

The role of mandatory provisions in planning schemes

Planning Practice Note | 59

JUNE 2015

The purpose of this practice note is to set out criteria that can be used to decide whether mandatory provisions may be appropriate in planning schemes.

Introduction

Planning schemes based on the *Victoria Planning Provisions* (VPP) are predominantly performance based. Planning schemes specify the objective that needs to be achieved and provide a degree of freedom on how it is achieved.

Performance based schemes require a judgement. The decision maker must undertake an assessment of the proposal and decide whether the proposal meets the relevant planning objectives or achieves an appropriate balance between competing planning policies.

A performance based planning scheme is able to accommodate variation, innovation, unforeseen uses and development or circumstances peculiar to a particular application to produce results beneficial to the community.

Mandatory provisions in the VPP are the exception. The VPP process is primarily based on the principle that there should be discretion for most developments and that applications are to be tested against objectives and performance outcomes rather than merely prescriptive mandatory requirements.

Nevertheless, there will be circumstances where a mandatory provision will provide certainty and ensure a preferable and efficient outcome. Although these circumstances cannot be common practice, they may include areas of high heritage value, strong and consistent character themes, or sensitive environmental locations such as along the coast.

A balance must be struck between the benefits of a mandatory provision in the achievement of an objective against any resulting loss of opportunity for flexibility in achieving the objective.

What is a mandatory provision?

A *mandatory provision* is a requirement or control that must be met and provides for no opportunity to vary the requirement.

A *performance based provision* provides for flexibility in the approaches or variation in the measure to achieve the required outcome.

When are mandatory provisions appropriate?

Mandatory provisions usually specify a maximum or a minimum built form requirement. The majority of mandatory provisions requested by councils are for building height controls, however they can also relate to such matters as:

- site coverage
- plot ratio
- setbacks to buildings
- lot sizes
- open space areas
- sight lines.

Mandatory provisions will only be considered in circumstances where it can be clearly demonstrated that discretionary provisions are insufficient to achieve desired outcomes.

The criteria below should be used to assess whether or not the benefits of any proposed mandatory provision outweigh any loss of opportunity and the flexibility inherent in a performance based system.

- **Is the mandatory provision strategically supported?**
 - Does the proposed measure have a sound strategic basis having regard to the planning objective to be achieved and the planning policy framework generally?
 - Does the proposed mandatory measure clearly implement a policy or achieve an objective rather than just being a prescriptive tool?
- **Is the mandatory provision appropriate to the majority of proposals?**
 - Has the scope of the proposed mandatory provision been carefully considered to ensure that it will be appropriate in the vast majority of cases to limit the unnecessary loss of the flexibility and opportunity available in a performance based system?
 - Will the considered application of planning policy to be implemented by the proposed measure lead to the outcome prescribed by the measure in the vast majority of cases or is it merely one of a number of possible outcomes?

- **Does the mandatory provision provide for the preferred outcome?**
 - Does a proposed mandatory provision resolve divergent opinions within the community as to a preferred outcome when a consistent outcome is necessary?
 - Does a proposed mandatory provision avoid the risk of adverse outcomes in circumstances where there is likely to be constant pressure for development inconsistent with planning policy?
 - Is there real evidence of development exceeding the proposed control?
- **Will the majority of proposals not in accordance with the mandatory provision be clearly unacceptable?**
 - Will the majority of proposals not in accordance with the requirements fail to meet the objectives of the control?
 - Will the majority of proposals not in accordance with the requirements lead to unacceptable planning outcomes?
- **Will the mandatory provision reduce administrative costs?**
 - Will the proposed mandatory provision reduce costs imposed on councils, applicants and the community to the extent that it significantly outweighs the benefit of a performance based provision?

How to write mandatory requirements in planning schemes

In writing a mandatory provision, it is important that the provision should:

- implement an objective
- be clear in its intent to users
- be able to achieve consistent and predictable results
- be as measurable as possible using a quantifiable measure
- be expressed in plain English using common terms.

The Design and Development Overlay is the most appropriate tool for the expression of mandatory built form requirements. Opportunities may also exist in some other zones and overlays to mandate controls.

Local policy and mandatory requirements

A local planning policy is not a control. Local planning policies have a defined role to guide the exercise of discretion created by a zone, overlay or particular provision.

Local planning policy cannot remove the discretion under the relevant planning control that triggers its consideration. Mandatory requirements cannot be included in local planning policy as to do so would remove the very discretion created by the planning provision. Hence mandatory requirements must be in a zone or overlay.

