

Policy Position – Strengthening Discretionary Height Provisions



POSITION

1. Summary

In some planning authority areas, there appears to be a divide between community expectations on development and the outcomes that are approved through the Victorian Civil and Administrative Tribunal (VCAT) appeal process.

In reviewing the decisions made at VCAT that have resulted in the approval or refusal of greater heights, the Urban Development Institute of Australia (Victoria) has found a great level of consistency in their rulings.

Based on this review, it is apparent that community anger towards developers and the VCAT appeals process for allowing development outcomes exceeding discretionary height limits is misdirected.

The review found that in those instances where the discretionary height limits applied by the planning authority do not consider or are misaligned with precinct history, design objectives and state planning policies (existing objectives and policies); greater development heights were justified.

However, where discretionary height limits aligned with existing objectives and policies; and no exceptional circumstances existed, proposals for an increased height were refused at VCAT.

While misalignment of local planning provisions with existing state policy objectives is identified as a primary issue in addressing community concerns, the UDIA recognises the need for consistent decision making in respect of proposals which exceed the discretionary height.

To address these issues, it is appropriate for State Government to look at:

- How discretionary height limits are consistently and appropriately set at a level which considers precinct history and is aligned with design objectives and state planning policy, and
- How development proposals exceeding discretionary height limits are dealt with to ensure consistent and appropriate decision making by the planning authority.

Recommendations

The UDIA recommends that State Government considers:

- Providing planning authorities with the education and tools to more effectively lead change with community engagement during the planning scheme amendment process;
- Reviewing the planning scheme amendment process to ensure that proposals are aligned with existing objectives and policies before and after the public engagement process;
- Developing a Planning Practice Note that informs decision makers on how variations from discretionary height limits should be assessed; and/or
- Introduce a new planning approval process that allows development applications that meet discretionary height limits and other significant provisions to be streamlined.

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ABOUT US

Urban Development Institute of Australia (Victoria)

The Urban Development Institute of Australia (UDIA) is the peak industry body for the urban development sector. In Victoria, we provide over 350 member companies with the benefits of policy and advocacy, industry intelligence, networking and business building.

Our members include developers, consultants, financial institutions, suppliers, government authorities and utilities. Together we drive industry discussion and debate and inform all levels of government to achieve successful planning, infrastructure, affordability and environmental outcomes.

DETAILED ANALYSIS & COMMENT

1. Summary of Issues

As demonstrated in the assessment of case examples below, the core reasoning around the success and failure of a proposal that goes to VCAT is centered around that proposal's alignment with and consideration of precinct history, design objectives and state planning policies.

The existence of VCAT case examples which refuse or approve heights based on consistent reasoning suggests that the issue with discretionary heights is in how those limits are being set.

As such, it is the position of the UDIA that the most significant issue with discretionary heights is in the manner that they are set.

Establishing discretionary height limits that lack consideration of and alignment with precinct history, design objectives and state planning policy creates unrealistic community expectations. Furthermore, the lack of honest and earnest discussions with the community around development further fuels community outrage as expectations are not aligned with reality.

Notwithstanding the issues related to aligning community expectations with reality, the UDIA recognises the Industry's role in managing community expectations. More specifically in locations where the discretionary height limits are properly aligned with design objectives and state planning policy.

To address these issues, it is appropriate for state government to look at:

- how discretionary height limits are consistently and appropriately set at a level which considers precinct history and is aligned with design objectives and state planning policy.
- how development proposals exceeding discretionary height limits are dealt with to ensure consistent and appropriate decision making by the planning authority.

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2. Case Examples from VCAT

In assessing some of the justifications used at VCAT for the approval or refusal of development heights exceeding the discretionary limit, the UDIA found that there is a consistent approach to determinations.

For example, in cases where development exceeding the discretionary height limit is refused, VCAT found that the limits were appropriately aligned with existing design objectives and state planning policies, and that there were no exceptional circumstances to support deviation from the limits.

Similarly, in cases where development exceeding the discretionary height limit is approved, VCAT found that the discretionary height limits failed to consider urban context and precinct history and didn't align with existing state planning objectives and policies.

The dominate elements considered from existing objectives and state planning policies include:

- The urban context;
- Intended use for the area (incremental vs substantial growth)
- Quality of proposal; and
- Effect of heritage overlays.

