www.sos.asn.au
G.P.O. Box 5042
Melbourne 3001

Review of the Planning and Environment Act 1987:

Submission by Save Our Suburbs, Inc (Vic)

May 2009

[partly updated, February 2014]

Ian Wood,
President SOS

CONTENTS

1 Preamble
2 The Need for more Prescription
3 Democratic council processes & accountability
4 Role of VCAT - to include council oversight
5 Residents' notification and appeal rights
6 ESD & Sustainability
7 Clarify Rescode objectives & standards
8 Compliance with State and National Standards
9 Other Issues
10 Specific Reponses to the Discussion Paper
11 Specific Clauses to address

Reference List

Appendix 1 SOS Submission on DAF (2004)

**Appendix 2 Perforated Metal Screening:
Ineffective for privacy applications to prevent overlooking**

Appendix 3 Two VCAT decisions involving council responses to errors of their own making

1 Preamble

SOS appreciates the opportunity to contribute to this vital review. However, our submission could have been more thorough and better organized if there had been more time available in which to complete it, although it has at least benefited from professional legal advice. Other reviews have also demanded our attention this year and community groups have to complete these undertakings in their spare time.

SOS agrees there is a need to simplify the current laws, eliminate duplication, remove redundant provisions, modernise the language and strengthen certainty and timeliness in the planning process. But because of growing demographic, environmental and social pressures the Review must go further than just technically streamlining the present system - it must simultaneously address the quality of planning outcomes and how the Act and the planning schemes can operate more democratically rather than just simplistically remove some of the existing controls on urban consolidation.

Otherwise the state risks a short-sighted knee-jerk reaction that would simply encourage market forces to operate with even fewer constraints and less transparency than exists now. History abounds with examples of how the market fails to deliver outcomes in the public interest.

In an era of increasing external pressures the guiding hand of government in the public interest is vital. We know how we want our city to be developed and we are quite prepared to listen to the advice of independent experts (as opposed to state bureaucrats) in order to meet these external pressures. But in a democracy we must be able to do so in an informed way that maximizes the functionality and liveability of the whole metro area, not only for ourselves but for future generations.

We support the following objectives of the Review, as will become clear from the body of this submission:

- enable the planning system to better respond to the challenges of the future
- increase efficiency, effectiveness, certainty and transparency
- improve the speed and quality of decision-making

However, we are concerned about the approach of other objectives:

- reduce regulatory burden: This suggests the Review wants to reduce planning controls or limit the situations where they apply. This is entirely the wrong direction because it allows less direction over development at a time when population, environmental and social pressures are combining to make it essential that planning decisions are more carefully considered, not less. We cannot afford any longer not to get it right. This will mean tighter and more mandatory regulation.

- deliver mechanisms that help to balance policy objectives in decision-making: This indicates that little thought is being given to the advantages of most controls being mandatory. As long as they are discretionary, the job of bureaucrats is made problematic, lengthy and inconsistent, as well as vulnerable to incompetence and corruption (see VAGO May 2008).

Unlike most other legal jurisdictions, the implementation of the PE Act via municipal planning schemes effectively has few actual rules, only discretionary guidelines. The conclusions of the VAGO report of May 2008 (1) supports the experience of SOS members and countless other residents that decision-making in most development application (DA) assessments is flawed. To complicate things further, these discretionary decisions are appealable. No legislative system can operate like this and still provide certainty, transparency, consistency and optimum outcomes - as all the angst, delays, poor planning outcomes and continual attempts at "band-aid" planning reforms over the last decade have so amply demonstrated.

The planning system is currently set up to reward recalcitrance. Most of the delays are due to the extra time devoted to non-compliant DAs in terms of requesting further information, negotiating amendments, dealing with large numbers of objections, etc.

Building & planning standards were gradually established last century as society realized that ad hoc development was constraining the city's efficiency and functionality and leading to adverse health and psychological effects from inadequate drainage, poor access to light and air circulation, etc.

Now planning standards have been made optional through the delegated exercise of discretion in the name of urban consolidation. The ultimate farce is that the controls that were supposed to focus the bulk of this increased density around mass transit nodes to optimize transport and urban efficiency are almost non-existent, especially any controls to limit or prevent further densification in areas with no mass transit (like most of the activity centres in Melbourne)

Instead, the planning regime not only allows but encourages higher density proposals in little pockets of infill development spread right across the metro area (being the areas of maximum proportional profit). There should be a strategy developed with wide community consultation on the optimum size of the city and even areas within the city (due to geography, neighbourhood character and the exponential costs of expanding infrastructure & utility services). Policies and mechanisms should be developed to direct further population growth to regional centres.

Finally, the issues raised in the recent VAGO reports need serious consideration - some of the key recommendations and comments are listed below:

- *The introduction of user-pays fees to cover the full cost of processing DA's*
- *The role of DoI enhanced in the areas of council support to improve their responsiveness to planning issues raised by councils*
- *Applicant fees are inadequate to cover the costs of planning permit processing*
- *Enforcement of the scheme and permits are an area of concern, particularly responsiveness and the level of fines imposed for breaches*
- *Acknowledged areas for improvement by councils include notification in some cases, documentation, staff training, enforcement and assessment*

To quote the VAGO report, "The major challenge for the Minister and the Department is to develop a true partnership with local councils in delivering planning services to the people of Victoria which meet their aspirations. This will require a further culture shift and a high level of co-operation with councils."

2 The need for more prescription

To maximise delegated discretionary decision-making in an area involving powerful vested interests and large financial investments is to just invite inefficiency, errors of judgment, undue influence and corruption. Add to this under-trained and over-worked council bureaucracies (due largely to a performance-based discretionary planning regime that requires more time to make decisions, coupled with a shortage of skilled planners and increasingly complex planning controls) and it's no wonder the system was strongly criticized in the 7 May 2008 VAGO report into planning in Victoria, which confirmed what residents have known for years and what VAGO revealed in Dec.1999 - that most permit assessments (78%) are flawed in terms of meeting statutory requirements.

Because of these issues and the importance of orderly planning to the community, land use planning must be highly and transparently regulated, but with ample community and independent expert input into the formulation of those regulations.

We agree with criticism from all parties that the planning permit & appeal process is too lengthy, overly cumbersome and too uncertain (as pointed out several years ago by the M2030 Implementation Reference Group, whose advisory reports have now been removed from the department website). This is partly due to the discretionary nature of the planning regime and partly because the Act & planning schemes have been "band-aided" for years with increasingly confusing complexity.

The government's simplistic approach to the planning log jam is to relax or remove controls that are there to protect the community but this does nothing to reduce the complexity, unfairness and dysfunctionality of the rest of the planning code.

SOS believes a more constructive and democratic solution would be to make most existing amenity standards and overlay requirements mandatory (which by definition wouldn't affect compliant DAs and would automatically fast-track all compliant proposals). The PE Act must also ensure that local *incorporated* policy variations take precedence over the VPPs - otherwise there is no point in councils bothering to put such local guidance measures in place. This issue is the single biggest reason for community dissatisfaction with VCAT decisions, because of insufficient weight given to local policy and the feeling of betrayal that this generates.

