Planning Institute to bash up Save Our Suburbs and people that thought like it.

He was going to do this, of course, because Vancouver has a reputation for being a place where what we call “urban consolidation” has been pursued apace. Well, they must be doing alright with it because, as those of you that follow these rather shallow things will have noticed, it was also awarded by one of the 386 organisations that hand out this accolade the title of “The World’s Most Liveable City” recently, beating Melbourne into second place. And given that one of the 5 things you got points for was the weather (I don’t know whether there are any of you who’ve followed the weather in Canada), as you can imagine, they must have really creamed us on all the things that were within the control of human policy in order to make up for our advantage relative to them on the weather.

Anyway, this Premier of British Columbia gave his initial speech at the Melbourne Town Hall about urban consolidation and why it was good for you and we were then walking up to some booze-up that I got to go to because the more important person from my faculty who was supposed to represent us was unavailable and I was the last person to get out of the room when a replacement was called for. And I think Michael Buxton who’s here and speaking this afternoon might be partly to blame for this.

We had about five minutes walking up Bourke Street to explain to this chap how our planning system *actually worked* and by the time he got to the piss-up (which was the kind of private thing just for what I think we will now call, using the Baillieu-ised Lathamism, “insiders” and in fact I was sitting very close to Helen Gibson, who at that stage was the head of Planning Panels Victoria and is now Stewart Morris’s deputy and in charge of the planning bit of VCAT) - he was a bit naughty, our guest speaker, and said:

“Oh, I’ve just heard some things that have explained to me how your planning system *really works*. I understand that under your current planning system it isn’t possible to zone residential land exclusively for single-family homes. Well, in the City of Vancouver, the *majority* of our residential land is zoned for single-family homes and all forms of higher density housing are illegal. And throughout the metropolitan area it’s probably 80 or 90 %. We do all our urban consolidation in a very small part of the city and on sites that are selected through an open and democratic process after lots of research has been done to establish that they can accommodate it”.

Well, that kind of upset the dinner party quite a bit so I was a bit unkind and then asked him a Dorothy Dixier about appeal bodies that hear appeals from discretionary planning decisions made by local councils. The important thing to understand is that this fellow, in a previous life, like me, was a lawyer so he’s not legalophobic and he said:

“Oh, you’ve got one of them too! My goodness, yes, we know all about that in Vancouver because they have one in Toronto called The Ontario Municipal Board and everyone in Ontario except the lawyers has been trying to get rid of it for years because it’s a disaster and the lawyers tried to get us to introduce one over here (in Vancouver) but fortunately we were able to stop them because it would completely wreck everything if a democratically-elected body could have its decisions overturned by a non-elected body about matters that are essentially questions of subjective opinion, like residential amenity”.

Well, as you can imagine, Mr Harcourt has never been invited back to Victoria since that time, although I've scammed a small amount of money from Melbourne University with which I hope to ship him back here again next year.

But it's worth thinking, you see, perhaps there is an alternative to the way we do things here. And perhaps it isn't as simple as, "Well, you're either a supporter of Melbourne 2030 and therefore you support urban consolidation, an end to urban sprawl, public transport, sustainability and blah blah blah - as some people, including I think even someone that asked a question here seemed to think you must be - to which my response is always:

"Ah, right yes, sustainable public transport-oriented development of activity centres! I guess that's why Chadstone is nominated as a Principal Activity Centre in Melbourne 2030 and the Nunawading Mega Mile is also nominated as a Major Activity Centre!"

That, for those of you who aren't familiar with it, is a mile-long strip of Bunnings stores and such things along the Maroondah Highway. And I guess that would be why the Tally Ho drive-in office park and the East Burwood K Mart are also nominated as Major Activity Centres!

Nevertheless, there's a bit of a tendency to fall into a trap of thinking that you either support all of that, because that's sustainable development (God forbid) or alternatively, you're one of the "bad" people like Bob Birrell who reckons that we should allow for growth to continue and we shouldn't consolidate our city and that even though urban planning is a complex area, those are in fact the only two possible positions on offer and therefore if you don't support one of them, you must support the other.

Of course, one of the things that tells you is that Vancouver must be an imaginary place because they don't in fact support either of those positions! Funnily enough, they're a bit old fashioned about all this stuff. They reckon that ultimately local decisions should be made by elected bodies and the appeal mechanism is "vote for someone else" if they do it badly - that's called an election. And that's basically the way in which you conduct appeals against elected bodies.

