



Improving the Operation of ResCode

MAV submission

December 2021

© Copyright Municipal Association of Victoria, 2021.

The Municipal Association of Victoria (MAV) is the owner of the copyright in the publication MAV submission – Improving the Operation of ResCode.

No part of this publication may be reproduced, stored or transmitted in any form or by any means without the prior permission in writing from the Municipal Association of Victoria.

The MAV does not guarantee the accuracy of this document's contents if retrieved from sources other than its official websites or directly from a MAV employee.

While this paper aims to broadly reflect the views of local government in Victoria, it does not purport to reflect the exact views of individual councils.

Table of contents

1	<i>Executive summary</i>	3
2	<i>Introduction</i>	4
3	<i>Proposed Performance Assessment Model (PAM)</i>	5
	3.1 <i>Complete application requirement</i>	5
	3.2 <i>The move to “deemed to satisfy”</i>	5
	3.3 <i>Dilution of neighbourhood character and local policy</i>	6
	3.4 <i>Time savings are overstated</i>	7
4	<i>Implementing the PAM into planning schemes</i>	7
5	<i>Council resourcing</i>	7
6	<i>Consultation timeframes and practises</i>	8
7	<i>The role of discretion and the push for consistency in Victoria’s Planning System</i>	8

1 Executive summary

The MAV welcomes the opportunity to provide a submission to the *Improving the Operation of ResCode* discussion paper.

The MAV is the peak representative and advocacy body for Victoria's 79 councils. The MAV was formed in 1879 and the Municipal Association Act 1907 appointed the MAV the official voice of local government in Victoria.

Today, the MAV is a driving and influential force behind a strong and strategically positioned local government sector. Our role is to represent and advocate the interests of local government; raise the sector's profile; ensure its long-term security; facilitate effective networks; support councillors; provide policy and strategic advice, capacity building programs, and insurance services to local government.

Councils have worked hard to tailor their planning schemes to balance State priorities with the needs of their local community. This includes embedding the outcomes of neighbourhood character studies in local policy and schedules to zones and overlays. Balancing State-led priorities like housing growth with the need for excellent urban design and improved neighbourhood character is the core business of local council planning departments. Moreover, using discretion to balance competing priorities is at the center of the Victorian planning system

The MAV and councils are invested in improving the operation of ResCode. The proposed changes do not achieve this, and thus we cannot support them for the following reasons:

- ResCode standards were developed in the context of discretionary decision making. Each individual standard must be comprehensively reviewed to ensure that their use as a performance measure will produce acceptable built-form outcomes
- Councils are highly concerned that the proposed reforms will undermine the role of local policy in protecting and enhancing neighbourhood character
- The proposed operation will remove discretion as a fundamental element of ResCode assessments
- The resourcing burden on councils to introduce, amend and revise their neighbourhood character work will be huge, particularly when they are concerned the proposed system will result in less favorable outcomes for their communities
- The time savings for councils and communities are overstated

Given councils' critical role in the planning system and their status as a democratically elected tier of government, it is disappointing that DELWP has not provided a sufficient consultation period to allowed for due consideration of the proposed reforms in council chambers. Deeper engagement with councils in the development of these proposed reforms would have enabled DELWP more time to address some of the key issues raised in this submission.

This submission does not seek to provide technical detail on specific ResCode standards and neighbourhood character issues that individual councils experience. It is anticipated councils will make their own submissions in relation to these aspects. The focus of this submission is primarily on themes that the MAV and councils believe DELWP must consider.

The MAV extends its gratitude to council officers who took the time to provide thoughtful and detailed input into this submission and earlier drafts.

2 Introduction

Victoria faces many housing challenges, including:

- affordability
- timely release of land to meet demand
- building resilient and regenerative homes in the face of anthropogenic climate change
- increasing density while ensuring change is managed in line with expectations around protecting and enhancing neighbourhood character
- access to reliable and integrated transport
- providing infrastructure for current and future communities

Councils continuously strive to ensure housing responds to a broad range of community needs. The most important part is ensuring high quality design. This includes ensuring external design responds to neighbourhood character or provides an innovative and to-scale response, as well as good internal amenity.

