

VICTORIA

Auditor General

Victoria

**Community
planning
services in
Glenelg Shire
Council:
1998-2005**

October 2005

Ordered to be printed

VICTORIAN GOVERNMENT
PRINTER
October 2005

ISBN 1 921060 16 6



AUDITOR GENERAL
VICTORIA

The Hon. Monica Gould MP
President
Legislative Council
Parliament House
MELBOURNE

The Hon. Judy Maddigan MP
Speaker
Legislative Assembly
Parliament House
MELBOURNE

Dear Presiding Officers

Under the provisions of section 16AB of the *Audit Act 1994*, I transmit my audit report on *Community planning services in Glenelg Shire Council: 1998-2005*.

Yours faithfully

JW CAMERON
Auditor-General

5 October 2005

Foreword

Planning for the future of a community is arguably a council's most important responsibility. Planning decisions shape communities and impact on their quality of life and local environments. They affect peoples' livelihood and amenity. The consequences of these decisions are around for a very long time.

This report sets out the results of our examination of Glenelg Shire Council's community planning activities, following concerns expressed about the quality of its processes and decisions. Those concerns centered around the impact of council decisions on the conservation and protection of significant state and local cultural, historic and environmental assets.

This is a story about the difficulties regional municipalities face in accessing skilled professionals, in the management of competing priorities in developing communities, about effective due process, including community consultation, and about Government bodies maintaining effective oversight of council activities.

While the findings and recommendations of this review are directed specifically at the Glenelg Shire Council, they may equally be applicable to other councils, particularly in remote locations. Those councils who have experienced a strong push for increased development over recent years and lack adequate oversight of planning services put their historic, cultural or environmental assets at risk. Councils need to exercise special care to ensure these risks are identified and effectively managed for the long term benefit of future generations. State agencies as well as local governments have a particular responsibility to ensure this remains the case.



JW CAMERON
Auditor-General

5 October 2005

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1. Executive summary



1.1 Introduction

Planning is essentially about the use, development and protection of land in the present and long-term interests of the community. This report outlines the results of our recent review of the Glenelg Shire Council's planning services.

Until early 1998, in-house staff provided the council's planning services. From mid-1998 to 2004, the council engaged a company to provide planning services. In practice this involved the council engaging an external town planner (planning contractor) to:

- provide planning services under contract
- make all decisions on planning permits, under delegation from the council as an employee of the council for 5 hours per week.

The planning contractor was initially engaged under a 5-year contract and later re-appointed for a further 5 years (commencing January 2003).

Our review was undertaken following receipt of a number of concerns expressed by the local community, organisations and government agencies around the provision of town planning services to Glenelg Shire Council. The concerns fall under 3 broad headings:

- an alleged failure of the planning contractor to comply with legislative requirements
- appropriateness of the council's arrangements for delivering its planning services
- quality of the council's strategic planning for the use and development of land in its area.

In December 2004, the agreement with the planning contractor was terminated by council for non-performance. However, 3 months later, the planning contractor was re-engaged to provide planning services to the council. He was, however, not engaged to make planning decisions on behalf of the council.

1.2 Overall audit conclusion

Obtaining approval for a planning permit from the council, over recent years, was not difficult or time-consuming. Planning decisions were generally made within a day or 2 of the council receiving a planning application, and very few applications were rejected.

This audit found, however, a number of serious deficiencies in the council's planning function, including:

- a failure to initiate amendments to the planning scheme to ensure its effectiveness and useability
- an unwillingness by council to change planning processes, when advised (by both internal and external parties) of process deficiencies
- the inappropriate practice of some councillors dealing directly with the planning contractor on planning issues, shutting other councillors and council management out of the planning process
- a failure to maintain adequate documentation evidencing the assessment process and planning decisions
- inappropriate notification or advertising of development proposals (material detriment requirements)
- a failure to refer development proposals to those government agencies and bodies to provide them with an opportunity to endorse, specify conditions or object to the proposal
- approval of planning permits that did not comply with the council's planning scheme.

Many of the above deficiencies have been highlighted in a number of successful challenges to council planning decisions at the Victorian Civil and Administrative Tribunal.

We consider that these deficiencies resulted from:

- An arrangement, whereby the council's planning services were provided by an external planning contractor (who was also employed by the council to make planning decisions) without appropriate oversight controls to ensure these responsibilities were handled appropriately. To a large extent this outcome was driven by a pro economic development culture amongst councillors and some staff. This culture resulted in the council placing priority on providing a timely service to planning applicants. In striving to achieve its economic development outcome, the council failed to adequately ensure there was balance between this objective and other objectives such as protecting environmental and heritage assets and involving the community in the planning process.

- Inadequate contract management. The council failed to establish proper contract management and monitoring mechanisms to ensure that the planning responsibilities delegated to the contract planner (when acting as an employee of council) were performed appropriately and in compliance with planning legislation and council's planning scheme.
- Planning decisions made by the planning contractor (as council employee) being almost entirely based on a narrow interpretation of the provisions of the council's planning scheme and without consideration of the outcomes produced.

We also found it difficult to comprehend how the council could terminate the services of the planning contractor for non-performance and then effectively re-appoint the same person 3 months later.

A significant challenge for the council in the short term is to manage community concerns about the capability of council and the quality of its planning services. The questionable legality of around 330 permits issued without a development plan over the past 6 years has contributed to this situation and potentially exposed the council to financial risk.

It is pleasing to note that over the last 18 months the council, largely through the efforts of its current chief executive officer, has made significant and positive changes to the way in which planning services are now delivered. These will improve the quality of future planning decisions.

Recommendations

1. **That the council:**
 - **periodically review its planning files to ensure that the check list is properly completed and adequately supported**
 - **consider establishing a pre-lodgement certification process.**
2. **That the council:**
 - **develop appropriate guidelines to assist its planning officers to apply the material detriment assessments required by the *Planning and Environment Act 1987***
 - **ensure its planning application assessments include detailed information of the notice requirements for each application**
 - **regularly audit assessments to ensure notice requirements are consistently applied.**

3. That the council:
 - provide a copy of the planning application to relevant referral authorities, as required by the *Planning and Environment Act 1987*
 - notify referral authorities of its final decision in relation to the permit application, as required by the *Planning and Environment Act 1987*
 - include all requirements of referral authorities in permit conditions
 - refer applications to other authorities likely to have an interest in the proposal (rather than relying on the conditions attached to planning permits to indicate to applicants that other legislative requirements need to be satisfied)
 - discuss referral and notice requirements of the planning scheme with authorities to refine future requirements.
4. That the council:
 - before it approves an application to change the use or to develop land within a designated heritage area, consider the potential impact of the proposal on the heritage values of the site and/or its setting and area. This is particularly so, where the zoning of properties (such as in Business Zone 1) removes the need to provide details of any proposal to owners and tenants of properties surrounding the site, making the proposal exempt from the normal objection and appeal requirements of the *Planning and Environment Act 1987*
 - develops a heritage policy, and considers developing a neighbourhood character overlay, and a design and development overlay for the Portland town centre.
5. That the council, work with local Aboriginal communities and AAV to:
 - identify significant Aboriginal sites
 - (through the planning scheme) establish controls to prevent these sites from inappropriate development.
6. Until such time as significant Aboriginal sites are identified and specific controls established to protect them, the council comply with the requirements currently existing in the planning scheme.
7. That the council complies with legislative requirements and considers the potential impact of any proposal on the environmental values of the site and surrounding area.

8. That where there are ambiguities regarding the requirements of the planning scheme, these issues are investigated and resolved by council in a timely manner (including seeking authorisation from the Minister for Planning to prepare necessary amendments to the planning scheme).
9. That in assessing applications for subdivisions in Rural Zones and Environmental Rural Zones, the council
 - considers the specific requirements of the planning scheme
 - takes account of the broader objectives of the scheme, considering the best use of the land for subdivision.
10. That the council:
 - review the need for each of its DPOs. Where a DPO is needed, it should be retained and a development plan established. Where there is no need for a DPO, an amendment to the planning scheme should be developed to remove the DPO from the scheme
 - review the 330 planning permits and:
 - issue new permits where considered appropriate
 - where a current land use or development is clearly inappropriate, the council should seek legal advice on the appropriate action to be taken
 - advise DSE of its proposed process for resolving the 330 permits.
11. That the council comply with legislative requirements in processing applications for amendments to permits.
12. In making planning decisions, the council should endeavour to achieve an appropriate balance between its objective of promoting economic development and its other objectives of sustainability, protecting heritage and environmental assets and amenity, and involving the community in planning decisions.

In undertaking its planning function, the council is obliged under the *Planning and Environment Act 1987* to give consideration to the relevant legislative and planning scheme requirements (including the overall objectives of the scheme) before making decisions on applications for planning permits.
13. The council should also:
 - develop a more constructive and cooperative relationship with other government agencies and bodies which have an interest in planning decisions (such as the Department of Sustainability and Environment and Heritage Victoria)

- attempt to resolve contentious issues through a consultation process with objectors, rather than issuing permits and dealing with objections at VCAT
 - adequately support its decisions with a planning report that fully addresses the requirements of the planning scheme and relevant legislation.
14. That the council undertake a risk assessment of its planning functions and include the results of this assessment in its risk-management plan.
15. That:
- the council finalise its current review process and submit its second triennial review of its municipal strategic statement to the Minister for Planning for approval as soon as possible
 - in future, the council more closely monitor and review the operation of the planning scheme and be more proactive in ensuring proposed necessary changes to the scheme are made.
16. In future, the council should respond to any findings and recommendations of its planning service reviews through initiating appropriate changes to its procedures and practices.
17. That the council:
- review its recently introduced initiatives and provide a report to council members on the findings
 - consider implementing the planning process improvements outlined in the performance improvement plan attached to this report (Appendix A).
18. That the council ensure that:
- staff have the appropriate skills, competencies and knowledge to perform their planning and contract management tasks
 - staff avail themselves of development activities to ensure the continuous improvement of skills.
19. For future outsourced arrangements, council should:
- ensure contracts include both quantitative and qualitative performance measures
 - implement formal contract management procedures that ensure regular contract performance reports are provided to the chief executive officer and council as appropriate

- **amend contract terms and conditions to incorporate dispute resolution processes and the right of access by the council to contractor records for verification purposes**
- **adequately evaluate service delivery for continuous improvement opportunities.**

RESPONSE provided by Glenelg Shire Council

Achieving an appropriate balance between the facilitation of economic development and the protection of heritage and environmental assets has presented Glenelg Shire Council with a challenge. Council recognises the role in economic development can be fulfilled in a timely and consultative manner in accordance with legislation and planning scheme requirements.

Council amended its town planning processes and delegations in July 2004 to ensure transparency and accountability of planning decisions, and has begun to develop a new shire planning framework that will guide future decisions. The changes aim to provide that the Glenelg Shire's planning system ensures fair planning outcomes that meet the shire's strategic objectives in accordance with relevant legislation.

The changes introduced by council are consistent with the recommendations within this report.

RESPONSE provided by Secretary, Department of Sustainability and Environment

The department considers the report to be comprehensive and agrees with each of its findings and recommendations.

It is noted that while the investigation has found no evidence of corruption, the report is very critical of the conduct of the council and its contracted planning officer.

The report cites numerous and sustained planning administration irregularities and deficiencies which have resulted in breaches of legislative requirements, due diligence and duty of care. The report's case studies further highlight the serious and repeated failures by council to provide responsible management and balanced planning and development outcomes in the Shire.

On a positive note, the report does acknowledge council's recent recognition of these serious governance and service delivery failings. Furthermore, it is pleasing to note the council's willingness to take necessary corrective actions to address the underlying problems and ensure the provision of a professional and competent planning service within the Shire, together with appropriate senior management and councillor engagement in the discharge of council's land use planning responsibilities and policy development.

RESPONSE provided by Secretary, Department of Sustainability and Environment - continued

The department supports the suggested performance improvement plan outlined in Appendix A of the report, as this can form the basis of an action plan to assist council with addressing the key issues with its planning services in an organised and timely manner. Indeed, the department along with the Municipal Association of Victoria are working closely with the council to facilitate the fixing of mistakes; the introduction of proper internal management review and quality control systems, and the building of an appropriate statutory and strategic planning capability.

The department will closely monitor the council's performance and looks forward to demonstrable improvement in the delivery of council's land use planning and development services.

RESPONSE provided by Secretary, Department for Victorian Communities

The department generally supports the thrust of the audit recommendations which are seeking to ensure compliance by Glenelg Shire Council with both the spirit and the letter of the planning legislation in Victoria.

The department supports the aims of (for example) recommendations 5 and 6 which seek to increase the involvement of local government in the management and protection of Aboriginal heritage values through planning and other processes. Council should negotiate with the relevant Aboriginal communities about identification, protection and management of heritage values and to identify appropriate and practical strategic and statutory planning tools to help achieve this purpose. Council should also work with Aboriginal communities to increase awareness and understanding of Glenelg's unique heritage values.

The department's concern is primarily to ensure compliance with the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, which provides a series of controls in addition to those provided through the planning scheme. However, council's planning processes can play a major role in managing and protecting Aboriginal heritage values. In addition, the department considers that if a council is aware of heritage values, it is expected that this information would be passed on to permit applicants in the interests of safeguarding Aboriginal heritage values.

The department will encourage all local governments in their application of planning legislation in Victoria.



2. Victoria's planning system



2.1 Victoria's planning system

Planning is essentially about the use, development and protection of land in the present and long-term interests of the community. Planning in Victoria is principally implemented through the *Planning and Environment Act 1987*. The state's planning objectives are to ensure the strategic and orderly use and development of land with regard to environmental, social, heritage and community interests.

Key organisations within Victoria's planning system are:

- *Planning and responsible authorities*
 Planning authorities develop and amend planning schemes to give direction on how broader state planning policies will be achieved or implemented in the local context. Responsible authorities manage the day-to-day administration of the local planning scheme. They process applications for planning permits and enforce the scheme and conditions incorporated in planning permits. Usually, the planning and/or responsible authority is the local council.
- *Minister for Planning*
 The minister has overall responsibility for the state's planning legislation and framework. In addition, the minister has wide-ranging powers to grant exemptions from complying with legislative requirements, make directions to planning authorities and responsible authorities, approve planning scheme amendments, and review cases where there is an issue of state policy or a need to intervene in order to expedite the process.
- *Department of Sustainability and Environment*
 At the policy level, the department administers the planning framework. It also supports the minister to fulfil his responsibilities under the Act.
- *Panels and advisory committees*
 The Act requires the minister to appoint a panel to consider submissions required to be referred to it under the *Planning and Environment Act 1987*. The minister may also set up advisory committees to provide advice on particular planning issues as required.
- *Victorian Civil and Administrative Tribunal*
 Parties aggrieved by the planning decisions of responsible authorities may appeal to the tribunal for a review of the decision.

- *Referral authorities*
The Act provides for a copy of a planning permit application to be sent to referral authorities whose interests may be affected if a permit is granted to use or develop land. These authorities can be any person, group, agency, public authority or any other body that a scheme specifies. They include the Environment Protection Authority, the Department of Sustainability and Environment, the Liquor Licensing Commission, water catchment management authorities and power companies.
- *Local communities*
In addition, local communities play an important role in the planning system. Planning for the future of the community is arguably a council's most important responsibility. Planning decisions shape communities and influence the environment and quality of life. They affect peoples' livelihood and amenity. The consequences of planning decisions are around for a very long time¹.

2.1.1 Planning schemes, scheme amendments and permits

Within the planning framework, planning schemes and planning permits are the major legislative mechanisms for controlling the development or use of land.

Planning schemes

Every municipality in Victoria has a planning scheme that sets out policies and provisions for the use, development and protection of land in that area. These are legal documents comprising maps, plans, and other documents prepared by the local council or the Minister for Planning. They are approved by the minister.

Each planning scheme includes the overarching State Planning Policy Framework², the Local Planning Policy Framework³, and zones and overlay provisions that control the development and use of land (residential, industrial or rural).

¹ Municipal Association of Victoria 2002, *Planning in Victoria, A Councillors' Guide*, Melbourne, p. 7.

² The State Planning Policy Framework sets out the statewide land use policies approved by the government. These policies must be taken into account when any council makes decisions or initiates changes to the planning scheme. The policies are listed under 6 headings: settlement, environment, housing, economic development, infrastructure, and particular uses and development. Every planning scheme in Victoria contains this identical policy framework.

³ The Local Planning Policy Framework contains a municipal strategic statement and local planning policies. The framework identifies long-term directions about land use and development in the municipality; presents a vision for its community and other stakeholders; and provides the rationale for the zone and overlay requirements and particular provisions in the scheme.

Reform of the planning system

A major reform of the planning system was initiated in late 1992 through the Perrott Committee. Three key objectives were to:

- focus on state and local strategic directions to set planning schemes controls to guide decision-making
- provide a consistent set of statewide planning scheme controls and provisions
- test the system's effectiveness by annual monitoring and review.

The Victoria Plan Provisions⁴ and new format planning schemes for all municipalities were developed in response to the committee's recommendations.

Scheme amendments

Planning schemes are dynamic documents that can be changed to reflect a new strategic direction, or a new policy or planning circumstance. They can also be changed as a result of a review. For example, the council may amend the scheme to rezone land from one zone to another. Councils may initiate changes to planning schemes. Prior to 23 May 2005, all planning scheme amendments were required to be approved by the minister. Recent amendments to the *Planning and Environment Act 1987* enables the minister to authorise a planning authority to approve an amendment. This means that councils may be able to approve some planning scheme amendments.

Planning permits

In the Victorian planning system, planning permits are used to approve land use and development (subdivision, buildings and works). They generally relate to a specific parcel of land and expire 2 years from the date of issue (unless otherwise specified in the permit).

Planning permits are legal documents. This means that where conditions are specified, those conditions must be complied with.

Where specified in the planning scheme, a planning permit must be obtained to use or develop land for certain purposes. Councils decide whether or not to grant a permit based on:

- an assessment of the proposal
- the strategies, policies and decision guidelines in the planning scheme
- any objections received or advice of referral agencies, where relevant.

This decision can be made under delegation by council to council staff.

⁴ The standard set of planning controls developed by the Victorian Government and used to construct planning schemes.

A planning permit is not always required to use or develop land⁵. For example, repairs and maintenance to an existing building, road works, gardening or installation of street furniture (including post boxes, telephone booths, fire hydrants and traffic control devices), do not require a permit. Some uses of land and development are prohibited under the scheme and, therefore, cannot be approved through the issue of a permit⁶.

2.2 Glenelg Shire Council

The Glenelg Shire Council was established in 1994 and is located in Portland in the south-west corner of Victoria, bordering South Australia. It is responsible for a geographical area of about 6 200 square kilometres and a population of around 20 000.

Portland is the site of the state's first European settlement and is surrounded by some of the state's major coastal wilderness areas, including foreshore land, national parks and native forests. As indigenous people historically occupied this area, significant cultural artefacts and Aboriginal sites also exist.



Glenelg Shire Council offices in Portland.

⁵ Development of land includes construction of a building, carrying out of works (such as clearing vegetation), subdividing land and buildings, or displaying signs.

⁶ For example, in a residential zone, land cannot be used for an amusement parlour, animal boarding house, nightclub, brothel, offices or retail premises.

2.2.1 Council's planning services: 1998-2005

Until early 1998, in-house staff provided the council's planning services. From mid-1998 to 2004, the council engaged an external town planner⁷ to:

- provide planning services under contract (planning contractor)
- make all decisions on planning permits, under delegation from the council as an employee of the council for 5 hours per week.

The planning contractor was engaged under a 5-year contract and later re-appointed for a further 5 years (commencing January 2003). This reappointment followed a formal tender process.

Over the past year, significant concerns about the council's planning services have been expressed to my Office by a number of people, organisations and government agencies.

Following an internal review of its planning function, the council, in July 2004, developed new planning processes and amended its planning delegations. When the planning contractor was informed of these new processes, he submitted a claim for an increase in fees of around 50 per cent. In response to this claim, the council engaged solicitors to review its planning services. The aim of the review was to determine whether the planning contractor was providing the services stipulated in his contract, and if the claim for increased fees, was warranted.

The solicitors' review found that the planning contractor had not complied with key legislative requirements in undertaking statutory planning activities. In December 2004, the council terminated the contract with the planning contractor, effective March 2005.

In early 2005, the council decided to provide most of its planning services internally, supplementing these resources with external contractors in peak periods. To this end, the council employed a town planner to manage its planning services and tendered for planning contractors to assist him.

In March 2005, the planning contractor was again engaged by the council (although under a different company name), under the direction of council's Development Services Manager⁸. The planning contractor processed around 10 planning applications in April 2005 and has undertaken no further work for the council.