It doesn't work very well if they're higher-up bodies like state or federal governments or bureaucrats, that's why you need appeal systems in that case, but if they're local councils which are supposed to be close to the people, it's much easier to turf them out if they start doing the wrong thing than it is to set up an elaborate administrative legal bureaucracy to oversee them.

Now the funny thing about Vancouver, which in addition to all these other things, thinks you shouldn't expand the freeway system at all because that'll encourage people to travel more by car and instead you should put all the investment into fixing public transport. And they don't just publish aspirational statements to that effect in planning documents, they actually do it.

Strangely enough, it's worth recording that this "Liveable City" award that they won was handed out by the Economist Intelligence Unit, which is a subsidiary of the Economist Journal which provides information for businesses seeking to invest internationally. It's

not handed out by the “organic food sub-collective” of Friends of the Earth, it’s actually handed out by the hardest of hard-nosed business types you could possibly imagine.

So I’m not suggesting that Vancouver is the only model but I’m suggesting that the moment you start to look around, you realise there are other models. In fact, if you look around far enough you find that there is nowhere else anywhere in the world that attempts to run planning in the way that we do here in Melbourne. I’ll come back in a moment to explain to you what I mean by that, but the way that we deal with planning disputes is unique in the entire world.

As it turns out, everywhere else in the world planning systems tend to follow one of about three or four models - and then there’s the Melbourne model! Now, it’s possible of course that we know something that they don’t. However, it’s also possible that they know something that we don’t! And some of the problems that seem to be arising in our planning system result from the fact that we’ve adopted a very, very unusual and weird way of dealing with planning disputes.

Now you don’t tend to hear this very much because most of us have spent all our lives (or at least all those portions of our lives with which we’ve had to deal with the planning system) in this city and therefore we assume that the way we do things must be natural. But in fact, it’s not true at all.

Let me give you a couple of quick examples to illustrate the point about how there might be alternatives. Let’s talk about our dear friend the Mitcham towers development. Now, Mitcham was not nominated as a Principal or Major Activity Centre in Melbourne 2030 and therefore I think it was probably reasonable for people to assume that 14 storey apartment towers wouldn’t be on the agenda there.

When the plans for those apartment towers were put in, most of the people who objected were in fact parishioners from the local Catholic church because the towers overshadowed the parish primary school.

It’s alright, however, said Justice Morris and his associates at VCAT, it’ll only overshadow it during the morning so they’ll be able to be in the sunlight during the afternoon, particularly if they play down the far end of the playground! So that was in fact the primary objection. There were other people who objected to density on this scale but the majority of people who objected simply thought that it was the wrong site within the station precinct.

I don’t know if any of you have ever been to Mitcham station but if you haven’t, you can look it up in the Melways and one of the things you’ll see next to it (apart from the St John’s Parish primary school) is a little square with the number 700 inside it. That’s the number of car parking spaces provided at the station for rail commuters. It’s the biggest rail commuter car park anywhere in Melbourne. Now, how about that? Somebody has decided that this should be a location for a transit-oriented urban village which will co-share it with the largest rail commuter car park anywhere in Melbourne. Now does this strike you as a particularly wise way of organising things?

How about this for a radical idea? If the community did decide that this was an appropriate place for high-rise development, how about putting it where the station car

park is now where it wouldn't overshadow anything, rather than next to the parish primary school? Is that an impossibly radical thought? What would you do with the car park? Well, you could move it down to Heatherdale, the next station further out in the same zone, which is in the middle of an industrial wasteland where the land might as well be used for car parking.

See, you don't need to have commuter car parks at every single station because people don't walk to them, you see, they're car parks - they drive to them! It's a kind of a definitional thing. So there may well have been things that we could have done there.

As I say, another outcome might be that it was decided that this was an unsuitable site. But in fact what happened instead was a developer fortuitously acquired the worst possible site for this development, then went off to VCAT and the council and the objectors said, "it's not nominated as an activity centre and therefore they shouldn't get a permit".

What Justice Morris and his associates at VCAT actually said was, "Well, it should have been nominated. Because if you look at the things that were nominated as activity centres in this former city of Nunawading, they are the Nunawading Mega Mile" (which we've discussed already), "the East Burwood K Mart, the Tally Ho drive-in office park, and the Forest Hill drive-in shopping centre". And you know what? Not one of them is a suitable location for transit-oriented development of any kind at all.

