



Victorian Planning and Environmental Law Association

[REDACTED]

Submission - Better Apartments Draft Design Standards

19 September 2016

VPELA – Better Apartments – Draft Design Standards submission

[REDACTED]
[REDACTED]
[REDACTED]

Introduction

1. This submission is made on behalf of the Victorian Planning and Environment Law Association (VPELA) in response to the *Better Apartment – Draft Design Standards* released for public feedback in late July 2016.
2. We are grateful for the indication by the Minister for Planning at our State Planning Conference in San Remo earlier this month that he expects a frank and fearless submission from VPELA having regard to the multi-disciplinary nature of our membership base and to the wealth of experience held by its members in relation to issues raised by the Draft Design Standards.
3. As a consequence of its broad membership base, the individuals which comprise VPELA's membership often have divergent views on a range of issues.
4. That said, if members of VPELA stand united on anything at all, it is that planning decisions – whether made at a policy level, or at the implementation stage, should be:
 - Based upon evidence which demonstrates the link between the outcomes sought and the measures chosen; and
 - The result of a transparent and rigorous process where key matters are tested in an open forum – in acknowledgement of the fact that in planning policy and implementation, opinions differ about a range of matters.
5. In VPELA's view:
 - The design standards for apartments are a legitimate area of policy and regulatory inquiry.
 - The work done to date is an appropriate starting point for detailed and open debate and rigorous analysis.
 - For the reasons which are set out in this submission, the Draft Better Apartment Design Guidelines should be the subject of a process of transparent and independent review.
 - The Minister for Planning should appoint an Advisory Committee pursuant to section 151 of the *Planning and Environment Act*.
 - The Committee should be constituted by highly qualified and respected members of the various professions. The Committee should conduct hearings in accordance with terms of reference which enable it to explore, in detail, the veracity and genesis of the measures which are contained in the Draft Design Standards.
 - The process for which this submission contends is appropriate and proportional to the importance of these guidelines.
 - Any design standard for apartments will represent one of the most fundamental policy interventions in the provision housing in Victoria since the introduction of Rescode and its predecessors, the Good Design Guide and VicCode2.

The Issues and Public Consultation to Date

6. The progression of the development cycle over the last 25 years has seen considerable change.
7. In the early 1990's medium density development proliferated, and codes were established to guide the consideration of development – first VicCode 2, then the Good Design Guide and finally Rescode.
8. In the last 15 years of the property cycle, higher density development, and in particular apartment typology, has become more prevalent than ever before.
9. Policy guidance on the design of apartment buildings and higher density development has not been highly prescriptive to date. The Guidelines for Higher Density Development contain a collection of loosely framed guiding principles – in recognition of the fact that the design of higher density development in both scale and appearance – and therefore housing product - can vary considerably.

