

# The Role of Mandatory Provisions in Planning Schemes

Planning Practice Note 59

SEPTEMBER 2018

This practice note sets out criteria that can be used to decide whether mandatory provisions may be appropriate in planning schemes.

In addition to this practice note, specific criteria and implementation approaches for proposed mandatory height and setback controls at activity centres are dealt with in *Planning Practice Note 60 Height and setback controls for activity centres*.

## 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?

Specific requirements and criteria for mandatory height and setback controls at activity centres are dealt with in *Planning Practice Note 60 Height and setback controls for activity centres*. That practice note outlines in more detail the level of work necessary to demonstrate that mandatory provisions are required and provides guidance on implementation approaches.

## 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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