

1.4 STATE GOVERNMENT REFORM – IMPROVING THE OPERATION OF RESCODE (SMcN/NS: W17-22)

Responsible Director: Peter Panagakos

RECOMMENDATION

That Council:

1. *Notes the release for consultation of the Discussion Paper on Improving the operation of ResCode.*
2. *Notes that whilst there is merit in the concept proposed, by simply translating existing ResCode provisions into the “deemed compliance” PAMs system, rather than improve ResCode or review the standards, there is the potential to further entrench and compound some of the existing problems inherent with ResCode and further disenfranchise local communities and decision making.*
3. *Endorses the issues raised in this report as the basis for Councils submission and authorises the Director City Development to finalise and submit a formal response to the review by the due date.*
4. *Notes that over the last several years the State Government has released significant review material in the planning and development field particularly in early to mid-November with very short time frames for the provision of genuine and considered responses to the issues raised.*
5. *Resolves that the Mayor write to the Minister for Planning requesting that consideration be given in future consultations to more appropriate timelines for Council to consider and respond, including the ability to engage properly with its community and have regard to their feedback in responding to the consultation.*

INTRODUCTION

The purpose of this report is to advise Council of the State Governments proposed translation of ResCode to the Performance Assessment Module (PAM) “deemed compliance” model, and to endorse the issues raised in this report as the basis for the Council submission.

BACKGROUND

On November 4 the Department of Environment, Land, Water and Planning have released a Discussion Paper called *Improving the operation of ResCode: A new model for assessment (November 2021)*.

The 181 page Discussion Paper outlines the proposed option for a new Performance Assessment Model (PAM) that is integrated into and uses the existing objectives, standards and decision guidelines in ResCode.

Broadly, the aim of the reform is to move from the current discretionary performance based system of ResCode to a system that is less open to interpretation and more standards based, with a “deemed to comply” approach based on developments meeting the existing translated ResCode standards.

Consultation for this significant planning reform runs for 6 weeks, from November 8 to December 17, 2021.

What is ResCode?

ResCode are the provisions included in all planning schemes in Victoria that set out the design, siting, and other provisions for residential development. ResCode includes Clause 54 (single dwellings), Clause 55 (more than one dwelling on a lot and residential buildings), Clause 56 (subdivision) and Clause 58 (apartment developments) of the Victoria Planning Provisions.

ResCode provides the principal guidance for residential development in residential zones (and occasionally in other zones), and addresses matters such as neighbourhood character, site coverage and layout, landscaping, adjoining amenity (such as overlooking, overshadowing, daylight / solar access to windows), as well as the internal amenity of apartments.

The significant component of ResCode is the way in which it is structured around:

- Objective – which must be met
- Standards – which contains the requirements to meet the objective but allows for other alternatives to be considered
- Decision Guidelines – how to assess whether a development meets the objective, whether doing so by adopting the Standard or by an alternative solution

The significance of the ResCode system is that meeting the standard does not always mean the objective is met. The current system requires an overall design assessment for the whole development. In essence the decision on an application is made on the sum of the parts and compliance with the objectives.

The current construction of ResCode has led to many differing decisions made by both Council’s and VCAT whereby a development that might meet the Standards of ResCode can be refused and a development that doesn’t meet any ResCode Standards could be approved.

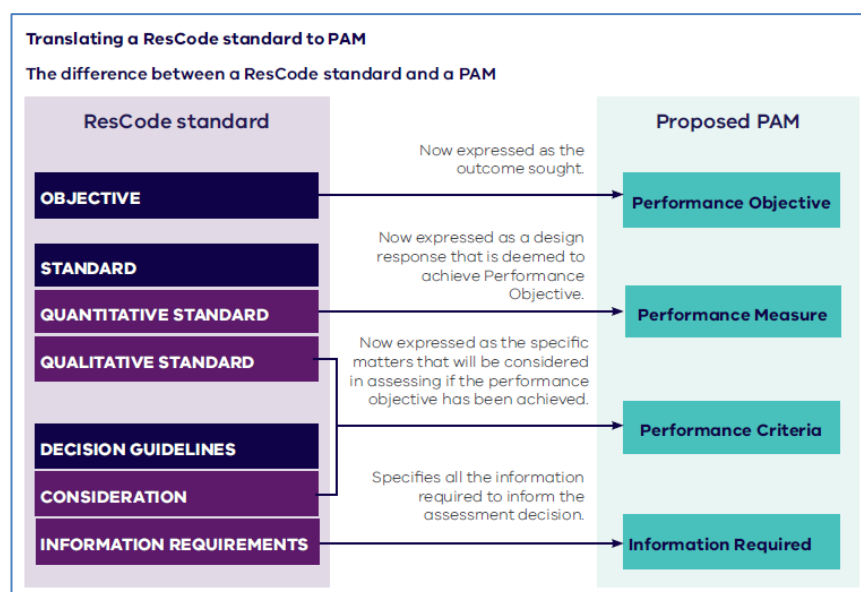
What is the proposed model aiming to do?

