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Draft Planning & Environment Amendment Bill 2009:

Comment by Save Our Suburbs, Inc (Vic)

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Preface

The Bill introduces significant reforms relating to the objectives, the amendment process, the permit process, State Significant Developments and other matters. The Regulations and VPP will also be updated.

This is not an exhaustive analysis of the Draft but a brief comment on issues which we are most familiar with and/or believe are the most significant.

We also note that the process of inviting submissions from the whole spectrum of the community (albeit with relatively little time to respond) may appear democratic but is not real community consultation, which would involve an educative process and a synthesis of views to create an informed consensus among all major stakeholders, including the lay community (see the community consultation record of the previous WA ALP planning minister, Alannah MacTiernan; and the work of Dr Lyn Carson - http://www.activedemocracy.net/).

By contrast, the consultative process used in planning reforms to date is little more than window-dressing, except for the extensive process used for the introduction of Melbourne 2030 - the major conclusions of which were ignored when the "draft" policy was introduced just before the 2002 State election without allowing for any feedback or modification.

If government really wanted to be guided by community input it would organize a participatory process involving charettes, citizens juries, public panels & workshops to inform a broad cross section of the community about problems and options, and to elicit - and incorporate - their feedback.

Finally, we note that most of the major areas we addressed in our original submission as requiring tightening or clarification have been either ignored or weakened:
- ESD & Sustainability
- Need for greater prescription
- Democratic council processes & accountability
- Residents' notification and appeal rights
- Clarification of Rescode objectives & standards

Similarly, the recommendations of the critical reviews of the planning regime by the Victorian Auditor-General's Office (December 1999 and May 2008) have not even been mentioned, let alone addressed.

It is unfortunate that the body conducting this review is the one which received some criticism in the VAGO reports. Consequently it is inappropriate that the review should have been conducted "in-house" - given the planning crisis the state faces, it would have been more appropriate and more productive for the review to have been conducted by an independent body.

Objectives of Planning

The most obvious omission from the Draft is any future long-term vision for the State which addresses the growing crises we face as a state and as a nation - climate change and drought, peak oil and population growth. Issues affecting residential and social amenity such as energy, water, housing, population, transport and increasing traffic congestion have not been included.

Without a vision there is also no spatial plan, although some such plan will be a prerequisite for some types of federal infrastructure funding.

Social and health issues, housing affordability and the provision of infrastructure are integral to planning and should be included in specific terms but remain largely ignored, as does the widely acknowledged lack of sustainability and energy efficiency of commercial buildings.

The Draft Objectives do not mention the precautionary principle or include ESD, let alone any attempt to define ESD in relation to transport, health, social infrastructure, affordable housing and water and energy conservation. The Bill is not linked to related government policies and legislation in these crucial areas

Liquor licensing has not been integrated. Accountability and enforcement should also be included in the Objectives of the Draft, as in the Environment Protection Act.

In general, the Draft focuses a lot on "should" but very little on "how" - not surprising when there is no vision of where the Act is designed to take us.

Ministerial discretion, already excessive, is increased, whereas in a democracy there should be mandatory provisions requiring ministerial decisions to be transparent and accountable.

Instead, rights of review and notice are reduced, as are community and Council involvement in the planning process. This adds to the increased lack of proper transparency and accountability that is evident throughout most of the Draft.

We agree with the general comment of the Environment Defenders Office:

"The review has made no attempt to address the current failures in transparency and accountability ... to rationalise the excessive Ministerial discretion ... The increasing propensity to ... sideline all other decision makers in favour of the Planning Minister ... favour development interests over community participation ... the responsibility for EIA under the EE Act must be moved to the Environment Minister. These proposals set up bias ... this undermines the entire EIA process."

Planning Scheme Amendment Process

Any criteria which allow the Minister to remove an amendment or permit should be set out in the Act. The Minister should be required to provide reasons to Parliament for any Ministerial exemption.

The Draft essentially aims to privatize the strategic planning process. It is completely inappropriate that developers should have the power to prepare amendments, including being able to give notice, consider submissions or refer submissions to a panel. This process should be open, transparent and accountable and conducted by a public authority in the public interest.

Council should retain the right to refuse an amendment and Panel reports should be publicly released when they are given to the Minister.

Some steps in the process have no stated time limits (eg, for Council to respond), which is an obvious oversight if the point of reform is to streamline the process. In this respect, all parties - councils, panels, the minister, the department - should all be required to complete their role in the process within set time limits.

Combined with the recent federal relaxation of foreign ownership rules, the proposed privatization of the planning amendment process will allow overseas interests to not only own more strategic Victorian real estate but to dictate how that land is to be developed and used. The Minister is likely to play a supportive role to stimulate this investment "in the interests of the state".

This situation is not only an affront to the democratic process but will undermine efforts to provide more affordable housing and to dampen the continuing rise of prices in the private housing market (both for purchase and for rent).

Planning Permit "2- Track" Process

The new 'Code Assess track' for non-contentious, low-impact classes of application, is estimated to include about 20% of all development applications, with no public notice or review. The 'merit assess track' is similar to the current process.

There is little detail on the code assess process - even the categories of applications that this will apply to has yet to be decided "after consultation" - with who? And who will have the final decision? It is inappropriate to include such generalized concepts into legislation until it details can be included as to how they will operate in practice.

Many code assessed criteria include scope for the exercise of discretion and judgment, yet decisions over local developments are to be taken out of the hands of elected councilors or staff acting under their delegation, and given to un-elected municipal CEOs (who are chosen for their corporate management skills, not experience in land use planning). This is unlikely to advance optimum planning outcomes in the community interest.