Areas suitable for great intensity development are well-catered for under the SPPF (eg, a DPO or IPO faciliates development of a large brownfield site). However, provisions to restrict built form further are needed in key local areas where unique buildings or geographical features dictate greater protection. This can be provided by variations to Rescode standards in residential zone schedules, which may increase minimum requirements for setbacks, back yard size, etc

More mandatory controls should include also legislating for **fast track refusals** for applications that don't meet these key standards. This would guarantee what are supposed to be minimum standards anyway and reduce opportunities for incompetent or corrupt exercise of discretion. Overlays in particular should be mandatory because they are able to best reflect the detail of local policy like structure plans which are

often worked out in exhaustive consultation with local communities. This is democracy in action and must be legislatively supported.

These steps would achieve what the government claims it wants. Mandatory statutory controls would have to apply to both councils and to VCAT and would:
- slash council workloads by minimising discretionary decision-making
- reduce DA assessment times across the board
- cut the number of DA's that are ambit claims
- reduce the planning caseload at VCAT
while also
- effectively fast-tracking compliant applications
- improving the quality of planning outcomes
- providing much more certainty for all parties

The "downsides" would be fewer non-compliant projects, less work for planning professionals and less opportunity for unscrupulous developers to get non-compliant projects approved. A few genuinely appropriate projects with unique site constraints may be curtailed or even blocked by more prescriptive controls but if they are of sufficient strategic state significance or sufficient importance to the local community, and if to be viable they need to exceed planning guidelines, then the Minister can always call them in.

These changes would also prevent the inappropriate exercise of discretion by the Tribunal in instances like the Cranbourne gas fiasco, where VCAT earlier ignored the combined advice of the council and a referral authority (EPA) attempting to act in the public interest. In doing so in order to grant a permit, VCAT also abrogated a legal s173 agreement between the council and the EPA. On top of this, a promised full written decision never eventuated, despite requests from the council. This was contrary to normal practice and the VCAT Act. This case only serves to underline the need for limits on the discretionary power of VCAT to override local policy and existing legal instruments, and for accountability measures to be introduced that don't require having to resort to expensive Supreme Court action (where appeals are limited anyway by very narrow legal technical grounds). See **Part 4 - Role of VCAT**.

In Victoria, a democratically-elected council can have its decisions overturned by an non-elected body (VCAT) on matters of subjective opinion, like residential amenity. We have a vague policy-based system with few mandatory rules, combined with an unlimited right to review decisions on their merits via a separate body which makes the decision all over again (but without any accountability or any depth of local experience of the development area). We maximize the uncertainty and the number of things people can fight about and then allow everything to be challenged in stage two.

If you were designing a system to maximise litigation, uncertainty, public dissatisfaction and conflict, it's hard to think of a better way. Nowhere else are these two combined - general and conflicting policy guidelines instead of rules, coupled with an unlimited right of review! Both need fixing - more prescription and certainty and an appeal body focused more on oversight of council administration (NB - but see **part 4 Role of VCAT** below for a compromise suggestion).

3 Democratic council processes & accountability

Since the P&E Act began in 1987, council amalgamations and performance-based planning schemes have been introduced. This meant less democracy (less councilors per ratepayer) so community consultation was stressed in the Local Government Act in the late 90s (Best Value, etc). But due to the inherently undemocratic LG corporate structure and its increasing lack of accountability (see VAGO 2), democracy needs more, not less, emphasis in the revised PE Act - ie the DAF approach is not appropriate in a democratic system.
(see Appendix 1 and also **part 5 Notification & Appeal rights**).

Under Best Value, councils are supposed to have responsive consultation processes in place that cover all their service areas. The six BV principles clearly apply to existing as well as proposed policies and services, and principles 2, 3 and 5 are particularly relevant to planning issues:

2 All Council services must be responsive to the needs of its community
3 A Council must achieve continuous improvement in its community services
5 A Council must develop a program of regular consultation with its community in relation to its services

Best Value needs to be more strongly legislated for in the LG Act but also reinforced by the P&E Act. One way would be for the Minister to issue a Code as to how the Best Value principles should be applied in statutory planning under s208H of the Local Government Act. There should be mandated processes for improved cooperation and feedback between councils and their communities (in planning in particular).

The VLGA/Best Value/Office of Local Government Consultation Guidelines (Chart, p15-16) show that the model most suited to on-going feedback and oversight on service issues like statutory planning is the Advisory Committee. Hence the revised PE Act should include a requirement that each council must establish at least one s86 committee to monitor and advise on service issues including town planning. Each committee would be required to include democratic community representation - ie, one or two representatives from community groups, not just some arbitrary selection from a random cross-section of residents, most of whom know nothing about specific local government issues (councils typically use this latter "widely representative" approach to minimize complaints in sensitive areas).

Given that town planning is consistently the area of council services most criticized in annual community surveys, the community representatives on a council s86 committee should include at least one experienced member of a local community planning group, preferably with some professional expertise in planning.

These would effectively be audit committees whose purpose would be to deal with any significant process or propriety issues referred to them internally or externally (ie by members of the community. Their function and terms of reference would be analogous to committees set up under the Dept of Health Advisory Committee structure.

The DPCD secretary's response to the issues revealed by VAGO (June 2008) was:

> *My Department, through Local Government Victoria, will continue to work with the peak bodies to help councils improve their performance reporting and use of indicators. I support the recommendation to establish minimum standards for the form and content of performance statements. Regulations are one way to do this, guidelines are another. Whether or not regulations are the best means of doing this will need to be subject to consultation with the sector (2).*

This is ineffectual. DPCD currently only seems to have the ability to implement whatever has the support of councils - but no council is going to voluntarily open itself up to more public scrutiny than it is legally required to, irrespective of reassuring motherhood statements in legislation that encourage rather than require.

This is why the situation has not improved (VAGO Enforcement Report Nov.2008). Performance monitoring and reporting on town planning issues by councils is currently almost useless (VAGO June 2008). Consequently there must be a statutory requirement in the amended PE Act for DPCD to impose mandatory performance & outcome-based KPIs on councils. This should include council audits and performance reporting (based on a transparent community consultation process), and mandatory establishment of formal s86 advisory committees to oversee controversial services like planning (on a confidential basis where appropriate) as described above.

Ratepayers are effectively shareholders in the municipal corporation and should have some direct democratic involvement in at least monitoring it. Specific reference to the recent Victorian Charter of Human Rights should also be included in the Act.

NB 1: s86 committees with community representation are already provided for in the LG Act - but to avoid democratic scrutiny, councils rarely establish such committees in contentious areas like statutory planning]

NB 2: s151 committees are also already provided for in the P&E Act and could be made a statutory requirement to provide wider input from representatives of the community and other stakeholders to the minister and the department on an on-going basis, and to liaise with councils. This would be analogous to the Melbourne 2030 Implementation Reference Group established by a former planning minister to advise on the progress of the M2030 strategy, but subsequently unilaterally abolished by the present minister.

4 Role of VCAT - to include council oversight

It is current SOS policy that VCAT should fulfill an oversight role for councils, not conduct de novo hearings. Various VAGO reports make it clear that effective independent oversight by a body empowered to require remedial action and compliance is long overdue. VCAT is the only entity able to uncover and order remedies to errors in council DA assessment processes.