Case Examples where additional height was refused

1. *Australian Hotel Development Pty Ltd v Melbourne CC*

- Proposal to develop a 36-storey building to be used for shops, offices and 137 dwellings
- Issues considered by the tribunal were height, prominence of building in Melbourne skyline and if the development would provide equitable development opportunities
- Tribunal found no issue with policy but was concerned about the significant impact the building would have on the public realm
- Tribunal maintained the approval of a nearby taller building would not impact the decision made regarding this proposal
- The decision was made that despite the employment opportunities the proposal would provide, the negative effect the shadow would have on important public amenity was not worth it

2. *Blue Earth Group Pty Ltd v Yarra CC & Ors 2013*

- Proposed to develop the land with 4 and 7-storey buildings with 112 dwellings and 119 basement carparks
- Site in residential zone and subject to a DDO
- Tribunal deferred to Clause 21.05 Strategy 17.2 of the Yarra MMS that provides reasons a development may exceed the 6-storey height limit
- Tribunal found, even at 5 or 6 storeys, the proposal would not have been appropriate
- "it is our view that this design does not even get to that level [for a 5 or 6-storey development] of acceptability that is reasonably expected from any urban consolidation proposal that comes before this Tribunal"

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- Tribunal believed the site could accommodate a development larger than the preferred height, but the design would have to be of a higher quality than this proposal
 - The proposed building did not “display visual architecture of anything above mainstream”
3. *244 Dorcas Street Pty v Port Phillip CC*
- 10 storey building with residential apartments on land in the Commercial 1 zone at the edge of South Melbourne lying in a heritage precinct
 - DDO applying to site has a preferred discretionary height limit of 6 storeys or 23.5m, whichever is lower
 - Tribunal’s concern was the additional 4 storeys that exceeded the preferred height limit
 - Location of the site was problematic; next to an individual heritage building; unlikely that there would be further high built form around the site
 - Proposal rejected as the building would be a dominant feature in views from the surrounding area to the detriment of the heritage place

Case Examples where additional height was approved

4. *Golden Seven Stars Pty Ltd v Manningham CC*
- Proposal of 4 storey section with height of approx. 14m; discretionary height in relevant DDO was 11m (3 storeys)
 - Council did not respond within the prescribed time; issue was referred to VCAT
 - Tribunal concluded the site’s large size and ‘peculiar topography’ justified exceeding the discretionary height limits
 - Council’s argument was that, while it accepted the area was focus for higher density development, it was ‘effectively bound by the three storey limit’
 - Tribunal considered the following points: the proposal was in accordance with the objectives of local policy, the setback and design of the building ensured there would be no visual impact on views and the proposal was fitting in the context of other approved proposals
5. *Padis Investments v Port Phillip CC*
- Proposal for 5 storey building (17-17.5m) deviated from DDO discretionary height of 12m
 - Tribunal recognised in this case the ‘tension’ between policy seeking to create a new built form character and a height limit that prescribed a lower built form than the rest of the site’s context
 - The proposal was deemed appropriate because of the physical context of the transition area and the abrupt change in built form, it aligned with policy objectives of a new built form character as well as broader policy objectives of urban consolidation and the lack of amenity impacts to the adjacent residential area
6. *Salta Properties v Stonnington CC*
- Application for a 9-storey building in South Yarra in 2013
 - Permit was granted by the Council on the condition of “removal of one level”
 - Permission was sought from VCAT to reinstate the level

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- A brief hearing at VCAT resulted in the permit being granted; however, deferring to the Tribunal resulted in a four-month project delay and close to \$50,000
- Conjecture from developer that the condition to remove a level was politically motivated as VCAT made the decision to overrule Council's demand with little delay in the first hearing of the matter

3. Consistent Approach to establishing discretionary height limits

As demonstrated above, much of the community outrage towards the height of development has stemmed from the creation of community expectations that fail to be aligned with design objectives and state planning policy.

This misalignment is created when there is a lack of honest and earnest engagement and discussions with members of the community about height and density. As such, the establishment of discretionary height limits are often based on political preferences rather than informed and professional assessments.

To better engage with the community, planning authorities need to be better equipped to engage with the community as a change leader. This comes down to providing municipalities with the education and tools needed to lead discussions with the community to facilitate appropriate change to their local government area.

As better equipping municipalities to lead the discussion on development does not guarantee honest and earnest community engagement on height and density, additional checks and balances are needed throughout the planning scheme amendment process.

