Response to DAF

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A BRIEF CRITIQUE OF DAF

DAF appears to be based on the key premise that community involvement should be limited to participation in policy formation by councils, with no third party appeal rights against decisions taken by the panels appointed to make actual decisions on development applications (DAs).

However, it is naïve in the extreme to suggest that a significant cross-section of the community is likely to be galvanised into involvement with the development of local planning policies or that such individuals would have adequate expertise and knowledge of the legal, democratic, socio-economic and environmental imperatives that underpin proper strategic town planning.

Experience demonstrates clearly that the vast majority of residents only get involved in planning decisions when challenged by an impending nearby development, as with most social issues. Hence any planning regime in a democracy must allow third party appeal rights.

It is an interesting and practical corollary that, in our experience, it is often local objectors rather than council planners who reveal inconsistencies, errors and omissions in DA proposals and plans. That would appear to be due to the simple fact that those with the most critical eye will be those with the most to lose, and a further reason why residents must be kept within the decision-making process.

There is another oft-forgotten fact that relates to the efficiency of the DA assessment process - proposals designed with a genuine regard for local planning policies and neighbourhood amenity are very unlikely to run foul of Council, VCAT or objectors.

In contrast, most of the complexity and effort of the planning process is devoted to proposals that seek to push the envelope and over-develop a site as much as legally possible. Why should the community (which pays the taxes that fund both councils and VCAT) fund a system that only exists in its present complex "discretionary" form to address the needs of the speculative developer?

DAF also suggests that the involvement of councillors in making DA decisions is a significant and inappropriate cause of delays and problems in the planning system.

However, in our experience, most councils in comparable situations have similar turn-around times despite the fact that some allow nearly all decisions to be made by staff under delegation while others run most decisions past full council meetings. This factor doesn't seem to be a significant contributor to the problems that DAF has allegedly been created to combat.

"Technically excellent criteria" deserve a mention. The phrase itself begs acceptance but the concept is open to subjective judgment and differs in different situations and over time, such as the improved Rescode "north-facing windows" guideline.

As a negative example in relation to Rescode and its predecessor, the "Good" Design Guide, it is clearly not technically excellent in an era of growing concern about energy efficiency and fossil fuel consumption to use the equinox as the standard for overshadowing. Why not the winter solstice?

Houses with northern walls and windows shaded in winter by new developments require hundreds of dollars more for winter heating and often suffer increased damp. Hardly "technically excellent", just an expedient compromise for the building industry.

Yet with this poor compromise still in place, the State Government now trumpets the advent of 5-star energy ratings! And VCAT makes decisions about energy efficiency on the basis that this is best addressed at the building permit stage, despite the fact that site orientation and passive solar design at the initial planning stage of a proposal is the acknowledged starting point for achieving low-energy use in buildings (another example of VCAT countermanding appropriate decisions made by Councils - see later discussion on reform of VCAT).

Lastly, there is the issue of increased private sector involvement. The fundamental cornerstone of any planning regime in a democracy is transparency, public control and oversight, which will all be seriously compromised by the DAF proposal.

Even the present "pre-certification" concept now being officially encouraged in Victoria has a number of downsides that have been overlooked.

First, while it may accelerate the passage of appropriate DA's through the planning system, it is not likely to attract the ambit claim developer who will still prefer to wait for council to fail to assess the DA within 60 days so it can be appealed to VCAT.

In analogous fashion to the privatised building surveyor who has a direct conflict of interest in being paid by the developer he is regulating, the "pre-certifier" may also be tempted to (even instructed to?) shape the DA to conceal deficiencies. We are aware of growing evidence that similar practices are already endemic in relation to cutting corners in the building industry.

This leads to the question of who or what will oversee, register or licence the pre-certifiers? Councils don't have the resources. The answer from the professionals we have consulted is that pre-certifiers are unlikely to be overseen or licensed at all. The most draconian step a council will be able to take against a "rogue" pre-certifier is just to strike them off their list of "approved professionals".

In other words, privatisation will be unregulated because to do otherwise would create more layers of bureaucracy than it would save.