But at present it has no role of judicial review of local government, only merits reviews (although with enforcement hearings councils can be ordered to pay costs). So despite all the issues uncovered by VAGO (including enforcement - see VAGO Nov.2008 - ref 3), there is no body exercising any regular oversight over council performance - apart from DPCD which has so far not been able to establish an improved and transparent regulatory process and set KPIs for council performance (VAGO June 2008, ref 2).

However, we appreciate the legal complexities of judicial review so it may be an effective compromise to institute instead an "extended merits review" process for VCAT similar to its powers in enforcement hearings - but only if:

(a) a substantial degree of prescription is re-introduced into planning schemes (with a corresponding decrease in the exercise of discretion by both councils and VCAT)

(b) VCAT and councils are required under the Act to uphold *incorporated* local variations as the default standard or policy

(c) VCAT is given the power to consider council DA processes in merits hearing (as with enforcement hearings), or at least be required to refer issues so identified to an entity such as a Victorian ICAC or a special Local Government Ombudsman (similar to the situation under the *Building Act*, for example where it is clear that the PE Act has not been complied with by a Council officer. This would require councils to be more accountable and directed to implement administrative or other reforms where appropriate to prevent repetition (eg, stronger & more transparent KPIs to improve accountability; staff re-training, etc)

(d) VCAT is given the power to protect councils from legal action in cases where they sought to remedy their own mistakes in the public interest

(e) VCAT itself is made more accountable - there are cases where its exercise of discretion has been demonstrably in error but it can currently only be challenged on technical legal grounds.

(e) Substitution of amended plans is disallowed - while it undeniably results in improved outcomes, those outcomes would be already achieved if well-designed and compliant plans had to be submitted to council in the first place. The main effect of the opportunity to submit amended plans is to encourage ambit claims. Invariably this occurs in response to the concerns of objectors and/or council, so it should only allowed during the council DA stage of the process, if at all. Developers must be encouraged to make the effort to "get it right" with their applications from the start, rather than having them effectively re-designed on their way through the process of obtaining a permit. While this approach is a gamble that often pays off, it does not represent the certainty that most developers say they want in order to properly plan the stages of their projects.

If planners were to become subject to a statutory registration system, VCAT could similarly be empowered to refer issues to the relevant regulatory board, for example where it is apparent that incorrect or misleading information has been lodged with Council or VCAT, or advertised, in relation to a DA or Scheme amendment.

An LG Ombudsman should also be specifically empowered to carry out regular audits and reviews of local government practices and decision-making.

The ultimate aim of the above conditions (particularly disallowing of amended plans) should be to persuade developers that they will only get a permit if they lodge accurate, compliant applications at the outset so they don't waste the time and resources of other parties. The present flexible system encourages the opposite. Developers also have the advantage that they can claim their application & VCAT costs as tax deductions - again, at the taxpayers' expense.

No other government department or private entity works like this - deficient applications in most other jurisdictions are simply rejected. No appeal; a properly-completed application just has to be re-submitted. Planning is in the public interest and should be treated as such. Permit applicants use professional architects, planning consultants and even lawyers to design and progress their development proposals so there is no excuse for sub-standard or erroneous DA's to be submitted.

VCAT oversight is also needed to address the accountability of council staff who seem to be increasingly focused on risk reduction and cover-up, not on correcting mistakes and avoiding repetition. Strong reforms are needed to improve council administration of the DA and enforcement process, and more oversight by objectors is needed right through the process - they are the parties with the strongest vested interest in detecting errors and misrepresentation on the part of proponents.

For example, transparent accountability would be enhanced if objectors were able to accompany infringement officers on site inspections where they are the complainants (or at least be able to inspect infringement notices in these cases - they can now, but only under FOI). In particular, the Act should also provide a week for objectors to check amended plans prior to endorsement. The rationale is simple - council staff pick up few of the deliberate but unrequested changes that some less scrupulous developers introduce on plans for endorsement after a permit has been granted.

These unauthorized deliberate additions result in inconsistencies within plans and between plans and permits, which make subsequent enforcement problematic. Consequently, there must be provision to legally and automatically remedy such changes introduced by stealth (similar to changes under s73 or the VCAT "slip rule") so that when incorrect or fraudulent plans are endorsed they can be easily corrected.

New legislation must also ensure that neither council nor the objectors could be held liable in such cases for damages due to corrections to the plans and delays, etc, due to any need for construction alterations. This would put the onus on developers to avoid fraudulent or careless accidental changes to endorsed plans (the vast majority of cases we are aware of have been deliberate changes by stealth).

Since councils are legally responsible when these surreptitious changes are not picked up they are always loath to admit the error, let alone rectify it, because currently they are at risk from their action. This knee-jerk defensive reaction of risk assessment and cover-up rather than attempting to correct errors can only be eradicated by a legislative requirement (with penalties for non-compliance) for councils to act to

rectify mistakes of their own making, whether deliberate or not, and to provide them with legal indemnity where an error has been accidental or unavoidable.

VCAT has made some strong judgments on this issue (see Appendix 3) which should be enhanced by legislation to oblige councils to address their own mistakes, and to be protected when they do so; but to be penalized further if they avoid remediation which they are aware is necessary, if only from a natural justice point of view. The vast majority of residents simply expect to be treated honestly and fairly.

However, especially because of these added powers VCAT must also be made more accountable itself - currently it is effectively immune from challenge. Firstly, the PE Act (and the VCAT Act) must be amended to require Members to adhere to local policy and local standard variations (see Part 2). Limits must be placed on the Tribunal's discretionary power to override policy and existing legal instruments.

Secondly, accountability measures are needed that don't require having to challenge VCAT decisions in the Supreme Court. A start could be made by mandatory training for Members in the issues outlined above (including the new Charter of Human Rights); by specific issues-based training for particular types of cases; by a requirement that Members with relevant professional backgrounds be appointed to hear more complex cases; and by instigating a formal complaints system to address controversial decisions to at least lessen the likelihood of repetition. The tenure of Members who were the subject of more than a few valid complaints would not be renewed or it could be terminated early.

While much of this comes under the LG Act, wherever possible the P&E Act should address these issues as well with regard to planning.

5 Residents' notification and appeal rights

SOS believes strongly that as long as the planning system retains performance-based "requirements" and discretionary decision-making, notice and appeal rights MUST be preserved and extended to ALL areas, including business zones. Notice and Review rights cannot be limited to the adjoining and opposite properties. Many developments impact the surrounding area for a considerable distance. Non residential uses, such as super-markets and medical or child care centres, should require a permit in a residential zone and not be exempt from parking requirements.

Former head of VCAT, Justice Morris, argued for appeal rights even in business zones. His general support for notice and appeal rights is predicated on 3 principles:
- better local democracy and governance
- improved planning outcomes through better scrutiny of applications
- greater scrutiny and transparency, which discourages corruption

[S. Morris, Third Party Participation in the Planning Permit Process, VUT, 4 March 2005 - ref 5*]*

No matter how planning operates, the fact remains that scrutiny and transparency discourages corruption, so in a democracy and absent any other independent third

party oversight, notice and appeal rights must remain (on valid planning grounds) and for the same reason they should be extended to all planning applications.