⁷ The council engaged a company specialising in planning services. The planning contractor was an employee of this company.

⁸ At August 2005, the contract between council and the company providing the planning services had not been signed.

2.3 Audit objective and scope

The concerns raised with our Office were broad, impacting on almost all aspects of the council's statutory planning activities. Major concerns focused on the:

- alleged failure of the planning contractor to comply with legislative requirements
- appropriateness of the council's arrangements for delivering its planning services
- quality of the council's strategic planning for the use and development of land in its area.



Selection of newspaper headlines outlining concerns with the council's planning services.

In investigating these concerns, we assessed whether the council:

- complied with key legislative, planning scheme and other requirements in providing planning services (Part 3 of this report)
- set up appropriate management arrangements for the delivery of its planning services (Part 4 of this report)
- effectively managed its outsourced planning services (Part 5 of this report).

2.3.1 Conduct of the audit

The council's planning services have been subject to several reviews over the past 8 years, including:

- 1998 review of the council's planning scheme by a panel appointed by the Minister for Planning
- 2003 Best Value review of planning services conducted by the council in line with the requirements of the *Local Government Act 1989*
- 2004 internal review of planning function and delegations
- 2004 legal review of the planning contractor's performance.

We examined the findings and reports of each of these reviews.

We also examined the council's municipal strategic statement, planning scheme, planning services contract delegation authority, the contract for the external provision of planning services, a selection of planning files, planning policies, procedures and correspondence.

We spoke with all current and some past councillors, senior council staff, the internal town planner, the planning contractor, local developers, engineers, surveyors, building contractors, valuers, associated government and regulatory agencies (including the Department of Sustainability and Environment, Aboriginal Affairs Victoria and Heritage Victoria), community members and representatives of community organisations.

WHK Day Neilson and the Victorian Government Solicitor provided specialist assistance and advice to the audit team.

The audit was performed in accordance with Australian auditing standards. The cost of the audit was \$180 000. This cost includes staff time, overheads, expert advice and printing.



**3. Did the council
comply with key
legislative,
planning scheme
and other
requirements?**



3.1 Introduction

As with many Victorian coastal councils, the demand for property subdivision and development in the Glenelg Shire has increased substantially in recent times, particularly along its coastline boundary and within residential areas surrounding Portland.

During this period, the challenge for the Glenelg Shire Council has been to facilitate development while protecting the area's unique, environmental, cultural and heritage assets.

The council's planning scheme sets the framework within which development can take place, by regulating certain types of land use and development through the issue of planning permits.

Each year, the council processes about 400 planning permit applications. These include simple, non-sensitive applications such as building carports and new fences or painting buildings. They also include complex applications that involve significant developments, sensitive environmental or heritage issues, and community concerns.

The council has numerous statutory obligations and responsibilities⁹ in assessing and approving these planning applications. As well, the council must follow its own imposed requirements, most of which are separately detailed in the council delegations and planning policies.

3.1.1 Planning permit process

The process for issuing planning permits typically involves 5 stages:

- **appraising** the application and ensuring its completeness
- **notifying** those who may be affected by the proposed application (where there is possible material detriment)
- **referring** the application to relevant authorities, as required by the planning scheme

⁹ Pursuant to the *Planning and Environment Act 1987* and *Subdivision Act 1988*.

- **assessing** the proposal to ensure that it:
 - *complies* with planning scheme requirements
 - is *consistent* with planning objectives and policy provisions of the scheme
 - *complies* with any strategic plan, policy statement, code or guidelines adopted by the Minister for Planning, Department of Sustainability and Environment, or the council; and any other relevant matter
 - *does not result in any significant adverse* environmental, social and economic effects due to development or changed land use
- **deciding** on whether or not to issue the permit, and notifying all relevant parties.

Victorian Civil and Administrative Tribunal's role

Applicants can apply to the Victorian Civil and Administrative Tribunal (VCAT) to review a:

- decision to reject a planning permit application
- decision to apply conditions on a permit
- failure to make a decision within the statutory time frame.

Individuals or organisations affected by planning decisions can also apply to VCAT for a review of council decisions.

VCAT has wide-ranging powers that include cancelling permits, amending permit conditions and requiring responsible authorities to issue permits. It reconsiders each matter on its merits, as if it was the original decision-maker.

3.1.2 Solicitor's review

As mentioned in Part 2 of this report, the council engaged solicitors to review the performance of the planning contractor¹⁰ and provide legal advice to the council on the appropriateness of the planning contractor's claim for additional fees.

The review examined 100 planning applications and applications for permit amendments received by the council between 2002 and 2004. It assessed the extent to which the processes and practices employed by the planning contractor met legislative requirements and represented best practice.

¹⁰ The council's solicitors engaged a qualified town planner with extensive local government experience to review the town planning services provided to the council.

The review was conducted in 2 parts. The first examined 50 planning permit applications and 5 amendments to planning permits. It found deficiencies in around half of the applications reviewed, leading the reviewers to conclude that:

“... applications appear to be processed and decisions made without adequate reference to the statutory provisions of the Glenelg Planning Scheme and without any assessment of how the state planning policy framework, municipal strategic statement and local planning policy are supported or affected by the proposal.”¹¹

The second part of the review produced similar findings, however, no final report was produced.

3.1.3 Our review

To assess how well the planning contractor complied with legal, policy and other requirements, we reviewed the work undertaken by Contour Consultants (Australia) Pty Ltd (the town planner engaged by the solicitors), and selected 10 planning permit applications and 4 permit amendments for detailed review.

Our review confirmed the findings of the solicitor’s review. We found limited documentation to support the planning contractor’s assessment, decision-making and approval processes.

The following 5 sections (3.2 to 3.6) describe these findings in detail¹².

In particular, we asked how well the planning approval process was implemented at each stage: **appraisal, notification, referral, assessment and decision-making**.

In our discussion of how permit applications were assessed (section 3.5), we focus on 6 areas that our file review showed to be problematic:

- heritage considerations
- Aboriginal cultural considerations
- environmental considerations
- rural subdivisions of land
- approval of permits without a development plan
- amendments to approved planning permits.

¹¹ Contour Consultants (Australia) Pty Ltd 2004, *Preliminary Report, Statutory Planning Processes, Shire of Glenelg*, Melbourne.

¹² In this part of the report we have attributed our findings to “the council” notwithstanding that a planning contractor made the planning decisions under delegation from the council. The council is ultimately responsible in any outsourced arrangement, notwithstanding it has delegated certain activities.

3.2 Appraisal of applications

The initial application appraisal determines whether a permit is required and, if so, whether the council has sufficient information to assess the application.

This process involves assessing whether:

- the application form has been properly completed
- all relevant information required by the planning scheme has been received, including sufficient information to enable the community to understand the proposal and assess its impacts
- the appropriate fee has been paid
- any other matters exist which may affect the granting of the permit (for example, land being subject to a restrictive covenant).

We found:

- *Little or no evidence of an initial appraisal on file.* This meant that we could not tell if discussions were held with prospective applicants about their application and the information required, before an application was submitted. Nor could we assess if there was an initial appraisal of the application.
- *An insufficient level of information provided with applications.* The information provided was generally insufficient for the council to adequately consider the proposal. For example:
 - not all application forms were complete
 - information was not always provided on the potential environmental, social and economic impacts of the proposal
 - information was not always provided on whether the proposal complied with relevant state planning policies, the Municipal Strategic Statement and other relevant local planning policies
 - plans were often roughly drawn, without appropriate and adequate details.
- *Some planning applications were initially accepted without the prescribed fee.*
- *Very few requests for additional information.* Requests for additional information were rare. When such a request was made, it was usually limited to planning staff asking the applicant for a copy of the land title certificate to which the application related.
- *No apparent reference to the Glenelg planning scheme.* This would enable the person assessing the application to gain an understanding of the particular planning requirements, or to guide any request for additional information.

- *No pre-lodgement certification process.* This process involves the applicant engaging an independent planning specialist to provide advice and guidance that the planning permit application is consistent with the objectives of the council's planning scheme, and all necessary and relevant information to support the application has been provided to the council. The specialist then certifies to the council that the application is of an adequate standard. This assurance would enable the council to process applications more quickly.

In July 2004, the council implemented a planning application checklist to guide the preparation of applications.

3.2.1 Conclusion

In many respects, the initial appraisal is critical to the entire assessment process. This is when the information required for an informed planning decision is identified and collected. The deficiencies we identified in this process have resulted in the planning files containing insufficient information to allow sound planning decisions. The introduction of a planning checklist by council should ensure all supporting information is provided with the planning application.

Better management of the application's initial appraisal, and use of a pre-lodgement certification process would also have helped to reduce the time taken to process planning applications, without compromising the integrity of the overall planning permit process.

Should the council introduce a pre-lodgement certification process, it is imperative that it ensures that the individuals providing the certification are professionally competent and adequately qualified. If this is not done, the standard of applications submitted may again fall below that required, and impact on planning decisions.

Recommendation

1. **That the council:**
 - **periodically review its planning files to ensure that the check list is properly completed and adequately supported**
 - **consider establishing a pre-lodgement certification process.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

An internal audit committee review of town planning is scheduled for January 2006, January 2007 and January 2008 in the adopted Glenelg Shire Council 4-year internal audit plan. A random review of the planning files will be included in the audit.

A pre-lodgement certification process will be considered subject to suitably qualified town planning practitioners available in the region to ensure the cost of the process is not prohibitive. Also, the certifier must be independent of council.

3.3 Notification of application

“There are not many actions that owners can undertake on their land which do not affect others in some way.”¹³

Decisions on planning applications can have a direct impact upon people’s lives, their livelihood and physical surrounds. In some cases, they can have far-reaching social and environmental implications.

An objective of the *Planning and Environment Act 1987* is for any changes to the current use of land or proposed development of land to take into account community interests. In practice, this means giving those affected by planning decisions an opportunity to comment on the application before the decision is made.

3.3.1 The material detriment requirement

When an application is lodged, the council must decide *who* will be advised of the proposal and *how* the notice will be provided.

The Act requires councils (as responsible authorities) to notify certain people of an application for a planning permit, unless they are *satisfied that the grant of a permit would not cause material detriment to any person*. In broad terms, material detriment means a potentially adverse impact such as a loss of privacy, a blocked view, overshadowing, noise disturbance, the loss of amenity caused by the loss of vegetation on nearby land, or the effect of unsightly development.

Once notified, affected people have an opportunity to lodge an objection.

¹³ Department of Sustainability and Environment website – An introduction to planning, www.dse.vic.gov.au

Another opportunity for community participation is where the council or its town planner invites informal feedback on planning proposals that may be of interest to the wider community, even though there may be no requirement to give notice. An example of where a planner may seek such feedback could be where a development is proposed in one of the shire's town centres. While there is no statutory requirement to give notice of the proposal, the council or planner may find it prudent to do so, to achieve a better planning outcome.

The Act does not specify what matters must be taken into account by councils in deciding whether or not material detriment may be caused to a person. The council has full discretion in deciding whether a notice is needed because a proposal is likely to be of interest or concern to the community.

However, both the courts and VCAT have considered the question of material detriment and a review of the decisions from these bodies indicates that:

- detriment must be real – not trivial, inconsequential or imaginary
- minor detriment can still be material
- it is important to consider detriments not immediately apparent, and to take a cautious approach
- when in doubt, the council should give notice¹⁴.

The possibility of material detriment needs to be carefully considered as a person who would have been entitled to object to an application (and who does not receive notice of the application) may seek amendment or cancellation of the permit. In these circumstances, the council may be at risk of receiving a claim for compensation.

In practice, it is common for councils and town planners to err on the side of caution and give notice to any person potentially affected by a planning application. As a result, we would expect notice to be given in a high proportion of planning applications.

¹⁴ Advice provided to the Victorian Auditor-General's Office by the Victorian Government Solicitor, 12 January 2005.

3.3.2 Application of notification requirements

Solicitor's review

The solicitor's review disclosed that:

- in 40 of the 100 planning permit applications reviewed, the council's assessment of material detriment was potentially incorrect (that is, notice was not given to parties assessed by the review as potentially affected by the proposal)
- for those planning permit applications where notice was not provided, the forms used to assess the application contained a tick in the "no" box against "material detriment". However, no reasons were documented for not providing notice.

2003 Best Value review

The internal Best Value¹⁵ review of the council's planning services indicated that the council had not adequately involved the community in making decisions on planning permits. Specifically, the report found that:

- compared with other councils, notice of the proposal was given in only a small number of council planning permit applications. For example, notice was given for only one planning application during 2001-02, as against 10-15 and 182, respectively, for 2 comparable councils¹⁶
- stakeholders considered that the council should adopt a wider interpretation of "material detriment".

The council did not adopt the review's recommendation to increase the level of advertising of planning applications because it would:

- result in an additional cost of about \$100 to applicants
- potentially delay processing by up to 8 weeks depending on whether or not the public made submissions and whether the matter needed to be referred to the council for decision.

However, in mid-June 2004, following a further review by the council of its planning services, a decision was initially taken to publicly advertise *all* planning applications. After a month or so, the council returned to assessing material detriment on a case-by-case basis.

¹⁵ Under the *Local Government Act 1989* councils are required to undertake a periodic Best Value review of their services against 6 key principles of service delivery (quality and cost, responsiveness, accessibility, continuous improvement, regular community consultation, and regular reporting).

¹⁶ Information gathered by reviewer from 2 other councils, which were both rural and similar in population to Glenelg Shire Council.

Findings of our review

Our review of planning permit applications supports the findings of both the solicitor's review and council's own internal Best Value review.

At the very least, we expected decisions on material detriment to be supported by site inspections and some written information about the relationship between the proposal and the adjoining properties. This was not the case for the planning applications we examined.

Further, the speed with which many planning applications received approval indicated that decisions on material detriment could barely have been made without due consideration of the application and its impact on adjoining landholders and the broader community.

Based on the information available to us, we consider that:

- the council approved many planning permits without due consideration of the effect these decisions were likely to have on the community, despite this being required by the Act
- material detriment determinations were not adequately supported.

We asked the planning contractor what factors he considered in applying the material detriment test. He indicated that he put himself in the position of an adjoining property owner and assessed whether or not the planning proposal would have an impact. He also indicated that despite a lack of supporting information on file, material detriment had been adequately considered in each case he had assessed.

Material detriment: Case study 1

The following case study shows how a planning permit was approved by the council without due consideration of the effect the development was likely to have on the community.

CASE STUDY 1: THREE-STOREY BUILDING IN HERITAGE AREA

On Friday afternoon on 21 November 2003, the council received a planning application for the construction of a 3-storey building in Portland, comprising shops and residential units. The property was in an area covered by a heritage overlay, indicating that the area was of heritage significance. The permit was issued the following Monday morning.

The proposed building:

- was contemporary in nature, with no concession to heritage sensitivities
- was only the second 3-storey development to be constructed in Portland (the other is a hotel in a 19th century heritage-listed bluestone building)
- was to be constructed along the city foreshore on the most prominent street in Portland
- abutted an existing hotel-motel and restaurant complex and a medical practice situated in a restored heritage building. A historic church is located across the street.

Notwithstanding the size and nature of the proposed building, its close proximity to neighbouring heritage properties and its location within a heritage precinct, there was no public notification of the planning application to owner/occupiers of adjoining properties or the community in general. Council assessed that there was no material detriment to any person.

Despite the development being prominent and likely to be sensitive, the council did not at the time query the development or request a formal report from the council's planning contractor.

Based on the requirements of the planning scheme, the proposed development was also required to have 12 parking bays for the occupants and one disabled parking bay. The plans for the development show access to these parking bays via a narrow laneway at the side of the proposed building. However, due to the position of posts supporting the building, the narrow laneway and the proximity of a wall at the end of the laneway, the 2 bays furthest from the street are virtually inaccessible.



Three-storey development in Portland.

Source: Glenelg Shire Council, Application no. 346/03, 111 Bentinck Street, Portland.

Conclusion

Providing the community with the opportunity to participate and provide feedback on planning proposals is a critical requirement of both the state's planning framework and the Act.

For the past 2 years, the council has been aware of concerns regarding its application of the material detriment requirements of the Act. Despite this, it was not until June 2004 that the council started to take action to address this situation.

Recommendation

2. That the council:

- **develop appropriate guidelines to assist its planning officers to apply the material detriment assessments required by the *Planning and Environment Act 1987***
- **ensure its planning application assessments include detailed information of the notice requirements for each application**
- **regularly audit assessments to ensure notice requirements are consistently applied.**

RESPONSE provided by Glenelg Shire Council

Recommendation is partially agreed.

The decision of material detriment cannot be determined by guidelines. However, guidelines have been established to guide council officers in the process of determining material detriment.

The new planning processes adopted by council in July 2004 detail council's requirements for notification and advertising. In accordance with these processes town planning applications are assessed by the senior planner based on outcomes, objectives of the Act and in accordance with the planning scheme and policies. If no material detriment exists, a recommendation is made to the manager that the application be exempt from advertising. Otherwise, notification and advertising is undertaken in accordance with the Planning Application Notification and Consultation Policy adopted by council in July 2004.

3.4 Referral of applications to interested parties

The Act requires the council to provide a copy of each planning permit application to referral authorities specified in the planning scheme. A referral authority can be any person, group, agency or public authority whose interests may be affected if a planning permit is granted. The main purpose of the referral is to provide these authorities with the opportunity to prevent permits being issued that will adversely affect their responsibilities or assets.

Referral provides another opportunity for stakeholders to be involved in the planning process. Referral authorities must consider each application they receive and respond to the council indicating that they:

- do not object to the granting of the permit, *or*
- do not object to the granting of the permit, providing certain specified conditions are met, *or*
- object to the granting of the permit, specifying the basis for their objection.

Under the Act, the council must incorporate into the permit any conditions required by the referral authority. If the referral authority raises an objection to the planning application, the council must refuse to issue a permit. All planning decisions relevant to a referral authority must be formally communicated to that authority.

As well as the referral authorities specified in the planning scheme, there are other approvals which the applicant must obtain. For example, where a property is listed on the Victorian Heritage Register, any proposal affecting that property must be referred to Heritage Victoria for approval¹⁷.

3.4.1 Findings of our review

Our review of the council planning files disclosed that referrals are usually provided in one of 2 ways: public notice by the applicant, or a letter to the relevant authority from the council.

Responses from referral authorities were then conveyed to the applicant for consideration and comment.

¹⁷ Section 67 (1), *Heritage Act 1995*.

We found:

- *Failure to refer.* In some instances, applications had not been referred to appropriate agencies as required by the Act. In others, conditions were attached to planning permits indicating to applicants that other legislative requirements needed to be satisfied, rather than referring proposals to agencies with responsibility for managing these requirements.
- *Issuing of permit before referral authority responds.* In one instance, a planning permit was issued prior to the referral authority responding to the council's referral. In this case, the referral authority objected to the proposal.
- *Inadequate support for assessors to make appropriate referrals.* The application assessment form contained provision for the assessor to indicate compliance with relevant referral requirements. However, the form did not include any reference to the specific requirements of the planning scheme. (This could be addressed by putting a note on the assessment form where, say, the proposal involved treating and retaining wastewater on site, indicating that details of the proposal should be referred to the Environmental Protection Authority.)
- *Required conditions not always communicated.* In relation to some permits issued, the conditions required by referral authorities were simply referred to in the permit and not made a requirement of the permit.
- *Final decisions not always communicated.* The council's final decisions for permit applications were not always provided to the referral authority, as required by the Act.

Referral authorities have raised a significant number of objections with VCAT over the council's planning decisions.

Conclusion

Open and effective communication between the council, referral authorities and other interested parties is critical. Without cooperation, there is a significant risk that planning decisions will be made without regard to their impact on public services, infrastructure and the state's environmental, historic and heritage assets.

In approving planning permits, the council has, on several occasions, failed to ensure referral authorities were notified of planning applications. This highlights the council's inappropriate attention to and, in some respects, disregard for the concerns of interested parties.

As well, the number of objections made to VCAT reflects poorly on the council's compliance with its legislative responsibilities in respect to these referrals.

Recommendation

3. That the council:

- provide a copy of the planning application to relevant referral authorities, as required by the *Planning and Environment Act 1987*
- notify referral authorities of its final decision in relation to the permit application, as required by the *Planning and Environment Act 1987*
- include all requirements of referral authorities in permit conditions
- refer applications to other authorities likely to have an interest in the proposal (rather than relying on the conditions attached to planning permits to indicate to applicants that other legislative requirements need to be satisfied)
- discuss referral and notice requirements of the planning scheme with authorities to refine future requirements.

