



GENERALLY IN ACCORDANCE:

Guidance Note

APRIL 2020

streamlining
FOR
growth

vpa
Victorian Planning Authority

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1 INTRODUCTION

1.1 STREAMLINING FOR GROWTH PROGRAM

This project is funded as part of the 2017/18 Streamlining for Growth program.

The Streamlining for Growth Program is funded by the Victorian State Government and managed by the VPA. It aims to provide support and capacity building for councils in regional Victoria and metropolitan Melbourne. Through the provision of targeted funding and staff resources, including development facilitation officers, the program assists to unblock delays in the strategic planning system and speed up the delivery of projects that provide employment growth and/or increased housing choice, diversity and affordability.

More information about the Streamlining for Growth Program can be found here:

<https://vpa.vic.gov.au/streamlining-for-growth-program/>

1.2 PROJECT PURPOSE

This guidance note is intended to assist developers, referral authorities and decision makers applying the 'generally in accordance' provision in the Urban Growth Zone (UGZ), the Development Plan Overlay (DPO) and the Incorporated Plan Overlay (IPO). It has been developed specifically for growth areas and precinct structure plans (PSPs).

2 APPLYING THE GUIDANCE

2.1 WHAT IS THE PROVISION?

The relevant clauses in the UGZ are contained at:

- **37.07-09 (Use of land)** which requires 'A permit granted must be generally in accordance with the precinct structure plan applying to the land'.
- **37.07-10 (Subdivision of land)** which requires 'A permit granted must be generally in accordance with the precinct structure plan applying to the land'.
- **37.07-11 (Buildings and works)** which requires 'If a schedule to this zone specifies that a permit is required to construct a building or carry out works, a permit granted must be generally in accordance with the precinct structure plan applying to the land'.

The UGZ was introduced into the Victoria Planning Provisions through Amendment VC48 on 10 June 2008. Since that time, the UGZ has been used to implement precinct structure plans in growth areas.

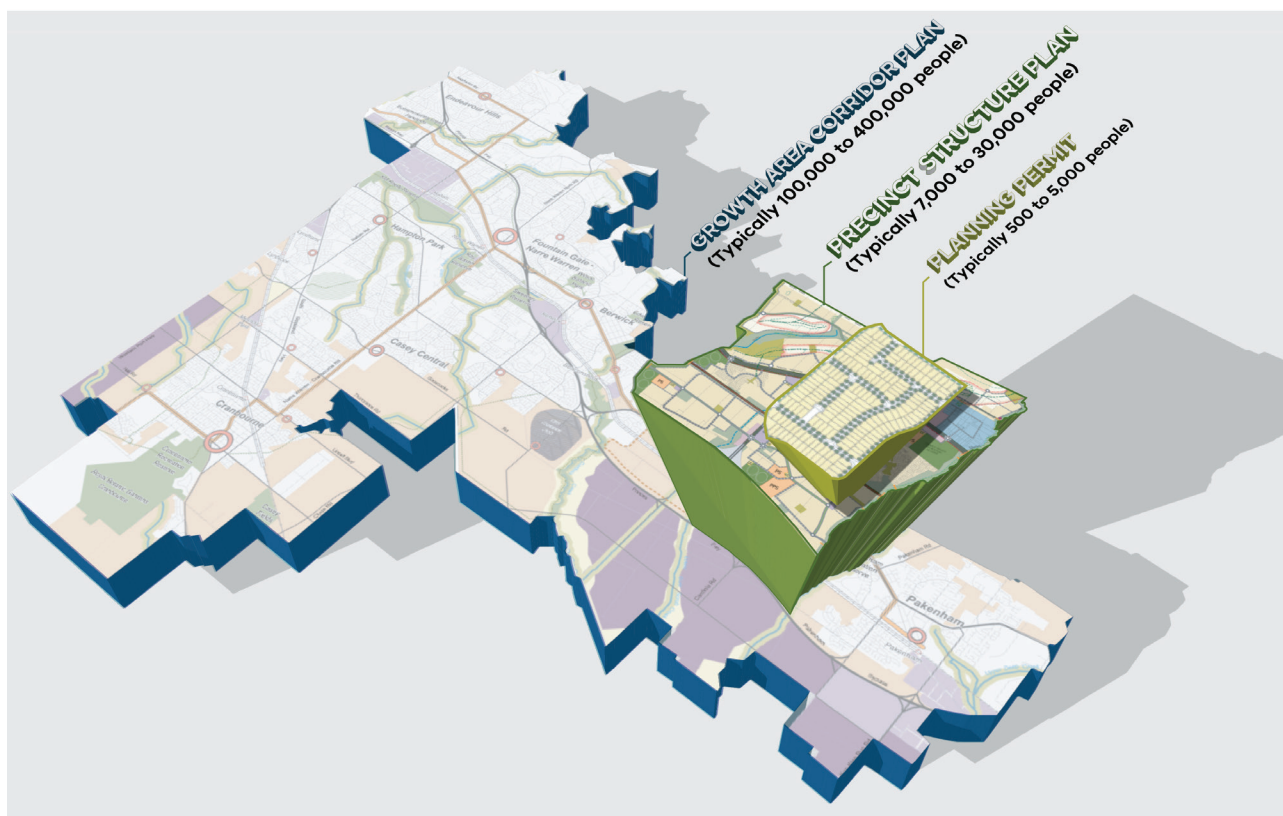
Prior to the introduction of the UGZ, the DPO or IPO were often used to fulfil the role now served by the UGZ and PSPs. Similar 'generally in accordance' clauses operate in these overlays. For the purpose of this guidance note, when the UGZ or PSPs are referred to, it also includes the legacy DPOs and IPOs that were gazetted before the introduction of the UGZ.

