

The Land use planning system: potential and problems for biodiversity

Dr Michael Buxton

Associate Professor of Environment and Planning
School of Social Science and Planning, RMIT University

Abstract

Land-use planning systems are potentially powerful means of conserving biodiversity and achieving a range of other environmental outcomes. Between 1987 and 1893 the Victorian government led other Australian governments in using the land use planning system to introduce regional and state-wide biodiversity conservation measures while allowing local authorities to respond to specific local needs. The Victorian Planning Provisions (VPPs) fundamentally altered this approach. The new format planning system is unable to deliver effective biodiversity conservation measures. The recognised problems with the VPPs are not just problems of implementation: there are indications of systemic problems that will only be overcome by moving to a more regulatory approach and requiring improved connections between land-use planning, catchment management and coastal management specifically aimed at conserving biodiversity.

Keywords

biodiversity conservation, land-use planning, Victorian Planning Provisions

Land use planning and biodiversity conservation

Land use planning systems offer powerful tools to protect biodiversity and to achieve conservation objectives generally. This potential has never been realised in Victoria. Important initial steps were taken by the Victorian government in 1989 with the introduction of state-wide native vegetation planning controls, and in 1992 with the exhibition of state-wide wetlands planning controls, under the *Victorian Planning and Environment Act 1987*. The native vegetation measures were implemented effectively until the election of the Kennett government in 1992, when strong state-wide intervention, monitoring, reporting and local government capacity-building programs were eliminated and new exemptions were introduced which severely reduced the effectiveness of the original land use measures. The state-wide Wetlands Planning Controls were quietly abandoned by the then Department of Natural Resources and Environment after the election of the Kennett government.

In addition, the Victorian government based its land use planning for urban development corridors, to an important extent, on the achievement of environmental principles such as retention of critical habitat. It also completed a range of concept plans for river valleys and coastal areas which it included into planning schemes, and related many important planning decisions to the need for habitat protection and the protection of natural processes.

The use of the land use planning system to introduce biodiversity protection measures, soon after the commencement of the Planning and Environment Act in 1988, was a significant step in the history of land use planning in Australia. It marked a major shift away from the traditional view of land use planning as development facilitation, towards realising its potential for achieving conservation objectives. New South Wales had used the land use system to introduce planning protection in a limited way, for example to protect coastal wetlands. However, no state or Commonwealth government had attempted to introduce such broad-ranging state-wide biodiversity controls through the use of planning legislation or systems. South Australia, in comparison, introduced special legislation which included compensation for development rights to protect its areas of remnant native vegetation. The Victorian approach specifically excluded compensation under planning law.

The fate of these Victorian measures is also a story of lost opportunities. Governments, government agencies, interest groups and the Victorian community could have improved and strengthened these early initiatives and extended the principle of planning protection for biodiversity conservation into other areas such as streamside and roadside protection, protection of coastal areas, rural subdivisional controls, and the prevention of further deterioration of rural landscapes. However, after 1992 these early initiatives were weakened or abandoned, and the potential for their extension into other areas was lost. Most importantly, a new land use planning system was introduced — the Victoria Planning Provisions — which was based explicitly on the notion of development facilitation. The Victorian system was returned to a planning mentality more in tune with the development ethos that pre-dated even the 1971 changes to the Melbourne Metropolitan Planning Scheme.

This stifling of a new environmental planning approach occurred with little opposition, in part because the Kennett government disenfranchised communities by removing democratically elected local councillors and dislocated community opposition by amalgamating local councils. Local government planners lost their political leadership and were burdened with short timeframes for completing new format planning schemes. Planning consultants and other leading planning professionals generally were conspicuous by their silence or support for the new system. The first steps towards linking planning with biodiversity conservation were stillborn with barely a whimper of protest.

The system before the Victoria Planning Provisions

Until 1985, responsibility for land use planning in Victoria was divided. The Melbourne and Metropolitan Board of Works (MMBW) was responsible for planning for the Melbourne metropolitan area. The MMBW was responsible for developing the Melbourne Metropolitan Planning Scheme (MMPS), preparing planning scheme amendments and submitting them to the minister for approval, issuing permits and generally administering the MMPS. The MMPS applied to all metropolitan municipalities. Gradually administration over a range of planning matters was devolved to local councils. In turn, a board comprising representatives from every metropolitan council directed the MMBW, until in the early 1980s it was replaced by a small board of members.