So in fact what they said was (this is the VCAT people), "what we will do is take the rhetoric of Melbourne 2030" (and that's the thing that by and large people agree with) "and ignore the actual *content* of Melbourne 2030 and use the rhetoric to override the content".

Now they say at one point, "People will accuse us of exceeding our role as an interpreter of planning policy and arrogating to ourselves the role of setting policy". To which my response is, as old Bill Shakespeare says, "Methinks he doth protest too much" because, of course, that's exactly what they were doing.

And Stewart can't help himself. Stewart's a very bright fellow and he's really interested in planning. That's part of the problem we have in our planning system - all the lawyers want to be planners and all the planners want to be lawyers! And no one wants to do their own job. Stewart really wants to be a politician. He ran for the upper house in 1996 and missed out by a very small margin and frankly I think he would have been a very good politician.

The problem down at VCAT is - and this is a difficult thing and it's not just him, I'm just using him as an example because he's tough and can stand up for himself - but the real problem is that there are no restraints at all on his behaviour. He thinks he's an expert on everything by virtue of having been appointed to VCAT so when he came to talk to my students this year (my planning law students, for which I am very grateful), he spent 5 minutes talking about how VCAT works and the rest of the time lecturing them about transport policy, a subject about which he knows nothing at all. But it doesn't matter. He's the president of VCAT so automatically he's an expert! On that, on heritage, on neighbourhood character, on urban design, on engineering, on everything you could possibly imagine! It doesn't work!

In Vancouver, they would have sorted things out in a proactive way through the democratic process and no lawyers would have been involved at all. Except possibly to do the property conveyancing. So we had an alternative there but we didn't go for it.

Go down the road to Camberwell. Who was the great celebrity who joined forces with the Camberwell station development objectors? I don't mean Geoffrey Rush, I mean the funny one, Barry Humphries. Now, of course, Barry has become something of a defender of iconic Melbourne suburbia such as the Golf Links Estate in Riversdale where he grew up.

Why do you reckon it's called the Golf Links Estate? Yes, it used to be the Riversdale Golf Club! Where is Riversdale? Well, it's on the Alamein line. When the Alamein line was electrified in the 1920s, the Riversdale Golf Club packed up and moved further out because they thought that this was no longer the highest and best use of the land so they subdivided this development - very attractive - around what's now called Willison station (that used to be Golf Links station).

So Barry actually grew up on a piece of urban infill development, a piece of urban consolidation! A kind that is now represented as the model, for many people, of the kind of development we should want, I think it's classified by the National Trust.

Where did the Riversdale Golf Club move to, by the way? They moved next to Jordanville station on the Glen Waverley line, which of course in the 1930s was a paddock. It's now surrounded by housing developments and you know what? I'm not quite sure that that fenced-off private golf club with barbed wire on the top of the fence to stop the hoi polloi getting in really counts as open space.

Now I know Ted Baillieu's quite keen on preserving golf clubs but I reckon this is one that might perhaps be about ready to do again what it did in the 1920s and get out there to somewhere like the back of Scoresby where there's acres of land suitable for golf courses. We could house 5000 people on that site and have them all within walking distance of the station and do the whole thing in a way that not one local resident would object to.

You might even have people say, "Where's the form to say I want this? Where's the form to applaud rather than object? Are we doing that? Good God no! Are we talking about doing that? Good God no! That's what they do in properly functioning planning systems. And in planning systems that then are more effective at getting urban consolidation than we are as well, and I'm a supporter of urban consolidation but I'm not a supporter of Melbourne 2030.

Well, what's standing in the way? Why can't we do this kind of stuff? (*Paul then showed an overhead projection*) You can hardly read that but I'm taking you back to that hippy commune, that paradise of environmental sustainability and liveability but yet business-like as well - that place called Vancouver, and I thought I'd bore you to tears by showing you a bit of the City of Vancouver Planning Ordinance. It deals with an area called "First Shaughnessy". I was trying to find an area that was perhaps as leafy and Glen Iris-like as possible. For those of you that know the area, it's actually about 4 kilometres from the central business district so in locational terms, it's probably like Kew

or South Yarra or something like that. But it's leafy Melbourne suburbia equivalence of the kind that Barry Humphries would have grown up in if he'd lived in Vancouver.