The objection process produces superior scrutiny of applications because residents have a vested interest. In our experience, objectors provide a vital quality control function because council planners often don't have the time or motivation to do more than a cursory compliance check. They often don't do proper site inspections and sometimes don't detect basic flaws, inconsistencies or errors in application plans.

The common occurrence of such faulty assessments was corroborated by the VAGO Land Use Planning report (May 2008 - ref 1), which concluded inter alia:

> *In 78% of cases examined, officer reports did not give adequate consideration to matters specified in the Act, planning scheme, or both, when assessing planning permit applications…deficiencies in most other stages of the permit process were also evident…".*

6 ESD & Sustainability

All applications for land use and development should require both a planning and a building permit so that two key issues can be taken into account in all cases - ESD principles (for long-term optimum building performance) and Neighbourhood Character (to protect local streetscapes etc). ESD principles like passive solar design need to be incorporated right from the start to ensure they are integrated into the design as cost effectively as possible. There are significant limitations on how well ESD goals can be met by only considering building materials and fittings, despite a number of VCAT decisions, including several by Justice Stuart Morris.

In *Taras Nominees v Yarra CC [2003] VCAT 1952* Justice Morris stated:

> *If environmentally sustainable design is to be incorporated into buildings, this should be required by the building regulation system and not be principally required by the town planning system…if environmentally sustainable design is important, as I believe it is, it ought be incorporated in all buildings, regardless whether those buildings require a planning permit or not. The vast majority of buildings which are erected in Victoria each year do not require a planning permit. Hence the principal approach for ensuring environmentally sustainable development must be by way of the building control system.*

This approach does guarantee that most buildings will incorporate some degree of ESD, but it ignores the major gains in building performance that can only be made by optimising the basic ESD principles of passive solar design. These have to be incorporated via the orientation and layout of building envelopes, including floor plans, elevations, location of open space, window placement and orientation, etc. Passive solar design cannot be efficiently addressed at the building stage (eg, by just using minor "add-ons" like thicker insulation or double-glazing).

If the Government is serious about improving Victoria's water and energy conservation performance, all development applications should undergo ESD assessment to optimise any significant siting and layout issues. This will encourage

developers to start taking ESD seriously, whereas currently the great majority of building designs are still driven simply by the maximisation of short-term financial return, not long-term environmental performance.

Basic ESD principles of passive solar design are already being recognised in recent incorporated changes to some municipal planning schemes (eg Yarra planning scheme: Clause 22.10-3.5 Environmental Sustainability). This Built Form policy was approved by DSE and the Planning Minister and yet the Morris/VCAT approach to implementing ESD flies in the face of attempts by local government to address these crucial issues via incorporated planning measures.

The extra resources involved in requiring all development applications to undergo an ESD assessment can be provided by the primary reforms listed above in part 2 - make Rescode amenity standards and planning scheme zone and overlay provisions mandatory, to reduce uncertainty and the often inappropriate exercise of discretion.

Together, these planning reforms advocated by SOS would improve assessment efficiency and pressure developers to start taking ESD seriously, in line with other government policies such as climate change.

As the white-goods energy ratings scheme showed clearly, industry doesn't mind regulation as long as it has a legitimate rationale, adequate notice and a level playing field so that all competitors are subject to the same rules. And if the economy and jobs are the government's overriding concern, the suggested SOS reforms will ensure that planning outcomes are better, quicker and more certain - all of which will benefit the developer's financial equation. But it will also mean that excessive or non-compliant proposals have to be whittled down a bit for a successful application.

7 Clarify Rescode objectives & standards

In the Chak Lai case (reference 6), the Member commented on "*the relevant portion of cl.55 under the sub-heading 'Operation': An objective describes the desired outcome to be achieved in the completed development…A standard contains the requirements to meet the objective*". While the Member was technically correct in saying that this Clause can't be interpreted as meaning that meeting the standard will not necessarily meet the objective, it was a theoretical argument. VCAT takes a practical approach to resolving planning issues and in this case it was arguable whether meeting the standard enabled the objective to be met.

This situation is not uncommon in practice - eg, the overlooking standard (9m) may be technically met but in practice due to a local site context or use, this degree of overlooking may be excessive or inappropriate. Another more technical example is limiting overlooking through the use of perforated metal screening, which is virtually transparent and equivalent to looking through flywire or tinted clear glass (due to the diffraction effect - see Appendix 2).

DoI is quoted in the Chak Lai case as recognizing that in real life, meeting standards will not always meet an objective (DoI practice note, June 04, ref.7) but the Member dismissed this as legally unsupportable in terms of Parliament's intentions. But the

drafters of Rescode were not aware of every possible site situation - hence the exercise of discretion, which is normally used when technical compliance is difficult or where it is possible but does not necessarily produce a desired or acceptable result.

According to our legal advice, the bottom line legally is set not by the "Operation" of Rescode but by the "Requirements" in the Rescode introduction, which state that: *'a development MUST meet all the objectives and SHOULD meet all the standards'*. The corollary is clearly that if, for some practical reason, meeting a standard does NOT meet an objective, then an alternative design solution must be found.

This should be clarified in the Act by including a requirement for compliance with Rescode as part of s60, along with incorporation of the DoI June 2004 Practice Note: "Understanding the Residential Development Standards" (ref.7):
"Each objective contains a relevant standard. A standard contains the preferred requirements or measures to meet the objective. However, if the particular features of your site or the neighbourhood mean that application of the standard would not meet the objective, an alternative design solution that meets the objective is required. Meeting the standard does not automatically mean that the objective has been met."

Finally, it needs to be formally recognized that Rescode standards are supposed to be minimum, not maximum, specifications (most contain the words "at least").

8 Compliance with State and National Standards

The community expects that state and national standards will be used to maintain the quality of local amenity and infrastructure. Some standards (eg AS/NZS 2890.1:2004 - Off-street car parking) are incorporated in planning schemes and thus clearly intended to apply to planning proposals.

VCAT and councils should not be able to approve a planning permit where any aspect of the development concerned does not conform to the appropriate safety and amenity standards not only of the Building Regulations but also of the Building Code of Australia and Standards Australia. S62(4) P&E Act should be strengthened to read:

> The responsible authority must not include in a permit a condition ***or approved plans*** which are inconsistent ***with***—
> (a) the Building Act 1993; or
> (b) the building regulations under that Act; or
> (c) a relevant determination of the Building Appeals Board under that Act in respect of the land to which the permit applies; or
> ***(d) the Building Code of Australia, or***
> ***(e) any state or national standard incorporated into a planning scheme***

This should also include protection/provision of access to easements, which both VCAT and councils often fail to insist on. This will have negative implications for infrastructure maintenance in the future.

9 Other Issues

ICAC necessary in Victoria

The latest revelations about council corruption in Brimbank underscore the demand from the professional and lay community for an ICAC in Victoria. As the recent NSW experience has shown, an ICAC would be invaluable as a safeguard to uphold council standards of propriety. That would also obviate the need to set up a special Local Government Ombudsman in Victoria (going on the VAGO reports, there will be too great a workload for the present Victorian Ombudsman to tackle the council oversight function).