Non-metropolitan councils initiated and administered their own planning schemes, subject to the advice of the Town and Country Planning Board (TCPB) until 1981 (when it was merged with the Department of Planning) and government approval.

On 1 July 1985 the planning powers of the MMBW were transferred to the Minister for Planning and Environment, and the MMBW's Planning Branch merged with the ministry. The Planning and Environment Act was approved in 1987 and came into operation on 16 February 1988. From this date, Day 1, the MMPS was discontinued and its provisions allocated to planning schemes for each municipality. Each municipal council administered its own planning scheme, consisting of a state, regional and local section. Initially the former MMPS metropolitan zones and zone provisions were included in the regional sections, and the local sections consisted of scheme maps. In a largely unrecognised achievement, between Day 1 and Day 2 (30 October 1989), Ministry for Planning and Environment officers allocated relevant MMPS zones and other provisions to local planning schemes, in effect developing 52 separate metropolitan planning schemes in a policy-neutral manner using a standardised format. On Day 2 all zones and zone provisions were inserted into the local sections. From that date local councils assumed the powers formerly held by the MMBW and gained the same planning powers held by non-metropolitan councils. Instead of one metropolitan-wide planning scheme, there were now 52. The state government maintained control over state and regional policy, control over approval of scheme amendments subject to the advice of independent panels, and general legislative and overall control through the Planning and Environment Act.

During the late 1980s and early 1990s the state government progressively identified important future planning directions and initiated measures designed to achieve consistent state-wide and regional outcomes. It used two methods to achieve this objective.

The first method was to build up policies in the state and regional sections of planning schemes which would guide and sometimes direct decision-making. By 1992 a substantial body of policy had been established. Some policy consisted of detailed planning measures for specified purposes; for example, state-wide controls over the clearing of native vegetation (Amendments S15 and S16). Other important state-wide amendments to all planning schemes included Amendment S24 to protect wetlands, and Amendment S25 to control rural residential subdivision.

The second method was through the use of ministerial directions, detailed state government planning for future metropolitan growth corridors, and codes. The government engaged in comprehensive planning for future urban development, to be located in three growth corridors: — the Plenty Valley, Werribee and the South East — while continuing to protect ‘green wedges’ between urban areas and other environmentally sensitive areas such as the Dandenong Ranges, Upper Yarra Valley and Mornington Peninsula. This urban planning was based explicitly on environmental principles. Flora and fauna studies were carried out for all growth corridors, and the results built into decisions. For example, in the Plenty corridor a special zone was introduced to protect the Plenty Valley Red Gum area, which included not only land use controls such as tree removal and 40 hectare subdivision controls, but also management prescriptions. The government began to address the issue of urban consolidation in 1991 through VicCode I and later by initiating VicCode 2, and by requiring through a ministerial direction a minimum average residential density of 15 lots per hectare for the South Eastern growth corridor.

This approach attempted to nominate and achieve control over planning outcomes for issues of state government interest while allowing local variation between schemes on matters of local concern.

The new format Victorian system

Immediately after its election in 1992, the Kennett government set about introducing a new Victorian land use planning system. Planning Minister Robert Maclellan (1993a, p.11) made clear the revolutionary nature of this change, stating that ‘in case anyone still has any doubts, let me assure them that [the new system] is not just a papering over of the cracks [but] a complete reconstruction from the foundation up ...’

Like the British government, the Kennett government intervened to impose deregulation. Thornley (1993) has described this combination of centralisation and economic liberalism as ‘authoritarian decentralisation’. The new system is an enabling process in that it establishes rules which facilitate development or which loosely control it. It is a regulatory process designed to deregulate; that is, it uses legislation and statutory processes to lessen restrictions over development and provide a framework within which developers can act. This approach is intended to promote entrepreneurial action and replace government intervention with business decision-making. Stoker and Young (1993) have described the general shift in the role of government from that of ‘provider’ to ‘strategic enabler’.