10. It is well documented that the size of apartments, along with the qualities of their internal amenity, have been the focus of planning decision makers in recent years.
11. Without in any way criticising either the councils concerned, or the divisions of the Tribunal that have written extensively on the subject, the planning system has facilitated this kind of piecemeal case by case development of principles. That such a system has been allowed to evolve concerning such an important subject is quite unsatisfactory. Outcomes are often arbitrary, guidance or principles are developed in a “pseudo cultural” fashion, new proposals are designed to fit a mould for the current fashion rather than necessarily achieving good outcomes and results are often inconsistent. This approach is neither fair nor orderly.
12. In such a situation it is entirely appropriate for government to attempt to introduce additional policy guidance.
13. The process of developing the Draft Design Standards has to date has been consultative, in that various industry groups and stakeholders have been consulted on a discussion paper which sought to make no firm suggestions on apartment design.
14. The government now has the benefit of that consultation, and it is clear that the government has undertaken analysis and investigation of the options and proposed the Draft Design Standards.
15. That said, the manner in which the standards have been arrived at, and the underlying assumptions which inform the standards has not been the subject of independent or rigorous review.
16. There is concern among various sectors of our membership, that the resultant Draft Design Standards have not been the subject of critical scrutiny, and that when tested, the underlying rationale for the existence of certain of the guidelines lack veracity, are incapable of consistent and fair application and have the capacity to lead to anomalous outcomes.
17. There are also parts of the membership that strongly support the proposed Draft Design Standards, or at least support many of the techniques employed.
18. Finally, there are parts of our membership who regard the proposed Draft Design Standards as a necessary step in the right direction, but who would prefer to see refinements and clarifications contained in the Draft Design Standards.
19. This spread of views is to be expected, but perhaps is indicative of a broader, deeper issue.
20. Whatever public consultation has taken place to date, the process by which that consultation has been digested to produce the Draft Design Standard has not been transparent.
21. Those responsible for preparing the Draft Design Standards should welcome the opportunity to publicly explain how and why various standards have been arrived at, to explain the process by which various alternatives were weighed and selected or rejected and to have the basis of those choices tested.
22. Public consultation is not just about listening to submissions that are made. The purpose of public consultation is to gather together a collection of ideas which might inform decisions to be made.
23. The publication of the Discussion Paper in 2015 represented the first phase. That discussion paper raised issues, but did not posit any possible solutions.
24. In the time which has followed, various scenarios have been tested by the Reference Group and the Local Government Working Group, who together have evaluated the draft measures. The content of that testing and the product of that evaluation has not been at all transparent.
25. We feel obliged to report that it is widely understood that in the preparation and evaluation of the Draft Design Standards various consultants were engaged to provide expert advice on areas of a technical nature, and that these engagements were subject to strict confidentiality requirements which preclude the disclosure of the content of that advice. Obtaining advice is entirely appropriate. The need for secrecy is more difficult to understand, particularly now, following the publication of the Draft Design Guidelines.

26. Whether the authors of the Draft Design Guidelines possess the necessary technical qualifications and experience concerning planning, acoustic, lighting, architecture, traffic, urban design, landscaping issues, and others, that are raised in the guidelines, is not known. The material upon which they relied is not known. The process of evaluation and reasoning is not known. There is no publicly available body of work which records how these Draft Design Standards came into existence.
27. It is unclear whether, and if so to what extent, the technical advice received was subjected to the kind of scrutiny which would reveal flawed thinking, inconsistency in approach or the identification and proper consideration of alternatives. It is unclear whether those evaluating the technical advice received were themselves sufficiently skilled to make the relevant evaluation. Finally, it is unclear whether any analysis has been undertaken of the impact that the Draft Design Standards might have on architectural and design outcomes, strategic planning aspirations (particularly in inner urban areas) and on housing affordability and the housing industry generally.
28. VPELA was a member of the Reference Group. In the course of its involvement its representatives raised concerns about the evidentiary basis underpinning the approach to be taken in relation to some of the Design Standards.
29. What is presented in the Draft Design Standards is the conclusion of whoever was responsible for assimilating the views of the Reference Group, the Local Government Working Group and the various experts advising the authors of the Draft Design Guidelines.
30. The Draft Design Guidelines do not transparently explain the basis for the choices made or the potential impact that the proposed changes might have on the current regulatory regime. For example, the Draft Design Guidelines appear to presuppose that 'saddlebag' or 'snorkel' bedrooms or bedrooms with borrowed light will necessarily deliver poor outcomes when in practice, this is not always the case. Similarly, many of the proposed standards appear to be driven by objectives that are concerned with daylight access. In our view, this is an entirely appropriate objective in order to ensure that housing is delivered with good standards of amenity. However, if it's the case that the basis for the standards chosen is somehow flawed, that there is insufficient transparency as to how the standards have been developed or that the standards have not been properly analysed and tested, then the objective will not be able to be achieved.
31. For a proposed change of the significance and importance of this kind, the absence of a detailed account of the choices made and decisions reached is particularly troubling.
32. The approach adopted so far is to be contrasted with the process of preparing regulatory impact statements, where significant changes in a regulatory environment are closely scrutinised from a range of perspectives.
33. The approach adopted here is also to be contrasted with the kind of analysis which is undertaken as part of an EES process, where a proposal is the subject of scrutiny by a Technical Reference Group, but where ultimately the content of the EES is subjected to review by an independent Inquiry. The contrast between the Draft Design Standards and a simple planning scheme amendment is equally valid – the latter usually accompanied by an explanatory memorandum, an assessment against the strategic assessment guidelines and usually a panel hearing.
34. Perhaps the closest and most appropriate comparison is the process adopted prior to the introduction of Rescode.
35. In the late 1980s and early 1990's the development of medium density housing was perhaps the greatest change affecting the provision of housing and the character of Melbourne's residential suburbs in more than a generation. A series of codes and guidelines were developed by governments to provide greater guidance: eg Vic Code 1, Vic Code 2 (which was then replaced by the Good Design Guide for Medium Density Development), and then finally Rescode.
36. At each stage of development, various techniques were devised to develop a performance based system of planning regulation.
37. Most importantly, at each stage, a panel of highly qualified people were appointed to consider the technical content of the proposed guidelines:

38. It was the review of Vic Code 2 in 1994 which led to the introduction of the Good Design Guide;
39. In 1998 the then Minister for Planning appointed a standing advisory committee to review the operation of the Good Design Guide, which resulted in the preparation of a paper addressing issues and options; and
40. The Report of the Advisory Committee on the Draft Residential Code (Rescode) was published in December 2000. The Report itself runs to 90 pages. It includes appendices which examine the expected costs and benefits associated with the introduction of Rescode, which itself runs to 54 pages. Part 2 of the Report contains a 109 page evaluation of the standards which were proposed. [REDACTED]
- [REDACTED] As a group, the Committee traversed the disciplines of planning, law, architecture and strategic planning. The group was able to bring to bear its collective experience in both the theory and practical application and implementation of planning policy and controls.
41. The importance of the measures proposed by the Draft Design Standards, and their potential effect on the planning system warrant no less consideration than that given to the introduction of Rescode.
42. The longevity of Rescode as a planning tool for the assessment of medium density housing is a testament to the level of consideration and scrutiny to which the measures sought to be introduced at the time were exposed.
43. Further, and importantly, recording the consideration of different measures, and the reasons for adoption particular approaches over others is, in and of itself, an important resource in the application of any guideline going into the future.
44. Axiomatically, understanding why a guideline exists informs how the guideline will be applied – and in particular, when departure from a particular guideline is justified.
45. The open and transparent evolution of ideas and innovations, and their translation into regulation informs the approach that decision makers take to the application of those regulations.
46. The consultation process to date has produced Draft Design Standards.
47. It is now time for those Draft Design Standards to be subjected to open and rigorous scrutiny.

Implementation

48. If it is said that one of the virtues of these Draft Design Standards is that they are merely intended as a guide which can be departed from on a case by case basis in the right circumstances, that virtue is considerably eroded if the Standards themselves do not disclose why they exist and what precisely they are intended to achieve.
49. Upon the introduction of Vic Code 2, the Good Design Guide and in turn ResCode, the public and planning decision makers had access to an extensive amount of material which explained how decisions had been made arriving at the various standards. That material informed both the process of design, and ultimately planning decision making. That body of material is not present in relation to these Draft Design Guidelines.
50. Exacerbating the absence of resources setting out reasoned consideration for the choices which have been made, the decision guidelines which are intended to inform consideration of the standards and possible variations provide no real guidance at all.
51. The Draft Design Standards set out what the standards are, but they provide little if any meaningful guidance on how the Standards will be varied.
52. Such a scenario will place proponents and planning decision makers alike in a position where there is little guidance about the circumstances in which departure from the guidelines is appropriate. In that light, it is difficult to understand how the Draft Design Standards will significantly improve upon the current position. It must be assumed that either:

- Variations from the Draft Design Standards will be approved in a policy vacuum and according to the idiosyncratic prejudices of the planning decision maker – thereby eroding any benefits of certainty and consistency which might flow from the introduction of such a standard; or
- Decision makers will slavishly apply the Draft Design Standards, and in so doing either preclude development which otherwise might proceed, or given some of the standards, encourage pedestrian “wedding cake” architectural outcomes.