As a footnote, in the Glen Eira Council official evaluation of its pilot pre-certification program, only pre-certifiers, council staff and developers were consulted - no provision was made to determine whether residents were satisfied with the process.

While there is as yet little evidence either way on this point, general experience in planning indicates that it is risky for residents to meet with permit applicants and their planning consultants without any professional assistance. There are many cases where residents have been intimidated and/or persuaded that a proposal meets all the requirements in order to head off any later objections.

Pre-certification as now advocated in Victoria does not safeguard the interests of residents who will usually be unaware of their rights and of the planning guidelines in relation to the development they are being consulted about. This in itself is an abrogation of residents' rights, which is not as likely to occur when consultation meetings are held with other parties present, such as council staff and councillors.

A SIMPLER SOLUTION

Resolving the present complexities and uncertainties in urban planning does not require extreme measures like imposing a new "one size fits all" national planning regime driven by powerful vested interests that abrogates the rights of third parties.

There is a more obvious, more democratic and much simpler solution - first, at the Council level, existing planning scheme policy constraints should be mandatory (such as heritage guidelines, design and development overlays, etc).

Basic Rescode amenity standards (which are described as minima anyway) should also be mandatory to safeguard basic living and housing standards that for health and psychological reasons alone justify provision of adequate space and access to sunlight, not just daylight.

Again, this will not adversely affect the majority of developers who already comply with these standards - it will only be the speculative and less scrupulous developer whose activities are more restricted, which is entirely appropriate.

Secondly, VCAT must be reformed to support the powers of local councils, not undermine them, including all properly evolved local policies which must have received ministerial assent to have been incorporated into the planning scheme.

VCAT should also be restricted to assessing council process rather than conducting de novo merits hearings, and amended plans should not be permissible once an application is appealed.

The reason is simple. The present system just encourages ambit claim applications. Instead, developers should be encouraged to get it right the first time and submit applications that meet the limitations of the site as well as local and state planning policies and overlays.

Their DA should represent what they actually intend to build, not what they think they might be able to get away with (for example, by intimidating junior and inexperienced council planning staff, or throwing large resources at a VCAT appeal).

The only grounds for appeal of DA's to VCAT should be based on the failure of a Responsible Authority to apply local or state policy properly in reaching a decision.

SOS also suggests that Councils should be able to refuse to consider applications that are not in accord with Council policies and objectives. Such a decision not to accept the application ought to be appealable but the powers of VCAT in this instance should be restricted to either upholding the Council decision or directing the Council to accept the application.

These reforms would remove most ambit claims and speculative development from the system, freeing up Council time to consider and report on applications of merit.

These simple steps alone would require little more than the political will and no new bureaucratic processes (considerably less in fact), mostly just a few word changes in the relevant legislation as well as several new Ministerial VCAT practice notes.

This would vastly improve VCAT congestion and Council approval times as well as decreasing the number of inappropriate DAs and safeguarding the community from inappropriate development.

Whenever there is provision for the exercise of discretion, the inevitable result is that the unscrupulous developer will exploit every loophole and definition, every "should" and "may" in the legislation, and use whatever tactics are necessary to influence, confuse and intimidate Council planners. At VCAT, they will then resort to a variety of "independent, expert" (and well paid) witnesses and a QC or two to win their case.

In terms of natural justice, VCAT was originally intended to be a court where ordinary citizens could argue their case equitably without being hopelessly out-manoeuvred by professional lawyers and other planning professional hired guns.

INADEQUACY OFTHE DAF/SOCOM CONSULTATION PROCESS

SOS (Victoria) has not presented a more detailed submission in response to the ANU reports and the Draft Consultation document on DAF for two reasons.

First, as volunteers and individuals, we required more time than was available to do the necessary research to enable a comprehensive response to be made.

However, just as importantly, we were hesitant to commit to such an effort when it appears to us that the DAF consultation process undertaken by SOCOM has not constituted a serious attempt to involve local community groups and residents.