The key aspects of the reform are:

1. A new Performance Assessment Model (PAM) for discretionary provisions in the Victoria Planning Provisions
2. Translate existing ResCode provisions to the new PAM system
3. Introduce a new opportunity to specify neighbourhood character performance measures

The key difference in the PAM model is that if a development meets a quantitative standard then it is considered to have complied and no further assessment is required or possible. For example, if a development meets the building height standard specified in our planning scheme then it complies and there is no assessment required of the building height. Council could not refuse an application on the basis of the building being too large and bulky in relation to adjoining buildings.

The aim is to produce a more simplified process. Instead of the current ResCode assessment format being Objective/s, Standard (qualitative and quantitative) and then Decision Guidelines, the new PAM approach will be prepared which removes discretion and design assessment from some of these steps or requirements. This is outlined in the diagram below.



The following extract shows the make-up of the proposed PAM process:

What is a PAM?

The PAM is built on four components:

- **Performance Objectives** – that clearly describe acceptable design outcomes.
- **Performance Measures** – that specify quantitative measures or objectively ascertainable conditions. Compliance with performances measures will be deemed to achieve the relevant Performance Objective.
- **Performance Criteria** – where a Performance Measure cannot be specified or is not complied with, the Performance Criteria will specify qualitative standards for determining whether the proposal achieves the Performance Objective.
- **Information required** – that identifies any specific information needed to inform a decision about whether a Performance Objective is met.

DISCUSSION

Issue - ResCode Performance base, PAMs deemed to comply

The Discussion Paper identifies that approximately 30% of all planning applications require an assessment against ResCode (Clauses 54, 55, 56 and 58). Across Victoria there were more than approximately 40,000 applications in 2019/20. Monash received 1,307 planning applications in this time and approximately 32% involved an assessment against ResCode.

The Discussion Paper states that the problems with ResCode are in the lack of certainty (for the applicant) and the timeliness of decision-making, both created by the performance based nature and discretionary standards of ResCode. The Discussion Paper proposes to solve this lack of certainty by translating existing ResCode standards into the PAMS which operates on a “deemed to comply” basis converting existing discretionary ResCode standards into default solutions to the design objective or issue.

The second aim of this process is to distil the key ResCode matters into a series of PAMs that can be divorced from the rest of the planning scheme and ultimately fully digitised (and available as checklists for applicants and planners to use as a form of deemed to comply code assessment).

Victoria has a long established performance model for residential development with a level of flexibility not often afforded in other

jurisdictions. For example the form of residential development permissible in the General Residential Zone can range from a single storey dwelling to a 3-storey apartment building, and are all assessed against the same objectives and standards in Clauses 54/55. This extreme flexibility can create uncertainty and anxiety for both developers and adjoining residents alike.

In addition, the inherent flexibility often encourages creative interpretations of the objectives and standards by some developers willing to push the envelope, leading to protracted permit processes and lengthy disputes around compliance with ResCode. More often than not end these applications end up at VCAT. Even at VCAT the flexibility in interpretation continues where there is often considerable variation in decisions and interpretation of standards between members.

Reducing the flexibility in the system in an informed and appropriate manner would go a significant way towards addressing the lack of planning certainty and speeding up planning application processing (or potentially eliminate it entirely if all requirements are met). However, simply translating the existing ResCode standards, which were design 20 years ago and for use in a system with design assessment and oversight does not achieve this objective.

Issue – No review of existing ResCode standards

In theory, it should be possible to set out maximum (and minimum) residential densities and quantitative development criteria within the schedules to the residential zones. This would include allowing opportunities for equitable development, minimum lot dimensions, and even the ability to prohibit underdevelopment in areas where housing growth and change is envisaged. This would provide certainty to residents and developers alike about what was possible to achieve as a residential development in a particular area.

The Discussion Paper fails to acknowledge that many of the current inefficiencies identified with ResCode actually stem from the hyper-flexibility and opportunity to argue the interpretation that the current system offers for almost every ResCode objective and standard. Since its creation the ResCode system has promoted the somewhat mutually exclusive combination of “flexibility and certainty”.

The Discussion Paper goes part way to recognising that to gain efficiencies and certainty there needs to be a commensurate reduction in design flexibility. However, it does not acknowledge that ResCode was introduced in 2001 (and is derived from the 1995 Good Design Guide). Since 2001 there has been a substantial change in development and densities across Melbourne, and this review offers an opportunity for genuine review of the existing ResCode objectives and standards for relevance and appropriateness to development in 2021.