Care needs to be taken to always check the specific overlay schedule to determine precisely how the provision operates. For example, the IPO allows a schedule to displace the 'generally in accordance' requirement, and the DPO and IPO both enable a schedule to allow for a permit to be issued before the relevant incorporated or development plan is approved, meaning the 'generally in accordance' requirement will not apply.

2.2 WHERE THE PSP FITS INTO THE PLANNING PROCESS

Planning for growth areas is undertaken in stages. The highest level of planning is at the Melbourne regional level through Plan Melbourne. Plan Melbourne identifies areas where growth will occur and establishes the Urban Growth Boundary. High level Growth Corridor Plans are then prepared which guide development on a sub-regional level.

Figure 1: Role of the PSP within the planning hierarchy



The way the different layers of planning interact together is shown in **Figure 1** above.

PSPs guide development of large green field areas accommodating between 7,000 and 30,000 people. They establish the overall structure of an area and are not intended to resolve detailed design issues that should be addressed at the planning permit stage.

The 'How to read this document' section of the PSP explains the interaction between **outcomes, requirements** and **guidelines** in the assessment of a permit application.

- **Outcomes** of a PSP are expressed as the vision and objectives;
- **Requirements** must be adhered to in developing the land;
- **Guidelines** express how discretion will be exercised by the responsible authority in certain matters that require a planning permit.

Meeting the **requirements** and **guidelines** will implement the outcomes of the PSP.

Provided an application meets the **outcomes** of the PSP it is possible for an application that does not meet a **requirement** to be considered generally in accordance with the PSP. However, given a **requirement** *must* be adhered to in developing the land, the **requirement** would need to be included as a condition on any permit that is subsequently issued.