Note that contrary to frequent political claims, the present Victorian Ombudsman's Office IS more limited than a corruption commission would be in a number of ways, including its investigative powers and even its terms of reference which normally prevent it dealing with issues over 12 months old.

Cases where lot boundaries do not comply with actual boundaries

Even if boundary anomalies would technically require the developer to subsequently apply for a new or amended planning permit, VCAT will still hear the case. That may be apropriate from a technical legal and property law point of view, but in practice (from cases we are aware of) it may mean that the developer intends to persevere with the original development and ignore the boundary issues, relying on the fact that neighbours are loath to get involved in court battles and that council building inspectors are loath to prosecute breaches with no significant risk to council (ie no health & safety implications). Developers frequently don't even fully comply with VCAT enforcement orders.

The law should protect the innocent - people should be able to rely on the permit system to prevent the onus being forced back on them to take Supreme Court action to protect their boundary from an unscrupulous developer who will usually take a punt that it's not worth the resident's angst, time & money. Councils & VCAT are very loath to remove buildings where distances of less than 300mm are involved so why not cut out any doubt from the start - failure of plans to conform to boundaries (ie existing fence-lines) should mean no permit assessment, let alone grant of a permit.

Thus if evidence shows that boundary anomalies will prevent a proposal from being constructed without changes to the building envelope, that would be grounds for council to reject the application. If such a case did proceed through to VCAT, the matter should be thrown out or at the very least the case should be heard based on the actual boundaries. This is a common sense and fair response in order to minimize future uncertainty and the possibility of illegal development requiring further more complicated legal proceedings.

Parallel changes to Building Act & Regulations as well as P&E Act [& LG Act]

The two need to be coordinated. There is especially a need to address mandatory insurance and enforcement provisions (clarify & strengthen, especially penalties). Eg, building permits and similar notifications are rarely sent to councils within 7 days as

theoretically required, so councils are often unaware of construction). It would be more efficient to re-integrate building and planning with a central LG oversight role.

Wording of permits

A development &/or use "**must accord**" or "**must specifically accord**" with the approved or endorsed plans, not "should generally accord" because this makes the permit too hard to enforce. Refer to decision in: City of South Melbourne v Raftopoulos (unreported Appeal No. 1999/34936, 7.2.89).

Tighten start of the DA process

Councils need to be able to refuse only partly-compliant DA's outright. This won't block development, just eliminate incomplete, dodgy or ambit claims and ensure that complete DA s are lodged, instead of forcing council staff to have to request missing information and plans, shadow diagrams, etc. Developers complain about delays but they cause many of them - this would reduce delays for all DA s and encourage developers to get their applications ironed out prior to submission

Incorporated Local planning policies should be the default controls

This is just common sense where local variations differ from VPPs if they were so necessary that councils adopted them with department & ministerial approval (a similar change is needed to the VCAT Act to also give local policy priority) - *see above under Part 2 - Need for more Prescription*

PE Act to synchronise with other related acts

The P&E Act should be linked to other relevant state policies (climate change, transport, water conservation, renewable energy, etc) with an accent on sustainability (which must be adequately defined, including its intergenerational aspects)

Time limits on the DA & Planning Scheme amendment process

The same limit - 60 days - should not apply to all DA's regardless of size of complexity - *see discussion under Part 11 - Specific Clauses*. Also, the time taken by DSE for authorization of amendments needs to be limited to a reasonable length of time - 3 months. Amendments should be approved by default if the department or the Minister has not acted within 6 months to either convene a panel, require changes, or authorize the amendment.

Councils not to be bound by un-supported state policy

There should be a clause in the Act that exempts Councils from having to adhere to state-imposed planning controls that require underpinning with 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 put the required planning tools in place first. To do

otherwise makes a mockery of the process and would imply that the government simply wants to facilitate any sort of development without concern for functionality or potential negative impacts on local areas. It negates the concept of town planning. Residents are often happy to see progress - it often means added facilities and opportunities for them - BUT they want to make sure it is done sensitively to maximise the benefits and minimize the disadvantages.

Councils to inform residents more fully with notification

Notice of an application should be required to include more details of the planning process and its pitfalls - eg, that an objection can still be lodged after the initial 14 day period; that residents should avoid signing away their right to object for what could be a worthless promise from the applicant that their concerns will be met; that a petition only counts legally as a single objection; that even a written agreement with an applicant will not prevent an amended application later to achieve the original proposed development; that council will not defend residents' stance at any subsequent appeal but only council's frequently weaker position; etc. Details could be drawn up in consultation with a council's community (including the s86 committees suggested).

10 Specific Reponses to the Discussion Paper

3.3 Changes since 1987:

Need explicit provision that regulation of land use and development must take account of social and economic matters; and that govt must undertake a transparent program of research into the carrying capacity of the state, which would include issues such as conservation of water, energy and arable land, a balanced program of population distribution that includes regional and rural areas

Need specific government intervention on a transparent basis as a planning tool to assist infrastructure provision in the community interest to direct compliant development proposals to desired appropriate locations (eg activity centres instead of infill). Similar effort is necessary to increase the supply of affordable housing - the market will not provide this.

Transport infrastructure requires large immediate investment but not balanced between road and rail - there is already a large imbalance in favour of road network and research shows that the most efficient and effective transport system is a parallel system of road and rail to keep commuters off the road network to leave it uncongested for commercial and industrial traffic and for those with multiple destinations for whom rail is not practical. This is vital to the future functionality of our city in an era of peak oil and climate change.

3.5 Planning legislation should be widened in scope - eg liquor licencing

Other aspects of planning must be referenced in the Act that affect residential amenity such as environmental and water and energy conservation issues - and social amenity issues like the proliferation and expansion of licensed premises, which are dealt with

by separate legislative regimes (the PEA and the *Liquor Control Reform Act 1998* (**LCRA**) that do not always overlap.

A planning permit requirement is only triggered under clause 52.27 of the VPPs where a new or different type of liquor licence is sought, or where trading hours are to be extended. If a licence holder wishes to increase the maximum number of patrons, they would only have to vary the liquor license, not apply for planning permission.

Liquor licences contain "red line" drawings showing the boundary of the liquor licence. It would help residents, particularly for enforcement purposes, if these drawings were included as an endorsed plan under a planning permit for licensed premises.

Options to streamline the two regimes for licensed premises were set out in *A good night for all* (DoJ, February 2005). SOS submits that the review of the PEA should include an examination of how liquor licensing could be dealt with more effectively as part of the PE Act, in light of the comments above.

4: Are planning objectives still relevant?

There is no specific reference in the Act to a number of significant issues facing Victoria, such as housing affordability, climate change and health and wellbeing. To ensure these issues are properly addressed there must be more stringent mandatory controls over the increases in urban consolidation to protect the existing amenity of the city for its present and future residents.

Section 3 of the PE Act should include a specific definition of "amenity" (similar to s 3A of the Liquor Control Reform Act 1998 but also requiring new development to minimise noise and odor pollution or other physical or psychological risk or irritation from industry, commerce, entertainment facilities or traffic), and to add as a specific objective in s4 of the PE Act "to provide for the protection of residential amenity" or "to ensure as far as practicable that land use and development contributes to the amenity of the local community".