The Kennett government made it clear that development facilitation was to be the focus of the new planning system. Development would be facilitated through the introduction of a centrally developed, uniform, state-wide planning system containing standardised zones and provisions, and through a substantial enlargement of ministerial powers. For the first time, standard state-wide planning provisions would be introduced into every planning scheme. In 1996 the government legislated to introduce the Victoria Planning Provisions (VPPs) (Minister for Planning and Local Government 1997). The VPPs originally comprised:

- the State Planning Policy Framework
- 25 standard zones
- 19 overlays
- 30 Particular Provisions
- 32 General Provisions.

The 1980s British planning model became the blueprint for Victoria, with its principal elements adopted. Even the language used by the British conservatives, with its emphasis on efficiency and its demonising of the system it replaced, is familiar to observers of the origins of the new format Victorian planning system. Land use planning could never have been excluded from the Kennett revolution in governance. It is too important a component of development, investment and power. Retaining a regulated planning system in an era of economic and institutional deregulation was inconceivable to Kennett government decision-makers.

The purposes of the revolution in the planning system were clear. The Liberal Party pre-election Planning Policy stated that planning should not inhibit wealth creation (Victorian Liberal Party 1992). The regulatory system ignored the need to 'facilitate economic development, which remains the State's number one priority', and inhibited or controlled instead of facilitated (Maclellan, 1993a, p.3). Therefore, it had to be removed.

The government made it no secret that promotion of development was the primary purpose of its new planning system. The 1993 ministerial statement made clear the minister's view that development facilitation was to be the focus of the new planning system. The Perrott committee, which reported to the Planning Minister on the provisions of the new system, restated this concern, arguing that 'Victoria's approval systems are ... an impediment to development (DPD 1997, p.2). The new emphasis would be 'on facilitating, rather than inhibiting or controlling (Maclellan 1993a, p.4) and 'promoting a positive attitude (*can do if ... rather than can't do unless ...*) (DPD 1997, p.6).

The Perrott Committee and Minister Maclellan both argued that development could only be facilitated through a simplified statutory planning system which led to certainty, efficiency and lower costs. Planning schemes were too large and complex, and there was too much variation between them. This frustrated developers and gave 'too much weight to the views of existing residents at a cost to ... facilitation of economic development'. This led to increased costs, uncertainty and delays (Maclellan 1993a, p.13, DPD 1997).

Assessment of the new format system

The Kennett government strongly criticised the performance of the planning system it inherited. The new system had six objectives: to facilitate development; reduce local control; improve strategic planning; reduce the size of planning schemes; reduce their complexity; and make them more certain, efficient, and less costly to administer. Only the first two have been achieved in any measure. The reason for this lack of success is the complex method the Kennett government chose to implement its objectives. The government began by introducing standardised zones into every planning scheme, reducing zone numbers and severely cutting the number of prohibited uses, relying instead on uses allowed without a permit, and discretionary uses.

However, the government supplemented the zones with a complex structure. This included state policy, 22 overlay controls, and 31 particular provisions on other issues such as native vegetation protection. Councils are free to apply zones and overlays to land as long as they select only from the suite of provisions provided. In this sense the use of these measures is discretionary, but their provisions cannot be varied by local government. This non-regulatory approach has led some commentators to argue that the market, not a planning scheme, will decide the fate of an area, and that current controls are 'simply a drive-through window on the way to a planning permit' (Glossop 2000). Councils may incorporate other documents, such as corporate plans and tourism policies, into their schemes, providing a new level of complexity. In addition, the government required local government to develop local policy that would provide guidance and consistency in local decision-making over discretionary uses (Gibson 1999).

Planning controls which are discretionary or aimed at development facilitation are a limited means of achieving biodiversity conservation, or contradict the objective of protecting biodiversity. This can be demonstrated by examining each of the principal types of provisions.

Critics have commented on the inability of the current zones to achieve complex environmental and social outcomes. The Rural Zone allows most agricultural uses without the need for a permit. It prohibits only three uses, allowing land in a Rural Zone to be considered

for use for industrial, major recreation and tourism, retail, commercial and other inappropriate uses. The Environmental Rural Zone contains more prohibitions on uses, including intensive husbandry, industry and retail premises, but still allows the consideration of many major tourism and commercial premises. The ability of councils to choose from a suite of zone and overlay provisions greatly reduces the environmental effectiveness of the planning system. The Victorian National Parks Association's (VNPA) (1996) prediction that many rural councils would not use the Environmental Rural Zone because of its increased permit requirements has been proved correct. Discretionary planning is severely limited as a means of achieving environmental outcomes, in the absence of a strong local historical culture of the use of planning controls for environmental purposes. The VNPA also criticised the use of only two main rural zones as an attempt to fit a complex suite of circumstances into a constrained structure.

