Submission No 83

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

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Environment and Planning Standing Committee
Legislative Council
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SUBMISSION

My submission is made based on my many and continuing years of experience in strategic and statutory planning matters since the 1980's, as a member and office bearer of community organisations, as an individual and as a resident. I hope that my submission will address some of the known **in**adequacies of the Planning and Environment Act 1987 and the implementation thereof.

My submission will cover the following Terms of Reference and specific issues within them:

(1) high cost of housing
(2) environmental sustainability and vegetation protection
(3) delivering certainty and fairness in planning decisions for communities
(4) protecting heritage in Victoria
(5) ensuring residential zones are delivering the type of housing that communities want

(1) HIGH COST OF HOUSING

(a) provision of social housing
The provision of social housing is supported as a government responsibility, however, this should not be at the expense of existing planning scheme provisions. A State Government Big Housing Build proposal for social housing has been put forward in my street, at 3-15 Shiel Street, North Melbourne, that does not comply with the Melbourne Planning Scheme provisions. Instead Clause 52.20 has been introduced that quashes the planning scheme provisions and 3rd party appeal rights. As a result, hard won height and setback controls applicable to the site - a designated Interface Street under Clause 42.02 DDO 63 - have been ignored. Why couldn't the Big Housing Build development comply with the existing controls and meet council and community expectations about development in their neighbourhood? If the proposed Big Housing Build development had met the Clause 43.02 DDO 63 guidelines, then the matter of 3rd party appeal rights would likely be immaterial. Instead, the State Government is seen as 'Big Brother' putting the 'Big Boot' into local planning to justify overriding planning controls. The development will unfortunately be used to set a precedent for the remainder of the south side of Shiel Street.

(f) mandatory affordable housing in new housing developments
Strongly agree.
This would make Responsible Authorities and VCAT comply, instead of dismissing. And it should not be seen as an 'add on' to allow exceedance of recommended building heights or other controls. It

should be an integral part of the development. The amount of social housing mandated should be based on the demographics of an area, access to services, transport, etc and set at a significant amount; minimum should not be zero.

(2) ENVIRONMENTAL SUSTAINABILITY AND VEGETATION PROTECTION

Greater environmental sustainability must be built into our planning laws. Maximum site coverage should be capped at 60%, mandatory, to ensure that our cities have 'breathing spaces' in the land coverage and there should be mandatory percentages of pervious surfaces. This will allow greater vegetation within a development and greater amenity within developments, reducing the heat island effects of our cities; allowing more natural heating/cooling/air circulation in developments; allowing greater solar access; encouraging habitat and biodiversity. Mandated rainwater harvesting and reuse and solar power generation should also be introduced …. applicable to all developments: commercial, government and residential.

(3) DELIVERING CERTAINTY AND FAIRNESS IN PLANNING DECISIONS FOR COMMUNITIES

(a) mandatory height limits

It is the lack of mandatory height (and other) limits that causes very many bad planning decisions. Developers like to know what limits apply so they can plan/build/finance developments with certainty. Residents and communities like mandatory limits so they know what can and can't be built in their neighbourhoods and the impacts on their residential/neighbourhood amenity.
Only planners and planning lawyers like the lack of mandatory height and other limits:

- Planners because they are frustrated architects and align themselves with 'landmark' designs and developments and because they see their role as granting permits, not questioning or refusing them.
- Planning lawyers have done more to frustrate the planning system than anyone else. The gladiatorial legal situation in planning at panels or VCAT has little to do with responsible planning, implementing the intention of the Planning and Environment Act. Planning lawyers love the lack of mandatory controls as it gives them great opportunity to argue according to their developer's financial interests. The worst example I can quote is the planning lawyer who argued: "What does *'should'* mean?" ['*should*' is the word applied in planning schemes, versus mandatory 'must'.] "Well, he said 'should' means it would be very nice to comply, but in fact one doesn't have to. The planning control thus has no meaning!"
  Unfortunately planning lawyers have taken over representations at PPV and VCAT and residents/other objectors are sidelined in the courtroom setting in making their arguments for height (or other) limits.

Another reason why mandatory height (and other) limits should be applied is the 'precedent' issue. Time and again, it is argued in planning decisions that the application and approval thereof do not set a precedent. Yet, time and time again, legal and planning cases are quoted as precedents in hearings. And unfortunately, VCAT does just that – justify their determinations on the precedents set by adjoining/nearby/other developments, where height limits have been exceeded.

Mandatory controls would avoid the exceedance of 'recommended' heights if the applicant can demonstrate some kind of community or social benefit, excellence in design, positive contribution to the quality of the public realm, etc. These mostly subjective provisions allow planning lawyers and VCAT tribunals too much leeway. They have allowed 10-13 storeys over recommended 9 storeys in a number of developments in Haines Street, North Melbourne; in which the so-called provisions for exceeding recommended heights have not been transparently applied, if at all.