Consequently it is completely unfair to only allow applicants the right to appeal. If the point of Code Assess is to fast-track simple compliant projects so that no notice or appeal rights are deemed necessary, why should applicants alone have these rights, including being able to appeal against conditions as well as a CEO's refusal?

Overall, we oppose the introduction of Code Assess as unnecessary, less democratic and likely to lead to worse planning outcomes. The existing process already reverts to a simpler model by default for simple applications - steps like obtaining more information, referrals, etc, are automatically omitted.

What would simplify assessments and save time would be to simply make most existing guidelines mandatory. This would avoid problems with retrospectivity and sudden changes in planning requirements; it would also deter "ambit claim" and non-compliant development applications, and obstructionist or trivial objections.

All that would expedite appropriate development proposals - compliant applications would proceed through the system as before, but council planners would have more time to deal with them because ambit claims would no longer be clogging up the system by taking disproportionate time for planners to communicate and negotiate on.

The Draft also retrospectively reduces the scope to use secondary consent provisions to vary permit conditions. We welcome the removal of the secondary consent procedure because in some cases it has allowed amended permits to introduce offsite impacts not considered in the original permit assessment. This measure will also put pressure on applicants to "get it right" with their initial application.

Councils should be allowed to refuse to deal with incomplete applications. In some cases, council staff even embark on months of collaboration with applicants to effectively re-design proposals - this is the role of the applicant, not council staff being paid by ratepayers. Applicants and their professional assistants should be able to design proposals that are sufficiently compliant to be assessed. Those that aren't should be refused outright, partly as a penalty to deter future non-compliant or non-complete applications.

Finally, giving Council power to make minor amendments needs to be subject to strict and transparent conditions.

There has been emphasis in some planning reform documents on the role of local policy and local government, but there is nothing in this Draft that underlines this democratic principle. In fact, incorporated local planning policies should be specified as default controls since they have been approved by the department and the Minister specifically to vary general state provisions to meet local conditions. Otherwise there is little point in councils wasting resources to research and implement them.

NB: It would streamline the objection and appeal process if some sort of transparent mediation system was established to operate early in the DA process to deal with trivial or largely unwarranted objections.

State Significant Development

State Significant Projects are often large scale with far reaching and long lasting impact on many people. They should attract a higher level of independent assessment, accountability, transparency and a minimum requirement for consultation.

The SSP principles and process should be enshrined in legislation and not left to Ministerial discretion. For example, it should not be up to the Minister to set notice, community and stakeholder engagement, with the extent of assessment entirely at his discretion.

Panel reports should be published and should be released at the same time they are given to the Minister. There should be a right to appeal to VCAT for all SSPs.

The s97AB Ministerial call in power should be removed and there is a lack of statutory time frames.

Environmental Impact Assessment under the Environmental Effects Act 1978 must be moved to the Environment Minister.

Other Issues

Enforcement: Section 126 & Section 48(2)

Rules that are not enforced will be flouted, especially if they are only discretionary guidelines to start with. In cases where councils have adopted a policy of referring enforcement cases to the magistrates court instead of VCAT, this has acted as a better deterrent than referral to VCAT where remediation is the only focus (although costs may also be awarded). This approach should be mandatory for councils because the main point of any enforcement regime is deterrence, not rectification.

However, it is usually appropriate for building errors to be corrected as well and rectification via VCAT appeal would remain as an option as at present (but would be facilitated by any preceding magistrates court conviction).

In this regard, and again focused on the deterrence principle, councils should be required under the Act to prosecute the actual miscreants - ie, the original owner and/or builder, not the innocent purchaser of the completed dwelling. The Act already allows for this approach but most councils focus on forcing the current owner to rectify any breaches, which is legally simpler but has no deterrence value but just encourages developers to commit more breaches with impunity.

Extra Requirements of Councils

Councils should not have to adhere to any new state-imposed planning controls that require considerable strategic planning work (eg, structure plans for M2030) until the

government or the planning department has provided an agreed amount of adequate time and extra funding, in advance, to enable councils to carry out the work first.

To do otherwise makes a mockery of the process and implies that the government simply wants to facilitate any sort of development without concern for potential negative impacts and it undercuts the whole concept of town planning.

Council feedback - monitoring the administration of planning schemes

The assessment of the performance of the administration of the planning scheme under the Act must include consultation with stakeholders (permit applicants, objectors and perhaps elected councillors).

Conclusion

The philosophical approach to this Draft has clearly been to "streamline" (deregulate) planning processes under the Act.

The timing of the review of the Act is unfortunate, coinciding as it does with the impact of severe bushfire and an economic recession. These appear to have influenced the focus of the review, while other more serious long-term crises such as climate change and peak oil have had less obvious influence. However, the new Act must be based on a sound ESD footing to be able to tackle the environmental challenges of the next few decades.

In a democracy (as opposed to an enlightened dictatorship) any area that is underperforming needs tighter, more specific or more appropriate legislation, not a more hands-off approach. This has already been evident from the failure of the Melbourne 2030 policy to achieve its aim of focusing most new medium and higher density housing into activity centres, protecting most of the suburban hinterland and obviating the need for further suburban sprawl.

Industry and commerce will not produce the necessary vision and drive in the public interest when society is facing the need for urgent changes in land use patterns in order to respond to major challenges like climate change, peak oil, lack of affordable housing and inadequate well-integrated public transport.

In general, the Draft fails to identify or address any future sustainable vision for the state, yet proposes to undemocratically streamline or deregulate key authorization and approval processes. It also fails to address most of the existing loopholes and weaknesses in the Act, many of which we highlighted in our initial submission.

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