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

With the adoption of the planning processes by council in July 2004 and in conjunction with the employment of an in-house planning manager, council is:

- *referring details of proposals to referral authorities*
- *notifying referral authorities of final decisions, and*
- *including all requirements of referral authorities in permit conditions as required by statute.*

Council is now operating in accordance with the Planning and Environment Act 1987 in relation to referral authorities.

Council refers applications on the basis of whether the referral authorities will be affected or not – rather than whether the authorities are likely to have an interest.

3.5 Assessment of planning requirements

3.5.1 Introduction

Following initial appraisal, notification and referral comes the crucial assessment stage of the planning process.

This section focuses on the following 6 areas where our file review showed that compliance, consistency and possible adverse affects had not been adequately considered:

- heritage considerations
- Aboriginal cultural considerations
- environmental considerations
- rural subdivisions of land
- approval of permits without development plans
- amendments to approved planning permits.

Before turning to these 6 areas though, we describe 2 key terms that recur throughout our discussion: zones and overlays.

Zones and overlays

The strategic policy, long-term directions and outcomes sought by the council are largely implemented through the zone, overlay and “particular provision requirements” of the planning scheme:

- *Zones* describe the land uses or developments allowed within the area, such as residential, business, industrial or rural uses. They are used to indicate whether the land use or development proposal requires a permit, and to indicate the conditions applying to permits provided.

All property within the Glenelg Shire has been allocated a zone classification (4 public land, 3 residential, 3 industrial, 3 rural, 2 business and 2 special purpose zones).

Zones also regulate subdivisions, buildings and works.

- *Overlays* define specific characteristics such as land subject to flooding, land with significant vegetation or heritage areas, and incorporate specific controls. Where overlays apply, they operate in addition to the zone requirements and generally concern environmental, landscape, heritage, built form, and land and site management issues.

Several overlays can apply to the same piece of land.

The overlays contain a statement of objectives, permit requirements and exemptions, if appropriate. The purpose and decision guidelines in the overlay must be taken into account when the council makes a decision about a planning application.

The council's planning scheme has several overlays for areas of environmental, heritage and development significance¹⁸.

- *Particular provision requirements* deal with specific issues such as public open space, car parking, advertising signs and easements.

Because a permit *can* be granted, does not imply a permit *should* or *will* be granted. The council must decide whether the proposal will produce acceptable outcomes consistent with the State Planning Policy Framework and the Local Planning Policy Framework.

3.5.2 Heritage considerations

One of the objectives of planning in Victoria is to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value.

A heritage place is defined widely and can include a site, area, building, group of buildings, structure, archaeological site, tree, garden, geological formation, fossil site, habitat or other place of natural or cultural significance, and its associated land.

Not every building or landscape element will be significant. Often the removal or alteration of non-heritage assets or the development of these sites is not a major concern. The objective is to ensure that where development does occur, it occurs in a manner that is appropriate to the significance, character and appearance of the heritage area.

Heritage places in Victoria are considered to be either of:

- state or national significance, or
- regional and local significance (that is, places important to a local community).

Heritage places of "state significance" are listed on the Victoria Heritage Register. The Heritage Council of Victoria and Heritage Victoria are responsible for maintaining this register and issuing heritage permits for the development of heritage places of state significance under the *Heritage Act 1995*. Heritage Victoria also maintains a register of non-Aboriginal archaeological sites.

Heritage overlays

Heritage places, including but not limited to places listed on the Victorian Heritage Register, are protected through the use of heritage overlays. Heritage overlays consist of a map identifying heritage areas and an attached schedule that lists specific properties of heritage significance.

¹⁸ Not all land has an overlay, some land may be affected by more than one overlay, and overlays may cross zone boundaries.

According to the Department of Sustainability and Environment's practice guide¹⁹, where councils establish a heritage overlay:

- significant heritage precincts and areas should be separately identified on planning scheme maps and allocated a map reference prefix. This should be cross-referenced to a schedule attached to the overlay. The purpose of identifying these areas is to preserve the personality of a streetscape or suburb
- individual properties or assets such as buildings, trees, lakes and swamps can also be identified on planning scheme maps and included in the schedule. These assets are separately identified where the council considers their use and development needs to be more tightly controlled than the broader identified precincts or areas.

If a heritage overlay applies, a planning permit is required to demolish, alter or add to an existing building and for any new building or structure. The heritage overlay requires the council to consider, before it grants the permit, whether the proposed action will lessen the significance of the heritage place.

Findings of our review

Heritage overlays included in the council's planning scheme outlined the purpose of the overlay, identified circumstances where a permit was required, and identified circumstances where notice and appeal requirements were exempt.

Heritage properties were identified on planning scheme maps and in the schedules to the heritage overlays. Designated heritage areas or precincts were also identified on planning scheme maps, but generally not listed in the schedules to the overlays.

In these circumstances, there is some ambiguity as to whether the requirements of the overlay relate to all properties, within the heritage areas designated in the planning scheme maps, or only to those heritage places included in the schedule.

However, in September 2001, VCAT considered this issue in relation to discrepancies in another planning scheme and ruled "if the property is shown ... on the planning scheme map as HO [heritage overlay] with or without a number, the heritage overlay provisions ... apply"²⁰.

¹⁹ Department of Infrastructure 1999, *Victoria Plan Provisions Practice Note – Applying the Heritage Overlay*, Department of Infrastructure, Melbourne.

²⁰ *Victorian Civil and Administrative Tribunal, Librey Pty Ltd v. North & West Melbourne Association Inc.* (2001) VCAT 1833, para. 42.

Despite this ruling, the planning contractor (in making decisions on planning permit applications) took the view that the heritage overlay requirements only applied to the heritage places included in the schedule to the heritage overlay.

This meant that many properties in areas designated as heritage areas on overlay maps were treated as if there were no heritage considerations impacting on property use or development.

Heritage considerations: Case study 2

It is quite common for a number of heritage assets to be located in close proximity. The character and/or broad heritage features of these areas are vulnerable to change due to development pressures. Therefore, in approving any proposed changes to land use or development, the council must consider both the direct effect of the proposal on specific heritage assets and its effect on the overall character (or heritage) of the area.

The following case study shows how the council's application of the heritage overlay requirements resulted in the approval of a permit for a proposed development which could have adversely impacted on the heritage value of the surrounding area. It also resulted in lost time and money through a protracted appeal and mediation process.

CASE STUDY 2: FAST FOOD STORE IN PORTLAND

On 14 May 2002, the council issued a permit to demolish a furniture shop and dwelling at 55 Percy Street, Portland, and to construct a fast food store. The property was in an area covered by a heritage overlay.

The permit was issued on the same day the application was received by the council. It provided for, among other things, a 10-metre high sign to be placed on the highway.

The council determined that as the premises were located in a "Business 1" zone, the application was exempt from the Act's normal requirement to give notice and rights to object and appeal to VCAT.

CASE STUDY 2: FAST FOOD STORE IN PORTLAND – continued

The council also determined that:

- as the property was not included in the schedule to the heritage overlay, the requirements of the overlay did not apply to this property (despite the property being situated in an area designated as HO on the planning scheme map)
- the existing buildings had no statutory heritage significance and the proposal was sympathetic to the existing streetscape.

A local heritage committee disputed the validity of the permit at VCAT.

Specifically, they argued that:

- the council, by not notifying owners of adjoining properties and its own heritage advisor of the application, had not followed due process required under the Act
- the corporate signage allowed for in the permit would dominate and adversely affect the significance, character and appearance of the streetscape.

The day before the VCAT hearing in August 2002, the applicant decided not to exercise their option to buy the property and did not attend the hearing. Despite this, the local heritage committee asked that the matter be referred to mediation as the permit remained in force.

The VCAT directions hearing was adjourned. On 27 September 2002, the council bought the property. Further hearings and mediation followed over the next 5 months in relation to both the permit and signage.

On 27 February 2003, the local heritage committee withdrew its application to have the permit amended, following the applicant agreeing to change the proposed signage specified in their development plans.

In February 2004, the applicant applied for and was successful in having the expiry date of the planning permit extended for a further 2 years to May 2006.

We consider that the council erred in not notifying adjoining landholders of the proposed development. We also consider that the council did not adequately consider the impact of the development (particularly the signage) on the heritage value of the surrounding area.

Had these actions been taken, this matter could have been resolved without the financial cost and loss of time associated with having the issue reviewed by VCAT²¹.

Source: Glenelg Shire Council, Application no. 116/02, 55 Percy Street, Portland.

²¹ Costs incurred by the council associated with VCAT's review of this application amounted to \$10 200.

Heritage considerations: Case study 3

The following case study provides an example of where the council referred the planning application to other agencies for “technical advice”, but failed to take appropriate action on the advice it received.

CASE STUDY 3: DEMOLITION OF HISTORIC BUILDINGS IN PORTLAND

At the end of February 2000, the council received an application to demolish a number of historic bluestone buildings (dating back to the 1880s) in a main street of Portland. The land was to be developed for commercial purposes. The property was zoned “Business 1” under the council’s planning scheme, and designated within the planning scheme’s heritage overlay.

The council provided details of the proposal to owners of properties adjoining the site and referred the application to Heritage Victoria, the council’s Heritage Advisory Board and the council’s heritage adviser.

The council’s heritage adviser was opposed to the proposed works and reported that the demolition of such historic buildings “... sets a dangerous precedent ... and ultimately devalues the purpose and objectives of the Heritage Overlay of the Planning Scheme”. He recommended that the council not support the proposal and, instead, prepare a conservation management plan for the site.

In March 2000, Heritage Victoria advised the council that the buildings proposed for demolition were “potential candidates” for registration under the Heritage Act and that the site was of local historic importance. Heritage Victoria also advised the council to take into account the advice of the council’s heritage adviser.

Despite receiving 3 objections to the application, the council issued a notice of decision to grant a permit for the demolition/development works in May 2000.

A local historic committee applied to VCAT to have the council’s decision reviewed on the grounds that the proposed redevelopment was contrary to the objectives of the State Planning Policy and the Glenelg Planning Scheme.

In October 2000, VCAT determined that the council’s decision be set aside and no permit issued on the basis that:

- parts of the property were historically significant
- policies encouraging commercial development do not necessarily override the heritage or tourism policies in the planning scheme
- removal of buildings would be contrary to state and local heritage policies, and contrary to the purposes of the heritage overlay.

VCAT was also critical of the council given that a notice to grant a permit had been issued based on documentation that “failed to meet the minimum requirements of the planning scheme”. The documentation did not consider key issues such as car parking, or the movement of pedestrians and vehicles.

Moreover, the plans had no dimensions and did not relate to the actual shape of the land.

Conclusion

We are unable to say why areas were designated in the heritage overlay maps, but not included in the schedule to the overlay. It seems likely these heritage areas were not included in the schedule due to an administrative oversight.

We identified instances where the council, through its inappropriate application of the heritage overlay requirements, failed to protect the shire's heritage assets. Our view is consistent with VCAT's 2001 decision.

Failure to apply the heritage overlay controls is of particular concern where the zoning of properties (for example, as Business Zone 1) removes the need to provide details of the proposal to owners and tenants of surrounding properties, making the proposal exempt from the normal objection and appeal requirements of the Act.

The absence of a heritage policy, a neighbourhood character overlay, and a design and development overlay for the Portland town centre has also impacted on the ability of the council to preserve its heritage assets.

Recommendation

4. That the council:

- **before it approves an application to change the use or to develop land within a designated heritage area, consider the potential impact of the proposal on the heritage values of the site and/or its setting and area. This is particularly so, where the zoning of properties (such as in Business Zone 1) removes the need to provide details of any proposal to owners and tenants of properties surrounding the site, making the proposal exempt from the normal objection and appeal requirements of the *Planning and Environment Act 1987***
- **develops a heritage policy, and considers developing a neighbourhood character overlay, and a design and development overlay for the Portland town centre.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

Pre application meetings are held with council's heritage advisor and all applications in heritage overlay areas are referred to the advisor.

Council has completed stage 1 of the Heritage Study and is currently undertaking Stage 2. The heritage policy and design and development overlay are due for completion in October 2005. Council has assessed the neighbourhood character overlay is of a lower priority at this stage.

3.5.3 Aboriginal cultural heritage

The Glenelg Shire has a significant Aboriginal heritage, with indigenous people having occupied the coastal areas of the shire and used coastal resources for over 10 000 years.

The State Planning Policy Framework requires the council to identify, conserve and protect places of natural or cultural value from inappropriate development. These include places of Aboriginal cultural heritage significance, including historical and archaeological sites.

The State Planning Policy Framework also requires the council to take account of the *Archaeological and Aboriginal Relics Preservation Act 1972*, the *Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (both of which are designed to protect Aboriginal cultural heritage) and the views of local Aboriginal communities.

Councils can identify significant Aboriginal heritage places, and use their planning controls to protect them. This could be achieved by identifying and including cultural heritage sites in a heritage overlay that places certain restrictions on their use and development.

Where a proposal may impact on an Aboriginal place or object, the applicant needs to contact Aboriginal Affairs Victoria (AAV), local Aboriginal communities or the Regional Aboriginal Cultural Heritage Program representatives to determine whether there is such an Aboriginal place or object of significance on the property. Under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the local Aboriginal community can grant or refuse consent to “deface, damage or otherwise interfere with or do any act likely to endanger”, consent may be issued subject to terms and conditions.

If a local community does not grant or refuse consent within 30 days, or if the project affects an area for which there is no functioning local Aboriginal community the applicant may apply to the Minister for Aboriginal Affairs for consent.

AAV works in partnership with Aboriginal communities in Victoria to manage this significant heritage, and maintains a register of known Aboriginal heritage places. All Aboriginal heritage places, regardless of whether they are listed on this register, are protected under legislation and require a permit from the local Aboriginal community before they can be disturbed or destroyed.

Findings of our review

The State Planning Policy Framework requires the council to identify, conserve and protect places of natural or cultural value from inappropriate development. We found that the council failed to protect, through appropriate planning controls, an area of historical and Aboriginal significance known as the Convincing Ground.

The Convincing Ground is significant as the site of an historic whaling station and the scene of a conflict in the 1830s that resulted in the massacre of Aboriginal people by the first European settlers in Victoria. The site is registered with AAV as an Aboriginal Heritage Place.

The area is also considered to be of great cultural and historical significance by members of the Gunditjmara Aboriginal community, many of whom live in Portland and surrounding areas.

Case study 4 shows how works have commenced that are potentially inconsistent with the planning scheme, and in breach of state and Commonwealth legislation that aims to protect areas of significance.

Case study 5 shows how the council, in assessing an application, potentially failed to follow due process.

The applications discussed in these case studies are the subject of current applications to VCAT.

A further issue associated with these planning applications is in relation to the absence of an appropriately constituted development plan for the site. Further comment is provided in section 3.5.6.

THE CONVINCING GROUND: BACKGROUND TO THE CASE STUDIES

In 2000, the council proposed re-opening the Old Coach Road, located on the north shore of Portland Bay, as part of a development proposal. This road passes through the Convincing Ground. Prior to opening the road, the council engaged consultants to conduct an archaeological survey and prepare a report.

The resulting report (May 2000) recommended that:

- no further land subdivision or development occur as "... any disturbance of the ground would be highly likely to impact upon Aboriginal archaeological sites" and be "... unsympathetic to the historical and cultural values in the area"
- the council amend its planning scheme to clearly record the site and its significance to the state so that the property could be conserved and future planning decisions informed.

The report also stressed that any disturbing, destruction, interference or endangerment of an Aboriginal place or archaeological site required written consent of the relevant local Aboriginal community or the minister under Commonwealth legislation. This requirement was reiterated in letters to the council from AAV in December 2000, January 2001 and February 2003.

In its letter of 15 January 2001, AAV reminded the council that the Convincing Ground was registered as an Aboriginal place and protected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The council responded to AAV in February 2001, indicating that it did not wish to adopt the report's recommendations, but that its planning officer would evaluate any proposed developments in light of the report and its recommendations. The council also indicated that it would make any applicants for developments in this area aware that the area is a registered Aboriginal heritage place.

Aboriginal cultural heritage: Case study 4

The following case study shows the council's poor management of cultural heritage issues as part of the assessment process.

CASE STUDY 4: APPLICATION TO SUBDIVIDE FARMLAND WITHIN CONVINCING GROUND AREA

On 18 June 2003, the council received a planning permit application to subdivide farmland in the Rural Living Zone and within the area known as the Convincing Ground.

The application was referred to Telstra, Powercor and Portland Coast Water, and notification provided to 4 other organisations including the Department of Sustainability and Environment (DSE).

On 4 July 2003, DSE wrote to the council objecting to the proposal on the grounds that:

- part of the land was Crown land administered by DSE
- it promoted linear development along the coastal frontage, contrary to the objectives of the Victorian Coastal Strategy
- it is located in a very vulnerable area, at high risk of coastal recession.

Following receipt of this letter and an objection from the Department for Victorian Communities, the council had discussions with the applicant and the application was subsequently withdrawn.

On 17 November 2003, a new application was submitted with the proposed residential blocks moved back from the coast so that they were no longer located on Crown land. The application was assessed and a permit issued on the same day it was received.

The application was neither advertised nor referred to relevant agencies, as it was considered a continuation of the previous application.

Under the scheme, the council is required to identify, conserve and protect places of natural or cultural development from inappropriate development. Such places are defined in the scheme and include "Places of Aboriginal cultural heritage significance, including historical and archaeological sites".

CASE STUDY 4: APPLICATION TO SUBDIVIDE FARMLAND WITHIN CONVINCING GROUND AREA – continued

Although AAV is not a referral authority under the council's planning scheme, the council had previously sought advice from it and Heritage Victoria in relation to development in this area. The council subsequently included an advisory note with the permit, stating that it was an offence to "... disturb or destroy an aboriginal site ... without obtaining the prior consent from the relevant local aboriginal community". The note indicated that "Aboriginal archaeological issues should be discussed with Aboriginal Affairs Victoria". Reference was also made to the relevant state and Commonwealth legislation that protects Aboriginal sites.

The property was also in an area covered by a development plan overlay, which meant that a permit could not be issued for any development on this property until a development plan had been prepared and approved by the responsible authority. The Minister for Planning has sought a declaration from VCAT that such a plan had not been prepared and approved. See part 3.5.6 of this report.

Bulldozing of the site commenced in January 2005. Works stopped soon after when the applicant was advised that the Aboriginal community or Minister for Aboriginal Affairs had not been consulted and, therefore, consent had not been given.

In early 2005, AAV engaged an investigator to identify whether there were any breaches of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The ensuing report indicated that the council, once it became aware of the significance of the site, had an obligation under the *Planning and Environment Act 1987* to protect it. In the consultant's opinion, the council was aware of the significance of the site. Accordingly, if appropriate planning processes had been applied, the permit would have been refused or the applicant advised that there was virtually no chance that the local Aboriginal community or the state minister responsible for Aboriginal affairs would consent to allowing dwellings to be built on the site.

The applicant advised the consultant that the council had indicated the Aboriginal issues associated with the permit had been addressed.

In April 2005, the local Aboriginal community and the Minister for Planning applied to VCAT to have the planning permit for the land subdivision cancelled. The matter is to be heard in December 2005.

AAV also referred the matter to the Commonwealth Director of Public Prosecutions to investigate if an offence has been committed under Commonwealth legislation.

Source: Glenelg Shire Council, Application no. 336/03, The Convincing Ground.



Aerial view of earth works on the Convincing Ground, Narrawong.

Aboriginal cultural heritage: Case study 5

CASE STUDY 5: FURTHER APPLICATION TO BUILD ON CONVINCING GROUND

In February 2004, the council received a planning application for a 9-lot subdivision of land on the Convincing Ground site (next to the land mentioned in case study 4).

Both the local historic committee and indigenous community objected to the proposal on the grounds that in granting the permit, the council would fail to recognise the impact of the development on a significant cultural and heritage property. The council and the applicant were unable to resolve the objectors' issues.

Council issued a Notice of Decision to Grant a Permit (a) on 27 January 2005 even though AAV and the community had significant concerns about the works on that site. The notice included 32 conditions and, in contrast to the previous permit issued by the council for works on the Convincing Ground, had 3 conditions specifically addressing the need to consult with AAV and to obtain necessary community and legal consents.

A permit has yet to be issued by the council and no works have been undertaken on the site.

In March 2005, an application was made to VCAT to review (b) the Notice of Decision to Grant a Permit given the failure by the council to:

- notify relevant parties who may be affected by the granting of the permit
- protect historically and culturally sensitive land.

This matter is to be heard by VCAT in December 2005.

- (a) If there are no objections, the council can issue a permit immediately. If there are objections, the council can only issue a Notice of Decision to Grant a Permit. The notice signals the council's decision to grant the permit.
- (b) An application for a review of Council's decision can be lodged by an objector within 21 days of the decision.