6: The permit process

SOS agrees that the current permit process could be improved to reduce the regulatory burden on government, business and the community - see our solution in Part 2. There is widespread concern about DAF among councils and residents who are aware of the issue, particularly now given the influence of the combination of the recession and advocates of DAF on the changes to the Act. DAF is mentioned positively on the very first page of the discussion paper. The DAF model is also not trusted by the community due to its genesis involving Bunnings & McDonalds seeking a nation-wide streamlined DA process. It is a centralised process that lacks sufficient democratic accountability and transparency (see Appendix 1).

6.1 DA - One size fits all?

Process requirements for applications involving little policy or only requiring testing against technical criteria can be unnecessarily complex. So 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 will simplify assessments and save time would be the simple step of making most existing guidelines mandatory.

There is a proposal for a Short Permit Process or to modify the existing permit process so that the "level of detail required for a DA is not excessive for the decision being made" - but none of this would be necessary with mandatory guidelines and all of it would be far simpler and less confusing to administrate. There would be no advantage to developers either - full plans have to be produced for the proposal to be built anyway. There is already too much exercise of discretion that omits more steps than justified (see VAGO May 2008)

6.2 Lodgment

Given the criticisms by VAGO (May 2008), councils should have a mandatory requirement to reject permit applications that are incomplete or inadequately prepared. To assist the lodgment of complete information, we are loath to argue for any furtherance of bureaucracy by way of a more comprehensive permit application form - perhaps a compromise would be a prescribed form under the Regulations but kept as simple as possible, although it must include provision of reference levels for all major parts of a development, not only FFLs and FCLs but wall heights and NGLs, all to Australian Height Datum or an appropriate common reference.

Pre-lodgment certification: if this were to be introduced, safeguards would need to be in place to ensure the integrity of the process, such as robust training of practitioners; practitioner registration similar to builders and professionals (as suggested on page 43); statutory penalties including fines and suspension of registration for breach of duty; and pre-lodgment certification only applying to small development applications mainly dependent on technical compliance, like ResCode.

Given these necessary constraints (and more bureaucracy to police them) in order to provide a reasonable level of transparency and competence, it would not be worth the effort - it would be a partial duplication of the role of council planners or building surveyors but without direct accountability measures. There is also the anecdotal issue of intimidation of residents who can be misled, "picked off" or "bought off" by the developer's consultant prior to the completion of the pre-certification. So SOS does not support pre-certification.

6.3 Notice:

Sections 19 and 52 of the PEA should be amended to acknowledge the vital role played by the objection process (see **4 Residents' notification and appeal rights)** and to at least require a mandatory site inspection by Council prior to determining who should be notified. Specific triggers for wider notification requirements should be included in the PEA, particularly where sites or developments of greater potential community impact are concerned.

Specific triggers for wider notification requirements should be included in the PE Act where sites or developments have significant potential community impact. The

choice of criteria could be developed with input from community consultation processes such as s86 committees, community meetings and workshops, citizens juries, etc (similar to the way some major development projects were handled in Perth by the WA Planning Dept)

6.4 Objections:

Solve the problem of too many obstructionist objections by making planning guidelines mandatory, so there would be far less to object to on planning grounds (see Part 2 of this submission - **The Need for more Prescription**).

Most 'objectors' simply want certain issues dealt with fairly and transparently or for planning outcomes to be acceptable to the community. In that sense they are "submitters", not objectors. However, the nature of the notice & appeal process under our current system is unavoidably adversarial so objector remains an appropriate title. "Frivolous, vexatious or irrelevant objections" are rare in our experience, but see Notice above. Notion of "supportive submissions" is a waste of time - this can already happen & occasionally does, but very rarely because usually neighbours don't want to waste time being involved at all unless they're worried because of XS impacts & non-compliance - then it IS an objection. And as long as planning matters have legal standing & go to court for mediation or resolution, it will always be adversarial

Objections must be considered and responded to as part of the DA assessment - this should be a requirement under s60. Occasionally issues are not considered, usually the ones where the proposal is not compliant or otherwise has a potentially untoward negative impact. However, more often the problem is that the key issues *are* responded to but are dismissed despite their obvious weight and credibility. This is part of the problem of poor exercise of discretion referred to in the VAGO May 2008 report and may be due to lack of training, incompetence or worse.

Consequently, there needs to be a requirement in the Act that failure to follow due process or failure to exercise discretion appropriately (as determined during for example a VCAT merits or enforcement hearing) must result in some form of remedial or disciplinary action at local government level. This should be reflected in similar enabling provisions in both the LG and VCAT Acts.

Requiring an objector to provide more specific grounds would overall negatively impact the oversight benefits of the process (see Part 5 - **Residents' notification and appeal rights**). Objectors are often concerned about the effects of a proposal on the broader community, not on themselves personally. That is entirely legitimate in a democracy and relevant to achieving an appropriate planning outcome. To require lay objectors to try and specify in more detail how a proposal affects them risks limiting the standing of members of the community to participate in planning outcomes. SOS believes that standing to participate in planning decisions must remain as open and inclusive as possible.

Should the Act set out a clear hierarchy of policy documents to be considered by a RA? - No, this will just result in a simplistic overruling of lesser policies. For example, in the Stewart St case all M2030 policy elements were legally found to have the same weight. But common sense dictates that policies should apply with more or

less weight depending on their relevance to a particular site & proposal - in a heritage area, heritage policies are meaningless unless they take priority over urban consolidation. Likewise, existing or preferred Neighbourhood Character (as decided in consultation with the community) should normally predominate (as it is supposed to now at the start of the Rescode assessment process).

6.6 Making a decision

SOS considers this to be of sufficient importance to require prescribed templates in the Regulations for assessment of particular types of permit applications. Section 60(1) of the PEA must also be amended to require Councils to undertake a site inspection, and to have all plans (accurately to scale and including specific details such as accurate dimensions and levels), prior to deciding on an application.

Section 60(1A)(a) should be included in s 60(1) as a matter Councils must consider - what is the point in developing strategy plans etc if these don't have to be considered for development on land they relate to? There is also scope to include a definition of 'social' effects so that it encompasses issues such as existing infrastructure, neighbourhood character, levels of community resistance to a proposal, residential amenity, and health impacts.

However, public opinion and numbers of objectors don't count in planning decisions. The only related issues that may (not must) be considered under the Planning Act (s84) are "any significant social and economic effects" of a proposal, although the extent to which people were able to and did object must also be considered.

In the 2013 Orrong Towers case, the Supreme Court decided that the interpretation of these planning considerations is very broad in scope and geographic area and that "evaluating objectors' perceptions means more than simply having regard to their number". However, s84B(2)(f) specifically required VCAT (the original decision-maker) to take into account the extent to which local residents objected, not, as the Supreme Court decided, to merely consider whether they were "able to and did participate" in the objection process.

So, as with most planning issues involving interpretation and the use of discretion, the relevant legislation needs to be democratized and made more precise.