Similarly, Gibson (1999) has also pointed to initial reluctance of councils to use the Environmental Rural Zone, the inconsistency in its use, and the inadequacy of the numbers and provisions of rural zones as a means of promoting sustainable agriculture and land use. The discretionary subdivision and other development zone provisions could also adversely affect the achievement of conservation objectives. The *New Format Scheme Panel Report* showed that rezoning requests for rural residential subdivision were the most prolific submissions which panels considered (Gibson, 1999). Excisions, dwellings in rural areas, and small lot subdivisions are now proliferating in some municipalities, sometimes on land with habitat value. Inadequate state control over small lot subdivision could seriously affect the maintenance and improvement of biological diversity.

The use of overlay controls is similarly constrained for three reasons. Firstly, they do not include protection for the broad range of habitats and biodiversity concerns. There is no Wetlands Overlay, for example. Secondly, the quality of the overlay controls is variable, and often provides only weak control over development. For example, the use of the Vegetation Protection Overlay as a means of protecting native vegetation is limited compared to the 1989 state-wide control because of the extension of exemptions. For example, the removal of vegetation to use land for timber production under certain conditions, for extractive industry, and for mineral exploration and mining is exempted from the need for a permit. Thirdly, the use of overlays is discretionary. Many rural councils, in particular, have not used the appropriate overlays, have used the wrong overlay, or have applied them inconsistently to land with similar characteristics. This is particular the case in the reluctance to use, or the misuse of, Environmental Significance (ESO) and Significant Landscape Overlays. The ESO does, however, allow the inclusion of matters other than native vegetation clearance which may have an impact on biodiversity values, such as subdivision and works.

Particular provisions apply to all land in addition to any selected provisions. They are therefore potentially a powerful land use tool to protect biological diversity. However, of the 31 particular provisions, only one — the native vegetation provisions — can be classified as environmental, and this is a weak control, as already discussed.

Similarly, the State Planning Policy Framework (SPPF) applies to all land in Victoria and sets the context for the consideration of land use decisions through permits and scheme amendments. A strong policy framework would also be a strong tool for environmental protection and natural resource management. However, the SPPF is of little use as an aid to conserving biodiversity and achieving environmental outcomes. The content of the SPPF is very general and difficult to apply to particular situations, is generally not mandatory, with limited use of the word 'must' compared to the terms 'should' or 'have regard to', omits key environmental provisions, and in parts is contradictory. In most cases it is very difficult to apply, and of little use.

The new format system originally sought deregulation, consistency and simplicity, and has ended with a wide range of optional quasi-regulatory features, with little use for environmental purposes, but which have added an unprecedented level of complexity within and between planning schemes. The system is now based on an inconsistency. On the one hand the zones promote a philosophy of deregulation, as does the optional use by local councils of some

provisions. On the other, the new schemes make available a complex number of new elements which can be used, with limited effect, in an attempt to regulate discretionary uses.

There are a number of explanations for this contradictory approach. The principle of market liberalisation may be more important than that of increased efficiency. The government may be prepared to tolerate increased complexity, costs, delays and inefficiency so long as increased levels of development occur in the end. It may accept variation between schemes, contrary to the Minister's criticism of variation in justifying the new system, so long as variation does not seriously impede development.

A second explanation is that the structure and development of the Victoria Planning Provisions is the result of a number of influences not always in accord with the Minister's 1993 statements. It is common for differing agendas to help shape the final form of policy. A lot of attention is being paid, for example, to improving the quality and consistent interpretation of local policy in an attempt to ensure it is a useful statutory tool. The government and official proponents of the new system are attempting to improve local policy while containing local power and control; that is, to maintain the original aims of the new system. But others, particularly at a local level, are attempting to use this opportunity to extend local control and, in effect, to try to hijack this element of the system.