SOS heard about the initial Information sessions at Nauru House only three days in advance, and not through any direct contact by the organisers. At the information session for community representatives, only three people were present, not surprising given that the meeting was held at 4pm in the CBD. Further, only one of those was a community group representative (a member of our SOS committee).

Had SOCOM been serious about ensuring community awareness of DAF and enabling community views on DAF to be taken into account, some effort would have been put into identifying the relevant organisations and then contacting them directly to invite them, in a timely fashion, to participate.

In contrast, the Melbourne 2030 consultation process involved extensive consultation at a whole series of public forums and individuals were contacted directly by mail and kept informed of the process, which in toto ran for several years.

However, most of the advice received from the comprehensive M2030 process was subsequently ignored by the State Government, even its technical expert reports.

In comparison, the DAF process even from the outset seems to be little more than window-dressing. The whole consultation process effectively ran for a mere six and a half weeks, from the information sessions on May 14 to the focus groups in mid-June and then the deadline for written submissions only a few weeks later on June 30.

This is a manifestly inadequate length of time for a comprehensive consultation process that should involve the entire community, given that the issue involves overhauling the entire town planning regime of the State.

This confirms our concern that the real motivation behind DAF is not to address the complexities and balance of environmental, social and economic pressures in an equitable and democratic way for the overall benefit of citizens but, as the Socom website states, just to make the planning regime easier and quicker to use, with reduced compliance and more flexible regulatory systems for businesses.

Appendix 1: SOS General Policies (1998)

Preamble:

> *Save Our Suburbs is an organisation devoted to protecting citizens from the destruction of their houses, their streets, and their environment.*
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> *Melbourne's suburbs provide some of the most desirable living conditions in the world and a lifestyle which is quintessentially Australian. Changes will inevitably occur in these suburbs, but these changes must be managed for the benefit of the community. They must cater for the future, rather than for short term demographic pressures, political fads or speculative profits. And they must be brought about with full regard for the established rights and expectations of existing residents and property owners.*
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> *We have a positive vision. Melbourne should retain its incomparable suburban environments, but should incorporate within this fabric concentrations of higher density development, clustered around nodes of public transport and provided with retail outlets, job opportunities, and educational and cultural facilities.*
>
> *The need for travel should be minimised. New residential development should be well designed in terms of its impact within the neighbourhood, the lifestyle it offers to its occupants, its energy performance, and its aesthetics. All suburban areas should be properly served by public transport and provided with parks and community and other facilities upon an equitable basis.*
>
> *Decision-making should be in the hands of elected representatives responsive to the wishes of citizens, whether at a local, a state or a federal level.*

General Policies:

1. SOS seeks to preserve the amenity and rights of existing residents.
2. SOS seeks to preserve and enhance the character of Melbourne's suburbs.
3. SOS believes that there is a case for an increase in residential density in some areas.
4. SOS believes that medium and high density development should take place in properly chosen locations and in a coordinated fashion, rather than upon an unplanned and sporadic basis.
5. SOS believes that greater densities can and should be achieved without adversely affecting existing residents, and with better quality results than at present.
6. SOS believes that the urban expansion of Melbourne should be contained by means of direct government intervention to prevent the development of peripheral agricultural and other land.
7. SOS believes that all forms of development should bear the direct and indirect costs involved, so far as these can be calculated, unless a subsidy is required in the public interest and for explicit reasons.
8. SOS believes that the whole of the planning system requires modification to meet the reasonable expectations of residents.
9. SOS believes that the State Government and the Minister for Planning should accept responsibility for the state of the planning system, and should rectify it as necessary.
10. SOS believes that the detailed planning of local areas should be the responsibility of democratically responsible local governments.

Appendix 2: VCAT Policy (2002)

Summary

In its planning review function, VCAT has evolved as an organisation which can override local Council policy with arbitrary decision making processes.