Source: Glenelg Shire Council, Application no. 049/04, Subdivision.

Conclusion

These 2 Convincing Ground case studies provide powerful examples of how the council is alleged to have failed to protect, through the establishment of appropriate planning controls and administration of the planning scheme, an area of historical and Aboriginal significance. This is despite receiving clear advice from AAV (in 2001) that the Convincing Ground was registered as an Aboriginal place and protected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Council's alleged failures will be examined through a number of applications to VCAT which are to be heard in December 2005.

Recommendations

5. **That the council, work with local Aboriginal communities and AAV to:**
 - **identify significant Aboriginal sites**
 - **(through the planning scheme) establish controls to prevent these sites from inappropriate development.**
6. **Until such time as significant Aboriginal sites are identified and specific controls established to protect them, the council comply with the requirements currently existing in the planning scheme.**

RESPONSE provided by Glenelg Shire Council

Recommendations are agreed.

The Memorandum of Understanding between Glenelg Shire Council and the Indigenous Communities (final draft) includes a commitment to develop the means by which the planning processes of the Council identify and protect the shire's cultural heritage value, in particular:

- *the development and use of strong, inclusive, well defined policies supporting strong objectives of the Municipal Strategic Statement*
- *the development and use of a protocol which acts in addition to the planning process by requiring input and advice from local Indigenous groups and corporations*
- *the development of a heritage and cultural overlay over the Glenelg Shire.*

It should be noted that the first time the boundaries of the Convincing Ground were identified was when a map of the Convincing Ground was tabled at the mediation meeting relating to this matter on 20 June 2005.

Council is now complying with the requirements currently existing in the planning scheme.

3.5.4 Environmental considerations

Planning decisions can have a direct impact on the environment. Proposed developments and changes in land use may involve clearing land and removing native vegetation, disrupting natural habitats for flora and fauna, polluting the environment, and impacting on water salinity levels.

These environmental issues need to be balanced against other council objectives, such as growing the economy, and fostering employment and development.

The council uses the Environmental Rural Zone and the Environmental Significance Overlay to protect areas of environment significance within the shire.

Environmental significance is interpreted widely and may include issues such as noise effects or industrial buffer areas, as well as issues related to the natural environment.

Where the use or development of land involves the clearing of native vegetation; impacts on environmentally sensitive areas such as coastal areas, wetlands, water courses and national parks; or affects native flora and fauna, it is usual for the proposal to be referred to the Department of Sustainability and Environment (DSE), or for DSE to be notified of the proposal.

Findings of our review

Our review of planning decisions disclosed that where developments were proposed in environmentally sensitive areas, the assessment process did not always consider land capability, the impact of coastal developments on coastal areas, or the impact of removing vegetation on the environmental and landscape quality of the area.

Discussions with DSE about the council's management of environmental issues indicated that there had been instances where the council had failed to obtain departmental input into planning permit applications (as either a referral authority or where DSE was an adjoining landowner).

Environmental: Case study 6

This case study shows how the council failed to adequately consider environmental impacts of a proposed development, particularly land capability, where an application proposed using land for a dwelling in an area remote to reticulated sewerage.

CASE STUDY 6: FAILURE TO CONSIDER ENVIRONMENTAL IMPACTS OF PROPOSED DEVELOPMENT

In early March 2003, the council received a planning permit application for the construction and use of a dwelling on a property located on the edge of Portland Bay.

As a reticulated sewerage service was not available to the property, the council sought advice from the Environment Protection Authority (EPA) (14 March 2003) on whether a domestic wastewater system could be used to treat and dispose of sewerage on site.

On 1 April 2003, a planning permit was issued. The permit included a condition that all wastes will be treated and disposed on the site in accordance with appropriate Australian standards.

The EPA responded to the council's request on 31 March 2003 (received 2 April 2003) indicating that it had a number of concerns with the on-site treatment of wastewater which included:

- under the proposal, the effluent envelope would be located within 35 metres of Portland Bay, whereas the EPA's Code of Practice for Septic Tanks requires a minimum 60 metre buffer between any effluent and any surface water
- given the size of the block (less than 0.4 ha) and the nature of the sandy soil, it would be very difficult to treat and reuse the wastewater by irrigating on-site as required by EPA's Reclaimed Water Guidelines.

On 8 April 2003, an application was received to install a septic tank on the property. This application was initially rejected by the council on 8 July 2003, but was later reconsidered following the provision of a land capability assessment (August 2003) and other information from the applicant. The proposal was again referred to the EPA.

The EPA responded on 31 October 2003, indicating, that following its review of the land capability assessment, it considered that the only sustainable wastewater management strategy for properties located along Portland Bay foreshore was for the properties to be part of a reticulated sewerage scheme.

The council again rejected the application on 20 November 2003.

The applicant appealed against the council's decision at the Building Appeals Board on 4 March 2004. The board dismissed the appeal.

The council then sought advice on the application from Portland Coast Water (response received 12 November 2003), Western Coastal Board (21 September 2004) and the Department of Sustainability and Environment (DSE) (16 September 2004). All of these organisations expressed concern with the proposal.

CASE STUDY 6: FAILURE TO CONSIDER ENVIRONMENTAL IMPACTS OF PROPOSED DEVELOPMENT – continued

In its response, DSE concluded that the proposed development:

- was contrary to the Victorian Coastal Strategy, and the Siting and Design Guidelines for structures on the Victorian coast
- located in a high-risk area which is vulnerable to coastal recession and extreme erosion events
- was deficient as it had no environmental wastewater management plan.

The applicant requested VCAT to review the council's decision to refuse to grant it a permit. On 6 December, VCAT affirmed the council's decision (of 20 November 2003) and ordered that a permit for the septic tank not be granted.

In assessing the initial March 2003 application for a permit to construct a dwelling on the property, the council should have considered:

- the impact of the proposal on the natural environment
- in the absence of reticulated sewerage, the capability of the lot to treat and retain all wastewater.

As the council was aware of the concerns with the installation of septic tanks on properties located along the Portland Bay foreshore, it is difficult to understand why the application to construct the dwelling was issued before the council received advice from the EPA regarding the installation of a septic tank on the property (a).

The council was also aware that properties in the immediate area were accessing underground water supplies to provide drinking water, and that effluent from the proposed septic tank was likely to contaminate these supplies.

As the property was located on the foreshore, the council was aware that any development on the property was subject to the Victorian Coastal Strategy and the Siting and Design Guidelines for structures on the Victorian coast. Despite this, the proposal was not referred to DSE until after the permit for the dwelling was approved.

(a) On 18 November 2002, the council received advice from the EPA expressing concerns with an application from the above applicant to install a septic tank on a property in the same subdivision along Portland Bay. This application was subsequently withdrawn by the applicant.

Source: Glenelg Shire Council, Application no. 044/03, Lot 1, Dutton Way, Portland.

Environmental: Case study 7

The following case study illustrates a permit issued by the council for a subdivision which did not accord with the planning scheme or the zone requirements.

CASE STUDY 7: SUBDIVISION INCONSISTENT WITH THE COUNCIL'S PLANNING SCHEME

In May 2004, the council received an application for a planning permit to subdivide a property of around 10 hectares into 5 lots with a dwelling on each. At the time of the application, the property was used for grazing and contained a dwelling.

Adjoining landholders were notified of the proposal and no objections were received. On 30 July 2004, the council issued a planning permit to allow the subdivision.

The land was zoned Environmental Rural, a zone used to indicate that the area had a significant environmental value to the state, and which needed to be protected. The council used this zoning to help conserve the environment, landscape and vegetation qualities of the land, and to recognise its environmental sensitivity and biodiversity. The property was also covered by an Environment Significance Overlay. This overlay requires the council to consider the statement of environmental significance and environmental objectives included in the schedule to the overlay, prior to approving a planning permit.

The schedule to the zone separates the zone into 2 parts for the purposes of subdivision. For the more environmentally sensitive part of the zone, land cannot be subdivided into blocks of less than 40 hectares in size. For the remainder of the zone, the minimum allowable size for a subdivision is 2 hectares.

Discussions with council staff indicated that there were differences of opinion about the location of the boundary separating the 2 parts of the zone. The planning contractor, in assessing the application, applied his own interpretation of where he considered the boundary to be and determined the property was located in that part of the zone allowing subdivision of lots down to 2 hectares in size.

While there is some ambiguity regarding the location of the road which forms part of the boundary between the 2 parts of the zone, we consider that the property is clearly located in that part of the zone where the minimum lot sizes could not be reduced below 40 hectares. As a result, we consider the decision to approve the permit was inconsistent with the requirements of the planning scheme and the purposes of the zone and the environment significance overlay.

Source: Glenelg Shire Council, Application no. 145/04, 329 Cape Nelson Road, Portland.

Conclusion

While the protection, enhancement and sustainable use of the shire's environmental assets was clearly a major objective of the council's planning scheme, this was not given adequate consideration in assessing planning permit applications.

Recommendations

7. That the council complies with legislative requirements and considers the potential impact of any proposal on the environmental values of the site and surrounding area.
8. That where there are ambiguities regarding the requirements of the planning scheme, these issues are investigated and resolved by council in a timely manner (including seeking authorisation from the Minister for Planning to prepare necessary amendments to the planning scheme).

RESPONSE provided by Glenelg Shire Council

Recommendations are agreed.

The Glenelg Shire Council town planning department is now proactive in taking environmental values into consideration when assessing applications.

Council's planning scheme was an early scheme. Council is now aware the scheme was poorly drafted leaving significant scope for misinterpretation. The need to incorporate development plans and difficulty clarifying boundaries to an environmental rural zone (ERZ) are examples. Council has sought resolution to these issues. The planning scheme has been amended in relation to development plans. Council is seeking declaration in VCAT in relation to the ERZ boundaries.

3.5.5 Subdivision of land

The subdivision of land is controlled through the planning system. In most cases, a planning permit is required before land can be subdivided.

The *Subdivision Act 1988* sets out the procedures to be followed by councils in certifying plans and issuing statements of compliance. The approval process for a land subdivision is the same as for any other type of planning application. Applications and plans for subdivisions must also be referred to the relevant water, sewerage, drainage, gas and telecommunications agencies.

It is essential that the council and referral authorities give proper consideration to subdivision at the planning stage, as it is not possible to place additional requirements on a subdivision once a planning permit has been issued. Conditions on permits should, therefore, cover the full range of matters that the referral authorities require to be addressed.

Impacts of subdivisions are highly evident in rural zones and, in the case of Glenelg, in the Environmental Rural Zone, which applies to land of environmental significance or high agricultural value.

The objective of the Rural Zone is to ensure that the state's agricultural base is protected from the unplanned loss of high quality productive agricultural land due to permanent changes to land use. The objective in the Environmental Rural Zone is to protect the environmental values of the rural area.

The council can help ensure these objectives are implemented by:

- using land capability as a key basis for rural land use planning
- setting appropriate minimum lot sizes for rural zones
- identifying and protecting high quality agricultural land and areas of environmental significance
- supporting effective agricultural production and processing infrastructure, rural industry and farm-related retailing
- balancing the potential off-site effects of rural land use proposals, which might affect high quality productive agricultural land, against the benefits of the proposal
- limiting the opportunities to use land for a dwelling not associated with farm use.

In the Rural Zone and a large part of the Environmental Rural Zone, the council's planning scheme requires that each lot resulting from a subdivision must be of at least 40 hectares. This is equivalent to the Victoria Plan Provision's statewide "default" minimum lot size. There are a limited number of exceptions to this rule, where a permit may (if appropriate) be granted to create smaller lots. These exceptions include subdivisions:

- involving a re-subdivision of existing lots
- where the number of lots is no more than the number the land could be subdivided into in accordance with the requirements of the scheme (averaging). For example, an 80-hectare lot could be broken into a 10-hectare and a 70-hectare lot
- which create a house for an existing dwelling (excising).

The decision to approve any subdivision, including these exceptions, is discretionary and must have regard to the policy context and the zone and overlay objectives for the area. There is no automatic right to a permit for subdivision or to utilise an exception.

Challenges in assessing applications for subdivisions

Proposals to subdivide rural land, particularly where the subdivisions create properties for residential use, represent the most contentious planning issue to confront rural and regional Victoria.

In rural zones, subdivisions designed to create properties for residential use can:

- create conflicts between farmers and residential landowners in relation to the impact farming activities have on residential users
- constrain new, expanding or changing rural enterprises – particularly where there is potential smell, noise, dust, and crop spraying.

These subdivisions also impact on the “per hectare” value of the surrounding rural land. In rural localities perceived to have a good lifestyle amenity (or convenient access to an urban area), the existence of residential landholders may cause the value of the surrounding rural land to exceed the value from which an economic return could be achieved from farming.

Findings of our review

Our review indicated that in assessing planning permit applications for subdivisions, the council narrowly considered each proposal’s *technical compliance* with the scheme. There is little evidence to suggest that the council considered whether the likely outcomes were *consistent with the planning scheme objectives*.

Our file review highlighted 22 instances where planning permits for the subdivision of land had been issued that were inconsistent with the purpose of the zone, contrary to the requirements of the zone or inconsistent with the council’s planning scheme. For example, planning permits for the subdivision of land in rural areas have been issued with resulting lot sizes smaller than the 40 hectares permitted under the planning scheme.

The following sections discuss how the subdivisions involving averaging, excisions to create residential blocks and transferable property rights were applied in the Glenelg Shire.

Averaging

This provision enables a permit to be granted to create smaller lots provided that the total number of lots is no more than the number the land could be subdivided into in accordance with the schedule to the zone and a legal agreement is entered into which prohibits further subdivision.

The difficulty with this clause is that while it can facilitate the consolidation of titles into a large agricultural parcel, it sometimes gives rise to rural residential sized lots adjoining that parcel. As indicated above, the problem arises when houses are constructed on the new lots, rather than the subdivision itself.

Applying excision provisions

The council has generally considered the excision provisions as a tool to facilitate the transfer of farm management to the next generation. However, these subdivisions are likely to be driven by financial gain (to create an asset which can be sold)²².

The council's planning contractor and the council have taken the view that there is a right to excise any dwelling from any lot. This view is based on a belief that if there is an existing lot, then there is an entitlement to a house, and if there is already a house on a lot, what difference does a subdivision make?

As many existing lots are significantly smaller in size than 40 hectares, the application of this provision has had the effect of making many uneconomic rural blocks even smaller. This application of the scheme has created small lot subdivisions (particularly in high amenity rural fringe areas), which are at odds with the zone's purposes.

The pressure to excise lots is more pronounced at the fringe of the council's town centres. This is due to a demand for small lots so that a non-urban, yet essentially residential, lifestyle can be pursued. However, most of the shire's towns have at least 20 years' supply of these allotments in their town centres. Consequently, any demand does not need to be met by the excision of further small lots in the rural zone.

The Victoria Plan Provisions Rural Zones Reference Group also considered this issue and concluded that:

- Where excision provisions are "scheduled in", a planning permit should only be granted if the balance of the land (or the "residual lot") is prevented from being used for a dwelling.
- Minimum lot sizes must be based on a proper land capability study that takes into account a range of factors, including a comprehensive natural resource assessment, the existing settlement pattern, environmental features, access to water and access to other infrastructure. Land capability is much more than soil type and land classifications.

²² An examination of excisions in the Barrabool Shire (subsequently Surf Coast Shire) during the 1990s found that more than 50 per cent of excised lots had been sold within 5 years of subdivision to persons unrelated to the farm.

This issue has also been considered at VCAT, with the following comments reported:

“While the proposed subdivision of the land is permissible in accordance with the provisions of the planning scheme, it is inconsistent with the Council's policy for the area as set out in the Scheme that seeks to minimise small lot subdivisions and a proliferation of dwellings in an area intended for broad scale farming. The proposal has failed to address and satisfy many of the matters referred to in the decision guidelines of the Scheme and the purpose of the rural zone that in turn may have provided a rationale for the application.”²³

Subdivision of land: Case study 8

The following case study shows how a permit was granted for a proposed subdivision and created outcomes contrary to the objectives of the zone.

CASE STUDY 8: FAILURE TO FOLLOW PROCESS IN RELATION TO SUBDIVISION AND LOT SIZE

In September 2003, the council received an application to subdivide a 14-hectare property in a rural zone to create a residential block for a dwelling. The permit was approved the same day it was received.

The rural zone allows a permit to be granted in lots smaller than 40 hectares, if the subdivision is to create a lot for an existing dwelling. Only one additional lot, which does not contain a dwelling, may be created in the subdivision. Each lot must be at least 0.4 hectare.

Our review disclosed that, while the proposal met the exception requirements which permits smaller lot sizes than the minimum allowed in the zone, it created outcomes contrary to the objectives of the zone. In addition:

- a report explaining how the proposed use and development was consistent with the council's Municipal Strategic Statement, local planning policies and purpose of the rural zone was not provided with the application, as required by the local planning policies
- no further information was requested from the applicant, despite the application being deficient
- adjoining landholders were not notified of the proposed subdivision
- no information was on file to indicate what had been considered in assessing the application and the basis for providing the permit
- despite the subdivision being in a sensitive coastal area, the Department of Sustainability and Environment was not notified of the proposal.

Source: Glenelg Shire Council, Application no. 248/03, Simpsons Landing Road, Nelson.

²³ *Victorian Civil and Administrative Tribunal, Ruven Nominees v. Greater Dandenong City Council and Ors* (2000) VCAT 1574.

Subdivision of land (transferable property rights): Case study 9

Transferable development rights are a scheme used by developers to transfer rights that apply to land in one area to land in a different area. While these schemes have been used in countries such as New Zealand and the USA for many years, they are relatively rare in Australia, and Victorian experience in other councils (prior to the introduction of new format planning schemes) shows them to be problematic²⁴.

They are not provided for in the Glenelg planning scheme and would require an amendment to the scheme before they could be implemented.

The following case study illustrates a proposal involving the transfer of property rights across zones. The permit was subsequently withdrawn when a legal opinion found the proposal was not allowable under the shire's planning scheme. This is also an example of where the council failed to comply with its referral requirements and, in assessing the permit application, did not follow proper processes.

CASE STUDY 9: TRANSFER OF DEVELOPMENT RIGHTS FROM ACROSS ZONES

The council received a planning application on 22 May 2003 for a proposed re-subdivision of 4 existing properties in an area known as "Benbows Green" at Cape Bridgewater.

The Cape Bridgewater area is recognised by many government agencies and bodies for its cultural (archaeological, Aboriginal), scientific (geological) and environmental (landscape, plant and animal) significance. It is also included in the National Trust of Australia Regional Classification for Portland as "essential to the heritage of Australia and (an area) which must be preserved."

Three landholders applied for a permit to rearrange 14 lots to form 18 smaller lots to be used for residential purposes (each approximately 0.5 hectares), a common property area (16.5 hectares) and 3 farming parcels (total 37.5 hectares).

²⁴ Two Victorian councils that have explored this concept are:

- the Surf Coast Shire which, in 1996, allowed farmers to establish blocks for dwellings in areas of low-value agricultural land as a trade for them consolidating areas of good-quality agricultural land
- Kyneton Shire which, through an amendment to its Planning Scheme in the mid-1990s, attempted to provide for subdivisions that transferred property rights between properties.

The Kyneton council later decided to abandon this amendment. A panel formed to review the amendment agreed with the decision, stating "there would be very few real opportunities to take advantage of these provisions". The panel also supported the former Department of Infrastructure's comments that the provisions were too generous to support zone objectives, and it was unclear how they would work.

CASE STUDY 9: TRANSFER OF DEVELOPMENT RIGHTS FROM ACROSS ZONES – continued

The properties consisted of 4 broad groupings:

- Lanyons North (one title, in the Rural Zone)
- Lanyons South (5 titles separated by road, in the Rural Zone)
- Lal Lal (7 titles separated by road, in the Environmental Rural Zone)
- Benbows Green (one title in the Environmental Rural Zone).

The application sought to re-subdivide the land across the 2 zones (Rural and Environmental Rural), thereby transferring “entitlements” from one zone to another. That is, entitlements were to be transferred from agricultural land (rural) to facilitate construction of 18 dwellings along the coast and adjoining agricultural land. The 4 properties involved in the re-subdivision were owned by different landowners and were in some instances kilometres apart.

Council approved the application on 23 May 2003, one day after it was submitted. Councillors and council staff had visited the site prior to the application being approved.

In October 2003, in response to concerns about a similar planning proposal, DSE had provided the council with legal advice. This indicated that re-subdivision across different zones was not permissible within the existing provisions of the council’s planning scheme. In August 2004, DSE expressed concerns to the council about the Benbows Green proposal.