Most importantly, the wording of permits should require a development not to be just "generally in accordance with" but to be specifically in accordance with the plans approved by VCAT (or a council). The difference can be significant - see City of South Melbourne v Raftopoulos (unreported Appeal 1999/34936, 7.2.89 (para 68):

> "*If the building must accord with the plans, then the permission granted is much clearer and more precise. A requirement of only general accordance leaves more scope for uncertainty and later disputes"*.

6.7 Conditions

SOS agrees that section 62 or section 68 of the Act should be amended so a development permit does not expire where it includes valid conditions of an ongoing nature, or that the expiration of a permit or the completion of the development does

not affect its ongoing obligations. There would need to be an exemption if on-going conditions were superseded by a new permit.

Developer contributions: SOS agrees that payments should be allowed for works or facilities that arise directly from a development to be dealt with in permit conditions, leaving broader-based development contributions for indirect works and services to be dealt with through a development contributions plan (not through s173 agreements). This would also allow for state contribution to infrastructure provision to help attract appropriate development to desired locations

Permit amendments & secondary consent? This needs to be tightened up so changes cannot be requested that reverse issues decided under the original permit decision unless approval is subject to appeal (but this just leads to more frustration and unfair expense due to more waste of resources for objectors over the same issue).

6.9 Enforcement

This needs strong attention because any system of rules only functions properly if all parties are aware that there will be serious negative repercussions if they are not followed. Unfortunately in planning the opposite has become too common, partly because council prosecutions are discretionary and the fines involved are often much less than the costs involved in following due process (for amended permits, for example). The banning of retrospective permits would minimise this practice.

Councils & VCAT must be required under the Act to act against breaches, and penalties increased to cover council costs and to include jail for miscreants and loss of PBS licences in serious instances. These situations involve neighbouring residents who have spent thousands of dollars to buy and then protect their investment in the family home only to find that an unscrupulous developer ignores key aspects of the permit. If the council fails to take enforcement action, as often happens, residents have to fight an expensive and antagonistic battle or sell up, which many do.

In a democracy councils must be required to protect their ratepayers from this costly and patently unfair menace. This is what Councils are required to do in relation to nuisance complaints under Part III (s 43) of the *Health Act 1958*.

The P&E Act should also enable VCAT to order Council to carry out work to restore land at an owner's or occupier's cost. Currently, VCAT is only empowered to order a person against whom an enforcement order is made (ie, not Council) to restore land (ss 114 and 119 of the P&E Act). A Council is only empowered to carry out the work itself where an enforcement order has not been complied with within time (s 123). A Council is best placed to carry out the required work quickly, efficiently and effectively in the situation where an owner or occupier cannot be trusted to do so.

Finally, the Act should also be amended to include in the Regulations the prescription of a matrix for analysing investigation and enforcement requirements, such as the one developed by Hume Shire Council and included as Appendix A in the VAGO May 2008 report. This sort of tool can help assess the validity of a complaint and prioritise it according to importance, scale and capacity for escalation.

7: Planning schemes and the amendment process

The main bottleneck is the time for departmental decision, indicating the need for a statutory requirement of 3 months max. Local policy must become the default, ie, must take priority over VPPs - otherwise there is no point in councils wasting their ratepayers' resources developing incorporated local variations and policies.

It is also patently undemocratic to do otherwise - citizens who become involved in helping to develop local policies do so on the assumption that these will guide and protect the future functionality and amenity of their suburb. If these changes are appropriate enough to be endorsed and gazetted, they should be adhered to by all parties (and should be mandatory, as explained elsewhere in this submission).

Submissions should include a formal s151 committee with community representatives - the most effective way to include real community input

7.9 Monitoring and review

The assessment of the performance of the administration of the planning scheme must include consultation with stakeholders (permit applicants, objectors and perhaps other members of the community). Again, there are simple consultative methods to achieve this - there is a record in the DA files of all permit applicant and objectors and the mandatory standing s86 advisory committee could note progress during the year by receiving reports from stakeholders. This could be done on a confidential basis with community and professional representation as well as staff and councillors.

8: State-significant projects

East Melbourne Group Inc v Minister for Planning [2008] VSCA 217 (31.10.08)
153 Whilst it may be considered unfortunate that Parliament did not require more demanding parameters than simple notification around a Minister's explanation of granting notice exemptions, the requirements intended by Parliament of that Minister are listed clearly in s 38 of the Act. They do not include the provision of reasons for the exercise of the power to exempt. In contrast to the regulation of planning permit applications, the Act does not provide for appeal to the Tribunal for decisions on amendments to planning schemes.

The above opinion is an indictment of the lack of accountability of the Ministerial call-in powers - they must be be made more transparent and accountable. The relevant practice note criteria should be a statutory requirement- otherwise, they will not be adhered to in precisely those borderline cases they were designed to apply in.

Terms of Reference for an EES or similar process required for significant or state projects should be determined by an independent process which should include academic, professional and community experts; ministerial panels and committees (both of which should have some community representation); and large-scale consultative processes like citizens' juries (there is substantial detail in the literature on innovative democratic consultative mechanisms).

Other comments: Impact assessments should be paid for by proponent but done by the state. These assessments are usually a farce because of the political way ToR are set, so these should be set first independently by a citizen's jury or similar democratic mass consultation process including various relevant experts.

9: Governance and decision-making

The subsidiarity principle - underlies the DAF model. This is flawed in several ways:

1 For democratic accountability LG planners must make all permit decisions on a streamlined set of mandatory criteria (see part 2 - **Need for more Prescription** and Part 5 - **Residents' notification and appeal rights**). In particular, for accountability and propriety reasons, private sector professionals must NOT be involved, at least not without registration and accreditation - in which case LG staff might as well do it. Private professionals are also likely to be subject to conflict of interest without transparent accountability - a sure formula to encourage graft

2 LG planners must make all permit decisions to improve their familiarity with built form in the area they administer on behalf of their employers - the ratepayers

3 subsidiarity would only be appropriate if planning guidelines were mandatory so there would be very little discretionary decision-making. None of the "solutions" discussed would be needed if most of the current standards and local policies were mandatory. We are concerned that no options have been considered except the democratically flawed centralised DAF model (see critique - Appendix 1)

9.2 Registration of planners

No process can certify a commitment to high standards of ethical and professional conduct - it can only impose a transparent system that encourages it

10.1 Section 173 agreements

SOS agrees with the comments and solutions in the discussion paper (see Part 11 below - section 46H-Q)

10.3 Access to planning information and privacy issues

It is unsupportable on common sense and democratic grounds that details which are publicly available one day are restricted the next (once a permit is issued). The DSE practice note of Oct 2007 must be given statutory weight. It is also inconsistent that planning plans are readily available for inspection by objectors but building plans are not - no objector is going to copy them by hand and go away and build a house based on them - building plans are site specific. The council excuse that they would be liable if an objector gained access to building plans and there was a subsequent break-in at the site based on prior building layout knowledge is also fallacious - this information could easily come from planning plans.