The comments put forward above are why mandatory controls/limits must be used to much greater extent in planning schemes. Height is one; setbacks are another; also maximum site coverage and environmental sustainability. Certainty and fairness in planning is the reason.

(c) community concerns about VCAT appeal processes

Many years ago, when VCAT was called the Administrative Appeals Tribunal, more rational and responsible planning determinations were made. The intent of planning scheme provisions would rule. A tribunal member, responsible authority planner, applicant and objectors would participate; putting forward the proposal, assessment and objections, expert reports were genuinely independent; not a legal person in sight and no 'court room' setting. A hearing would rarely last more than a day. Now VCAT hearings are run like a judicial court, with all the theatre and formality, dominated by planning lawyers and barristers, expert witnesses no longer provide independent assessments - they are considered to be 'hired guns' because they provide selective evidence to support the application, ignore or downplay conflicting facts. Hearings now take a week, two weeks or more.

[The comments about so-called 'expert witnesses' can also be applied to other planning panels, not just VCAT, e.g. PPV and EIS, EES]

Unfortunately, in the above process, VCAT tribunal members have assumed more legalistic, rather than planning administrative positions. They thus put greater emphasis on what 'legal' representatives at a hearing have to say. This is very much evident in their written determinations; often non-Council or resident objectors and their objections are relegated to bare/cursory mentions or are not even mentioned.

Also in the legalisation of the VCAT appeal process, objectors (non-Council) are now essentially priced out of the process, costing around $1000 to lodge an appeal with the additional threat of bearing large legal costs of the applicant and responsible authority. This is designed to deter objectors from appealing a planning decision – in effect denying objectors justice in planning.

A significant issue with VCAT is the overreliance on State Planning Provisions over Local Planning Provisions. SPP's are far more generalistic and less prescriptive than LPPs. It is the LPPs that address the finer issues of a development in its context and setting and they should be major determinants in an appeal as long as the wider implications of the SPPs have been met.

The VCAT process needs to be overhauled, to return it to its primary function – as an appeal body to consider the planning merits or otherwise of an application, not the literal interpretation of the wording of the planning provisions and use of 'precendents'. Also, perhaps VCAT should appoint independent expert witnesses. The priority of VCAT's considerations needs to be changed – SPPs for the wider planning perspective but LPPs for the detailed determinants of an application. And democracy and fairness needs to be reintroduced in regards to costs.

(d) protecting third party appeal rights

Some points relevant to this issue have been addressed in my comments above, including VCAT costs for third party appellants, and relegation of third party objections by VCAT.

(4) PROTECTING HERITAGE IN VICTORIA

(a) adequacy of current criteria and processes for heritage protection

Although not under the Planning and Environment Act, but with implications in regard to heritage criteria/processes, I have concerns about the assessment process for applications under the Heritage Act, in which local planning provisions relating to heritage are not given significant weight. Like VCAT emphasising SPPs over LPPs, Heritage Victoria applies generalist historic criteria/Burra Charter, rather than considering in more depth the setting, context and local heritage and planning provisions regarding an application. Heritage Victoria's assessments are concentrated on historical aspects; current context and planning scheme provisions, etc. appear not to receive due consideration.

I believe the former assessment process for VHR buildings was delegation by Heritage Victoria to the local Council/Responsible Authority. I believe better decisions were achieved under this process. Third party appeal rights should be introduced into heritage applications; under current Heritage Victoria processes, these are limited or not available.

(e) appointment of independent local and state heritage advisers
Strongly support. These should advise at both local government level as well as at VCAT, PPV. So-called heritage 'expert witnesses' at VCAT or other planning panels are also seen as 'hired guns' in their selective evidence and opinion.

(5) ENSURING RESIDENTIAL ZONES ARE DELIVERING THE TYPE OF HOUSING THAT COMMUNITIES WANT
I refer to comments made above under (1) (a) relating to a Government Big Housing Build project at 3-15 Shiel St, North Melbourne. The local community strongly opposed the development that flouted planning provisions for the street; the community did not oppose the development being for social housing.

Of concern to neighbouring communities are urban renewal areas, where a mix of residential and commercial development is planned. Proposals for Arden and Macaulay urban renewal areas in North Melbourne will yield higher residential densities than put forward under their strategic plans and planning scheme amendments using Floor Area Ratios. Such densities should be road tested with their FARs on real sites. Environmental sustainability and public open space provision are key determinants, not increased residential density alone.
Established communities do not want 'Docklands' type development with so many poor outcomes for residents, including no housing mix.

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Kaye Oddie