Following this advice from DSE, the council became concerned about the legality of the proposal and applied to VCAT to have the permit cancelled.

In late 2004, a solicitor engaged by the council²⁵ reviewed the decision to grant the planning permit. The solicitor’s review found that the council, in assessing the permit application, had not followed proper processes in that:

- no notice of the application was given to the owners/occupiers of adjoining properties (including DSE), to the National Trust or the community generally
- no referral was made to relevant authorities such as DSE. In fact, DSE indicated that it would have objected to the proposal as it was not consistent with the Victorian Coastal Strategy or Victoria’s Biodiversity Strategy, and would have had an unacceptable impact on the area’s ecological values.

²⁵ Refer section 3.1.2 for the solicitor’s role.

CASE STUDY 9: TRANSFER OF DEVELOPMENT RIGHTS FROM ACROSS ZONES – continued

There were also numerous problems with the proposal, including:

- an increase in the number of lots, which is not allowable under the scheme
- re-subdivision of land across different zones, which is not allowable under the scheme
- the development of housing along the coast, which is inconsistent with the objectives of the Victorian Coastal Strategy
- unplanned residential development in the Bridgewater Bay coastal area, which is contrary to the objectives of the scheme
- removal of coastal vegetation to the detriment of the environmental and landscape quality of the Bridgewater Bay coastline.

In August 2004, the council made an application to VCAT to cancel the permit. In December, with the agreement of the applicant, VCAT ordered the permit to be cancelled on the basis that a material mistake had been made in granting the permit.

Source: Glenelg Shire Council, Application no. 140/03, Benbows Green, Cape Bridgewater.

Conclusion

The principal purpose of the Rural Zone is to support agriculture and promote effective land management practices. The purpose of the Environmental Rural Zone is to protect high environmental value or high agricultural value land. However, the council's application of the subdivision zone controls and other requirements of the scheme, does not achieve these purposes.

The way in which the council has applied the planning scheme has led to the subdivision of rural land to its lowest common denominator rather than subdivision based on agricultural or environmental outcomes. This approach is contrary to one of the main objectives of the Act, which is to make planning decisions on the basis of land capability and suitability and having regard to environmental outcomes.

These planning decisions may have adversely impacted on the sustainability of rural enterprises and led to the loss and under-utilisation of agricultural land in the shire.

Recommendation

9. **That in assessing applications for subdivisions in Rural Zones and Environmental Rural Zones, the council**
 - **considers the specific requirements of the planning scheme**
 - **takes account of the broader objectives of the scheme, considering the best use of the land for subdivision.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

The Glenelg Shire Council town planning department is proactive in considering all requirements of the planning scheme. Council is preparing to undertake a Master Community Settlement Plan process to set vision, including future residential development.

3.5.6 Approval of permits without a development plan

Two overlays commonly used by councils to achieve coordinated development of specific areas of land are the incorporated plan overlays (IPOs) and development plan overlays (DPOs). These overlays are used to implement plans that guide the future development of land in the area covered by the overlay.

The plans outline the form and conditions that must be met before any changed land use and development is approved.

In the case of a DPO a schedule to the overlay may allow a permit to be issued without a development plan having been approved, but it must expressly allow this to occur. If it does not, no permit can be issued before a DPO is in place.

Why have IPOs and DPOs?

IPOs and DPOs do not set up permit requirements, but stop permits being granted in areas covered by the overlays, until the relevant plans are prepared.

Neither the IPO nor the DPO can change the scope of the discretion provided in the zone applying to the land. They cannot be used to “schedule in” or “schedule out” a permit requirement. If a use is “as of right” in the zone, the overlay cannot introduce a permit requirement. If a use is prohibited in the zone, the overlay cannot remove that prohibition. If a use requires a permit under the zone, the overlay cannot exempt it from the need for a permit.

Once a plan is approved, both overlays require that all planning permits granted must be “generally in accordance” with the plan. To do this, the council tests each proposal against the requirements of the plan. If the proposed land use or development is not in accordance with the plan, a planning permit cannot be granted.

Development plans include maps, diagrams, a strategic management plan and specific requirements.

As IPOs are part of the planning scheme, a planning scheme amendment is needed to introduce or change the plan²⁶. Where a DPO is used, the development plan is not incorporated into the planning scheme. The council can, therefore, approve the establishment or amendment of the DPO plan, without the need for a planning scheme amendment.

Because the DPO requires no public approval process for the plan, it is normally applied to:

- development proposals that are not likely to significantly affect third-party interests
- self-contained sites where ownership is limited to one or 2 parties
- sites that contain no existing residential population and do not adjoin established residential areas.

How development overlays apply in Glenelg Shire

Many areas within Glenelg Shire are covered by a development plan overlay. These include 6 areas zoned as residential, township, low-density residential, industrial, offensive industrial, and rural living.

Importantly, the council’s DPOs differ from those of most other councils in that the Glenelg Council’s DPO schedules require that development plans be incorporated into the planning scheme.

As with other planning schemes, the council’s scheme prohibits the issue of permits for works in areas covered by development plan overlays, until a development plan has been prepared. None of the council’s DPO schedules expressly overrides this requirement.

The DPOs exempt permit applications, that are generally in accordance with the plan, from notice and review requirements.

²⁶ This requirement enables third parties to be involved in the process of making or changing the plan. For this reason, IPOs are normally used for sites that are likely to affect third-party interests and sites comprising multiple lots in different ownership.

The council advised us that, historically, DPOs had been established in areas experiencing major growth to:

- guide the future development of the land in the area covered by the overlay
- reduce the time taken to approve planning permits by removing the notice and review processes normally required.

However, by requiring that the development plans be incorporated into the planning scheme, the council effectively stalled the planning approval process. It was suggested to us that the requirement to incorporate the development plans into the scheme was an administrative mistake.

It could be argued that when the DPOs were established, the council was attempting to facilitate community input into planning decisions through the extensive public consultation that accompanies any amendment to the planning scheme. This public consultation would have helped ensure community involvement on occasions when both the DPOs and associated zones (like the Business 1 zone) remove the normal public notice and review processes.

Findings of our review

Our review disclosed that:

- the council has not established development plans for any of its 6 DPOs
- some 330 permits have been issued in areas covered by these DPOs and there is a risk that some may be technically invalid (in that the permit does not comply with the requirements of the planning scheme).

These permits cover the construction of buildings for various land uses, extensions of dwellings, garages and verandahs, and subdivisions of land. Although we did not undertake a detailed review of these 330 permits, a number of permits are likely to have been issued that are not in accordance with the planning scheme. These include a drag racing strip, a waste recycling plant situated close to residential areas, and subdivision of land for residential purposes close to the airport without adequate consideration of the noise.

The council's planning contractor advised us that he was aware of the need to set up development plans for each of the council's DPOs, and that the issue had been raised with the council in May 1999 and on a number of subsequent occasions over the past 5 years. Details of these are outlined below:

- The planning contractor developed a Guiding Principles Plan for the shire's rural living zoned areas. This was subsequently adopted by council. At this meeting, it was agreed that the Guiding Principles Plan would form the basis of a development plan for these areas (May 1999).

- At this same meeting, the planning contractor canvassed a proposal whereby plans submitted with permit applications could be used as a substitute for a development plan. This would avoid some of the costs associated with the council establishing a development plan.
- Annual budget submissions for the planning function, prepared by the planning contractor, requested additional funding for the preparation of development plans.
- A number of meetings between the Department of Infrastructure (when that department had responsibility for the planning function) and the council considered this issue and recommended amending the planning scheme to abolish the DPOs.
- The need to correct the “inadequacies in the planning scheme” with regards to development plans was raised in VCAT planning application hearings, as far back as 2001.

In February 2002, the council exhibited an amendment to its planning scheme²⁷ that included the removal of all development plan overlays. The documentation supporting the amendment contended that the DPOs are “... an unnecessary duplication of controls contained elsewhere in the planning scheme”.

As there were objections to the amendment, the council decided to split the amendment into parts – adopt one part (without submissions) and refer the submissions related to part 2 to an independent panel (appointed by the minister) for review. This is in accordance with the Act.

We were advised that this review process was not undertaken.

As the council had not established development plans for its DPOs, the council’s planning contractor was faced with the prospect of rejecting *all* planning permit applications in areas covered by the DPOs. This would have had a significant adverse impact on the shire’s development activity.

In these circumstances, the planning contractor, acting as the council’s delegate, decided to use the project/site plans provided with planning applications as a substitute for a development plan. The planning contractor considered that this enabled him to continue processing and issuing planning permits in areas covered by DPOs.

²⁷ Amendment C5 relates to errors and inconsistencies in the scheme, minor re-zoning and implementation of planning-related matters. We discuss this further in Part 4 of this report.

Current status

As indicated in case study 4, the council issued a planning permit in an area subject to a DPO, without a development plan in place. In April 2005, the local Aboriginal community and the Minister for Planning applied to VCAT to have the planning permit cancelled. Proceedings in VCAT are scheduled for December 2005. These will consider whether individual project/site plans submitted with planning applications, can be used as a substitute for a development plan for the purpose of the planning scheme.

Following the appointment of an internal town planner in April 2005, the council decided not to approve any planning permit applications in areas covered by the DPO until the development plans were established. By early June 2005, the council had received, and was holding, 6 planning permit applications for land affected by DPOs.

In recognition of the adverse impact this issue was having on both the shire's development industry and the public's confidence in the delivery of its planning services, the council asked the Minister for Planning to approve an urgent amendment to the planning scheme in May 2005.

The amendment sought to:

- remove the requirement for development plans to be incorporated in the scheme
- allow the council (for a 12-month period to 31 July 2006) to issue permits in areas covered by DPOs (with the exception of the area known as the Convincing Ground), in the absence of a development plan – provided the proposal met the requirements of the planning scheme.

In June 2005, the minister agreed to the council's request to amend the planning scheme.

Council is also awaiting advice, sought in May 2005, on the legality of the 330 planning permits issued by the former planning contractor without a development plan during the period 1999-2005.

Conclusion

Over the last 6 years, the council has approved 330 permits which are at risk of being invalid. The council's action in issuing these permits could have a significant impact on the ability of landholders to use and develop their land.

The council has been aware (since 1999) of the need to establish development plans for each of its DPOs. It should have known it could not legally issue permits in areas covered by DPOs without a development plan. Despite this, the council took no action to resolve this issue.

Had the council acted to amend the planning scheme in mid-2002, as it intended, it would not be facing the significant issues it does today.

Given the time needed to set up adequate development plans for all its DPOs, the current situation had the potential to significantly disrupt development activity in the shire.

It is, therefore, pleasing to report that the proposed amendments to the planning scheme will provide an opportunity for the council to establish its development plans and allow development activity to continue in the interim.

We note that the Minister for Planning has advised the council that he expects that the council will prepare and adopt appropriate development plans or provide reasons as to why development plans are no longer required. He has also advised of his expectation that appropriate resources be provided to resolve this issue quickly.

Recommendation

10. That the council:

- review the need for each of its DPOs. Where a DPO is needed, it should be retained and a development plan established. Where there is no need for a DPO, an amendment to the planning scheme should be developed to remove the DPO from the scheme
- review the 330 planning permits and:
 - issue new permits where considered appropriate
 - where a current land use or development is clearly inappropriate, the council should seek legal advice on the appropriate action to be taken
 - advise DSE of its proposed process for resolving the 330 permits.

RESPONSE provided by Glenelg Shire Council

Recommendation partially agreed.

Council is reviewing the need for DPOs in accordance with the recent Ministerial amendment.

The 330 permits are currently under review. Any proposed action will be in accordance with legal advice.

3.5.7 Amendment to approved planning permits

During the period covered by the audit, the Act provided for the council to amend a planning permit it has issued in the following situations:

- to correct a clerical mistake or omission
- to correct a miscalculation or a mistake in any description of a person, thing or property included in the permit
- when the owner requests minor changes²⁸.

In approving amendments to permits, the council is restricted to changes that do not adversely impact on other interests. The Act sets out tests that the council must consider in making a decision to approve any amendment.

Amendments to permits should:

- not change the effect of any condition required by VCAT
- not adversely affect the interests of a referral authority (unless it is acceptable to the relevant referral authority)
- be consistent with the planning scheme applying to the land
- not cause an increase in detriment to any person
- not change the use for which the permit was issued.

Where the amendment to the permit fails to achieve the above requirements, the applicant needs to seek a new permit. If the council is in doubt as to whether a proposed amendment is minor, the matter can be referred to VCAT for a decision.

Findings of our review

Our file review identified 5 instances where the council amended planning permits for changes that were likely to have more than a minor impact on the proposal. In these cases, there was no evidence on file of the council having assessed whether the amendment was permitted under the Act or considered whether the applicant should have applied for a new permit.

Amendment of approved permit: Case study 10

The following case study illustrates the amendment of a permit without due consideration of the legal requirement to assess the impact of the change on relevant persons.

²⁸ From 23 May 2005, the Act was amended to formalise procedures for processing amendments to planning permits.

CASE STUDY 10: AMENDMENT TO PERMIT - COFFEE SHOP AND GALLERY IN RESIDENTIAL AREA

In May 2003, the council approved a permit to establish, within a residential area, a coffee shop and gallery. The permit application lacked detail, with no information supplied on the level of seating in the coffee shop, car park and vehicle access, and fire protection services to be provided. There was no evidence that an assessment of the application had been undertaken. Adjoining land holders were notified of the proposal.

Two neighbours objected to the proposal. Their concerns included the impact of the business on the amenity of the area given the potential for increased noise and traffic, and the limited off-street car parking proposed. The applicant responded to the objections by indicating that his intention was not to seat more than 8 to 10 people at any one time in the coffee shop and the operation of his business would not interfere with residents' daily routines.

The permit was issued with 8 conditions that addressed such matters as operating hours, drainage, the need to act responsibly, and seating capacity (limited to 10 seats). The applicant was also to construct an on-site car parking area and provide adequate access to the business.

On 10 October 2003, the applicant asked the council to amend the permit to increase the seating capacity to 30 people. This permit was amended on 15 October to incorporate the changed seating capacity. The file contained no evidence of any assessment by the council, as required by the Act, to determine whether the amendment caused increased detriment to any person. The neighbours who had objected to the initial application were not advised of the amendment to the permit.

In April 2004, residents complained to the council about the noise, cars being parked on their front lawns, their driveway access being blocked, the coffee shop operating outside of its advertised hours and the excessive number of patrons (greater than 10). They were also concerned that liquor was being served on the premises when there had been no notification that the business was to have a liquor licence.

Council asked the business owners to comply in all respects with the conditions of their amended planning permit.

Source: Glenelg Shire Council, Application no. 124/03, Isle of Bags Road, Nelson.

Amendment of approved permit: Case study 11

The following case study provides a further example of changes made to an approved permit without any evidence supporting the council's decision.

CASE STUDY 11: PERMIT AMENDED WITHOUT SUPPORTING DOCUMENTATION

Council received an application in March 2003 for a permit to undertake a 6-lot subdivision. Although no assessment report was on file, nor any record of a site inspection, the council considered that the subdivision could cause detriment to owners and occupiers of adjoining properties, and advertised the application in the local newspaper.

The council received no objections to the proposal and a permit was issued in mid-November 2003 with 13 conditions (covering drainage and specific requirements of referral authorities). However, the plan attached to the approved permit was for a 7-lot subdivision (and not 6 as initially applied for).

Late in November 2003 and early December 2003, the applicant asked for an amended plan for the land which provided for the 7-lot subdivision, staged development of the land and a change in the layout.

The permit was amended on 9 December 2003 in accordance with the applicant's request. The file contained no information justifying the decision to amend the permit. Nor did it include evidence that the impact of the changes on adjoining property holders or others had been considered.

Source: Glenelg Shire Council, Application no. 053/03, Kerrs Road, Portland.

Conclusion

The notification and other requirements of the planning scheme and the Act are designed to ensure:

- community involvement in planning decisions likely to impact on them
- that land use or developments proposed in the permit applications comply with the requirements of the scheme.

Where substantive changes are made to permits that bypass the normal planning process, the integrity of the planning process is called into question.

Amendments to planning permits examined by us indicated that, in some cases, such changes were made.

Recommendation

- 11. That the council comply with legislative requirements in processing applications for amendments to permits.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

Council's current processes ensure that amendments are in accordance with the provisions of the Act.

3.6 Decision-making

As we have reported, in making a decision about whether or not to grant a planning permit, numerous factors need to be considered. These include compliance with the Act and planning scheme, objections from the public, and comments from referral authorities and other relevant organisations. A permit that complies with the Act and planning scheme can be granted where there are no objections.

Where there are objections, these need to be considered and a decision made on whether the concerns are significant enough to result in the rejection of the application for a permit.

Once the decision is made, the council is required to issue a *Notice of Decision* outlining its decision and reasons to objectors and the applicant. If no appeals are lodged within 21 days following the decision, a permit can be issued.

It is considered sound practice to support each planning decision with a planning report. This report would normally contain:

- a description of the site and surrounds
- a description of the proposal
- details of the relevant policy, strategy and provisions of the planning scheme
- a summary of any objections
- a planning assessment that:
 - indicates how the proposal advances the council's planning strategy and objectives of the planning scheme
 - includes discussion on potential impacts of the proposal on adjoining properties and the environment
- a recommendation to council.

3.6.1 Findings of our review

Our review of the council's planning files and information disclosed:

- *A lack of information.* There was insufficient evidence on file to show that the council had considered all relevant matters in assessing planning applications, and to support its decision to approve or reject planning permits. Very few planning decisions were supported by a planning report.

When questioned on the lack of file documentation, the planning contractor advised us that, although not formally documented, his work was based on discussions with applicants, surveyors, other specialists and councillors and supported by site visits, reference to the council's computer mapping system, other electronic property databases, and the planning scheme.

- *A very low planning permit refusal rate.* Of over 1 000 planning applications received by the council, only 15 permits were refused in a 3-year, 4-month period (January 2002-May 2005).
- *An extraordinarily quick decision-making time.* During 2004, the average time taken to make decisions on planning permit applications was 1.7 days. In March 2003, comparative information indicated other councils took an average of 68 days to process permits²⁹. Under the Act, the council is normally required to make a decision on a planning application within 60 days³⁰. The time taken by the council to process permits has significantly decreased over the last 10 years from 29.8 days in 1995 to 1.7 days in 2004.
- *A reliance on VCAT to resolve contentious issues after approval.* Discussions with the planning contractor and councillors indicated that where an application was difficult to assess or required considerable additional work, it was the council's practice to approve the permit and let any objections and contentious issues be dealt with at VCAT. A council review of its involvement in VCAT hearings concluded that although VCAT appeals generally added 4 to 6 months to the planning process, it provided "a reasonably inexpensive means whereby parties to an application can seek review"³¹.

²⁹ J Harris 2003, *Best Value Review of Statutory Planning Services*, Glenelg Shire Council, Portland. Council statistics do not include the time the application spends in the hands of referral agencies.

³⁰ Variations in processing can be attributed to *different procedures* in how applications are processed (in particular the extent of community consultation), the level of *complexity*, the *adequacy* of supporting information and *different types* of applications.

³¹ B Wilder, Town Planner, Glenelg Shire Council, *Review of VCAT*, Report presented at council meeting on 13 February 2001, pp. 15-17.

- *Councillors were not actively involved.* The planning contractor submitted detailed reports to the council meetings about some applications for planning permits. However, most of the applications that have been the subject of VCAT appeals were not discussed by councillors before a decision was made to grant the permit.
- *Most VCAT decisions on council planning matters over the past 5 years were made against council.* Although the number of council planning matters brought before VCAT was not significant when compared with the total number of applications received (an overall average of 1.3 per cent), 62 per cent of the decisions made by VCAT were *against* the council³². At August 2005, 9 planning matters were before VCAT.
- *Dissatisfaction with planning decisions.* There was a considerable level of dissatisfaction with many of the council's planning decisions by the Department of Sustainability and Environment, Heritage Victoria and the local heritage committee.

Conclusion

The lack of supporting documentation, extraordinarily quick processing time and low refusal rate for planning permit applications indicate that these applications are more than likely not to have been adequately assessed.

Furthermore, our investigation of specific planning decisions, VCAT rulings and the dissatisfaction of other government agencies with many of the council's planning decisions, indicate that a number of the planning applications approved by the council were inappropriate.

Had councillors had a greater involvement in overseeing the council's planning function many of these problems may have been overcome. See comments in section 5.3.3 of this report.

³² This figure does not include one action at VCAT where the council sought to cancel a permit it issued. VCAT agreed that there had been a material mistake in issuing the permit and agreed that the permit be cancelled.

