

NEW PLANNING ARRANGEMENTS: DA DECISION MAKING

Tim Field, ISCCC Committee Member

In Summary:

The move to an 'outcomes focussed' planning system involves

- **Major deregulation of residential development, with DAs to be assessed against broad outcome measures**
- **Most current rules have been dropped, and DAs will not be assessed against them**
- **Assessment against broad outcome measures is not a good basis for consistent, transparent decision-making**
- **Most current rules will be placed in a 'Technical Specifications' document; which can be changed by ACTPLA as it wishes. It is proposed to use this document on a 'deemed to satisfy' basis.**

Measures which are essential to improve the proposed arrangements include

- **Adopting tighter definitions of desired outcomes, based on verifiable evidence and objective tests of compliance**
- **Adopting additional key mandatory 'Assessment Requirements', for example covering current V369 provisions**
- **Technical Specifications to form part of the Territory Plan, and changes be regarded a major amendment to the Plan.**

Proposed Mandatory provisions

The key change in the move to an 'outcomes focussed' approach is to drop most current rules from the Territory Plan.

Part E1 Residential Zones Policy of the proposed Territory Plan sets out 'Assessment Requirements' ie, mandatory controls, for the various residential zones. These cover, for RZ1 and RZ2

- **Site coverage**

- Density and minimum block sizes for multi- unit housing
- Number of storeys
- No apartments in RZ1.

Technical Specifications

Rules other than those retained as ‘Assessment Requirements’ have been removed to a document titled ‘Technical Specifications, November 2022’. These cover

- Development and site controls (setbacks, private open space)
- Height, bulk and scale (incl solar access)
- Environment & heritage (incl tree planting)
- Amenity, safety and accessibility (incl privacy)
- Transport, parking and movement
- Services and utilities.

The Technical Specifications document does not form part of the Territory Plan, and, to be approved, a development does not have to be assessed against them. Rather

‘Technical specifications are used as a possible solution or to provide certainty for identified aspects of a development proposal. Technical specifications may also be used as a reference or benchmark for technical matters in the preparation and assessment of development’ (TS p2)

‘Where a proposed development complies with a relevant provision in the technical specifications and the technical specification comprehensively addresses the outcome, further assessment regarding those specific provisions will not be required’ (TP partD4)

A problem with this approach is that the Technical Specifications document is not part of the Territory Plan. It can be amended by ACTPA without reference to the Assembly (or indeed anyone.)

This means that ACTPLA can change the basis by which a DA is deemed to comply, and will certainly be under pressure from industry to water down the specifications.

If it is desired to have the Technical Specifications operate on a ‘deemed to satisfy’ basis, then they should be included in the

Territory Plan, to ensure Assembly oversight. Also the proposed Planning Act must explicitly allow for this use.

Case study: Variation 369: Living Infrastructure

Variation 369 to the existing Territory Plan came into effect on 1 September 2022, and introduced new rules covering minimum levels of private open space and planting areas, and minimum levels of tree plantings across developments in RZ zones. These rules have been incorporated into the relevant codes (Single Dwelling, Multi Unit) in the current Territory Plan.

In the proposed new planning arrangements, the contents of V369 have been incorporated into the Technical Specifications document.

This means that, when the new arrangements are in place, the V369 provisions will not apply. A DA will not have to address them, and will not be assessed against them.

They are only relevant if a developer decides to comply with the Technical Specifications on a 'deemed to satisfy' basis.

Basically, a development will not have to comply with the content of V369 unless the developer chooses to do so.

Decision Making

Under the proposed Act, a decision on a DA must consider, inter alia, 'any applicable desired outcome in the territory plan.' The relevant context here includes

- within the Territory Plan, the desired policy outcomes set out in the Residential Zones Policy and District policies
- more indirectly, the 'principles of good planning' in the draft Planning Act, given the Territory Plan must promote these principles
- The planning strategy and district strategies; the Plan is to give effect to these
- The Urban Design and Housing Design Guides.

On the face of it, focussing on desired policy outcomes has some logic, by bringing broader considerations to bear. For example, for RZ1, the Policy Outcomes set out in the Residential Zones Policy comprise

The fundamental desired outcome for the RZ1 zone is to achieve and/or maintain low density residential neighbourhoods in suburban areas.

Other important desired outcomes to be achieved in the RZ1 zone:

- 1. Provide for a range of housing choices that meet changing household and community needs.*
- 2. Limit the extent of change that can occur particularly with regard to the residential density and original pattern of subdivision.*
- 3. Ensure development respects valued features of the neighbourhood and landscape character of the area and does not have unreasonable negative impacts on neighbouring properties.*

DAs will also be considered against general 'assessment outcomes', for example being consistent with the Design Guide.

The problem is that all of these statements are qualitative, broad in nature and not measurable. Their interpretation when applied to decision -making on a specific DA therefore involves subjective judgement.

They are not a good basis for consistent, transparent decision-making.

By comparison, current arrangements require developments be consistent with the relevant code in the Territory Plan, and assessment against the code's rules and criteria. Assessment against a broader range of desired outcomes, rather than against the more specific rules and criteria, will be more open to differing interpretations.

Implications

For those DAs that do not comply with the Technical Specifications, the use of broader, qualitative outcome criteria gives ACTPLA enormous discretion to approve applications.

It may be hard to win an appeal against approvals, as this will involve assessing competing subjective judgements regarding these diffuse concepts, rather than more specific assessment of whether a rule has been complied with or not.

Over time, court rulings may provide some clarification, but court appeals are only likely from proponents appealing against rejection of a DA. It may become difficult for ACTPLA to reject a DA.

If nothing else, there is likely to be a period of greater uncertainty for both the industry and the community.

Possible Action

Tighten the 'desirable outcomes' measures

The Development Assessment Forum, in 2005, developed a leading practice model for Development Assessment in Australia. It indicated

Clear requirements and criteria for submitting and assessing an application should be available at the outset to ensure appropriate outcomes.

And further,

Clear policy statements enable the formulation of objective rules and tests, which are essential for efficient and consistent decision-making.

Technically excellent criteria are based on appropriate, relevant, verifiable evidence and lead to objective tests of compliance.

(A leading practice model for Development Assessment in Australia, Development Assessment Forum, 2005)

A simple example of an objective, measurable 'desired outcome' would be that any development had to preserve the solar access of neighbouring properties. 'Solar access' is easily defined (certain hours of access in midwinter, etc). How the proposed development achieved this would be up to the proponent, rather than, as currently, conforming to rules about setback, building bulk. Such an approach would provide flexibility for innovation, while preserving a desired outcome of solar access.

Retain key existing rules

An examination of the Queensland outcome focussed system concluded:

We might start by exploring whether all aspects deserve the same amount of flexibility. We treat the urban footprint boundary as a firm

policy position. Why can't we allow other aspects of significance to local communities and local governments to have a greater level of certainty?

The potential win-win is that greater certainty will give communities confidence and support a more efficient assessment process.

This is not to advocate removing all flexibility. But we could firm up the negotiating position on certain matters. We should be clever enough to modify our approach to achieve a better balance. Perhaps we can identify these things as specific requirements or minimum standards (rather than optional), and that they are to be met unless there are special circumstances or a higher level of performance can be achieved. (Jennifer Roughan, Director Buckley Vann Planning + Development Mar 2016)

In the current context , this would mean adding key rules to the mandatory 'Assessment Requirements' in the proposed Territory Plan. For example, the current rules relating to V369 would be an obvious candidate for this.

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