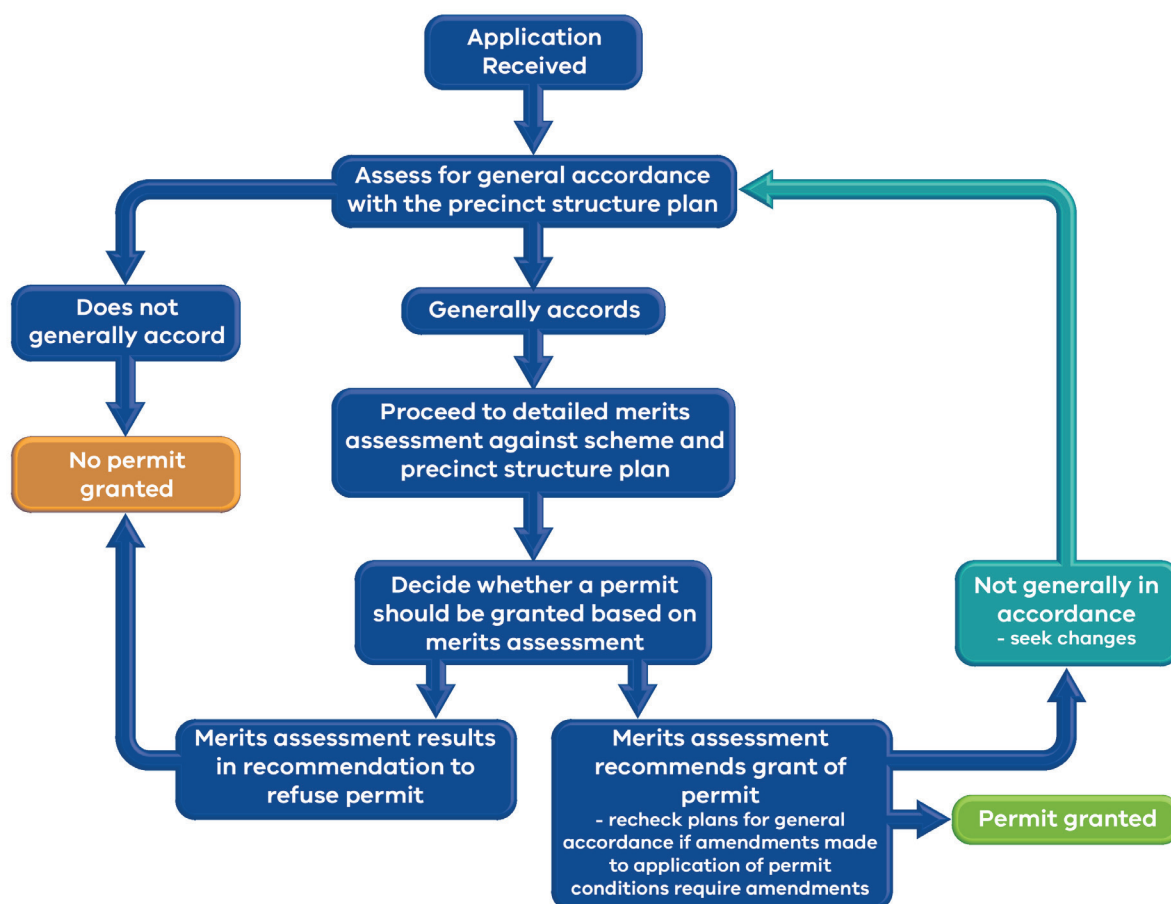
If the responsible authority is satisfied that an application for an alternative to a **guideline** implements the outcomes, the responsible authority may consider the alternative. A **guideline** may include or reference a plan, table or figure in the PSP.

Development must also comply with other Acts and approvals where relevant e.g. the Environment Protection and Biodiversity Conservation Act 1999 in the case of biodiversity and the Aboriginal Heritage Act 2006 in the case of cultural heritage, amongst others. Not every aspect of the land use, development or subdivision is addressed in this structure plan. A responsible authority may manage development and issue permits as guided by the relevant planning scheme provisions.

A permit application within a PSP area is not an opportunity to question the fundamentals of the planning process that has preceded it and should not be used as an opportunity to re-explore the strategic planning merits of the PSP and overall growth strategy.

Figure 2 below shows how the ‘generally in accordance’ consideration forms part of the planning permit decision making process.

Figure 2: Considering ‘generally in accordance’



Note: other considerations such as referrals, native vegetation assessment etc, have been excluded from the diagram as its purpose is limited to showing how generally in accordance works in the decision making process.

2.3 LIMITATIONS OF THIS GUIDANCE NOTE

This guidance has been developed to assist decision makers apply the ‘generally in accordance’ test in the context of the UGZ and PSPs, as well as the legacy DPOs and IPOs that were gazetted before the introduction of the UGZ. The guidance has been prepared based on the cases decided by the Victorian Civil and Administrative Tribunal at the time of writing. It should not be read as a set of definitive factors for applying the ‘generally in accordance’ test. In accordance with common law, each case will need to be considered on a case by case basis.

Although generally in accordance is used in various clauses of the Victorian Planning Provisions, and the same legal test applies, there are some more specific matters that usually arise when applying the test in an Urban Growth Zone, PSP, IPO and DPO contexts.

2.4 WHAT DOES ‘GENERALLY IN ACCORDANCE’ MEAN?

The term ‘generally in accordance’ is not defined in the Victoria Planning Provisions (VPPs) or the *Planning and Environment Act 1987*, so, under Clause 73 of the VPPs, it has its ordinary meaning.