Recommendations

12. In making planning decisions, the council should endeavour to achieve an appropriate balance between its objective of promoting economic development and its other objectives of sustainability, protecting heritage and environmental assets and amenity, and involving the community in planning decisions.

In undertaking its planning function, the council is obliged under the *Planning and Environment Act 1987* to give consideration to the relevant legislative and planning scheme requirements (including the overall objectives of the scheme) before making decisions on applications for planning permits.

13. The council should also:

- **develop a more constructive and cooperative relationship with other government agencies and bodies which have an interest in planning decisions (such as the Department of Sustainability and Environment and Heritage Victoria)**
- **attempt to resolve contentious issues through a consultation process with objectors, rather than issuing permits and dealing with objections at VCAT**
- **adequately support its decisions with a planning report that fully addresses the requirements of the planning scheme and relevant legislation.**

RESPONSE provided by Glenelg Shire Council

Recommendations are agreed.

Council gives a commitment to consider an appropriate balance between its objective of promoting economic development and its other objectives of sustainability, protecting heritage and environmental assets and amenity, and involving the community in planning decisions. Due consideration will be given to the relevant legislative and planning scheme requirements.

In-house planning staff are establishing working relationships with a range of government agencies and bodies.

RESPONSE provided by Glenelg Shire Council - continued

The Glenelg Shire Council Planning Application Notification and Consultation Policy provides for consultation and/or mediation where written objections are received to an application. Therefore, a process has now been adopted to resolve contentious issues through consultation.

Council planning reports are now prepared in accordance with industry best practice and council guidelines.



4. Did the council have appropriate management arrangements for the delivery of its planning services?



4.1 Introduction

For any council's planning function to be effective, an appropriate management structure must be in place. This should include:

- appropriate risk-management processes
- a strategic framework to guide the provision of planning services (one that allows changes to be made to planning schemes where necessary)
- arrangements for the delivery of planning services
- appropriate delegations of authority for decision-making
- appropriate community consultation processes
- supporting policies, procedures and guidelines
- a reporting regime and performance management system to assess performance.

The following parts of the report address how well the Glenelg Shire Council (the council) met these 7 requirements.

In the final section (4.9), we consider if recent initiatives by council have led to better planning outcomes.

4.2 Appropriate risk-management processes

As with all major council activities, council management should assess the risks associated with its planning activity and develop strategies to manage those risks.

In Part 3, we highlighted how the council's poor planning record in appraising, notifying, referring, assessing and making decisions has exposed it to considerable risk.

Sections 4.5 (delegation of authority) and 5.2 (contractual arrangements), describe in detail how engaging the planning contractor to provide planning services and make planning decisions on behalf of council, did not relieve the council from its fundamental responsibility for service delivery.

4.2.1 Conclusion

While an overall risk-management plan has been developed for the council, it does not cover the council's planning function. This is a critical deficiency, given that the council remains accountable for the cost and quality of its outsourced planning services.

Recommendation

- 14. That the council undertake a risk assessment of its planning functions and include the results of this assessment in its risk-management plan.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

The Glenelg Shire Council Risk Management Strategy will be amended accordingly.

4.3 Strategic planning framework

The council is regarded as a planning authority under the *Planning and Environment Act 1987* (the Act). As such, it has a duty to provide sound, strategic and coordinated planning for the use and development of land in the Glenelg shire.

As indicated in Part 2, the key document used by municipal planning services to regulate land use and development is the council's planning scheme. This scheme has two broad parts as outlined in Figure 4A.

FIGURE 4A: COMPONENTS OF GLENELG COUNCIL'S PLANNING SCHEME

1. A policy component, designed to ensure planning decisions achieve certain planning outcomes.	This is outlined in: <ul style="list-style-type: none"> ● the State Planning Policy Framework ● the Local Planning Policy Framework ● the Municipal Strategy Statement³³ (MSS). (The MSS should be consistent with the council's corporate plan.)
2. The detailed requirements of the scheme.	These are outlined in zones, overlays, particular provision requirements, and general provision requirements. (For an explanation of these terms, see part 3.5.1.)

Source: Victorian Auditor-General's Office.

Under the Act, the council must regularly review the provisions of its planning scheme and prepare amendments as required. The Act also requires the MSS to be reviewed at least once every 3 years.

³³ The purpose of the Strategy Statement is to further the State Government's planning objectives to the extent that they apply to the municipal district.

The Glenelg planning scheme was prepared in 1997 and formally adopted in December 1998. It was one of the first “new format” schemes prepared under the Victoria Plan Provisions. Since its inception, the planning scheme has been subject to 2 reviews: a 1998 Panel review and a 2003 Best Value review. The council has also proposed 12 amendments to the scheme during this time.

The following section describes the findings of both the 1998 panel review and the 2003 Best Value review in relation to Glenelg’s planning scheme. It also summarises recommendations of the most recent review of the council’s Municipal Strategy Statement (February 2005).

We then assess how well the council manages the important process of seeking amendments to its planning scheme.

4.3.1 Review findings

1998 Panel review

In 1998, the then Minister for Planning established a panel and advisory committee to review the Glenelg planning scheme. The panel’s report concluded that:

- the planning scheme represented “a balanced and forward looking response to the opportunities and constraints facing the Shire. Clear directions have been identified and the scheme has been formulated in a genuine attempt to respond to the expectations of the planning reform program”
- the strategy statement “grasped the key issues facing the municipality. It is a comprehensive and logical development of a strategic response to the planning of the Shire”.

However, the panel also noted that the scheme, while providing a framework to facilitate development, had insufficient regard for environmental and heritage issues:

- “... despite the rich cultural heritage of the Shire and statements about its significance in the MSS, the actual identification of assets was patchy and consequently there were gaps in the level of protection. The Council acknowledged this and the need for a proper Shire-wide heritage study, but there was no evidence that there is a firm commitment to undertaking this within a defined time frame”.
- “... the lack of any reference to heritage protection or assessment in the Corporate Plan 1997–2000, particularly among the performance indicators, is conspicuous, given the significance of heritage and tourism in the Council’s MSS”.

- “Steps need to be taken to adequately reflect SPPF [State Planning Policy Framework] principles about the maintenance of ecological processes and genetic diversity in terms of the conservation of flora and fauna”.

In December 1998, the then Minister for Planning approved the planning scheme, notwithstanding several outstanding matters that council was to address as part of its ongoing review. These outstanding matters included:

- a review of the heritage provisions within the next 12 months and development of a program to identify and protect all the shire’s heritage assets
- development of local policies to address native vegetation clearance and timber production
- an examination of factors that may influence the development of residentially-zoned land.

In 2002, the council considered the findings of the panel report, as part of its triennial municipal strategic statement review process. However, the council did not address any of these outstanding matters³⁴.

2003 Best Value review

The 2003 Best Value review recommended that council:

- clarify the significance of certain overlay provisions contained in the council’s planning scheme (in line with recommendations in the 1998 panel report)
- appoint a heritage adviser
- incorporate its Community Engagement Strategy into the contract for the provision of contracted planning services.

While the council did appoint a heritage adviser, it has not acted on the other 2 recommendations.

2004 Municipal Strategy Statement reviews

The first triennial review of the council’s strategic statement was undertaken in 2002. The resulting amendment that proposed to update the strategic statement has now lapsed (refer Case study 12, Amendment C4 below).

Following a review of its contracted planning services in late 2004, the council set up a new process to review how it managed the planning scheme. In January 2005, an experienced planning consultant and a graduate strategic planner were engaged to assist the council with its strategy planning and management of the scheme.

³⁴ Stage 1 of a heritage study was completed in October 2002. A brief has been prepared for the final stage and this is due for completion at the end of 2005.

The council completed its second triennial review of its Municipal Strategic Statement (MSS) in February 2005. The review involved extensive consultation with key stakeholders and the community. As part of this consultation process, a number of emerging issues were identified and their impact on land use and development in the shire was assessed. The council has yet to report the findings of this review to the Minister for Planning as required by section 12B (5) of the *Planning and Environment Act 1987*.

Figure 4B outlines the key findings from the most recent MSS review.

FIGURE 4B: MUNICIPAL STRATEGY STATEMENT REVIEW – KEY FINDINGS

<p>Consultation on current MSS</p> <ul style="list-style-type: none"> ● Heavy weight given to economic development at expense of heritage and environment decisions. ● Objectives, strategies and policies not applied in planning decisions. ● Destruction of native vegetation not addressed. ● Planning policy failed to achieve conservation objectives. ● Need policy to stop ad hoc submissions, especially along road frontages and coastal areas.
<p>Emerging issues</p> <ul style="list-style-type: none"> ● Development pressures present significant challenges in terms of managing urban growth; rural land use; coastal protection; economic and social development; and environmental, heritage and cultural preservation. ● The council needs a robust strategic base to guide future planning and development.
<p>Performance of MSS</p> <ul style="list-style-type: none"> ● Consistent with state planning policy. ● Local planning policy requires review. Policies need to clearly outline the council's position and provide practical guidance in the day-to-day decision-making on matters in the planning scheme. ● Gaps in scheme: errors in heritage overlay; planning policy recognition of Aboriginal cultural heritage; coastal planning and application of development plan overlay.

Source: Glenelg Shire Council, MSS 3-year Review Report and Consultation Reports, February 2005.

The council, through its current MSS review, has identified the need for further work to improve the planning scheme, including the redrafting of the MSS. The council has prepared a detailed program to undertake this work.

4.3.2 Improving the planning scheme: How the council approves amendments

As part of its broader strategic framework, the council is responsible for making sure that the planning scheme works and complies with both local and state planning policies. To do this, the council must make timely changes to the planning scheme to improve its operation, address issues which come to the council's attention, and correct any mistakes and ambiguities.

Deciding to change a planning scheme is a significant decision because it affects the way in which land can be used and developed.

Amendments to planning schemes take several months and involve:

- assessing requests
- seeking authorisation from the Minister for Planning to prepare the amendment (requirement since 23 May 2005)
- processing the amendment which, in some cases, can involve referring the amendment and submissions to an independent panel appointed by the Minister for Planning³⁵
- adopting the amendment or adopting and approving the amendment if authorised by the Minister for Planning.

Since the approval of the scheme in 1998, 12 amendments have been prepared by the council. These have followed council decisions to re-zone land, correct mistakes in the scheme and introduce new strategic directions – for example, the wind energy project.

Of those 12 amendments:

- 6 have been approved and changes incorporated into the scheme
- 3 have lapsed
- 3 are on hold.

Apart from these amendments, 7 more amendments have been prepared directly and approved by the Minister for Planning. One further amendment prepared by VicRoads has also been approved.

A council is not bound by a panel's recommendation. However, it must consider the report. If a council then decides to adopt an amendment contrary to the panel's recommendation, it must give reasons to the minister for doing so.

There is no right of review if the minister rejects an amendment submitted for approval by council.

Amendments to the planning scheme: Case study 12

The following case study shows how the council made an invalid decision to amend its planning scheme. Its failure to act on the issues raised by the Victorian Government Solicitor, has resulted in the amendment lapsing. This amendment proposed a new council MSS.

³⁵ This can be done if the council does not either change the amendment in the manner requested by the submission/s or abandons the amendment. Refer *Planning and Environment Act 1987*, section 23(1).

CASE STUDY 12: AMENDMENT C4

During October and November 2002, a proposed amendment was publicly exhibited. It proposed a number of changes to the planning scheme, based on recommendations made in the 1998 Panel report. Submissions were received from the National Trust of Australia, the Western Coastal Board and the former Department of Natural Resources and Environment.

The submissions were critical of the council's proposed amendment as it did not adequately address:

- recognition and conservation of the shire's cultural assets – specifically, the clarification of heritage overlay provisions in the planning scheme
- the Victorian Coastal Strategy and the South West Regional Coastal Action Plan (this is a requirement of the State Planning Policy Framework and had been specifically requested by the Minister for Planning)
- environmental issues – specifically, native vegetation controls; protection of Aboriginal cultural sites; management of wildfire, soil and stream salinity; as well as appropriate zoning to limit town boundaries.

The council considered that these submissions related to matters not specific to the amendment and were in the nature of *additional matters* to be included in the MSS. As a result, no changes were made to the amendment.

In December 2002, the council formally adopted amendment C4 and submitted it to the Minister for Planning for approval. The amendment failed to address any of the matters initially raised by the 1998 panel report³⁶ and the amendment and submissions were not referred to an independent panel for review, as required by the Act.

The Department of Sustainability and Environment disagreed with the process the council had followed in amending its planning scheme and sought legal advice in mid-2003.

The Victorian Government Solicitor concluded that the amendment was invalid and that the council had:

- erred in ignoring the submissions from the 3 agencies, and in not referring these submissions to an independent panel for review
- failed to comply with the legislation.

³⁶ Stage 1 of a heritage study was completed in October 2002. A brief has been prepared for the final stage and this is due for completion at the end of 2005.

CASE STUDY 12: AMENDMENT C4 – continued

After receiving this advice, the minister's delegate advised the council that the "adopted amendment" submitted for approval was void and could not be decided on by the minister.

Amendment C4 lapsed in September 2004. Council did not request an extension of time for the amendment to enable it to address the issues raised by the Victorian Government Solicitor and resubmit it to the minister for approval.

Source: Information provided by Glenelg Shire Council and the Department of Sustainability and Environment.

Similar problems of process have affected Amendment C5. In May 2002, a few months after the proposed amendment was publicly exhibited, 7 objections to the proposed changes were received. Council adopted the part of the amendment without submissions, however the remaining part of the amendment was not acted on, and has since lapsed.

We were advised by council staff that the amendment was not progressed due to the reluctance of the planning contractor to provide a briefing to the panel without receiving additional payment. The provision of this briefing appeared to be a requirement of the contract with the planning contractor.

Where a proposed amendment is abandoned, the minister is required to be advised. This has not been done.

Role of the planning contractor

The planning services contract between the planning contractor and the council (1998-2004) required the contractor to assist the council to meet its strategic planning requirements. As a key part of this role, the contractor was to initiate and prepare all relevant documentation on routine amendments to the planning scheme (that is, documents for council's consideration, public exhibition, adoption and ministerial approval).

There was evidence that the planning contractor raised issues with the council that needed amendments to the planning scheme to be resolved. However, we found very little evidence of work to *assist* the council in amending its planning scheme and finalising its strategic statement.

Discussions with the planning contractor indicated that while he was willing to undertake this work, he did not believe it was covered by his contract, and the council was unwilling to pay for the additional work.

4.3.3 Conclusion

Since its adoption, the planning scheme has been subject to an independent panel review, a Best Value review and 2 internal reviews of the MSS. All identified a number of significant deficiencies with the scheme. In undertaking its own assessments of planning permit applications, the council has also identified some deficiencies.

Many of the deficiencies that have been identified relate to the council's strategic planning and policy documents not adequately addressing the impacts of development activities on environmental and heritage assets. As we showed in Part 3 of this report, many of the objections to council-issued planning permits relate to the impact of planning decisions on environmental and heritage assets.

Despite a number of attempts by the council to address these deficiencies, they have largely remained unresolved. As shown by the council's management of planning scheme amendments, the council did not pay sufficient attention to ensure legal requirements or due process, were complied with in amending the scheme.

Had these deficiencies been addressed as part of the planning scheme review process, many of the problems currently faced by the council would not exist.

Based on this evidence, we consider that the council's strategic planning function has not been effectively managed.

Recommendation

15. That:

- **the council finalise its current review process and submit its second triennial review of its municipal strategic statement to the Minister for Planning for approval as soon as possible**
- **in future, the council more closely monitor and review the operation of the planning scheme and be more proactive in ensuring proposed necessary changes to the scheme are made.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

The review of the Municipal Strategic Strategy (MSS) has been completed. The report was adopted by council in February 2005. The Master Community Settlement Plan is to be undertaken as a priority. The MSS will then be redrafted.

Drafting of statutory policies for incorporation into the local planning policy framework has been actioned.

Council now has an in-house strategic planning unit to undertake regular reviews of its planning scheme.

4.4 Arrangements for the delivery of planning services

The planning contractor provided planning services to the council from March 1998 to March 2005³⁷. The value of the planning contractor's most recent contract (5-year contract commencing January 2003), prior to its termination at the end of 2004, was \$1.02 million, plus CPI adjustments.

At the same time, the planning contractor was also employed by the council as a staff member for 5 hours per week. In this role (as council town planner), he had delegated authority to approve planning permits on behalf of the council.

The Victorian Government Solicitor advised us that under the Act, this arrangement was not unlawful. He did consider it, however, to be unsatisfactory "because of a high potential to blur the two roles"³⁸.

For example, on any given day, the planning contractor was likely to undertake tasks related to both his role as provider of contracted planning services and council town planner. These could include:

- receiving, recording and maintaining planning applications
- deciding whether a person or persons might be affected by the grant of a planning permit
- assessing public submissions on proposed amendments to the planning scheme

³⁷ The contract with the planning contractor was terminated by council in December 2004, effective from the end of March 2005.

³⁸ Victorian Government Solicitor, Glenelg Shire Council – Administration of planning functions, 12 January 2005, p. 5.

- preparing reports on permit applications
- granting or refusing planning permits.

The Victorian Government Solicitor raised a number of concerns with this arrangement, including:

- *Lack of transparency.* A resident, applicant, affected person or councillor may be unclear about whether they are getting advice from the planning contractor or council officer.
- *High risk of poor record keeping.* This may affect the validity of the decisions.
- *Lack of supervision, quality control or peer review.*
- *Potential role conflict.* This may exist between the planning contractor's role in providing planning services to the council/approving planning permits and, in providing town planning services for members of the community.
- *Risk of corrupt conduct.* The arrangements may lead to the risk of corrupt conduct³⁹.

While the planning contractor recorded the times when he worked as an "employee of the council", he did not record the powers, discretions and functions exercised while performing the role. A position description was never developed for his role as an employee of the council.

Glenelg Shire Council is one of only a few councils in the state that has decided to outsource its planning services⁴⁰. The council advised us that this was due to:

- the difficulty in attracting qualified and experienced planning staff to Portland
- a legislative requirement for councils to tender at least 50 per cent of their services under the prior Compulsory Competitive Tendering policy.

4.4.1 Conclusion

We accept the Victorian Government Solicitor's advice that the arrangements in place at the council for most of the last 7 years were not unlawful under the Act, and understand why the council chose to adopt such an arrangement.

However, the arrangement introduced an additional party into the council's planning process who had potentially conflicting responsibilities, and risks that needed to be carefully managed by the council.

As we show in Part 5 of this report, these risks were not well managed by the council.

³⁹ Ibid, p. 5.

⁴⁰ The 9 other councils in the south-west region all engage in-house staff to deliver their planning services.

4.5 Delegation of authority for planning decisions

The Act⁴¹ requires that planning permits are only to be issued by members of the council or by a staff member under delegated authority.

It is normal practice for councils to assign authority for making planning decisions according to the risk associated with the decision.

Most planning permit applications are *routine* – for example, construction of extensions, verandahs and sheds. As these permits are low risk, responsibility for their issue is usually delegated to junior planning officers, without the need for senior approval.

Applications dealing with *moderately large and complex developments*, or *moderately sensitive issues*, usually require approval by senior management or the chief executive officer. Applications involving *large complex developments* or *very sensitive issues* are generally referred to council for consideration and approval. These delegations are usually outlined in a formal delegation schedule.

Our examination of the exercise of council's power to delegate authority⁴² disclosed that the planning contractor, in his role as a member of council staff, had been assigned responsibility for approving *all* planning decisions.

In councils generally, senior council officers and/or council often become involved in a planning decision when objections have been submitted. Objections function as a "trigger" for their involvement. However, as the planning contractor commonly approved applications without notifying persons such as adjoining landowners who may be affected by the proposal (refer to part 3.3 of this report), there was little community awareness of proposed developments, and so fewer objections resulted.

4.5.1 Conclusion

Council members are responsible for all planning permit decisions within the parameters of the *Planning and Environment Act 1987*. They have the power to delegate this authority to whomever they see fit. In transferring their authority to one individual, without any real oversight or approval process, they create a number of significant risks.

⁴¹ *Planning and Environment Act 1987* and *Local Government Act 1989*.

⁴² The delegations covered all duties, functions and powers which were the responsibility of the council under the *Planning and Environment Act 1987*, *Planning and Environment Regulations 1998*, *Planning and Environment (Fees) Regulations 2000* and *Subdivision Act 1988*.

For example, council planning permits may be overturned at VCAT or in a court of law, after development work has commenced. This means council ratepayers could be exposed to considerable costs, including restoring the property to its former state and compensating the developer for costs.

4.6 Community consultation processes

An objective of the Act is to ensure the strategic and orderly use and development of land with regard to community interests. The way most councils determine community interests is through appropriate consultation processes.