Whilst the changes to the zones provided some certainty, the breadth of uses remaining in the residential zones, such as retirement village, that are actually exempt from many of the restrictions applying to dwellings and the inherent flexibility of ResCode mean that even in a Neighbourhood Residential zone, near a creek, a resident still has no clear idea as to what may be constructed next door. There have been attempts at creating planning certainty but still within a performance-based system.

Issue - Missed opportunity for ResCode and residential zone reform

As discussed above the proposed PAM model tinkers with the current system rather than creating genuine reform. ResCode deals with development of dwellings in residential zones, but does not apply to other uses allowed in residential zones such as student accommodation, aged care, or childcare centres. While dwelling development has detailed planning controls, these other types of development have little control and limited guidance. There is need to review both ResCode and the residential zones simultaneously to consider and provide guidance for all forms of development in residential areas.

For example, a permit is required in a residential zone to construct a building associated with a Section 2 use. Unless an overlay applies (e.g. DDO, NCO), there is no guidance for that built form in the same way as there is for residential development. Similarly, residential buildings that are proposed to be used for student accommodation are *considered* against Clause 55 (but not assessed against) in a Residential Growth Zone even if the building is above 4 storeys. Whereas Clause 58 would apply to a proposal for a similar scale apartment building on an adjoining site.

There are also gaps in what ResCode considers. ResCode currently doesn't address matters around equitable development for smaller scale development beyond simply responding to the amenity impacts on adjoining sites (and assumes those sites will remain undeveloped or underdeveloped).

The Discussion Paper should address the issues of the gaps in what ResCode does and does not consider – and perhaps attempt to fill those in for all forms of development that can occur in residential areas. This needs to be undertaken before considering changing the assessment model.

Issue - Implementation and translation

A new 'tick a box' approach

The report discusses a new framework and the aim is to reduce the current assessment regime to what is effectively a tick a box approach. The paper lists various VCAT decisions that take differing points of view on whether meeting a ResCode standard meets the objective and the role of the decision

guidelines (even when a quantitative standard is achieved). It is likely that the new process will simply replace one set of issues with another.

As discussed previously, the new proposed PAM includes performance objectives, performance measures (which are generally quantitative in form) and performance criteria. However, the performance criteria (unlike current decision guidelines) are only used where the performance measure is not met.

The Discussion Paper hasn't assessed whether the current accepted standards, now proposed to be divorced from their objectives, are suitable to be used in this (deemed-to-comply) way. Specific differences in outcomes can still be accommodated within the Schedules to the zone, however, these will take time to translate and our planning scheme already offers that nuance and guidance in the form of local planning policies and preferred future character statements.

Issue - Quantifying neighbourhood character

The Discussion Paper claims that there is great uncertainty by the general and development community with the current system, and that over time there has been many variants incorporated into planning scheme. The solution offered is a more streamlined approach to planning outcomes.

The Discussion Paper has a strong focus on revising neighbourhood character assessments. The aim is to provide a straight-forward process so it is very clear what will be required without any ambiguity to achieve a character outcome.

Neighbourhood character is one of the most significant of all the ResCode standards and the Paper claims that it is already dealt with through the application in other existing standards such as street, side and rear setbacks, site coverage, walls on boundaries, front fences, height, landscape, garden area and built form. Neighbourhood character is significantly more than these. On Page 32 of the Paper, it states *"In most settings the basic ResCode standards will deliver developments that respect the neighbourhood character of the many locations where it applies."*

The aim therefore is to reduce neighbourhood assessment down to consideration of these measures only and remove Council's discretion to consider other outcomes and discounts the significant work councils have done in undertaking neighbourhood character and housing studies.

The placement of structures on a site and their relationship to development on abutting land and the street is a fundamental element of the assessments that planners undertake every day. For example, a 2-3 unit scenario built to the maximums of the performance measures could potentially have a

significant issue for neighbourhood character, particularly if that model is replicated on neighbouring properties or in the same street.

As an example under the PAMs model a residential unit development on a suburban block of around 700m² could have at least 17 metres of wall along the boundary with no assessment of the neighbourhood character and no comment from the neighbour.

Issue - Are the current ResCode standards suitable for direct transfer to deemed-to-comply performance measures?

As discussed previously, the Discussion Paper has not sought to review the suitability of the current ResCode default standards before attempting to translate them into deemed-to-comply performance measures.

The current standards operate in a complex policy environment with supporting decision guidelines and objectives. Acceptable deemed-to-comply performance measures should be much more specific conservative and precautionary as they propose to remove the exercise of consideration of neighbourhood context and the discretion by the planning authority.

There is also a fundamental problem with the translation proposed in the discussion paper in that many of the ResCode Standards are based on assessing a subjective phrase in the objective such as “new rooms receive adequate daylight” but then carry over existing ResCode standards which in many instances do not actually translate in a meaningful and quantifiable way, again through the use of general and subjective statements.