ResCode remains the key planning tool when assessing the design and character of residential development in Victoria. Councils believe that this assessment, linked to council strategic policy and schedules to zones and overlays, has served Victorians well.

Despite the strengths of the system, councils have been frustrated by the inconsistency of VCAT decisions on ResCode. The confusing nature of deemed to comply with a standard or objective creates uncertainty for councils, industry, “mum and dad” developers, as well as informed communities keen to preserve the intrinsic values of their neighbourhood. We welcome a State-led effort to address this issue. It is critical however, that local discretion around character and other detailed design elements remains part of the planning system. These reforms must not weaken councils’ ability to develop and implement local policy.

Local planning policies are vital to meet community expectations, express local character and provide guidance as to how change will be managed. Councils must retain the right to strive for higher standards above the state-wide baselines for dwelling design.

Neighbourhood character cannot be assessed through solely applying purely quantitative measures. The fundamental importance of qualitative measures is explicitly acknowledged in Practice Note 43 – Understanding Neighbourhood Character with references to measures such as ‘rhythm’, ‘consistency’ and ‘respect’. The Practice Note also clearly states that “Any assessment that takes a ‘tick-a-box’ approach to identifying the features and characteristics of the neighbourhood is not sufficient.” It is this statement that underpins the position of the MAV and councils in their position on these reforms.

3 Proposed Performance Assessment Model (PAM)

By design, the planning system in Victoria allows for discretion and debate around how to envisage, develop and protect our communities and environments. Councils value the ability to tailor planning controls to meet the needs and aspirations of their communities.

Implementing the proposed reforms will require councils to undertake new or updated strategic planning work on neighbourhood character. This is highly resource-intensive work that will require significant investment of council time and funding. It is a particularly onerous requirement for councils that have completed housing studies and neighbourhood character reviews in recent years.

It is not clear if it is intended for the new PAM system to be introduced before councils have the opportunity to amend their zone schedules. There are sector concerns that a State-led amendment to implement the new PAM system will jump ahead of council amendments that update zone schedules in line with the new system. This is of particular importance in rural and regional areas where the strategic work has not yet been undertaken and the market is reluctant to deliver anything other than the status quo.

It is critical DELWP engages with councils to work through these types of questions to avoid unintended negative consequences. Councils are also keen to work with DELWP to ensure the neighbourhood character planning provisions allow for local nuance.

3.1 Complete application requirement

We strongly support the proposed requirement for applicants to submit complete applications at the time of lodgement. PPARs data shows approximately 50% of applications require further information under Section 54. This requires councils to spend time and resources on assisting applicants to demonstrate they comply with the planning scheme or clarify contradictory information on plans and in reports. Clearer application requirements and mandated complete applications will go some way towards resolving these issues. There will always be some circumstances where further information is needed after lodgement. However, these circumstances should be the exception and not the norm.

3.2 The move to “deemed to satisfy”

The discussion paper underestimates the degree to which directly translating existing standards to explicit deemed to satisfy (DtS) measures would impact planning outcomes.

The status of ResCode standards, and whether meeting all standards is sufficient to demonstrate meeting an objective, is a contested space. Disagreement over this is one of the driving forces behind the discussion paper and proposed changes.

We give weight to Dr Stephen Rowley’s evidence¹ that ResCode standards were neither intended as nor currently applied as a DtS measure.

Performance based assessment and DtS measures are fundamentally different. A performance-based assessment allows for consideration of whether in the context of the individual application, the proposed design response is suitable. A DtS measure must instead be set to ensure that a response that meets DtS will be suitable in every context. Accordingly, DtS measures should be set conservatively.

¹ [“Who Needs Context and Character”](#) – Dr Stephen Rowley, 2021

The PAMs proposal, as many DtS systems do, adopts a hybrid model. Applicants can choose to meet DtS requirements or choose to instead demonstrate that an alternative response achieves acceptable outcomes in their individual context.

However, the work has not been done to demonstrate that the existing ResCode standards are suitable in all circumstances, and thus appropriate as DtS measures. It is impossible to support the move to the PAMs model without this background work. We do not believe that the potential incorporation of a small number of quantitative local performance measures to address neighbourhood character is sufficient to address this problem.