The objective of engaging the community in the planning process is reflected in the council's vision and strategies.

The *Glenelg Council Plan 2004-08* outlines the council's vision, which includes the comment that it "will strive to achieve respectful and inclusive consultation with our communities".

The plan includes a number of strategies and proposed actions designed to achieve the council's objectives, including:

- a program of community consultation on specific major issues, including planning
- a process that enables consultation at an early stage of the planning process.

The council has also developed a Community Engagement Strategy, which identified several strategies to improve the council's engagement with the community.

4.6.1 Conclusion

At the strategic level, the community has been informed of, and involved in, the planning process. However, at the operational planning level, this has not been the case. The council often made planning decisions without notifying relevant parties, and specific issues where the public could not get resolution from the council were taken to VCAT for resolution.

4.7 Policies, procedures and guidelines to support the planning function

The council is responsible for making sure appropriate policies, procedures and guidelines are developed to support the planning function.

Council planners use these documents to make consistent decisions in line with the planning scheme and other requirements.

Responsibility for the development of these policies, guidelines and strategies was assigned to the council's planning contractor.

4.7.1 Conclusion

Our review disclosed that, for most of the period in which the planning services were contracted out, policies and procedures for the planning function had not been documented. Nor was any formal guidance given to the planning contractor to help them perform the council's planning function.

The council developed detailed planning procedures in August 2004.

4.8 Monitoring and assessing the performance of the planning function

The council should periodically monitor and assess how well it performs its planning activities, just as it would monitor and assess all major activities. This is an opportunity to reinforce good practice, correct problems and learn from any mistakes.

A number of external and internal reviews of the planning function have been conducted in recent years. These include:

- 2003 Best Value review
- community satisfaction survey
- Glenelg Shire Council internal review
- 2004 solicitor's review.

4.8.1 External surveys and feedback

2003 Best Value review

This review⁴³ identified that a range of performance indicators were needed to address qualitative planning outcomes (discussed in Part 5 of this report). It also gave valuable insight into the level of stakeholder satisfaction with both the planning contractor and the council's planning services.

Feedback from stakeholders indicated varying levels of support for continuing the outsourced model of service delivery for planning services. Some internal stakeholders (councillors and some council staff) and those representing the interests of permit applicants were very satisfied with the services provided. However, others (government agencies and other bodies) considered that the planning processes and decisions did not reflect a "balanced and participative approach to service delivery". Areas where improvements in the delivery of planning services by the planning contractor were required included:

- availability of the planning contractor to facilitate mediation proceedings between objectors and developers prior to permit approval
- recording and documenting of advice sought by council from relevant authorities prior to permit approval
- a better balance between development and other issues such as heritage
- public notification of a greater proportion of planning applications prior to the approval of permits.

Respondents identified the following as key strengths of the planning service:

- expeditious processing and approval times
- simple planning processes
- level of expertise of the planning contractor
- courteous and prompt service from the council's customer service staff.

Our discussions with stakeholders included developers, engineers and other clients in regular contact with the council's contracted planner. Those discussions further confirmed a high level of satisfaction with the council's planning services over the past 7 years. Again, the main reasons for stakeholder satisfaction were timeliness, simplicity, expertise and customer service.

⁴³ J Harris 2003, *Best Value Review of Statutory Planning Services*, Glenelg Shire Council, Portland.

Community satisfaction survey

The Department for Victorian Communities and local councils fund an external organisation to conduct an annual community satisfaction survey to measure Victorian residents' perceptions about the performance of their local government in different service areas⁴⁴.

This survey found the key issue affecting residents' level of overall satisfaction with the council was *town planning policy and approvals*.

A review of recent survey results also shows that community satisfaction with the council's planning services has reduced significantly over recent years. Results from the 2005 survey show that:

- the average level of satisfaction with the council's planning services (52 per cent) was significantly lower than the council's target level (62 per cent) and that recorded for like councils⁴⁵ (64 per cent)
- 44 per cent of respondents consider the service delivered by the council needed improvement.

The detailed results of the survey are outlined in Figure 4C.

FIGURE 4C: COMMUNITY SATISFACTION WITH GLENELG SHIRE COUNCIL'S TOWN PLANNING POLICY AND APPROVALS

Results for 2005 (%)					Indexed mean, past 5 years				
Excellent	Good/ Adequate	Needs some improvement	Needs a lot of improvement	Indexed mean (a)	2004	2003	2002	2001	2000
2	54	18	26	52	58	61	60	59	58
Reasons why improvement is required (level of respondents): <ul style="list-style-type: none"> • better planning policies (27 per cent) • more consistent decisions (17 per cent) • more consultation with community (14 per cent) • more efficient/faster approval processes (13 per cent) • too little regulation in heritage areas/knocking down old houses (12 per cent) • council should be stronger in representing community opinion (11 per cent) • greater enforcement of/adherence to planning policies (10 per cent). 									

(a) The indexed mean is the average satisfaction rating achieved across a 5-point scale, multiplied by 20, to obtain a score out of 100.

Source: Department for Victorian Communities 2005, Annual Community Satisfaction Survey Research Results, Melbourne.

⁴⁴ Department for Victorian Communities 2004, *Local Government in Victoria 2003*, Department for Victorian Communities, Melbourne.

⁴⁵ That is, large rural councils.

In 1999 and 2000, the council also engaged a firm to undertake research on the level of customer satisfaction with the provision of town planning services. The research for both years indicated that the town planning services met the expectations of its clients. Areas where the service could be improved were also identified.

4.8.2 Internal reviews

Internal review of planning function

In late 2003, the council's chief executive officer (CEO) became concerned with a number of process matters involving the planning services unit. This was triggered, in part, by the CEO's concerns over the quality of some planning application decisions and concerns expressed by other agencies. In response to these concerns, the CEO initiated an internal review of planning services in early 2004.

The review examined the adequacy of the controls, procedures and service delivery standards of the planning services unit. The review concluded there was a need:

- to revise current statutory planning systems to engage relevant council officers and councillors in the decision-making process
- for councillors to become more involved in the development and review of policy to support the decision-making process and ensure good planning outcomes.

The council adopted these recommendations in June 2004 (further comment is provided in part 4.9 of this report).

Solicitor's review

In 2004, the council engaged a solicitor to review the planning contractor's performance and provide legal advice to the council on town planning issues. These findings are discussed elsewhere in this report (see part 3.1.2).

4.8.3 Conclusion

The council's planning function has been subject to a number of external and internal reviews over the last 5 years. These have raised a number of problems with how council planning services are provided.

Despite the council being aware of these issues, it has done little until recently to address any of these problems.

Recommendation

- 16. In future, the council should respond to any findings and recommendations of its planning service reviews through initiating appropriate changes to its procedures and practices.**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

Council has adopted the recommendations of the review completed in July 2004 and has continued to implement these processes.

4.9 Have recent initiatives by the council led to better planning outcomes?

Following the 2004 internal review of the council's planning function, the council introduced a number of key initiatives in July 2004, which included:

- a revised delegation instrument and decision guidelines
- a planning procedures manual (including revised notification policy)
- a Delegated Planning Committee (with delegated powers).

The council considered the new initiatives were necessary to improve controls and processes, and to bring council planning in line with industry best practice.

4.9.1 Revised delegation instrument and decision guidelines

The revised delegation instrument and decision guidelines were prepared following a review of current practices and procedures – and benchmarking – against other councils. The delegation instrument and guidelines cover:

- statutory compliance
- operational efficiency
- improved customer service
- delegations to council officers and external service providers
- procedures to guide notification of planning applications and decision-making
- working arrangements for the newly created Delegated Planning Committee
- reporting and communication.

The new instrument extended significant planning delegations to the council's CEO and provided for appropriate delegations to the new statutory planner. It amended and revoked a number of the planning contractor's authorities.

4.9.2 Planning procedures

To support the revised planning model, a comprehensive procedures manual was developed in July 2004 for use by the council's planning services unit. It includes proformas, templates, check lists, performance/service targets and protocols.

Importantly, the new procedures address the concerns of key stakeholders, and include:

- strict application of "material detriment" and notification of applications to interested parties
- a direction that no planning application be processed and approved in less than 5 working days (considered the minimum time in which a planning application can be adequately assessed)
- a "call-in" protocol where councillors may at any time prior to a decision being made on the application, ask that the matter be referred to the council for determination. This may occur where the council considers the application raises issues of genuine municipality-wide significance. This may be in relation to achieving or interpreting local planning policy or because the application may have material impact across municipal boundaries
- improved documentation and file recording processes to support decisions made.

4.9.3 Delegated Planning Committee

The Delegated Planning Committee (DPC) comprises 5 councillors and planning personnel. The DPC operates under a separate instrument of delegation from council that provides for:

- permit applications to be referred to the DPC for mediation and/or determination where an objection has been received that has not been resolved through consultation with the relevant parties. Where 2 or more objections have been received, applications *must* be referred to the DPC for mediation and/or determination

- the DPC to conduct informal mediation where an application can be presented and discussed in the presence of both objectors and the applicant. This is with a view to achieving negotiated settlements and the best planning outcomes
- the DPC to make a decision on the application or refer the matter to the council for decision.

4.9.4 Conclusion

The council has, in recent times, been proactive in addressing concerns with its planning function. New procedures, based on sound practice and statutory requirements, have ensured consistency in the council planning processes. These new procedures also minimise the risk of incorrect planning decisions being made, and challenges to decisions on the basis of inadequate assessment of material detriment and failure to notify interested parties.

Some councillors, developers and others regularly involved in the planning process have been critical of the changed processes, believing that planning decisions may not be made as quickly as in the past. However, we consider that the initiatives and changes put in place by the council have significantly improved the effectiveness, transparency and probity of its statutory planning service.

It is important that the effectiveness of the council's initiatives be assessed after 12 months of operation. Further changes may be possible, such as relaxing the minimum 5-day permit assessment process for routine applications. This will yield greater efficiencies in the council's statutory planning process.

Both in this audit and the council's own internal review, the engagement of councillors in the planning function was identified as critical to better planning outcomes. To some extent, this has been achieved with the setting up of the DPC.

The performance improvement plan developed as part of this audit (Appendix A of this report) could complement the council's continuous improvement activity of this critical service delivery area.

Recommendation

17. That the council:

- **review its recently introduced initiatives and provide a report to council members on the findings**
- **consider implementing the planning process improvements outlined in the performance improvement plan attached to this report (Appendix A).**

RESPONSE provided by Glenelg Shire Council

Recommendation agreed.

Review of planning processes formed part of the resolution by council in July 2004 when adopting the new planning processes.

The performance improvement plan will be implemented.



**5. Did the council
effectively
manage its
outsourced
planning services?**



5.1 Introduction

Accountability must be preserved when services are contracted out - "... while responsibility to do certain things can be transferred, accountability for the results cannot. Whatever the method of service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by Government ..."⁴⁶

As a planning authority, the Glenelg Shire Council is responsible for planning activities within the shire. While the council is free to determine how its planning services are delivered, it continues to be responsible for all planning decisions, *regardless of who makes the decisions or how they are made.*

Consequently, where an external contractor provides planning services, the council must maintain adequate procedures in place to oversee and manage those services. This ensures that:

- the contractor complies with contractual obligations to deliver planning services according to the specified time, cost and standards (quantitative and qualitative)
- planning services are delivered efficiently and effectively
- the council has sufficient information to make a decision regarding succession arrangements when the contract ends.

Inadequate service delivery – whether through failure of the service provider or poor contract management – may impact on an organisation's resources, reputation and compliance. It may even cause business interruption. Where the failure is associated with a key business process such as urban and regional planning, there will invariably be an impact on the community.

Beyond the terms and conditions of the actual contract (in this case, a standard commercial contract), contract management has 3 key stages:

- setting up of the contractual arrangement
- ongoing day-to-day management of the contract
- evaluation and succession planning.

The following 3 sections consider each of these in turn, to determine if the council effectively managed the delivery of its outsourced planning services.

⁴⁶ The Audit Office of New South Wales 1999, *Contracting Out Review Guide*, The Audit Office of New South Wales, Sydney, p. 1.

5.2 Setting up of the contractual arrangement

To assess whether council had set up appropriate procedures to manage its outsourced planning function, we reviewed:

- the contract manager and planning contractor's skills and experience
- the council's and the planning contractor's roles and responsibilities in providing planning services
- contractual arrangements.

We did not review the rationale for outsourcing the planning services or the tender process used to engage the planning contractor.

5.2.1 Skills and experience

In undertaking their duties, planners have to manage the competing interests of those applying for planning permits and those in the community. Planners must provide an impartial and professional service to both parties⁴⁷. Councils rely on their town planner's skills, experience and knowledge for professional planning advice.

Qualifications

The contract between the council and the planning contractor required him to be:

- suitably qualified
- able to demonstrate experience in administering the relevant acts, codes and regulations
- eligible for admission to an appropriate professional association/institute.

The planning contractor did not have formal town planning qualifications. He did, however, have extensive experience in local government (37 years) and town planning (28 years), and was also a member of several relevant industry associations.

In recent advertisements for statutory planners, the council has stated that a tertiary qualification in town planning or associated field is mandatory.

⁴⁷ Municipal Association of Victoria 2002, *Planning in Victoria, A Councillors' Guide*, Municipal Association of Victoria, Melbourne, p. 14.

Ongoing professional development

The Department of Sustainability and Environment (DSE) and the Municipal Association of Victoria provide a professional development program for planners (since 2000). As well, they provide forums on planning issues in various regional locations, including the south-west of the state (since 1995-96). These activities are designed to increase skills and knowledge, and provide a forum for planners to discuss common planning issues.

DSE advised us that council's planning contractor rarely attended these sessions.

Contract management

One of the council's most important planning decisions was the appointment of a contract manager to manage the outsourced planning function. In cooperation with the council, this person has the greatest opportunity to influence the success or failure of the contract. If the contract is not soundly managed, the contractual relationship may be eroded and adversely affect service delivery.

To effectively perform this function, the contract manager needed to have:

- appropriate technical skills and experience in town planning
- sound contract and people management skills
- high quality communication and negotiation skills.

During the contract period, 3 council staff had responsibility for the management of the outsourced planning services, including management of the planning contractor. Our audit disclosed that some of those staff had limited contract management expertise and almost no experience in town planning. One of the contract managers advised us that while he had some experience as a planner at some smaller councils, he "was out of his depth" when complex planning issues arose and when detailed interpretation of the planning legislation and Victoria Plan Provisions⁴⁸ was required.

⁴⁸ The standard set of planning controls developed by the Victorian Government and used to construct planning schemes.

5.2.2 Roles and responsibilities

We expected that the council would have addressed many of the risks associated with outsourcing its planning services, *before* implementing the contract. For example:

- both parties should have a common understanding of the contract and its requirements before it is signed
- the planning contractor, council staff and council should be clear on the planning process and the roles and responsibilities of all parties involved in the decision-making process.

Figure 5A outlines key roles and responsibilities of both the planning contractor and the council in the delivery of town planning services.

FIGURE 5A: KEY TOWN PLANNING SERVICES ROLES AND RESPONSIBILITIES

Responsibilities
<p>Council</p> <ul style="list-style-type: none"> • Provide office accommodation, facilities and customer service staff support. • Provide a heritage advisory service to support the town planning function. • Assess contractor performance against service activity standards and contract performance indicators (a). • Take action when contractor performance does not meet requirements to bring about improvement. • Pay the contractor monthly in arrears upon receipt of a verified claim for works satisfactorily completed. • Annually review the performance of the contractor against key performance indicators and best value principles, and assess whether continuous improvement has been achieved.
<p>Planning contractor</p> <ul style="list-style-type: none"> • Deliver services (a mix of statutory and strategic planning functions) in a professional manner, comply with relevant acts and legislation, and accord with “best value principles”. • Employ sufficient persons to provide services at all times, e.g. during holidays or staff absences. • Regularly visit other areas in the municipal district and work outside hours to fulfil the contract. • Keep comprehensive records of operational matters and submit reports to the council (a). • Prepare and submit specialist reports as directed by the supervisor (b). • Participate in, and contribute to, the conduct of annual customer satisfaction and performance evaluation surveys.

(a) As outlined in *Service Standards*, Schedule 1 Activity Schedule and Schedule 2 Contract Performance Indicators.

(b) General Manager, Infrastructure Services.

Source: Glenelg Shire Council 2002, Contract No. 200135; Form of Agreement; Tender Conditions; Services General Conditions and Services Specification, Glenelg Shire Council, Portland.

As Figure 5A shows, the roles and responsibilities of the planning contractor were clearly specified. As we noted in part 4.5 of this report, the contractual roles and responsibilities were supported by council delegations⁴⁹ issued to the planning contractor. Under these delegations, the planning contractor, in his role as a council employee, effectively was assigned the role of council.

5.2.3 Contractual arrangements

In an effectively managed outsourced planning function, we would expect to see performance-based contractual arrangements. These should clearly outline the services to be delivered and the rights and responsibilities of both parties.

There should also be:

- a performance management system to monitor and assess the contractor's performance
- appropriate dispute resolution provisions built into the agreement.

The contract between the council and the planning contractor was a standard commercial document, similar to that used by other local councils for their outsourcing arrangements.

The contract adequately outlined the services to be delivered, defined the commercial relationship between the council and the contractor, and addressed key contractual risks such as the contractor not meeting required performance standards, termination of agreements and conflict of interest.

As the services contracted to external providers increase in size and complexity, councils are increasingly using performance-based contracts. These contracts link part of the provider's fee to the achievement of key performance targets in order to encourage enhanced performance.

The planning contractor's contract was performance-based. The annual amount paid by the council to the contractor for planning services was based on the contractor achieving specified output targets. There was also a "variation to workload" agreement. This allowed the contractor's monthly payments to be adjusted where the workload varied by more or less than 10 per cent. Additional amounts were routinely claimed by the planning contractor for the processing of planning assessments over and above the contracted levels.

⁴⁹ Instrument of Delegation by council to members of council staff, January 2004.

Performance management

Detailed information outlining *when* and *how* the planning contractor's performance would be assessed was included in the contract. Continuous improvement by the contractor was to be monitored through the achievement of key performance indicators.

Details of the 16 individual service activities and 7 performance indicators established for the planning contractor are shown in Appendix B of this report.

Our review disclosed that service standards and performance indicators included in the contract were largely *quantitative*. They provided the council with clear expectations of processing times for key activities, but did not provide sufficient measurable indicators to enable the council to adequately assess the *quality* of the services delivered by the planning contractor.

The council was made aware of this deficiency in its planning services contract (both the current and proposed contract) when the council's planning services were subject to a Best Value review in October 2002⁵⁰.

The Best Value report included recommendations that qualitative measures be introduced to comprehensively assess the contractor's performance. The council considered the Best Value report and, in principle, agreed with the findings. However, additional qualitative service standards were not included in the proposed planning services contract.

Examples of performance indicators that could be used to assess the quality of the services provided by the contractor include:

- level of compliance by contractor with legislative requirements and council policies and procedures
- council satisfaction with services provided
- level of complaints received
- success rate of planning appeals
- level of VCAT appeals as a proportion of all planning decisions.

The tender specification for town planning services dated November 2002 further indicated that all works and services were to be carried out to "... industry best practice standards, in compliance with relevant professional codes of conduct ...". However, there was no definition of the relevant standards and codes to be applied in assessing the planning contractor's performance.

⁵⁰ J Harris 2003, *Best Value Review of Statutory Planning Services*, Glenelg Shire Council, Portland.

Monthly activity reports and access to records

Under his contract, the planning contractor was required to provide the council with monthly activity reports. These reports were intended to keep council informed in a timely manner of what planning activity he was involved with each month.

However, the contract did not specify what he was required to *include* in the report (for example, details of the status, nature and levels of planning activity; whether the planning function was being delivered in compliance with legislative timelines etc.). We make further comment on these activity reports in section 5.3.1 of this report.

Dispute resolution

It is normal commercial practice to incorporate into contractual arrangements appropriate dispute resolution mechanisms.

The council's contract with the planning contractor did not have such a provision. This increased the risks of additional costs or the suspension of service in the event of a dispute with the planning contractor.

5.2.4 Conclusion

Transferring various risks and responsibilities to an external contractor does not relieve the council of its fundamental responsibility for service delivery. The council remains accountable for the cost and quality of its outsourced planning services.

The planning contractor's planning skills were largely derived from his many years experience in the business. However, his lack of formal qualifications and limited involvement in professional development activities placed council at risk of appropriate planning decisions not being made.

For example, our review of his specific planning decisions indicates a narrow interpretation of the planning scheme and a reluctance to apply sound planning processes in assessing planning permit applications. (Various case studies are included in Part 3 of this report.)

