Submission No 215

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

Organisation: Victorian Planning & Environmental Law Association

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Victorian Planning and Environmental Law Association

Submission to the Parliamentary Enquiry to examine the Planning and Environment Act

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[redacted]

1. Introduction

This submission is made on behalf of the Victorian Planning and Environment Law Association (**VPELA**) in response to the Legislative Council's Environment and Planning Committee's (**Committee**) enquiry into the adequacy of the Planning and Environment Act 1987 and the Victorian planning framework.

The Victorian Planning and Environmental Law Association is a not for profit professional association formed in 1989 and with a membership exceeding 1200. Its members are professionals working in the fields of town planning, law, environmental science and property development including town planners, lawyers, engineers, architects, economists, environmental scientists, property developers and landscape architects. It is the peak multi-disciplinary body in Victoria, which is concerned with planning, development and the environment.

VPELA's broad membership base places the organisation in an excellent position to provide comprehensive submissions to Government concerning proposed policy or legislative changes.

VPELA welcomes the opportunity to make this submission to the Committee. There are a number of matters which VPELA regards as being relevant to the Committee's Terms of Reference and which we would be happy to expand upon if the Committee would like us to. The issues we raise for the Committee's consideration are as follows:

2. VCAT review of decisions regarding development contributions and works in kind proposals

There is an inconsistency regarding the implementation of development contributions plans and infrastructure contributions plans (**DCP**) and right of review of decisions which undermines the integrity of the DCP system and causes significant delay and additional costs. These are costs which go directly to the cost of delivery of housing (owned and rented) and new communities (including schools, community hubs and infrastructure such as libraries and kindergartens, public open spaces and shopping and commercial employment facilities).

Briefly, the implementation of development contributions plans and infrastructure contributions plans relies on decisions by three agencies (as identified under the Act), usually all being the local Council acting in different capacities. These are the 'responsible authority', the 'collecting agency' and the 'development agency'.

The scheme of the Act, in this regard, is directed at the implementation of a development contributions plan or infrastructure contributions plan. These are statutory documents providing for the implementation of works to support development, usually in outer urban growth areas. The primary obligation on a developer is to pay a levy. However many Councils require the developer to undertake the works identified in the DCP. There is logic to this as the developer can manage the works as part of the implementation of the other subdivision works and will usually be in a position to deliver the infrastructure much earlier than the Council would be able to. There is often some relationship between the subdivision works and the DCP items (eg roadworks and open space improvements). The scope of each DCP item is described in the DCP as a basis for the costing and calculation of the levy, sometimes by reference to plans (eg in the case of road intersections, showing the road width and number of lanes required).

Acting as the responsible authority, pursuant to section 62 of the Act, the Council is empowered to impose permit conditions regarding the collection of development and infrastructure levies under a DCP (s.62(5)(a)). In this capacity there is a right of review to VCAT to challenge a permit condition. This is not controversial, and in practice, as DCPs specify the rate to be applied (eg $ per hectare), it is a fairly straightforward matter. Usually the requirement is for the developer to pay the appropriate amount prior to the issue of a statement of compliance for the relevant stage of the subdivision which triggers the requirement.

However, the Council acting as the collecting agency has the power to agree to works being carried out in lieu of, or by way of credit against, the contributions (often referred to as 'works in kind'). There is no right of review in respect of this decision. Similarly, there is often no right of review in VCAT in respect of a dispute concerning the detailed design of the works, or the amount of credit which the developer will be entitled to upon construction of the works.

An issue that frequently arises is the scope of required works expanding, at the direction of the Council or another government agency such as the Department of Transport, from that specified in the DCP. In the case of intersection works, this might be an extra turning lane or extra through lane. In the case of recreation facilities it might be additional improvements to those specified in the DCP. (eg turning basic tennis or netball courts into floodlit competition courts).

In its capacity as the development agency, the Council is responsible for the delivery of the DCP items if it delivers the projects itself. This is relatively rare as Councils generally prefer developers to carry the risk of coordinating construction and delivery of the assets. Councils are usually reluctant to borrow money to construct the infrastructure and otherwise will rarely have collected sufficient cash funds in time to deliver infrastructure at an early stage of the development, leaving new residents with inadequate physical and social infrastructure when they move in to the area. Also, as mentioned earlier, the early delivery of infrastructure by the developer can be beneficial for both parties, allowing the works to be done at the same time as other subdivision work. However this assumes the DCP budget is adequate and the scope of works is the same as specified in the DCP.

There are mechanisms in the Act to allow review of DCPs. Many DCPs provide for a review every 5 years. However even when faced with demonstrated shortfalls, most Councils have refused to update the DCPs and instead put pressure on developers, by refusing to approve plans of subdivision, to do works beyond the scope of those specified in the DCP, without allowing any additional credit for the expanded scope. For example, despite DCP under-funding issues and failed attempts in VCAT proceedings to force a developer to contribute to extra infrastructure, and express commitments to review DCPs every 5 years, the City of Greater Geelong has failed to institute such reviews.

We have examples of this. For instance in Geelong a developer has been forced to spend in excess of an additional $1m on an intersection with Surf Coast Highway due to changes in the scope of work from that documented in the DCP. The intersection will be shared by 4 major developments, but the Council refused to review the DCP rates to allow for the additional cost. Similarly in Casey there are examples of DCP works being required greatly in excess of the budgeted works. There are also cases where the DCP budget was simply inadequate and the Council has failed to update the DCP contribution rates. In other cases where the developer and Council have agreed that the developer will construct part of an infrastructure item, the Council, in its capacities as collecting and development agency, has refused to allow the amount of credit that is commensurate with the proportion of the works being carried out by the developer. Short of a judicial review proceeding in the Supreme Court, there is no straightforward right of review of such a decision by the Council despite such a decision often being worth millions of dollars.