It is not uncommon for planning provisions in zones, overlays and in planning policy to prescribe preferred building heights. These provisions are not mandatory. But, at times, these provisions are mistakenly considered by councils and the community as mandatory requirements. Consequently this leads to the view that the controls or policy have been disregarded. It is desirable that the use and language of discretionary controls be clearly expressed and also be subject to a rigorous strategic assessment.

Further reading

Proposals for mandatory provisions have been dealt with by Planning Panels Victoria in numerous reports. Helpful panel reports include:

- Bayside Planning Scheme Amendment C2
- Stonnington Planning Scheme Amendment C58
- Port Phillip Planning Scheme Amendment C52
- Queenscliffe Planning Scheme Amendment C7
- Melbourne Planning Scheme Amendment C20
- Hobsons Bay Planning Scheme Amendment C11.

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Published September 2010, republished June 2015
ISBN 978-1-74208-075-8 (pdf)

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Height and setback controls for activity centres

Planning Practice Note | 60

JUNE 2015

This practice note provides guidance on the department's preferred approach to the application of height and setback controls for activity centres.

This practice note supersedes Practice Note 60: Height and setback controls for activity centres dated April 2010.

Activity centres

Activity centres are a focus for commercial, retailing, employment, community, transport, entertainment and other services, and are places where people shop, work, meet, relax and live. State planning policy directs the further expansion of these services within activity centres, and recognises that activity centres are ideally placed to provide for growth in household numbers. As such, activity centres are a major focus for change in metropolitan Melbourne.

A key strategy of metropolitan development policy in the Victoria Planning Provisions (VPP) is to build up activity centres as a focus for housing and economic growth by ensuring Metropolitan Activity Centres and Activity Centres:

- can accommodate ongoing investment and change in retail, office, service and residential markets
- have a mix of activities that generate high numbers of trips including business, retail, services and entertainment
- have the potential to grow sustainably and support intensive housing developments without conflicting with surrounding land-uses
- provide for services and infrastructure to support population growth
- identify areas for urban renewal.

The Activity Centre Zone (ACZ) is the preferred tool to guide and facilitate the use and development of land in an activity centre. The schedule to the zone is the Development Framework, which can be tailored to the individual needs of the relevant activity centre.

The role of height and setback controls in activity centres

Change in and around activity centres is anticipated and encouraged by state planning policy but needs to be managed appropriately. This will ensure that new development maintains amenity, and integrates with existing land-uses and built forms. State policy seeks to manage change in and around activity centres through structure planning.

Structure planning is the process of developing a framework for the integrated development of an activity centre and surrounds. Structure plans provide the foundation for activity centre change by clarifying preferred directions for future growth and articulating how this change will be managed.

As part of this process, structure plans may propose preferred built form outcomes including minimum or maximum building heights and setbacks. Height and setback controls can be appropriate so long as they are not aimed at restricting the built form, but at facilitating good design outcomes. Clarification of when it is appropriate to use height and setback controls is provided below.

Appropriate use of height and setback controls

Proposed height and setback controls, whether maximum or minimum, must be soundly based on the outcomes of strategic research that includes a **comprehensive built form analysis** that is **consistent with State policy**.

Comprehensive built form analysis

A council will need to demonstrate that proposed height controls are based on identifiable objectives or outcomes. Proposed height controls must be selected through a comprehensive built form analysis that achieves the following:

- identifies significant opportunities for change within an activity centre
- explores alternative built form objectives and outcomes to accommodate this change. This should include an analysis of visual and amenity impacts
- selects appropriate heights and built form outcomes at a precinct level through evaluation of built form objectives, land use outcomes and economic growth consistent with State policy.

A comprehensive built form analysis should be completed as part of the structure planning process.

Consistency with State policy

A council will need to demonstrate that proposed height controls are consistent with State policy. Height controls must not encumber a centre's ability to accommodate community requirements for retail, commercial, housing, community, health, educational and other essential requirements, as consistent with the metropolitan development policy in the *Victoria Planning Provisions*.

Form of height and setback controls

The application of discretionary controls, combined with clear design objectives is the preferred form of height and setback controls. Discretionary controls are more likely to facilitate appropriate built form outcomes than mandatory controls by providing more flexibility to accommodate contextual variations and innovative design. This preferred form of height control has been supported through a number of planning panels, more so than mandatory controls.

When appropriate maximum and minimum height and setback controls are identified, they should be included in the relevant planning scheme as discretionary controls with clear design objectives.