3.3 Dilution of neighbourhood character and local policy

Local policies are developed to articulate, protect and enhance neighbourhood character. These policies guide applicants, the community and VCAT on what councils consider appropriate or reflective of the site and its specific context. While quantifying character provisions will in theory improve clarity, the risk is it will do so at the cost of local nuance, depriving councils of the ability to apply discretion and negotiate better outcomes for their communities.

By quantifying neighbourhood character, the planning system will favour 'standard' developer design responses regardless of site and neighbourhood context. This represents a move towards a broad minimum compliance model, rather than improvement of how character is understood and assessed. This would be a retrograde step. We must ensure that new development positively contributes to existing or preferred character.

Many councils already have their own residential neighbourhood character objectives implemented across the suite of zones and overlays. Councils support continued use of this approach. Reforms to ResCode must not change the operation of the zones and overlays, but rather complement them.

Changes to the operation of ResCode must also not weaken local planning policy provisions in other areas of the planning scheme that cannot be translated into ResCode provisions. Commercial buildings, education and health buildings, industrial development and other special uses are not covered by ResCode. These types of development must still meet neighbourhood character expectations through specific local policies that seek design outcomes in respect to height, massing, separation, and greening, among other key considerations.

Neighbourhood character provisions must retain a level of flexibility to enable thoughtful, contextual site-specific assessments. For example, the draft Operational Provisions state that "If the proposed use or class of development complies with any specified performance measures, it is deemed to achieve the relevant performance objective and the responsible authority must not consider and is exempt from considering... The Municipal Planning Strategy and Planning Policy Framework." That is, this new model will strip away consideration of policy, and qualitative aspects of planning assessment will be severely diminished.

In the push to standardise neighbourhood character assessments, the paper fails to recognise that a development can be fully compliant with numerical standards such as setbacks and minimum private open space areas and still clearly not deliver acceptable built form outcomes in terms of the prevailing and preferred neighbourhood character. It is in these circumstances that the value of local policy and discretion in assessing an application becomes important. This must not be undermined.

A key strength of the Victorian planning system is its incorporation of community input into development assessments. The proposed model's push to quantify neighbourhood character has the potential to severely constrain community input and diminish public confidence in planning in Victoria. Communities play a critical role in informing and influencing local policy and are also able to voice their concerns about proposed developments both directly to council and at VCAT. This is a component of our system that is enshrined in legislation and gives social license to local planning decisions. The positive influence community input often has on development outcomes should not be underestimated.

3.4 Time savings are overstated

Councils are not convinced that the proposed model will result in time-savings for their planning officers or the wider public.

The planning scheme will still retain other planning controls and policy that must be considered by applicants and their representatives, and by councils as the responsible authority. Despite the desire for clarity in ResCode's operation, there will still be debate over whether standards are met, there will still be objections, and unresolved issues will still go before the council chamber or up to VCAT.

4 Implementing the PAM into planning schemes

We understand that DELWP wishes to progress these changes quickly as part of its wider reform program. However, in light of the issues raised in this submission, we ask that DELWP prioritise further engagement with councils to address and resolve their concerns.

In terms of eventual implementation, councils are keen to avoid the tight timeframes and uncertainties experienced in the Planning Policy Framework translation project. Significant burden often fell on smaller and less-resourced councils.

Requiring all councils to translate neighbourhood character standards into the new format ResCode in a set timeframe is not supported. This strategic work can take years, is costly and requires extensive community consultation. Many councils have already undertaken extensive neighbourhood character studies, with the support of DELWP, as part of township or suburban structure plan processes. We understand that some of these studies will be easily implementable, while others will need to be significantly updated or redone to reflect the level of detail required in the proposed PAM framework. The different levels of readiness and capacity in councils to undertake this work must be acknowledged.

If the proposed changes to ResCode are to be implemented by the State, there must be options that allow transitional provisions, or fast-tracked, policy-neutral planning scheme amendments to translate existing neighbourhood character policy into the PAM and zone schedules.