This is often not helpful in assessing permit applications in the UGZ as the ordinary meaning is broad. The Victorian Civil and Administrative Tribunal (VCAT) established a test for the phrase ‘generally in accordance’. VCAT has expressed the test as:

- (a) *General accordance is a question of fact to be judged on the facts and circumstances of each case; and*
- (b) *the less detail and precision there is in the primary document or documents, the more flexibility is given by the phrase ‘generally in accordance with’.*

As each case must be judged on its own facts and circumstances, definitive rules and principles cannot be defined, however reasons set out in VCAT decisions provide some guidance about applying the ‘generally in accordance’ test as outlined in Guidance 2.

There is a difference between ‘in accordance’ and ‘generally in accordance’. While ‘in accordance’ allows for some minor (insignificant) differences, ‘generally in accordance’ will allow for greater latitude when assessing an application.

In the VCAT hearing *Caydon Prahran Developments Pty Ltd v Stonnington CC* [2013] VCAT 323 the Tribunal was required to consider the question ‘what is in accordance?’. In that decision, the Tribunal concluded that ‘the notion of plans being ‘in accordance’ allows for some differences, albeit that those differences should be minor, insignificant, tiny or of a trifling nature.’

If a permit application is ‘in accordance’ with a PSP, it would also be ‘generally in accordance’ with the PSP. If a permit application is not ‘in accordance’ with a PSP, the decision maker would need to consider whether the extent of change still leads to the conclusion that the permit application is ‘generally in accordance’ with the PSP. The permissible degree of latitude or flexibility that can be given in a particular case will be influenced by the relevant PSP.

It is not uncommon for a residential subdivision application to be deemed generally in accordance with the PSP and for a permit to be granted which, due to efficiencies gained through the design process, results in minor changes to the net developable area (NDA) of the parcel. Where this occurs – and as per standard text included in VPA prepared development contribution plans (DCPs) – the ‘per net developable hectare’ contributions will not and must not be amended to respond to minor changes to land budgets that may result from the subdivision process.

1. The test established by VCAT for 'generally in accordance' is:

General accordance is a question of fact to be judged on the facts and circumstances of each case; and

The less detail and precision there is in the primary document or documents, the more flexibility is given by the phrase 'generally in accordance with'.

2. 'Generally in accordance' implies a degree of flexibility. When considering a permit application, achieving the objectives of the PSP is an important starting point. In addition:

Judge each matter on its facts and circumstances.

Make decisions in the context of the whole PSP.

Make decisions in the context of the objectives to be achieved. A matter can be in general accordance without being identical to the PSP.

Accord less flexibility to matters resolved to a higher level of detail in the PSP.

Accord greater flexibility on matters resolved in less detail in the PSP.

3. 'In accordance' provides much less flexibility and only allows for differences that are minor, insignificant, tiny or of a trifling nature.'

2.5 'GENERALLY IN ACCORDANCE' IS A THRESHOLD TEST

'Generally in accordance' is a threshold test, which must be passed by all permit applications. Just because an application meets the 'generally in accordance' test does not mean it must be approved. A planning merits assessment against all other relevant clauses is required to determine whether an acceptable planning outcome will be achieved to warrant the granting of a planning permit.

Even if a permit application is generally in accordance with a PSP, it might be a poor planning outcome, in which instance it should be refused.

4. Just because a permit application is 'generally in accordance' with a PSP does not mean it must be approved.**5. Just because a permit application represents an acceptable planning outcome does not mean that it will be 'generally in accordance' with the PSP.****6. 'Generally in accordance' is a threshold hurdle and a full planning merits assessment of the permit application is still required.**

2.6 THE MATURITY OF THE PLAN IS NOT A 'GENERALLY IN ACCORDANCE' ISSUE

It is important that consistent decisions throughout the life of a PSP are made. Applying the 'generally in accordance' test more flexibly during the early stages of a PSP may create issues in the subsequent stages, particularly if the assumptions underpinning the Development Contributions Plan are varied materially. Likewise applying the test too strictly will undermine the utility of the test throughout the life of a PSP..

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- 7. The maturity of the PSP should not influence the flexibility applied to the 'generally in accordance' test. The 'generally in accordance' test should be applied consistently throughout the life of a PSP.**

2.7 AVOID CONFUSION WITH THIRD PARTY NOTICE AND APPEAL EXEMPTIONS

The exemption from third party notice and appeal rights should not be confused with deciding whether a permit application is 'generally in accordance' with a PSP. These are two separate decisions. If a permit application is generally in accordance with the relevant PSP, certain exemptions from public notice and third party review rights will apply. These exemptions do not mean that the impact of the proposal on adjoining or nearby properties is an irrelevant consideration. If the merits assessment leads to a conclusion that a permit application will have unreasonable impacts on adjoining or nearby properties, it can be refused even if the application was generally in accordance with the PSP.