Practical Implications and areas for further consideration

53. Recently VPELA conducted a seminar inviting highly qualified experts in the field of urban design to share their thoughts on the Draft Design Standards. It is apparent that the following further factors are matters which VPELA members consider require further detailed consideration:


- The Draft Design Standards would require (if applied strictly) outcomes which are inconsistent with the recently approved amendment by the Minister (Port Phillip Amendment C107) and currently proposed amendment by the Minister (Melbourne Amendment C270);
- If applied strictly, the Draft Design Standards may significantly reduce the development capacity of key and strategic redevelopment sites within inner urban and established areas. As recently put [REDACTED] at VPELA’s seminar on this topic, developments over 8 storeys in height will require a site that is 39 metres wide in order to comply with the stated setbacks;
- “Wedding cake” architectural responses and exposed blank walls cannot be ruled out as likely design outcomes as a consequence of the pressure created to design in accordance with Draft Design Standards as presently proposed;
- If adequate daylight is a fundamental concern of the Draft Design Standards, the standards themselves do not address some of the fundamental determinants of daylight levels: eg room width (as opposed to depth); window size; balcony overhangs; building projections and adjacent buildings;
- Applying the Room Depth Standard may in some instances result in an exceedance of Best Practice as defined by BESS, which must mean that “adequate” daylight levels could be achieved in rooms deeper than 8 metres – depending upon other design elements. The same is true for bedrooms; and
- The Draft Design Standards appear to suggest that an acoustic standard other than the widely accepted noise limits according to AS2107 are appropriate but without proper analysis it is unclear to some members why a different, potentially more complex, standard would be adopted by the Draft Design Standards.

Transitional Provisions

54. In the introduction of any new standard of this kind it is appropriate that transitional provisions ensure that applications presently under consideration should be exempt from the operation of the new standard.
55. In recent times, the drafting of transitional provisions has created confusion. Since the introduction of the new residential zones a trend has emerged in the drafting of transitional provisions which, on the one hand exempts applications from the quantitative measures introduced by a new control, but at the same time invite the planning decision maker to have regard to the prevailing policy context.
56. This form of transitional provision can be confusing and difficult to apply. In some cases, the application of such a provision (which seeks to have a foot in both camps) is capable of resulting in profound injustice, where any protection afforded by the transitional provision is completely eroded by the application of the policy settings which underpin the new controls (from which the application is technically exempt).

57. In the case of the Draft Design Standards it is to be borne in mind that their application will have a significant effect on a wide range of people beyond just current applicants for planning permission.
58. The Draft Design Standards have the potential to significantly alter development yield and the willingness of financiers such as banks and other lenders to fund the construction of new housing projects. The Draft Design Standards represent a significant departure from the development paradigm which has underpinned many investment decisions across all sectors of the industry.
59. If applied strictly, even developers who bought land on the assumption of yields that could be achieved whilst still achieving generous internal amenity, guided by various decisions of the Tribunal and general industry practice to date, could find that those investment decisions have been adversely affected by the strict application of the standards. It is not possible to quantify this possible effect and it is unclear whether any such investigation or analysis has been undertaken.

Conclusion

60. For reasons set out above, the development of Design Standards for apartments is a perfectly legitimate and appropriate initiative.
 61. The work done to develop guidelines for the design of apartments is a necessary and worthy task.
 62. The next phase necessarily involves further rigorous and transparent analysis of the Draft Design Standards.
 63. Planning in this State has been well served in the past by specially appointed bodies being invited to conduct hearings, test assumptions and ground truth the introduction of new planning controls and policies.
 64. The proposed Draft Design Standards do not warrant being treated as an exception to this rule. If anything, the matters raised in this submission underscore the need for further work to be done, and for the assumptions which underpin the content of the draft standards to be openly examined.
- 

About VPELA

The Victorian Planning and Environmental Law Association (**VPELA**) is a non political multi-disciplinary professional association, concerned with the planning legal and environment fields. The Association draws its membership from professions involved in the planning and environment fields including:

- Architects – Building, Landscape
- Barristers
- Developers
- Economists
- Engineers – Civil, Traffic, Acoustic
- Environmental Scientists
- Heritage specialists
- Lawyers
- Local Government Officers
- Planners
- Social Planners
- State Government Officers
- Surveyors
- Transport Planners
- Valuers
- Urban Designers