There are also quite often competing matters, and there are many gaps that ResCode does not fill (such as room sizes and internal amenity considerations for non-apartment developments). For example:

- Overlooking – A development may meet the provisions that manage overlooking into adjoining properties by screening or translucent glazing to upper-level windows. Under a tick a box approach, such a treatment would be approved as the performance measure would be met. However, the outcome could be quite poor with no outlook or clear windows available for residents. It is possible all habitable rooms could have no outlook at all – despite the requirement in Standard B27 for habitable room windows to face minimum areas of clear sky. A different development layout may solve the problem, however, if there is no opportunity for discussion or review of that design element, sub-standard outcomes will arise and to resolve the conflict between Standards B22 (reducing external amenity impacts) and B27 (providing for internal amenity).
- Landscaping - A numeric requirement for trees can be provided in a standard, however, minimisation of paving and plantings along

driveways and other green spaces and their layout are important considerations. This matter is fundamental to how a design responds to a site and an area. This is only partially met through compliance with the garden area requirement.

A more detailed assessment of the issues with translation is included in Attachment 1 to this report.

Issue - Objections and third-party appeal rights

In moving to a deemed-to-comply model, objectors will potentially have less of a say in the design outcome. They will have the right to object but if the design complies with the numerical requirements, their concerns cannot be considered in a holistic way by the planner or by VCAT.

Issue – Timing and lack of consultation

The changes propose a significant reform to the planning system, particularly for residential development. The short timeframes for consultation, particularly when considering Council meeting cycles do not allow for Council to engage with its community on the proposed changes so as to seek their views to inform how Council may respond.

Given the significant changes proposed, and the level of community interest in the planning applications it affects, engagement with the community would have been the preferred approach.

POLICY IMPLICATIONS

Whilst in a nominal sense the proposed program translates the existing ResCode provisions and therefore claims to be “policy neutral, there are in fact significant implications arising from this change as it removes the current levels of discretion of the planning authority from many aspects in the decision making process.

The deemed to comply element in itself is a significant policy departure for the State and the stated objectives of the *Planning & Environment Act 1987*.

CONSULTATION

Council is intending to respond as a stakeholder to a State Government consultation. The consultation is open to a wide variety of stakeholders, including the general public, to provide their feedback. However, the timing and inadequate length of the consultation on something as fundamental and controversial as ResCode is not conducive to meaningful or fulsome feedback from stakeholders.

The lack of the broad consultation on such a fundamental change to the permit assessment system is of concern for Council and our communities who have operated under the performance based system for many years.

SOCIAL IMPLICATIONS

This report will not result in any identified environmental, economic or social impacts.

HUMAN RIGHTS CONSIDERATIONS

It is considered there will not be any human rights implications as a result of Council's submission to the review.

GENDER EQUITY ASSESSMENT

A gender equity impact was not required for this report.

FINANCIAL IMPLICATIONS

There are no immediate or direct financial impacts as a result of the consultation.

CONCLUSION

The State Government is currently proposing to translate the majority of existing ResCode Standards to a new PAM, deemed compliance system. This means that if a design element meets a transferred ResCode Standard that part of the design is deemed to comply and there is no assessment or comment on it. This risks creating poor design outcomes, as designs are created to achieve compliance with the diverse individual range of standards and therefore "deemed compliance" rather than looking at the overall design outcome.

Although an extreme example, a design could propose to apply translucent coating to the majority of windows to meet the overlooking standard with no regard to the internal amenity impact or the positioning of windows.

As a real life example, the current ResCode standard option of providing only a balcony to meet the open space requirements in a unit development has created the "reverse living" design, (*where living areas are placed upstairs with only a balcony*) in order to increase development density with little regard for the overall design outcome. The PAM's process is likely to accelerate this lowest common denominator approach in many designs. In the absence of a detailed review of the appropriateness of ResCode standards to the needs of housing in 2021, the permit process should continue to include comprehensive assessment of residential development design and how it fits into the overall neighbourhood and amenity for new residents.

The PAM also proposes to change the neighbourhood character assessment to quantifiable measures, potentially leading to some poor outcomes, discounting the substantial work already undertaken to articulate the importance of neighbourhood character in local policy and schedules and creating the need for additional work.

Providing quantifiable outcomes for all assessment considerations removes a comprehensive assessment basis, and creates a new set of problems. Poor lowest common denominator design and low quality developments are more likely to be proposed and approved leading to an increase in friction, anxiety and appeals from neighbouring residents exercising their appeal rights. If the application is deemed to comply, VCAT will also be unable to assess these issues and have no choice but to approve the application.

In going for a quick fix and translating the existing ResCode standards, the reform has missed an opportunity to review and update ResCode provisions, and consider different provisions for a three story apartment building, townhouses and units, and dual occupancies as well as include controls for other types of residential buildings beyond dwellings such as student accommodation and rooming houses.