Further, the decision maker should not apply the 'generally in accordance' differently depending on whether the surrounding area has been developed out or not.

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- 8. The exemption from third party notice and review rights does not influence whether a permit application would be 'generally in accordance' with a PSP.**

3 CASE STUDIES

3.1 CASE STUDY 1: CRANBOURNE WEST

This example shows that the outcomes of a PSP can be achieved even if the layout of the plan is not specifically followed.

The Cranbourne West Structure Plan was approved in 2012. **Figure 3** shows:

- the proposed layout of the major sporting ovals
- the location of the state primary school
- drainage treatment
- location of smaller open space pockets.

Figures 4 and **5** show the final layout of the land. In this we can see the following changes to the layout shown in the PSP:

- The location of the major sporting ovals is further to the south and a different layout.
- The orientation of the school runs east – west instead of north – south.
- The drainage treatment is different. It is a more organic layout.
- The location of the smaller open space pockets differs to the plan but the distribution is similar.

These differences can be considered to be generally in accordance with the PSP because overall, the objectives of the PSP have still been met and the ultimate layout remains broadly consistent with the layout in the PSP. The approved outcome delivers the identified infrastructure generally in the locations shown on the PSP even though there are differences in their precise locations.

For example, the **Drainage Infrastructure** objectives to be achieved include:

- To provide land use efficiencies through the co-location of stormwater retarding and stormwater quality treatment within the Precinct.
- To implement best practice in water sensitive urban design such that potable water use is minimised, water reuse is maximised and aquatic ecosystem health is protected and enhanced through improved stormwater quality and flow management.
- To ensure that stormwater drainage and storage areas contribute to the urban structure and amenity of the residential suburb and employment areas.

The outcome that has been achieved meets these objectives even though it differs to the layout shown in the PSP. Indeed, the approved retarding basin layout created the opportunity for a better urban structure and amenity to the residents in the immediate vicinity than the plan had envisaged.

Note that these comments are based on an analysis of a small part of the Cranbourne West PSP for the purpose of illustrating how generally in accordance has been applied to this particular drainage issue.

Figure 3: Excerpt from gazetted Cranbourne West PSP, May 2012.



Figure 4: Development nearly complete



Figure 5: A copy of the Melway map of the area upon development.



3.2 CASE STUDY 2: WHEN INFRASTRUCTURE STANDARDS CHANGE

Infrastructure standards, such as drainage easement requirements, intersection treatments and buffer distances can change over time for a range of safety, technological and other reasons. Sometimes a change to an infrastructure requirement can impact on the achievement of other objectives in the PSP.

An example of this would be changing a proposed open drainage waterway to an underground pipe. This change would require less land to deliver the required drainage infrastructure which in turn might impact on achieving other objectives relying on that land such as those relating to shared trails, open space and pedestrian and cyclist links. Depending on differences in the land areas, such a change may also have a material impact on the net developable areas assumed in the PSP and DCP.

Figure 6: An example of land achieving multiple objectives



Such a change may represent an acceptable planning outcome from a drainage perspective. In these circumstances, and consistent with Guidance Note 5, a responsible authority will need to take a step back and ask itself whether the outcome is generally in accordance with the relevant PSP. This will usually involve assessing whether the outcomes sought by the PSP will still be achieved for the specific area and whether the language of the PSP can accommodate the degree of change.