Now, have a look at this. Height limits; site coverage requirements; everyone has to have a front yard of 9 metres; everyone has to have side yards and set-backs. And what happens if you don't? Well, you don't get a permit. You'll notice that there are some discretionary things - on occasion the director of planning can certify whether you are entitled to an exemption or not. And if you don't like that, you can ask the council to overturn the director's decision and if the council refuses to overturn the director's decision, what do you do? Well, vote for someone else next time!

There is a thing called the Board of Variance, which enables you to complain about by-laws that cause personal hardship to you, and Stewart Morris rather dishonestly attempted to pretend that that was an equivalent of VCAT. You can't go to the Board of Variance on any of this, it's a technical boring thing you don't want to get into. So, very old fashioned you see, the kind of thing we're not allowed to do in Melbourne anymore.

Now, in Melbourne of course, if you recall, we once had something like this in terms of the regulatory side of our planning system but we replaced it with policy-led planning. You remember that? That's one of the things that's supposed to be good about the current system.

Michael Buxton and Trevor Budge and Robyn Goodman from RMIT have done this really fantastic report that assesses the Kennett reforms to the planning system. The title as you can see is "A Failed Experiment" so I guess I've given the punch line away already. Basically, everything it was supposed to do to make things simpler, it produced the opposite effect. It was supposed to reduce the volume of paper, the volume of paper has exploded. It was supposed to simplify things, it complexified them, blah blah. But some of the planners they talked to actually thought the one good thing about it was that it was policy-led.

Now, we used to have all these bad things called *rules* and people didn't know why they were applying the rules and so it's much better if you've got, instead of rules - a statement of policies! Instead of saying there should be a front yard with 9 metres, there should be a long vague collection of wafty, woolly words about how nice it would be if people had front yards!

Problem, you see? Planning schemes are laws, legislation. This is actually called the Planning By-Law in the City of Vancouver. And our planning schemes are in fact by-laws as well, although you wouldn't know. And nobody else in any other area of the law drafts policy-based laws.

Here's one from Victoria - it's called "The Crimes Act". It's a law, right? It tells you what you can and can't do and what the consequences are if you do the wrong thing, you see? "Armed robbery: a person is guilty of armed robbery if they commit a robbery and at the same time have blardy blardy blah". If they do it, they're guilty of an indictable offence and they can be imprisoned for up to 25 years!

But where's the policy? Where's the bit at the front saying "We really think armed robbery is bad"? Actually, "bad" might be a bit specific because we've got to balance the

needs of the armed robbers against the armed robberies! You see, no one tries to do this anywhere else except planning!

So what have we got? Well, apparently the answer to all our problems, according to the minister, was that councils should stop writing such vague and hopeless planning documentation. It's all their fault and if they just wrote their policies more strictly then we'd all live happily ever after.

Well, here's one from the part of the planning scheme that comes from the State government. This is part of the neighbourhood character objectives. You know, there's about 500 standards you have to satisfy under the Rescode thing, in addition to the hundreds and hundreds of other pages of platitudes that you apparently have to take into account.

And just look at how it's written! You'll never find legislation on any subject anywhere in the world that is written in this fashion, not even in Victoria on non-planning things:

“Neighbourhood character objectives: to ensure that the design respects the existing neighbourhood character or contributes to blah, blah blah.

Objective: to ensure that the design response must be appropriate.

Standard: the design response must be appropriate to the neighbourhood and site.”

Well, I'm sorry - what does that mean? Does that mean we should have a 9 metre front yard or not? You see the difference? With the Vancouver scheme you know whether you comply or you don't.

But is the Vancouver scheme policy led? Well, of course it's policy led!. What the [Melbourne] people who've drafted this stuff have got together and done is they've completely forgotten what planning actually is and what it isn't. By-laws are part of the last stage of planning, they're part of the implementation mechanisms, they're development controls. If you run your planning system properly, you *do* decide on your policies and if you run it in a rational way, you decide on them in a logical hierarchy starting at the regional level and working down to the local level.

Once you've decided what they are, you then develop legal regulations to implement them, such as in Vancouver. What we seem to have decided in Victoria is to try and collapse all those processes and put them all inside a legal document like a by-law. The net result is that they're all 20 times as long as they need to be, they are completely and utterly content free and meaningless, by and large, except there's the occasional standard that floats in there.