It is not fair or reasonable to shift the burden of ensuring planning scheme amendments are aligned with design objectives and state planning policies on the Minister for Planning. As such, independent checkpoints should be incorporated within the planning scheme amendments process to ensure alignment of proposals with existing policies and objectives.

While in some cases, the misalignment in local planning provisions with state planning objectives and policies is a result of inconsistency in establishing limits, in other cases the introduction of new state planning provisions did not come with a review and update of local planning provisions and strategy.

For example, despite Plan Melbourne's direction to direct new development into areas with appropriate infrastructure to support greater density and optimise the value of existing infrastructure, there are housing strategies and local planning frameworks that have not been reviewed to ensure alignment with that direction.

This lack of alignment further demonstrates the need to have new state planning provisions to be accompanied with measures that review and align local planning frameworks. For example, should State Government undertake a review of local planning frameworks should local government fail to review an update their planning scheme's to appropriately align them with State Planning Policy?

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Encouraging preferred outcomes

One of the major criticisms with the application of discretionary height limits is that proposals often propose greater heights with the current process often rewarding such proposals. However, this perception is often strongest in areas where the existing local planning framework has not been appropriately reviewed to align with state planning provisions.

Furthermore, in the current overall planning framework, applicants are generally encouraged to exceed preferred heights. In identifying how the planning application process encourages permit applications to exceed discretionary height limits, it is important to understand project risk.

In majority of areas, planning applications for residential development is required to go through a public notification process with a large proportion of those applications going to VCAT. This often occurs whether the application meets discretionary height limits or not.

As such, in majority of circumstances an application for residential development that meets height limits have similar costs and risks than developments that exceed discretionary heights.

Whether the discretionary height limits are aligned or not with design objectives and state planning policies, the risk and cost associated with applications exceeding those limits do not differ much from applications that exceed them. As such, there is greater potential reward in attempting to exceed discretionary height limits without incurring additional cost and/or risk.

To encourage applications that meet appropriately set discretionary height limits, the planning approval process needs to ensure that the risk and reward associated with exceeding discretionary limits is lower than the risk and reward associated with meeting them.

Two separate approaches can be implemented to assist in reducing the risk profile of development applications meeting discretionary limits and increasing the risk associated with exceeding them. They include:

- Development of a Planning Practice Note and Controls that sets out the circumstances that must be taken into account to determine how variations from discretionary height limits should be assessed and determined; and/or
- Allow development applications that meet discretionary height limits and other significant provisions to undergo an assessment process that removes the requirement for public notification and removes third party appeal rights.

Planning Practice Note:

By setting the circumstances in which a discretionary height limit maybe exceeded, the Planning Practice Note should discourage applications that don't meet any of the reasoning provided.

The Planning Practice Note should describe the following:

- Exceptional circumstances in which variation may be accepted in assessing a development application;

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- List of relevant State Planning Policies that should inform acceptable height limits; and
 - List of existing strategies and objectives that should inform acceptable height limits.

Streamlined Approval Process:

Decreasing the risk and cost associated with obtaining a permit for development that meets the discretionary height limits will do two things:

- Decrease the potential reward and increase the risk associated with exceeding appropriately set discretionary height limits; and
- Ensure that existing objectives and policies can still be met whenever discretionary height limits are not appropriate set and aligned.

Removing the public notification process and third party appeal rights for development that meets height and other requirements will encourage proposals that are not only aligned with existing objectives and policies, but also meets the general expectations of the community.

In situations where the discretionary height limits have been aligned with existing objectives and strategies, any potential variation in height would have a higher risk profile with the potential reward being significantly lower.

It is only in situations where the discretionary height has been set too low in context of existing objectives and policy that the potential reward in exceeding limits might justify the additional risk. As such, applications seeking to exceed discretionary height limits will become less of the norm while still ensuring state planning objectives and policies can be achieved.

4. Maintaining Community Influence

Some proponents would argue that the removal of public notification and third party appeal rights for development will exclude the public from influencing outcomes that may impact on them or the community.

However, this ignores the public notification and engagement process undertaken during the planning scheme amendment process.

If undertaken effectively, the public notification and engagement process will have a greater influence on development outcomes, particularly when accompanied with incentives to meet specific preferred outcomes such as height and density.

Furthermore, providing planning authorities with the education and tools to more effectively lead the discussion on development outcomes, the community will be able to be better informed of constraints and opportunities in influencing planning outcomes. This will ensure a stronger alignment between community expectations and actual development outcomes.