Mandatory height and setback controls (that is, controls that cannot be exceeded under any circumstance) will only be considered in exceptional circumstances.

Exceptional circumstances

Exceptional circumstances may be identified for individual locations or specific and confined precincts, and might include:

- sensitive coastal environments where exceeding an identified height limit will unreasonably detract from the significance of the coastal environment
- significant landscape precincts such as natural waterways, regional parks and areas where dense tree canopies are the dominant feature
- significant heritage places where other controls are demonstrated to be inadequate to protect unique heritage values

- sites of recognised State significance where building heights can be shown to add to the significance of the place, for example views to the Shrine of Remembrance and major waterways
- helicopter and aeroplane flight paths and other aeronautical needs.

Even where exceptional circumstances are identified, mandatory height and setback controls should only be applied where they are absolutely necessary to achieve the built form objectives or outcomes identified from the comprehensive built form analysis. Where mandatory controls are proposed, it will need to be demonstrated that discretionary controls could result in an unacceptable built form outcome.

Where identified, it is more than likely that exceptional circumstances will apply to particular sections of an activity centre and not the entire activity centre. In some situations, it may be appropriate to include a mix of discretionary and mandatory height and setback controls over one precinct.

Where blanket mandatory height and setback controls are proposed over most or the entire activity centre, rigorous strategic justification has to be provided. The level of strategic work required is:

- a Housing Strategy which examines the city's future housing needs and the role of activity centres (including neighbourhood centres) in accommodating these needs
- an activity centre/economic strategy which examines the role of the centre as part of a network of centres
- an analysis of the capacity and constraints of each centre where planning controls are proposed
- a comprehensive built form analysis of each centre where planning controls are proposed
- identification and analysis of key sites within each centre which can accommodate more intense development when compared with the remainder of the centre.

Statutory implementation of height and setback controls

The Activity Centre Zone (ACZ) is the preferred tool to guide and facilitate the use and development of land in an activity centre.

In most instances, height and setback controls would be applied at the precinct level within the Activity Centre Zone schedule.

The Design and Development Overlay (DDO) is the preferred planning instrument for implementing discretionary and mandatory building heights and setbacks on an interim basis or at neighbourhood centres.

The design objectives and decision guidelines contained within the ACZ or DDO must be well structured and carefully worded to provide clear guidance to both decision makers and designers. This will ensure that any proposal to depart from the nominated heights and setbacks will be able to be rigorously assessed against a clear set of criteria, thereby minimising the likelihood of approval of a proposal which does not implement the design objectives of the ACZ or DDO.

The preferred expression of heights and setbacks is in metres and should be in reference to a defined point such as the footpath at the frontage or Australian Height Datum. If height is measured in terms of storeys, this should be expressed in relation to a preferred height provision of metres as well.

Planning publications

The following publications provide best practice guidance on planning for new urban communities, statutory planning processes and drafting statutory documents (as relevant).

Planning for urban communities

- Ministerial Direction No. 9 Metropolitan Strategy
- *Guidelines for Higher Density Residential Development* (Department of Sustainability and Environment 2004)
- *Activity Centre Design Guidelines* (Department of Sustainability and Environment 2005)
- *Safer Design Guidelines* (Department of Sustainability and Environment 2005)
- *Public Transport Guidelines for Land Use and Development* (Department of Transport 2008)

- *Victorian Cycling Strategy* (VicRoads 2009)
- *Structure Planning for Activity Centres Practice Note 58* (Department of Environment, Land, Water and Planning 2015)
- *Assessment and Response to the Report of the Advisory Committee on Activity Centre Boundaries* (Minister for Planning June 2009)
- *Activity Centre Zone Practice Note 56* (Department of Environment, Land, Water and Planning June 2015)

Statutory planning processes

- *Using Victoria's Planning System* (Department of Environment, Land, Water and Planning)
- *Planning Practice Note 46: Strategic Assessment Guidelines* (Department of Environment, Land, Water & Planning 2015)

Using VPP tools and statutory drafting

- *Writing Schedules VPP Practice Note* (Department of Infrastructure 2000)
- *Planning Practice Note 13: Incorporated and Reference Documents* (Department of Environment, Land, Water & Planning 2015)

Further information

All practice and advisory notes are available on the department's website:

www.delwp.vic.gov.au/planning/publications

Further information in relation to planning for activity centres is available on the department's website: www.delwp.vic.gov.au/planning

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ISBN 978-1-921607-52-3 (pdf)

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