And nobody knows whether they're Arthur or Martha. And to suggest that drivel like that actually means that urban planners are more likely to take policy into account when they're deciding development applications, is, it seems to me, a pie in the sky notion.

The converse is, in the case of Vancouver, most planning applications don't need to go near a planner because a building surveyor can immediately tell whether they comply or not. The policy part of the system isn't played out every single time someone asks for a permit to do something. The policy part of the system is played out in advance of you designing the legal controls because the legal controls implement the policy and if they are to implement the policy, they should be as clear as possible.

But how on earth are you supposed to do that when policies like Melbourne 2030 are put in the planning schemes, 3 years after it was enacted. But the main issue here is what does it mean? It's just all bullshit, isn't it? It doesn't mean anything.

My personal favourite, however - this is clause 12 (*shows 20-page excerpt from the Victoria Planning Provisions titled "12 METROPOLITAN DEVELOPMENT"*).

There is one clause of the State Planning Policy Framework that does actually mean something and that's clause 13 - there it is. (*shows clause 13 accompanied by much laughter: "13 [no content]"*). That's the open and honest bit of the State Planning Policy Framework but I think in fact it represents an accurate description of the rest of them as well.

Time to give you a boring little run down on how planning is organised everywhere in the world except Melbourne and I promise it won't take too long because there aren't that many models on offer.

Basically, you've got a challenge. You've got to try and balance two competing objectives. You're trying to provide certainty on the one hand and flexibility on the other hand. Certainty, why do you want certainty? So everyone knows where they stand, so you don't need appeal bodies making themselves unpopular, to reduce costs, you all know why we need certainty. And funnily enough, developers want certainty as well. Everyone wants certainty except lawyers and planning consultants who make their money out of *uncertainties*. The other 99.9% of the community want certainty.

We also want some measure of flexibility because cities change, societies change. I live in a house in Fitzroy that was a non-conforming use for 30 years under the Melbourne Metropolitan Planning Scheme because the Board of Works decided we were all going to be turfed out because industry was going to take over. So you have to have some capacity to change that as well. And fairness as well.

So how do you ensure all of those things? Well, you've basically got two parts of the system. You've got the regulatory side of things, the by-law side of the system, and then you've got the question of review of decisions. And the issue of how you put those together is the issue that most planning jurisdictions face and it seems to me the particular way we've put those two parts of the system together is primarily responsible for all the disasters that we've had here in Victoria.

What we've done you see, is we've gone to the by-law part that says everything will be discretionary and policy based and nothing will be certain. And in fact, you're not allowed to be certain because all the guidelines about how to prepare planning schemes and things restrict councils - they can't for example introduce a zone that says no higher density housing here. Which is of course is what most of them want to do and what, as you can see, Vancouver not only does but can then specify whether you'll have a front yard or not. So the councils don't have flexibility there. We instead are forced inflexibly to have a vague policy-based system in which there are no clear open and shut rules.

Now that wouldn't be a problem if we didn't combine that with an unlimited right to review decisions on their merits and go off to a separate body which acts as if the council

was never there and makes the decision all over again! The first part of the mixture in Melbourne maximizes the uncertainty and the number of things people can fight about. We then create a system in which everything is up for grabs in the second stage.

If you were trying to design a system to maximise incomes for lawyers and planning consultants and maximise as much as possible the amount of litigation, the uncertainty in the system and the amount of public dissatisfaction and fighting, it's hard to think of one that would be better than that. Because as it turns out, no one anywhere in the world has tried to combine these two things - the absolute apogee of vagueness and lack of precision in the legislative controls, coupled with an unlimited right of review!

Let's do the planning controls first. Basically, if you go to the United States or Canada, essentially municipalities are free to write their own planning by-laws. They can write it any way they like, it's just a piece of legislation governing what people can and can't do. In the United States there are no constraints imposed on them by and large from higher governments at all, except in one or two jurisdictions where they've established metropolitan authorities.

The only constraint imposed on them in the US is the funny old American Supreme Court decided there was something in the Constitution which restricted how you could do zoning. They talk about Euclidian zoning in the US and I got very confused about that, I thought it was something to do with maths, you know, like non-Euclidian zoning but actually Euclid was the name of a municipality involved in a court case in which they decided that zoning was constitutional, so it took me a while to work that out.