This situation was compounded by council's contract manager not having adequate planning skills and experience. This limited council's ability to oversee the planning contractor's performance and to effectively assess the appropriateness of any actions or decisions. This meant that decisions on complex, sensitive or high-risk planning applications were left entirely to the planning contractor (in his role as employee of the council).

In effect, the planning contractor was able to operate as he saw fit.

Our review also indicated that the contractual arrangements to provide planning services were inadequate. The arrangements did not provide sufficient measurable indicators, define the standard of service to be provided, or provide dispute resolution mechanisms. Given this, the council could not adequately assess the quality of the services delivered by the contractor.

5.3 Ongoing day-to-day management

Effective contract management is a key component in achieving the council's planning outcomes. One of the contract manager's main responsibilities was to oversee the provision of planning services to ensure that they are consistent with the contractual arrangements.

We expected the council (through the contract manager) to:

- monitor how well the planning function operated
- monitor the performance of the contractor
- review and approve the more sensitive, complex or high-risk planning decisions
- develop a productive working relationship with the planning contractor.

5.3.1 Monitoring how the planning function operated

Systems should be set up so that information relevant to the planning function can be collected and reported. This information should include details of applications received, permits approved and applications where objections had been made. The information collected should then be available to the contract manager, senior management and council (where relevant), for decision-making purposes.

Our review indicated that the planning contractor provided monthly activity reports (daily updates from December 2003) outlining the level and details of applications received, permits approved and the status of applications (including objections received).

The council did not independently verify this information, despite it being used to determine the contractor's fees.

5.3.2 Monitoring performance

To properly measure and monitor the planning contractor's performance, we expected that a performance management system would be in place, including:

- a procedural manual containing instructions on how to perform the services
- clearly-defined standards for each service to be provided
- appropriate and effective methods for measuring and monitoring performance
- targets aimed at continuous improvement
- reporting mechanisms that adequately outlined whether service levels had been achieved.

While the contract indicated that the council would monitor the planning contractor's performance, the manner in which this was to be done (for example, contract management meetings or periodic discussions) was not clearly outlined.

We found no evidence that the council had monitored the planning contractor's performance in relation to the achievement of contract activities and targets (as outlined in Appendix B of this report).

Our review of the extent to which the planning contractor complied with key contractual requirements is as follows:

- *Undertake statutory planning functions (assess proposals, provide expert guidance on submissions and initiate planning permit procedures) in line with the planning scheme and legislation.* In a number of instances, the planning contractor did not comply with the requirements of the planning scheme. Most of the contractor's planning decisions were inadequately supported. No mechanisms were in place for the council to routinely assess the quality of the contractor's decisions or practices.
- *Achieve quantitative standards of performance.* The planning contractor was required to undertake certain planning activities within specified time frames (for example, processing correspondence and registering planning proposals). The council had no systems in place to monitor whether this was achieved.
- *Inspect all planning permit and subdivision sites within 35 days.* The council did not have systems in place to monitor whether this was achieved. Our investigation disclosed instances where site visits had not been undertaken.

- *Liaise with developers, ratepayers and government departments.* While the planning contractor liaised with developers in assessing applications, at times applications involving key planning matters were not referred to government agencies such as the Department of Sustainability and Environment and Heritage Victoria, as required by the *Planning and Environment Act 1987*.
- *Liaise with the council's heritage adviser.* Liaison about whether a planning proposal did or did not have heritage implications rarely occurred between the planning contractor and the adviser.
- *Attend council meetings.* Despite being required to attend 90 per cent of meetings, the planning contractor attended only 9 meetings (from a total of 85 meetings) over a 5-year period from 2000 to 2004. Planning reports prepared by the planning contractor were, however, submitted to council in 39 of the meetings. We were advised by council staff that some councillors had direct discussions with the planning contractor about specific planning issues. This practice may have resulted in some significant planning issues by-passing council's senior management and the full scrutiny of the council.
- *Develop town planning policies, guidelines and strategies.* The planning contractor's work in this area was limited. He produced an information brochure of the service the community could expect to receive from the council on planning matters. Information was also provided on the council's website. Council staff have only recently developed procedural information to support the town planning function (August 2004).
- *Initiate at least one seminar or workshop per year on town planning or urban design.* This was not done.
- *Prepare a continuous improvement program and a works schedule with performance targets.* The planning contractor prepared a performance program, schedule and performance indicators. There is no evidence that the contract manager assessed the appropriateness or quality of the information prepared, or that the actions proposed in the program were undertaken by the planning contractor.
- *Provide fortnightly time sheets.* The planning contractor did submit fortnightly time sheets to the council (as a council employee), but the time sheets did not record the specific activities performed by him and decisions he made, while in the role of council employee. This was required under his employment contract.

The contract for planning services provides for the council to take action against the contractor for non-performance. Our review disclosed that despite the contractor's failure to meet some of the service standards outlined in his contract, the council had not specifically raised issues of non-performance with him until around July 2004.

5.3.3 Reviewing sensitive, complex or high-risk planning decisions

One of the biggest risks facing the council was the approval of applications that did not comply with the requirements of the planning scheme or other relevant legislation. We expected to see a referral/approval process that involved senior council staff in more sensitive and complex planning applications. For the most complex and sensitive issues, we envisaged that council would become involved in the approval process.

The Municipal Association of Victoria's, *Planning in Victoria A Councillors' Guide*⁵¹ states that councillors need to be aware of the following to perform their planning role effectively:

- state and local planning policies
- the basis for planning decisions
- key steps in the planning permit application process
- major, significant and controversial planning permit applications.

Interviews with councillors indicated that they were generally satisfied with the planning contractor's performance and encouraged him to act with total autonomy within the bounds of the instrument of delegation.

However, it also became evident from these conversations with councillors that:

- many lacked a basic knowledge of the planning process and what the process was trying to achieve
- most had very limited knowledge of major, significant and controversial planning permit applications. Generally, the only time councillors became aware of such applications was when an objection to a permit was lodged with VCAT or when the contractor referred an application to council meetings. This was rare.

5.3.4 Working relationship between the contractor and the council

While the contract is vitally important, it only represents the formal and legal arrangement that governs the contracting relationship. A contract will never capture the full nature of the relations between the parties that guides much of the day-to-day activity.

⁵¹ Municipal Association of Victoria 2002, *Planning in Victoria A Councillors' Guide*, Municipal Association of Victoria.

Contracts are consulted in detail when things go wrong and when parties need to clarify their legal rights. However, it is the working relationship that develops between the planning contractor and the council that ultimately determines the success of an arrangement.

When issues arise (which are not dealt with or are unclear in the contractual agreement), or when there is a misunderstanding or dispute, a strong, positive relationship will ensure they are dealt with effectively.

Our audit disclosed that the arrangement between the planning contractor and the council was a one-sided affair with the contractor working almost independently from the council, rather than in a collaborative relationship.

5.3.5 Conclusion

While the absence of qualitative service standards and performance indicators in the contract limited how well the council could monitor the quality of planning services, a number of outputs could be measured. Despite this, neither the contact manager nor any other council employee actively monitored or managed how those outputs were provided. The contract provided for the council to take a series of actions for non-performance by the planning contractor. Issues of non-performance were not specifically raised by council in a timely manner. This poor management of the contract contributed to community dissatisfaction with the council's planning services. It also increased the council's risk of making incorrect planning decisions.

Council members took virtually no part in the review, assessment or approval of planning applications or planning decisions. Even for complex, sensitive or high-risk planning applications, there was little involvement by other senior council officers or councillors. They were not consulted, applications were rarely referred to them and they were not involved in approval of planning decisions.

This inadequate oversight over many years:

- is likely to have contributed to the situation in late 2004 where the contractor's services were terminated by the council prior to the expiry of the contract
- has contributed to the declining level of community and stakeholder satisfaction with town planning services, and ongoing concerns about the council's ability to deliver high-quality planning services.

5.4 Evaluation and succession planning

This third phase of the contract management lifecycle is about transition. Processes are needed to ensure a smooth transition from the existing contract to a new contract – whether it is with the same service provider, a new service provider or is provided in-house. This ensures minimal disruption to the council's operations.

The contract succession phase (which may commence before the contract is completed), also involves a review of the successes and failures that occurred over time in the contract arrangements.

This process involves:

- evaluating the outputs and outcomes of the contracted activity against tender requirements
- assessing the effectiveness of the contract in achieving government objectives for the activity
- assessing effectiveness through feedback from clients and other stakeholders
- considering how to manage the possible transition to another provider
- considering new approaches at the completion of the current implementation period of the contract.

The contract with the council provided for the planning contractor to assist with the transfer of the delivery of council planning services to his successor, should the need arise.

As indicated previously, the planning contractor's contractual performance and effectiveness in achieving planning outcomes was not monitored by the council. The council entered into a second contract with the planning contractor in 2003 without any real evaluation of the contractor's performance or re-assessment of the way in which council planning services could be delivered.

5.4.1 Conclusion

At the end of the planning contractor's contract, a re-assessment of council planning services was not undertaken to determine the most appropriate arrangements for the delivery of future planning services.

Recommendations

18. That the council ensure that:
 - staff have the appropriate skills, competencies and knowledge to perform their planning and contract management tasks
 - staff avail themselves of development activities to ensure the continuous improvement of skills.
19. For future outsourced arrangements, council should:
 - ensure contracts include both quantitative and qualitative performance measures
 - implement formal contract management procedures that ensure regular contract performance reports are provided to the chief executive officer and council as appropriate
 - amend contract terms and conditions to incorporate dispute resolution processes and the right of access by the council to contractor records for verification purposes
 - adequately evaluate service delivery for continuous improvement opportunities.

RESPONSE provided by Glenelg Shire Council

Recommendations are agreed.

Council has employed the following staff:

- *Planning Services Manager*
- *Senior Statutory Planner*
- *Statutory Planner*
- *Strategic Planner*
- *Planning Administrator.*

A rigorous selection process was undertaken to ensure these positions were filled by people with appropriate skills, qualifications, competencies and knowledge. Council's staff training program provides for appropriate accreditation and registration of town planning staff to be undertaken.

The current outsourcing contract with the planning contractor (unsigned) includes appropriate qualitative measures, quantitative measures are no longer considered necessary. Work to be completed is to be in accordance with Best Practice Model officer reports issued by the State Government.

RESPONSE provided by Glenelg Shire Council - continued

The planning contractor will be engaged on an as needs basis. A performance meeting was held in April 2005 to discuss the quality of the planning reports prepared in that month.

A dispute resolution clause has been included in the current contract and under the current contracting arrangement, each service delivery can be evaluated for continuous improvement opportunities.



Appendix A. Performance improvement plan



FIGURE A1: PERFORMANCE IMPROVEMENT PLAN: STATUTORY PLANNING SERVICE

Issue	Action	Responsible officer	Time frame
Planning process initiatives introduced during 2004 require review.	Review effectiveness of 2004 planning process initiatives.		
Delegated Planning Committee (DPC) meetings need to be well controlled.	Introduce speaking time limits for DPC participants (say, maximum 10 minutes). Develop defined chair procedures for DPC meetings.		
Planning applicants often have no knowledge of planning processes or application requirements.	Review applicant instructional material and reproduce where necessary. Encourage pre-application meetings at all times. Conduct periodic information sessions for regular applicants.		
Councillors (collectively) are not always aware of the detail and complexity of contentious planning applications and matters.	Planning staff should periodically brief the whole council on contentious planning applications and matters.		
Council has rarely received written planning reports.	A councillor/officer workshop should be held to discuss future reporting needs with a focus on determining an agreed range of report formats for applications with differing levels of complexity.		
Consistency in planning decision-making.	A monitoring system should be introduced. Like applications should be randomly reviewed to assess if decisions are consistent.		
Councillor knowledge of statutory planning processes and legislative compliance matters, state policy etc. is limited.	Develop and introduce periodic education workshops for councillors and planners.		
Planning matters are rarely referred to the full council for decision.	Consider and introduce criteria for referrals to council – for example: more than 6 objections; more than 8-lot subdivisions; Aboriginal heritage implications; specific heritage or environmental issues; height of developments.		

FIGURE A1: PERFORMANCE IMPROVEMENT PLAN: STATUTORY PLANNING SERVICE - continued

Issue	Action	Responsible officer	Time frame
Some councils have introduced a “self certification” fast-tracking system for planning applications.	Investigate the appropriateness of a self-certification system for the council.		
Heritage adviser funding in rural Victorian municipalities is often inadequate.	Discuss with Heritage Victoria the potential for increased heritage adviser funding.		
Significant criticism has been levelled at the application of material detriment and public notification.	A review of resident and public notification procedures should be conducted with agreed new protocols established. Management should randomly monitor the consistent application of these protocols.		
Heritage referral considerations are not always well documented.	A proforma to document heritage referral considerations, inclusive of appropriate headings and prompts, should be developed and implemented.		
The currency and effectiveness of any planning scheme requires continual monitoring, in addition to statutory reviews (note: a strategic planner has recently commenced with the council).	The revised planning scheme should contain a clause whereby periodic performance monitoring programs evaluate the operational effectiveness of the scheme. Set a specific task plan and time frames for completion.		
Statutory planning legislation and related government policy and industry practice changes regularly.	A structured staff training/professional development program should be developed for all staff involved in statutory and strategic planning. Appropriate continuous improvement activities should be identified.		
Some communications to the planning services department have not been responded to in a timely manner.	Develop protocols for communication response times, and a monitoring and reporting system.		
Supervision and management of the planning services contract was not performed in a structured or regular manner before 2004.	Any contract personnel engaged in the planning services area should have their performance monitored regularly and formally with results documented and reported to the relevant director or the council's CEO.		

FIGURE A1: PERFORMANCE IMPROVEMENT PLAN: STATUTORY PLANNING SERVICE - continued

Issue	Action	Responsible officer	Time frame
Performance indicators and measures were minimal in the previous 2 planning service contracts.	Any new planning service tender specifications should include meaningful and measurable performance indicators and measures to enable effective contract supervision and performance management.		
The council has an obligation to pursue and develop continuous improvement processes and systems through the Best Value legislation.	The application of this performance improvement plan should be considered as part of a continuous improvement program for planning services. A performance improvement plan for planning services should be reviewed and redeveloped on an annual basis.		
Objectors are often unaware of the processes to be followed when lodging an objection, the mechanism for conciliation, and the time frames they need to operate within.	A guidance sheet could be developed for objectors that: <ul style="list-style-type: none"> ● details their rights, obligations and responsibilities ● lists accepted grounds for objection. 		

Source: Victorian Auditor-General's Office.



**Appendix B.
Contract for town
planning: Key service
activities and
performance
indicators**



FIGURE B1: KEY SERVICE ACTIVITIES AND PERFORMANCE INDICATORS

Activities	Performance indicators
Statutory activity	
1. Assess proposals, provide expert guidance on submissions, and initiate planning permit application procedures.	Register within 48 hours of receipt; take action as per Council Planning Scheme, relevant acts, regulations, guidelines and policies.
2. Process general correspondence.	85 per cent within 5 working days, and 15 per cent within 7 working days.
3. Assess, determine or refer to council as required by relevant acts: <ul style="list-style-type: none"> • planning permits • subdivision applications • planning certificates. All planning permits and subdivision sites must be visited and thoroughly inspected prior to assessment. A record should be maintained of all inspections.	Within 10 working days where referral and public notification not required and no objections lodged. Within 21 working days where referral is not required but public notification required and no objections lodged. Within 35 working days where referral is required and no objections lodged.
4. Prepare planning appeals submissions and represent council at VCAT hearings.	Submissions should be well researched and as per the council's planning scheme, relevant acts, regulations, guidelines and policies.
5. Provide advice and liaise with developers, ratepayers and government departments.	As per the council planning scheme, relevant acts, regulations, guidelines and policies.
6. Process inquiries and applications and advise the council on planning matters relevant to liquor license applications.	As per the council planning scheme, relevant acts, regulations, guidelines and policies.
7. Undertake enforcement duties – investigate all complaints and breaches.	Initiate enforcement process: 85 per cent within one working day and 15 per cent within 2 working days of receiving advice of possible breach.
8. Initiate and promote mediation procedures to minimise level of appeals.	Organise meetings within 7 working days from the closing of public exhibition period.
9. Liaise with heritage adviser and process applications for heritage loans.	As required by the relevant acts, policies and guidelines.
10. Ensure appropriate procedures are in place to enable the public to quickly obtain accurate information regarding the preparation of planning applications and status of applications.	As required by the relevant acts, policies and guidelines.
11. Attend council and committee meetings, prepare reports to the council as required and monthly activity reports.	90 per cent attendance rate.
12. Process subdivision applications.	As required by the relevant acts, policies and guidelines.
13. Process flood certificates.	As required by the relevant acts, policies and guidelines.

FIGURE B1: KEY SERVICE ACTIVITIES AND PERFORMANCE INDICATORS
- continued

Activities	Performance indicators
Strategic activity	
14. For routine amendments to the planning scheme, initiate and prepare relevant documentation for the council's consideration, public exhibition and ministerial approval.	As required by the relevant acts, policies and guidelines.
15. Develop policies, guidelines and strategies relevant to town planning matters.	Research to be concise and comprehensive, with appropriate consultation and in accordance with relevant acts.
16. Promote issues related to town planning and urban design, initiate and facilitate seminars, workshops and public forums as directed or approved by the contract supervisor.	Initiate a minimum of one seminar/workshop each year.

Source: Glenelg Shire Council 2002, Schedule 1 Contract no. 200135, Provision of Town Planning Services, Glenelg Shire Council, Portland.

FIGURE B2: CONTRACT PERFORMANCE INDICATORS FOR THE PLANNING CONTRACTOR FOR YEAR 1 (2003)

Key performance indicators (a)	Due date
1. Prepare a Town Planning Services Continuous Improvement Program and submit for approval.	31 May 2003
2. Submit a works schedule with performance targets.	31 May 2003
3. Submit a report on the planning unit's operations for the past month and year to date.	By the 7 th day of each month
4. Comply fully with the corporate calendar	Not applicable
5. Submit a recommended Continuous Improvement Program for the planning unit 2004-05	31 May 2004
6. Submit recommended key performance indicators for the planning unit 2004-05.	31 May 2004
7. Submit the planning unit's Best Value Annual Report.	31 May 2004

(a) Reports to be submitted to the Group Manager, Infrastructure.

Source: Glenelg Shire Council 2002, Schedule 1 Contract no. 200135, Provision of Town Planning Services, Glenelg Shire Council, Portland.



Appendix C. Audit case studies index



FIGURE C1: AUDIT CASE STUDIES INDEX

Case study	Details	Report reference (page no.)
1.	Three-storey building in heritage area, 111 Bentinck Street, Portland.	31
2.	Fast food store in Portland, 55 Percy Street, Portland.	40
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5.	Further application to build on the Convincing Ground.	49
6.	Failure to consider environmental impacts of proposed development, Lot 1, Dutton Way, Portland.	51
7.	Subdivision inconsistent with the council's planning scheme, 329 Cape Nelson Road, Portland.	53
8.	Failure to follow process in relation to subdivision and lot size, Simpsons Landing Road, Nelson.	59
9.	Transfer of development rights from across zones, Benbows Green, Cape Bridgewater.	60
10.	Amendment to permit - coffee shop and gallery in residential area, Isle of Bags Road, Nelson.	69
11.	Permit amended without supporting documentation, Kerrs Road, Portland.	70
12.	Amendment to the planning scheme, C4.	84

Source: Case studies were compiled from information from the Glenelg Shire Council.

Auditor-General's Reports

2004-05

Report title	Date issued
Results of special reviews and other studies	August 2004
Measuring the success of the Our Forests, Our Future policy	October 2004
Report of the Auditor-General on the Finances of the State of Victoria, 2003-04	November 2004
Results of 30 June 2004 financial statement and other audits	December 2004
Meeting our future Victorian Public Service workforce needs	December 2004
Managing school attendance	December 2004
Regulating operational rail safety (2005:1)	February 2005
Managing patient safety in public hospitals (2005:2)	March 2005
Management of occupational health and safety in local government (2005:3)	April 2005
Results of special reviews and other investigations (2005:4)	May 2005
Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits (2005:5)	May 2005
Our children are our future: Improving outcomes for children and young people in Out of Home Care (2005:6)	June 2005
In good hands: Smart recruiting for a capable public sector (2005:7)	June 2005
Managing stormwater flooding risks in Melbourne (2005:8)	July 2005
Managing intellectual property in government agencies (2005:9)	July 2005
East Gippsland Shire Council: Proposed sale of Lakes Entrance property (2005:10)	July 2005
Franchising Melbourne's train and tram system (2005:11)	September 2005

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