We believe that:

> **VCAT should, in its planning jurisdiction, be concerned only with appeals over legal and technical errors and inconsistencies in any decision or decisions by a responsible authority.**
>
> **As a prerequisite to appealing at VCAT, the appellant should be required to first demonstrate that the Council has failed to comply with its own policies and legal obligations in issuing either a notice of decision or a refusal for a permit. Matters of subjective judgement should not be appealable.**

1: Why VCAT should be reformed

The current system is wasteful and costly and perceived by the general public as having processes that are unfairly biased in favour of developers. Outcomes are unpredictable and inconsistent in that individual members are not bound by precedent and are able to apply their own subjective views to cases they hear without fear of challenge or review.

In considering appeals as new applications, VCAT duplicates the work already done by Councils, resulting in the unnecessary expense of time and money by Councils and objectors alike. This encourages developers to submit ambit applications to Councils in the hope that VCAT might give them a permit for a slightly watered down version. The system discourages developers from getting it right in the first place.

Allowing VCAT to stand in the shoes of the responsible authority diminishes the right of the community to establish local interpretations of State policy guidelines through local planning schemes. These have received input from users and community prior to receiving Ministerial assent and their integrity should not be compromised by an appeal tribunal. Developers, Councils and communities will all benefit from a more efficient planning process.

There is currently no avenue to correct erroneous VCAT decisions, except on a point of law. This is prohibitively costly for most people, even on the rare occasions when a point of law exists.

In summary, the SOS VCAT policy will achieve the following goals:

- Transparency of decision making to improve confidence in the planning system
- The need to provide a separate system of checks and balances on VCAT decisions is obviated

- Economic benefits will flow through cost savings from avoiding lengthy delays
- If an appeal is upheld then areas of deficiency in Council's policy or systems will be more readily highlighted with, perhaps, recommended remedies.

2: Objectives of the policy

1. That VCAT should not be a generator of planning policy
2. That VCAT should not be able to interfere with properly approved planning provisions by invoking state or metropolitan objectives
3. That VCAT should not overturn or interfere with decisions which have been properly made by a responsible authority
4. That VCAT should not impose the subjective opinions of its members in relation to planning, architectural or other questions
5. That any decision by VCAT should be consistent with all previous and properly made policies and decisions of the responsible authority
6. That an appeal to VCAT should not be seen as a chance for a second bite at the cherry.
7. That applicants for permits should not be in a position to benefit from making ambit claims to VCAT
8. That permits should not be amended without going through the usual notification and advertising process, unless by the common consent of all concerned parties
9. That responsible authorities be the sole sources for issuing permits
10. That VCAT should truly be a body of review and not itself a decision maker that is not subject to review.

THE SOS VCAT POLICY

1. VCAT should, in its planning jurisdiction, be concerned only with appeals over legal and technical errors and inconsistencies in any decision or decisions by a responsible authority, and not with substantive planning issues.
2. As a prerequisite to having an appeal listed at VCAT, the appellant should be required to first demonstrate that the Council has failed to comply with its own policies and legal obligations in issuing either a notice of decision or a refusal for a permit. Matters of subjective judgement should not be appealable.
3. In hearing the appeal, VCAT should be required to take account of all relevant elements of the Victorian Planning Provisions, of any previously published planning or other relevant policies of the responsible authority, and of any

previous decisions, directions or undertakings by the responsible authority relating to the subject or neighbouring properties, as provided for under Section 60 of the Planning and Environment Act 1987.

4. If the responsible authority has deemed it appropriate to use the powers granted to it by s60(1)(b) of the Planning and Environment Act 1987, the Tribunal should be required to restrict its assessment of the responsible authority's use of these powers to the consideration of the legal correctness, or otherwise, of this use.

5. Except as may be provided for in points 3 and 4 above, VCAT should be required to operate on the presumption that existing planning schemes and provisions already take proper account of state and metropolitan planning objectives and should not seek to re-implement such objectives.

6. In relation to a decision by a responsible authority, VCAT should have the following courses available to it:

   - Affirm the decision of the responsible authority to grant or not to grant a permit
   - Amend a permit or permits, but only with the consent of all parties to the appeal, and only if it is satisfied that no other party will be materially affected
   - Direct the responsible authority to issue new or modified permits, either subject to advertising conditions or within 14 days, and/or
   - Rescind a permit or permits