The new-format planning system will have to be judged by both its results and how well these meet the stated aims of the system. Whether the system's neo-liberal intentions and rhetoric actually lead to a quasi-regulated system will not be known for some time.

Local policy and control

In 1987, with parliamentary approval of the Planning and Environment Act, the former Labor government initiated a trend towards the more localised development of zone controls. Many planning schemes included strong local environmental controls which were swept away by the Kennett government's standardised provisions. These controls were developed in conjunction with local communities as locally specific responses to the need to protect biodiversity and other environmental conditions. The strong element of local control introduced to planning by the previous Labor government was an anathema to the Kennett government. Robert Maclellan argued that the 'devolution of State planning powers to a large number of municipal councils ... resulted in an overemphasis on local aspects of planning and development at a cost to the wider community'. Local variation, he claimed, frustrated developers and consultants and gave 'too much weight to the views of existing residents at a cost to ... facilitation of economic development.' He repeatedly criticised local government's planning performance and, after elections had reinstated Victoria's councils, warned that planning powers could be redirected from councillors to chief executive officers if councillors 'meddled' with planning issues (Maclellan 1997).

The Kennett government, and policy developers, argued that local policy could provide a strategic context to decision-making, and guidance and consistency to local decisions about discretionary uses (Gibson 1999). Local policy has the potential to become an additional set of mandatory requirements. This has been officially resisted and would conflict with the function of providing guidance on discretionary uses. The report of the Advisory Committee on the VPPs (DOI 1997, p.10) placed great emphasis on the role of local policy, arguing that the new zones and other statutory provisions simply provide a framework for decisions directed by state and local policy and that 'policy is expected to drive decision-making'. Two years later, the *Final Report. New Format Planning Schemes* (Gibson 1999, p.10) warned that local policy might constrain the exercise of discretion and 'undermine the intent of the planning reform program by becoming de facto zone controls'. This report placed the primary emphasis where it was intended — on the relevant zone.

The problems in developing useful local policy are many. Local policy cannot contradict the content of other provisions, although it can develop vague or general statements in other provisions into more specific statements. No council can develop a policy for every conceivable use. The more comprehensive local policies are long (up to 70 pages), complex and often contradictory. Most are full of vague and general statements, making them of little use in

guiding consistent decision-making. These characteristics contradict the VPP objectives of brevity and simplicity. Other weaknesses are the inconsistent support of local policies by local councils and VCAT, and the reliance on residents or applicants for appeals against perceived council failures to uphold local policy. The constant pressure in money and time on residents in objecting and appealing is likely to reduce the level of community participation in planning.

Lack of integration

Planning and land management legislation and documents constantly refer to the importance of integration between land use planning and land management. However, this integration, and cross-sectoral decision making is as far away from achievement as ever. References to integration remain expressions of hope rather than achievable statements of change.

The SPPF (clause 15.01) requires planning authorities to consider regional catchment strategies, and seeks to coordinate land use planning with catchment management. It similarly requires consideration of the Victorian Coastal Strategy and coastal action plans, and to coordinate land use planning with coastal management. It also requires planning authorities to consider the National Biological Diversity Strategy but not the Victorian Biodiversity Strategy, although the amended VPPs do refer to the Flora and Fauna Guarantee Strategy. None of these exhortations is having any impact on the achievement of coordination over rural land use planning and management and the protection of biodiversity. This is because the means of implementation are fundamentally at odds with the strategic principles and statements. In particular, the provisions of Victorian planning schemes cannot achieve responsible rural land management and protect biodiversity for the reasons outlined above, and the operations of the planning system and those of the Catchment Management Authorities, and the Coastal Boards, are generally divorced from one another. A cross-sectoral strategy, such as the Victorian Coastal Strategy, which establishes strong environmental and cross-sectoral principles, remains discretionary and is being widely ignored by government and local government.