5 Council resourcing

There is a critical shortage of planners across the state. This has been an acute issue in small rural and regional councils for some time, however we understand that some regional cities and peri-urban councils are now struggling to recruit and retain planning staff. Many councils are under-resourced and may struggle to update their strategic work program to reflect the new operation of ResCode.

Changing the operation of ResCode will impact the everyday decision-making processes of many council planning officers. We support the State's willingness to run or fund workshops on the proposed new assessment. Workshops and training will need to be supplemented with guidance and practice notes. Example PAM measures will be helpful for councils, however councils must be able to specify or vary a broad range of design typologies and not be limited to a state-mandated set of options that may not reflect local character. We strongly support DELWP's offer to develop and work with councils in identifying existing best practice provisions that could become "model" PAM provisions. Regulatory testing must be done before any reformatting commences.

The Regional Planning Hubs have a key role to play in ensuring rural and regional councils have up-to-date planning schemes that enable the most efficient use of their extremely limited planning resources. We see a potential role for a well-resourced and funded Regional Planning Hubs program to work with rural and regional councils to keep their planning schemes updated and reflective of community views. This must include work on local character.

We strongly urge DELWP to involve councils in further developing these reforms and the resulting planning scheme amendments. Incorporating local experience and expertise of those at the frontline of the planning system will be vital. It is highly concerning that other areas of planning reform have not engaged openly with councils to obtain their expert input. Greater local government input assists in smooth implementation, and widespread buy-in from the level of government responsible for processing the overwhelmingly vast majority of planning applications in Victoria.

6 Consultation timeframes and practises

The timing and length of the consultation period for this discussion paper is disappointing. Councils have not been given sufficient time to thoroughly consider the proposals and test the likely impact on their ResCode assessments. Given councils' critical role in the planning system, it should be a given that council officers will have sufficient time to review the proposals, brief their councillors and allow their councillors to provide their views.

A more inclusive and involved consultation process with councils would have been beneficial.

The MAV and councils strongly agree with the sentiment expressed in the discussion paper that the detailed drafting of each PAM will require further review and refinement before coming into operation. We understand that councils have highlighted potential flaws in drafting and concerns over language used in the test translations. Councils are also keen to share with DELWP how the ResCode standards could be better drafted, and where gaps in their intended application lie. Additional consultation must occur on the above, with adequate timeframes to allow a thorough investigation and testing of the proposal and their implications.

7 The role of discretion and the push for consistency in Victoria's Planning System

The protection of neighbourhood character is core business of councils. To achieve positive long-term outcomes, the need for private investment must be objectively assessed against a broader public good. This is a complex task and often requires weighing up competing and strongly held views and vested interests.

It is the role of planners to undertake assessments on a site and context specific basis. Elements such as articulation, bulk, proportion, materiality and landscape character are extremely difficult to quantify. It is this difficulty that underlines the inherent issue of delivering 'certainty' in planning. As such, there is rarely 'certainty' and indeed certainty in all application types must not be the aim for planning in Victoria. This strive for 'consistency' should not be used to replace the need for critical thinking and context responsive design when preparing planning applications. There are sites where a 'cookie cutter' approach or design can be used, and other sites where this will not be appropriate.

Buildings and precincts have long lifespans and development carries significant impact not only for the proponents, but for future occupants, neighbours, and the community as a whole. Today many places continue to benefit from good foresight and long-term planning visions. We also pay for mistakes where decision making has not ensured quality outcomes. It is critical to take enough time to reach the right decisions in the approval phase.

Developers often call for increased consistency of provisions across municipalities. However, local variations to planning schemes are key to the operation of Victoria's planning system. They allow a unified system to be tailored to meet the different priorities and views of communities across 79 municipalities. Local variations ensure innovation of planning schemes, and encourage strategic thinking that leads to better outcomes across the state. Local variations are also a key tool for maintaining democratic legitimacy of planning systems. Without local policies, communities will increasingly reject the planning system, and the role and authority of assessors and decision makers will continue to erode.

These reforms have the potential to enable planners to think more critically about how to make the drafting of neighbourhood character provisions clearer, as well as the potential for the consolidation of use of existing overlay controls and zone schedules. However, we must ensure that those assessing applications against the planning scheme can use discretion to make decisions that benefit all of the community.