

Mandatory Provisions in Planning Schemes

August 2023

This practice note sets out criteria that can be used to decide whether a mandatory provision is appropriate in a planning scheme.

Victorian planning schemes largely consist of performance-based provisions that require an assessment to decide whether a proposal:

- meets relevant planning objectives
- achieves an appropriate balance between competing planning policies.

Performance-based provisions can facilitate variation and innovation in how a use or development is planned. They can also accommodate unforeseen circumstances peculiar to a particular application.

While mandatory provisions only provide fixed planning outcomes, there are circumstances where they are warranted. Mandatory provisions provide greater certainty and ensure a preferred outcome and more efficient process. Although mandatory provisions are the exception, they may be used to manage:

- areas of high heritage value
- areas of consistent character
- sensitive environmental locations such as along the coast
- building heights in some activity centres.

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* (also called a *discretionary provision*) provides for flexibility in the method or measure used to achieve a required outcome.

When are mandatory provisions appropriate?

Mandatory provisions usually specify a maximum or minimum built form requirement. Most mandatory provisions are for building heights, but they can also relate to:

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

Mandatory provisions may be considered if it can be demonstrated, through a detailed assessment and evidence-base, that discretionary provisions are insufficient to achieve desired outcomes.

The criteria below, provides a guide to assessing the appropriateness of a proposed mandatory provision. Each question should be fully considered and justified.

Criteria for Applying a Mandatory Provision

STRATEGICALLY SUPPORTED

Is the mandatory provision strategically supported?

- Does the proposed mandatory provision have a solid strategic objective while having regard to the planning objective?
- Does the proposed mandatory provision implement planning policy (state, regional or local)?

APPROPRIATENESS OF DEPARTING FROM PERFORMANCE-BASED APPROACH

Is the mandatory provision an appropriate substitute for a performance-based provision?

- Will most proposals that contravene the proposed mandatory provision lead to unacceptable planning outcomes?
- Has the proposed mandatory provision been drafted to limit any unnecessary loss of the flexibility and opportunity available through a performance-based approach?
- Have all other relevant performance-based provision options been explored?
- Would policy or performance-based measures lead to the outcome prescribed by the proposed measure in most cases?
- Is there evidence of adverse existing or proposed use or development that justifies the proposed control?

FACILITATES REQUIRED OUTCOME

Does the mandatory provision provide for the preferred outcome?

- Is the proposed mandatory provision limiting? Does it only lead to one outcome from a number of suitable ones that would deliver on related planning policy?
- Does the proposed mandatory provision avoid the risk of adverse outcomes in a way that a performance-based approach cannot?

The planning authority should also consider whether the proposed mandatory provision reduces costs for councils, applicants and the community.

Controls for mandatory height and setback for activity centres are dealt with in *Planning Practice Note 60 - Height and Setback Controls for Activity Centres*. That practice note outlines the level of work necessary to demonstrate that mandatory provisions are required and provides guidance on implementation approaches.

How to write mandatory provisions in planning schemes

In writing a mandatory provision, 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.

Where can a mandatory provision be specified?

Mandatory provisions can be specified in a zone or an overlay if required by the Victoria Planning Provisions.

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

A local planning policy is not a control. Local planning policies have a role to guide the exercise of discretion created by a zone, overlay or particular provision. Local planning policy cannot include mandatory provisions or remove a discretion under a planning control.

It is important to use clear language in both mandatory and performance-based provisions to ensure their effect is properly understood.

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
- Queenscliff Planning Scheme Amendment C7
- Melbourne Planning Scheme Amendment C20
- Hobsons Bay Planning Scheme Amendment C11
- Mornington Peninsula Planning Scheme Amendment C204
- Stonnington Planning Scheme Amendment C272
- Bayside Planning Scheme Amendment C126
- Maribyrnong Planning Scheme Amendment C162
- Yarra Planning Scheme Amendments C293 and C291.

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