An example of the way the planning and land management systems work in practice can be provided by references to vegetation protection. The SPPF (clause 15.09) refers to the need to protect biodiversity and for planning authorities to consider strategies and vegetation plans. The Victorian Biodiversity Strategy, as a key management approach to rural landscapes, refers to the need to maintain viable remnants of native vegetation and habitats, including remnant paddock trees and landscapes, in the context of Regional Vegetation Plans. The reference to 'viable remnants' introduces a qualification which compromises the implementation of this section through difficulties in interpretation. Regardless of these strategic statements, the planning system, and the lack of strong policy in many catchment management plans inhibit in practice their achievement. In addition, Victoria's Native Vegetation Management Framework (NRE 2002) introduces a 'net gain' policy and a system of classifying vegetation which would allow the clearing of vegetation classified as 'low' value. The position in this framework that clearing will not be 'generally permitted' for vegetation classified as 'medium' and 'high' value will be difficult to interpret and will lead to legal disputes and decisions which contradict the objectives of the framework. This policy will be implemented through the Victoria Planning Provisions.

Victoria's Biodiversity Strategy (NRE 1997a, p.16) argues that 'Victoria has extensive policy, legislative and regulatory mechanisms for conserving biodiversity'. The strategy (NRE 1997b, pp. 10–11) argues that

'The Planning and Environment Act 1987 is critical to planning land use and development in Victoria. The new format planning schemes developed under the Victoria Planning Provisions (VPP) will provide both a consistent framework and a strategic direction for decisions on land use and development. A key component of the VPP is the State Planning Policy Framework (SPPF), which applies to all land in Victoria.

The SPPF includes a biodiversity objective, to "assist the protection and conservation of biodiversity, including native vegetation retention and provision of habitats for native plants and animals" '

An analysis of the operation of the land use planning system, particularly applied to private rural land, does not support this expression of hope. The problems associated with the current land use planning system in protecting biodiversity are not only problems of implementation, but indications of the system's inability to achieve environmental objectives on a state-wide scale. Victoria's natural systems on rural land are not being affected by problems which tinkering can remedy, but are undergoing systemic collapse. Until this is recognised, the potential of the land use planning system will be subverted by token recognition of the need for change. The VPP's strategic environmental objectives cannot be achieved because the tools — the bulk of the VPP provisions — cannot deliver the required biodiversity outcomes. The VPPs are intended to facilitate development, explicitly work against protecting biodiversity, are weak and general, omit key biodiversity measures and are usually discretionary, and the limited range of biodiversity conservation measures are usually not applied or misapplied. Enabling regulatory policies and other tools are an insufficient method of delivering results. Government policy documents which attribute non-existent capabilities to a planning system are part of the problem. There may be extensive mechanisms which seek to achieve to conserve biodiversity, but the land use planning system is not one of them. Neither are the existing governmental environment and resource management structures and processes properly integrated. The causes of rural land planning and management, and biodiversity conservation, will continue to suffer until major structural changes are made.

References

- DPD (1997) *Report of the Advisory Committee to the Victoria Planning Provisions*. Department of Planning and Development: Melbourne.
- Gibson, H. (1999) *Final Report. New Format Planning Schemes*, Planning Panels Victoria.
- Glossop, J. (2000) The challenges of using and developing policy in the new format planning scheme environment. *Writing Local Government Policy Workshop*, RMIT University, 2 June 2000.
- MacLellan, R. (1993a) *Planning a Better Future for Victorians. New Directions for Development and Economic Growth*, Speech 13 August 1993, Carlton, Victoria.
- MacLellan, R. (1993b) *Planning Better Future for Victorians. New Directions for Development and Economic Growth*. Department of Planning and Development: Melbourne.
- Minister for Planning and Local Government (1997) *Victoria Planning Provisions*. Melbourne.
- NRE (1997a) *Victoria's Biodiversity. Sustaining Our Living Wealth. Summary*. Department of Natural Resources and Environment: East Melbourne.
- NRE (1997b) *Victoria's Biodiversity. Sustaining Our Living Wealth*. Department of Natural Resources and Environment: East Melbourne.
- NRE (2002) *Victoria's Native Vegetation Management. A Framework for Action*. Department of Natural Resources and Environment: East Melbourne.
- Stoker, G. and Young, S. (1993) *Cities in the 1990s*, Longman, London.
- Thornley, A. (1993) *Urban Planning under Thatcherism. The Challenge of the Market*. Routledge, London.
- Victorian Liberal Party (1992) *Planning for Jobs and Recovery*. Victorian Liberal Party: Melbourne.
- VNPA (1996) *Submission to Government on New Format Planning Schemes*. Victorian National Parks Association: East Melbourne.