So in the US they have to be a bit careful with how they draft their zoning requirements but basically they can do whatever they like. And there are no appeal systems because local government is constitutionally entrenched in most states and therefore higher-level governments can go to the devil.

You go across the border into Canada and by and large the system is that there are regional plans prepared and local plans have to be consistent with them. On the whole though, there's a lot of room for negotiation and argy bargy. Vancouver, as I've said, has a regional council. Until recently they weren't able to compel local councils to make their plans consistent with their regional ones but they became very good at negotiation and they run the public transport system and basically if you want your train extension, well, you'd better design the land use in a helpful way that will accommodate it. Very recently the province has made the regional planning schemes binding but there's still lots of negotiation and dispute resolution and so on.

But once you get down to the lower level they can do what they like in terms of zoning controls and they *can* tell you how big the front yard should be. Or conversely, in the urban consolidation areas of Vancouver they specify things like the floors have to be made out of materials that make it safe for children to fall over on them. Seriously - they're very, very specific, because they don't want to create ghettos for childless yuppies. So they've got lots and lots of rules on new high-density developments designed to make them family-friendly, so everyone's got lots of rules in Vancouver.

If you go to Europe, what you tend to find is that rather than zoning, it tends to be a slightly more design-based system and again, particularly in the German-speaking world

(I include Scandinavia and all those other places, they're all dialects of German but don't tell the Danes that, okay, or the Dutch!), in those areas essentially it's a hierarchical process - regional plan, municipal plan, local area plan. And the local area plans are designed for the local neighbourhood.

And you talk to Europeans about statutory planning, deciding whether something is consistent with the local plan or not, they've never heard of it because the local plan is so detailed that everyone knows. It's like a little urban design for the area.

In the European context, particularly in well-organised systems, there's a constant cycle of review. The flexibility of the system is brought in by requiring the whole thing to be regularly reviewed. So by the time you've got down to your local area plans and they've all been implemented, the time has come to start reviewing the regional plan with the view to it filtering down to the local area, so it's a continuous cycle. So certainty is provided by very specific plans with no appeal rights. Flexibility is provided by a regular requirement for review.

The United Kingdom in many respects does urban planning more poorly than any of its counterparts on the continent so naturally we've chosen them as our inspiration here in Australia! The UK deliberately went the other way and said, "no, our system will be discretionary", and in fact in many respects they don't have zoning at all in the UK. Planning documents consist of policy statements like this, which, for what it's worth, bears some resemblance to the kind of things you see in Melbourne but with two principal objectives: one, there's less weasel words and two, it doesn't go on for hundreds and hundreds of pages.

Basically, councils assess development applications against these policies. It's not quite right, because there are also zoning provisions that ban things and their Green Wedges, which are of course green belts, are protected by legislation there, so they have a very paramount form of protection. Councils assess applications against these policies and there is a right of appeal.

This in fact brings me to rights of appeal because the interaction in England is actually interesting. In the UK, their appeal system at first glance looks like ours. It's said to be a "hearing de novo", a new hearing, it's not just an appeal on questions of law or process - the appeal body has another look at the whole question - but they do it slightly differently from us.

First of all, it's on the whole something that lawyers aren't involved in. On the whole, they don't have hearings, it's done on the documents. In fact, the appeal body is the minister and these people who review appeals who are called inspectors are delegates of the minister.

Now in fact what they do - and I have never been able to work out whether this is really by legislation or just the practice - is that they look at the council's decision to see whether it was reasonable. They don't do the whole thing again. They look at it, they look at the material, they look at the policy and say, "Oh right, yes. They considered all those things". I might subjectively have a different view about whether something was the right height or not, but providing they went through the whole job properly, considered all the policies and their decision wasn't unreasonable, it stands, and so most

appeals fail. As a result, on the whole, most council planning decisions stand. So even the UK system, which looks like ours, isn't quite like ours.

In Europe and the US there are no appeal rights at all, unless the council does something illegal - you can always go to court to stop a public body exceeding its powers but that's the only appeal system you have.