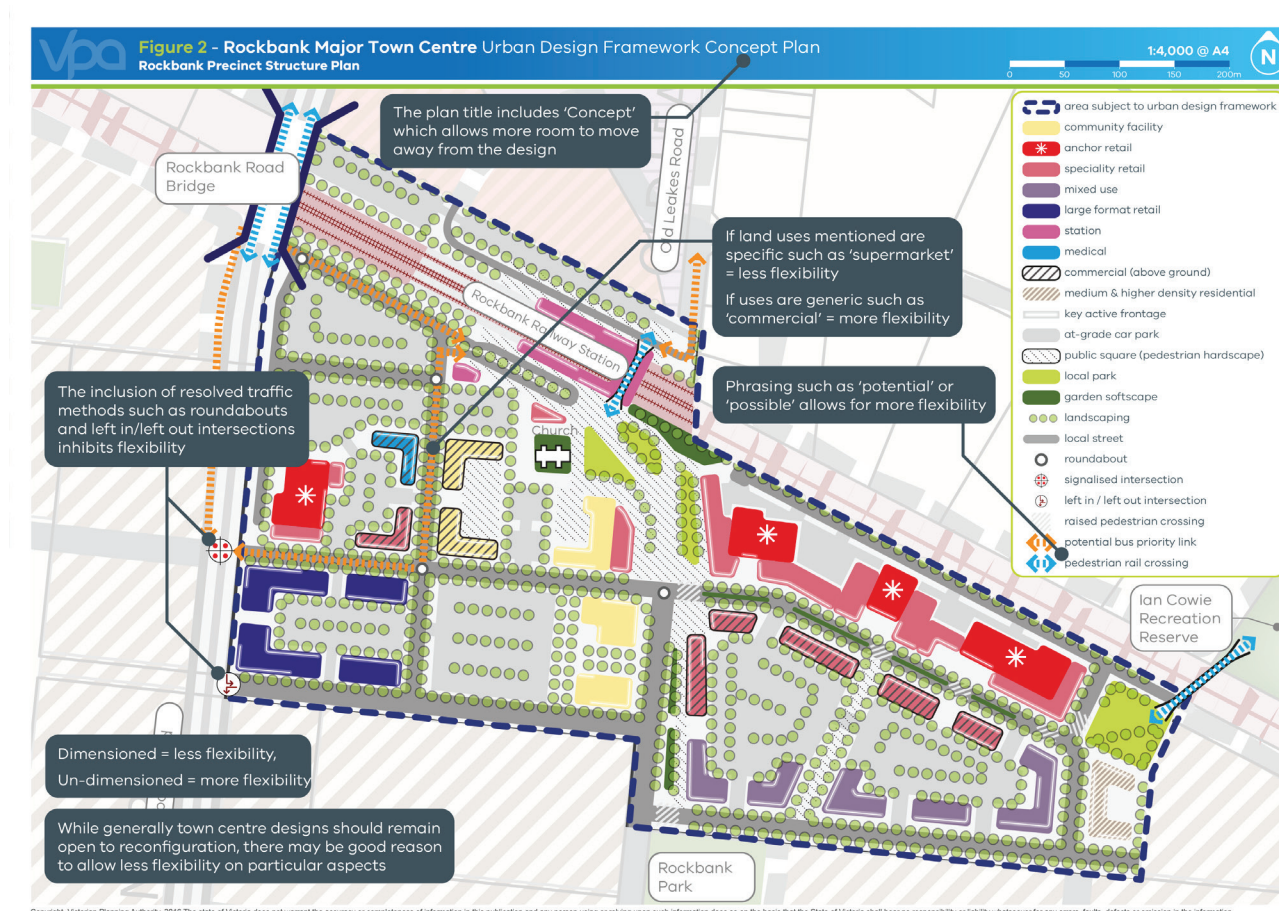
3.3 CASE STUDY 3: TOO MUCH INFORMATION

In some PSPs, the layout of some features, such as activity centres, are shown in great detail, including the layout of internally circulating roads and the position and size of buildings. This level of detail is often inserted in the PSP at the request of a landowner to assist with getting a planning permit. The issue that arises is that the development economics change over time, and the way retail – in this example – is delivered constantly evolves.

This is an example where too much detail in the PSP can deprive landowners of the flexibility contemplated by PSPs and the ‘generally in accordance’ test. Conceivably, too much detail in a PSP may also thwart the achievement of good planning outcomes if the detailed design of an activity centre is embedded in a PSP to suit the owner of a parcel of land at a point in time.

Where a PSP is resolved to a high level of detail, the ‘generally in accordance’ test will need to be applied with less flexibility. There may be some instances where the PSP may need to be amended to pursue an alternative use and/or development.

Figure 7: Degrees of flexibility in a town centre concept plan



VCAT has accepted that the words ‘indicative’ and ‘approximate’ indicate that a greater degree of flexibility will exist when applying the ‘generally in accordance’ test. In applying the test, VCAT still used the indicative plan as the starting point for assessing whether the degree of difference remained within the scope of being ‘generally in accordance’.

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