Council is a public corporation administering planning in the public interest, so all relevant documents should be available on principle including internal reports. Again, scrupulous developers have nothing to fear from these changes which will only impact planners and developers not complying with policy, process or guidelines

10.4 Cash-in-lieu schemes for car parking

Again, transparency is the problem here - payments must go into a specific fund which has plans and timeframes for the implementation of new local carparks and must actually be used for this purpose, not go into general revenue

10.5 Interaction with other legislation

Should specify consistency with other related legislation (climate change, energy & water conservation, etc) as already mentioned

11 Specific Clauses to address in the P&E Act

s20(4) call-in and accountability by Minister - transparent criteria must be sought from the Parliament for the community to have confidence in the propriety of this process. Reasons for such decisions should be made public. Eg, see judgment in East Melbourne Group Inc v Minister for Planning & Anor [2008] VSCA 217 (31 Oct. 08)

Part 3B (s46H-Q) Tighten the basis of developer contributions to require them to be made on the basis of a DCP, not s173 agreements which can encourage deals between councils and individual developers and are not a transparent process.

48(2) "no false declaration re permit". The Act should be modified to side-step the onus of proof of deliberate errors/omissions by simply empowering and requiring councils under the Act to reject a DA without appeal if it is incomplete or found to contain information which is found to be false. A new application and a new fee would be required. Alternatively, there should be an extra fee to compensate for any extra work required to deal with a sub-standard application.
The existing clause is necessary but like many planning requirements, it is not enforced and consequently is frequently abused in various (usually small and subtle) ways, as happens with any law that is not enforced.

51 A crucial issue for many residents is adequate access to planning file information, and councils vary greatly in the access they grant and the copying costs they charge. SOS considers that as a matter of high priority, the DSE General Practice Note "Improving Access to Planning Documents" (revised October 2007 - reference 8) should be referenced in the Act as a requirement that all councils must follow, including access to closed files. This requirement should also mandate easy availability of reference and incorporated documents under Planning Schemes, eg on Council websites.

58 Needs to specify that the Neighbourhood Character Analysis & the Design Response MUST meet planning scheme requirements first before the DA can be considered.

60 One way to strengthen Rescode compliance via the PE Act would be a paragraph added to s60 requiring consideration of whether the objectives of ResCode have been met. (see "6.6 Making A Decision" in Part **10 Responses to the Discussion Paper**)

62(4) [*see Compliance With Standards above for re-wording*]

79 Prescribed time - shouldn't be the same (60 days) for small & large DA's

77-82 Appeal time limits:
Currently the applicant/developer has 60 days after the issue of an NOD in which to appeal against a decision, and an objector has only 21. This is inequitable, given that the applicant is initiating the new development, that developments are primarily for private profit, and that objectors are usually novices at planning with no access to tax-deductible professional advice.

Objectors may require legal advice after receiving an NOD to determine if an appeal is worthwhile, and 3 weeks is a short timeframe to organise their approach in the spare time they have available. However, developers and planning professionals are familiar with the appeal process and usually already have their Council and VCAT strategy mapped out in advance with the help of planning professionals.

The most typical injustice occurs when objectors who win compromise concessions as extra permit conditions find they may lose these through a conditions appeal. Many objectors reluctantly accept improved conditions rather than prolong the unpleasant, potentially expensive and possibly unproductive business of appealing the permit. Objectors are usually naive and hope the developer will also accept the permit.

However, the applicant typically waits until after the 21 day limit and then appeals the conditions, thus preventing any challenge to the merits of the proposal itself while in almost all cases being able to get the conditions removed or relaxed. The applicant has nothing to lose and a lot to gain.

Conversely, the objectors have a lot to lose and nothing to gain. They can't challenge the merits of the NOD itself by this stage - the best they can achieve is to maintain the status quo. If they knew an appeal would be lodged anyway, objectors would usually prefer to challenge the less satisfactory aspects of the draft permit itself, not just support the extra compromise conditions.

Finally, in terms of time limits, developers are the ones who usual complain about costly delays – indeed, the thrust of many of the Operation Jaguar VCAT reforms (such as Prompt and Practice Day hearings) was specifically designed to speed up the decision process where minimising delay was of importance to the permit applicant.

So the simplest, fairest and most efficient remedy is to make the lodgment timeframe longer for objectors (the same time for both would still allow "ambushing" - objectors would still not have time to act if an applicant lodged at the last moment). The permit applicant should have to lodge within (say) 21 days and objectors within (say) 35 days or 5 weeks to give objectors time to seek advice and respond.

This would speed up the timeframe of the appeal process by a month or so and remove the disadvantage to objectors without disadvantaging the developer. As a compromise, at the very least, the time for lodging an appeal should be equal, and more than 21 days but less than 60.

84B(2) omit the qualification "where appropriate". Also, the matters VCAT should take into account under s84B do not include the equivalent of s60(1A)(g), ie, "any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council". There are a number of such documents that support arguments on residential amenity which ought to be considered by VCAT in reviewing the merits of a planning permit application.

87 "material change of circumstances" - deliberate illegal construction of building to be specifically excluded

97N There have been a number of cases where unsuspecting new home purchasers have been prosecuted at VCAT by their local council for breaches of planning permit conditions perpetrated by the builders of the new home. New owner occupiers are legally responsible for planning breaches (s126[2] & [3] of the Planning Act). But under s126[1] so is "any person who uses or develops land in contravention of a planning scheme or permit".

To protect home-buyers AND encourage developers to respect permit conditions, the P&E Act should be amended to require developers to acquire a s97N certificate from the local council prior to sale of the developed land, to be made available to all prospective purchasers. The Sale of Land Act should likewise be amended to require all vendors to supply a s97N certificate from the council as part of s32 information for purchasers.

Greater council resourcing to meet this demand should be met through a development application levy, which would enable all development sites to be subject to a final council inspection for compliance - in itself a deterrent to errant developers

126(3) Change to include "knowingly" - to protect innocent owners. This will be hard to prove and thus will push the focus of enforcement & prosecution onto the original developer & builder - the real culprits If there are serious breaches (ie, health or offsite consequences) then the new owner should also be required to fix the problem but compensation should be automatic for the owner if the prosecution of the developer/builder is successful

149B Need easier test to be able to hold councils accountable for poor decisions - perhaps a compromise that allows for a correction of an erroneous or flawed action without penalty or financial liability of the council, as long as it admits the fault where this is the case rather than fighting the issue.

151, 153 Transparent criteria should be included for appointments to Advisory Committees and Panels proposed to consider planning matters.

==========

REFERENCES:

(1) Victoria's Planning Framework for Land Use and Development - 7 May 2008 (2007-08:18) VAGO

(2) Performance Reporting in Local Government - 11 June 2008 (2007-08:27), VAGO

(3) Enforcement of Planning Permits - 13 November 2008, (2008-09:10), VAGO

(4) Land use and development in Victoria: The State's planning system 15 December 1999, VAGO

(5) S. Morris, *Third Party Participation in the Planning Permit Process,* VUT, 4 March 2005

(6) Chak Lai Li v Whitehorse CC (No. 1) [2005] VCAT 1274 (30 June 2005)

(7) DoI Practice Note: "Understanding the Residential Development Standards", June 2004

(8) DSE General Practice Note "Improving Access to Planning Documents" (revised October 2007