The closest thing we have anywhere in the world outside Australia to our VCAT system is in Ontario. They have this funny thing called the Ontario Municipal Board, set up in the 1890s to wipe out corruption in local councils as part of something called the Progressive Era, for historians of North American politics. Councils were corrupt so we needed someone to keep an eye on them. They've kind of lost all their other powers and evolved into the Ontario equivalent of VCAT and everyone hates them and everyone else in Canada says, "thank God we don't have one of them!"

There was an interesting article in a journal called "Progress In Planning" (April 2005 edition) where an Australian lawyer actually did a survey of planning appeals in different jurisdictions and concluded that the Vancouver system really worked quite well. He interviewed a senior planner there and they said "I hope there is no consideration being given to the establishment of a province-run appeal board in British Columbia. If you look at the Ontario Municipal Board as a case in point, the appeal process has overwhelmed all the other processes and that's had a disastrous effect". So everyone in Vancouver says, "thank God we haven't got one of them".

But even in Toronto, things aren't as bad as they are here because they can still enact their own by-laws and prohibit things. So they're probably as close to the Melbourne experience as you'll get and probably analogous to the other Australian states and New Zealand. But nobody except us has done the combination of, "You can't have clear planning by-laws that say what's in and what's out, coupled with an unlimited right of appeal in which the decision of the original council counts for nothing".

So it seems to me therefore if you're looking at ways for us to go - and I'm now talking about the machinery rather than the policy - it seems to me that we should move in the direction of the rest of the world. We should have less emphasis on statutory planning, development and regulation. In fact, in most parts of the world it doesn't exist. Nobody knows what you're talking about when you use words like that. We should put our planning resources into strategic planning, deciding what we want. The task of writing the by-laws then becomes a relatively simple technical legal task of translating what we've agreed into words that as tightly as possible make sure that what happens on the ground will reflect what we've agreed.

And if we're worried about things becoming inflexible then let's have regular cycles of review, preferably starting with the regional plans and working down to the municipal plans, and then (if we're going to have them) the neighbourhood plans as well.

Basically, it seems to me that we can go in one of two directions or a combination of both of them. We can eliminate all of the State Government imposed fetters on local government zoning by-law powers so they can do what they like, so they can have zoning by-laws like the one from Vancouver that I showed you. If you did that, you might actually be able to keep something like the current appeal system.

Or alternatively, we could move to something like the English model which retains a greater emphasis on the policy but if we did that we'd have to severely limit appeal rights. It would seem to me that the options for appeals are either they should be purely confined to legal and process questions, such as whether the council gave people a fair hearing, whether they actually took the policies into account, whether they did their homework. Or alternatively, the slightly broader kind of appeal process that you get in the UK where they can go a little bit further than that but basically they don't upset the council decision unless there's something wrong with it.

See, that's the key difference here. VCAT aren't interested in whether the council did anything wrong. It's just a matter of, "Oh well, if it had been me, I'd have done something differently". That kind of appeal has to go, no matter what you do.

So there, it seems to me, is your template, your menu, your basic building blocks of a planning regulatory system. And it seems to me that the objective ought to be to get some certainty into it. Because God knows, we've had flexibility to death here in Victoria over the last 15 or 20 years. And the only people that it's really providing flexibility for are lawyers, planning consultants and members of VCAT who even though in many respects they're fine and perfectly wonderful people, in other respects have basically got completely out of control and acted as if they are (in spite of all the protestations to the contrary and in fact the protestations to the contrary are what makes you realise that even they're a bit worried that we might be catching on) acting as if they're planning authorities.

So the idea of this is about returning responsibility to elected bodies but lastly also, it seems to me, about doing something for planners because I'm not quite sure whether people who work as planners are "insiders" or not in Ted Baillieu's categorisation. But trust me, the ones I know, my current and ex students, they all hate it. That's the reason why, for example, the majority of my best students who graduated two years ago have all left Victoria. There's a shortage of planners in other parts of the world and they'd much rather work in a place where planners plan things rather than get involved in all the nonsense that goes on here.

So I reckon we'd all be better off but we'd have to make some fundamental changes. But I think the starting point ought to be not to say, "How can we tinker with what we've got?" because I think what we've got is so corrupt and so dysfunctional that we should put it to one side for the moment and say, "If we were starting again, what would we do and what lessons can we learn from the way other people do it?"

And I think the first lesson we'd learn is that whatever you do, if you're attempting to follow best practice, it would be very, very different indeed from the way planning is currently run in Melbourne.