With no independent umpire, developers are often forced to accept significant increases in scope and cost of infrastructure. Together with the delays associated with securing approvals for detailed design of works and the time needed to negotiate agreements concerning the delivery of infrastructure, the inefficiencies in the system result in significant increased cost to new communities and therefore the cost of housing.

It is often said in response to this debate that developers are being greedy and should simply reduce their profits in order to absorb this type of increased cost. But of course the situation is not that simple. A developer's capacity to obtain finance to construct a development that will potentially cost hundreds of millions of dollars is predicated on the development achieving a particular IRR and finance simply

will not be available unless those metrics are achieved. Further, delays in the supply of housing because disputes with government agencies cannot be quickly and efficiently resolved result in the market being unable to supply the significant unmet demand, which is also a cause of significant increases in cost of housing.

3. Recommendation

Modify the Act to introduce an appeal right in respect of a decision by the collecting agency and development agency.

Process for resolving disputes

A key issue which frequently faces developers is that opportunities to resolve small disputes or procedural matters at VCAT is very limited and the delay before such a matter can be listed for hearing is too substantial to warrant bringing a proceeding to challenge a decision of the Council even where the Council's decision results in significant increased costs to the developer and the new community. There is a small cases list for matters that can be dealt with in up to an hour, but it has been difficult for VCAT with its current resources to bring such matters on quickly. Often these are matters that really require decision within 2-4 weeks rather than 6-12 months and have been before the Council for decision for many months already. There is no special list for urgent procedural matters.

Examples of such matters are:

- Endorsement of plans or other documents pursuant to permit conditions;
- Minor disputes at the statement of compliance stage when Councils hold up issuing a statement on the basis of some relatively minor outstanding matter or alleged non-compliance. These can hold up multi-million dollar projects, more importantly, with a large multi-lot subdivision, can hold up purchasers waiting to settle and start building. There should be instituted some form of urgent list for matters where Councils refuse to issue statements of compliance. Such an application needs to be able to be brought as soon as it is clear that there is going to be a dispute about an issue, rather than only being able to bring such a dispute when the disputed item is the only issue outstanding that is preventing a Statement of Compliance being granted (reference s40 Subdivision Act 1988). At present these matters are listed in the normal list of VCAT and can take 6 to 9 months or more to resolve. More often than not the proceedings are not even brought and the developer is forced to accede to the Council's position;
- Council refusals to agree to end s.173 agreement. There is no express appeal right in respect of the refusal to agree to the ending of an agreement. The VCAT cases that deal with this matter have determined that the only right of review is an appeal on administrative law grounds (ie based on a procedural defect or a failure to consider relevant considerations etc). There should be an amendment to s.178A to allow a right of appeal against the refusal of a Council to agree to initiate the process;
- Disputes concerning the content of a s173 agreement. In some cases, many years are spent negotiating the terms of these agreements. The scope for independent and timely review of proposed agreements is limited in the Act and results in significant delay and cost to housing.

4. Refusal and abandonment of planning scheme amendments

Councils can decide not to proceed with planning scheme amendments, or abandon amendments, for political or other non-planning related reasons with no right of appeal.

Developers frequently spend hundreds of thousands of dollars on reports and consultation processes for proposed planning scheme amendments. This is often done in concert with Council officers and other agencies.

Councils have the power under the Act to decide to not commence the formal amendment process, or abandon an amendment. It is frequently the case that those decisions are made for political reasons rather than for reasons with any planning merit. At present there is no right to appeal against a Council's refusal to embark upon a planning scheme amendment process, or determine to abandon an amendment, regardless of the Council's reasons.

It is considered that a right of review to VCAT or to a Standing Advisory Committee (as long as the Committee can be provided with decision making powers), similar to the Priority Projects Advisory Committee, could provide a useful means to resolve these issues.

5. Other matters

In relation to some other matters being considered by the Committee, we make the following observations:

(1) The notion of a Heritage Tribunal, which operates in a similar manner to the merits review jurisdiction of the Planning and Environment List at VCAT, is strongly supported. VCAT should be the body that is funded to include the Heritage Tribunal, rather than creating an entirely different agency. It seems this would be the most efficient way to create such a Tribunal.
There does not appear to be any justification for involving an additional layer of government into heritage decision making and the notion of federal involvement in heritage protection is opposed. One only need review the complexity and difficulties associated with the administration of the Environment Protection and Biodiversity Act (Cwlth) to understand why a federal level of heritage protection should be avoided;
(2) We attach a copy of VPELA's submission to the Affordable Housing Advisory Committee which explores the various models which should be widely embraced in order to reduce the cost of housing and to increase the supply of affordable housing. If a mandatory affordable housing requirement is to be introduced, there must be flexibility as to how that obligation is to be delivered and the requirement must be introduced gradually over a number of years so that the cost may be appropriately taken into account in the price paid for the land to be developed;
(3) Mandatory planning controls are to be avoided except in circumstances where something of real and genuine importance needs to be protected (such as views of the Shrine of Remembrance). Good planning outcomes are ultimately fundamentally concerned with site specific circumstances and mandatory planning controls are simply incapable of delivering exemplary outcomes on every piece of land.
The best planning controls are not 'one size fits all' but rather are controls that deliver development that is site responsive. Inevitably mandatory planning controls have a tendency to be drafted as a lowest common denominator and can lead to absurd outcomes. The mandatory height and setback controls in the CBD of Melbourne are a good example of this;
(4) Third party appeal rights are key to protecting the planning system against corruption, encourage a far more nuanced approach to site responsive design and often lead to better development outcomes. They should be protected;
(5) The role of VCAT in planning, heritage and environmental approvals is strongly supported. In circumstances where the power of a Council to make decisions in its capacity as a responsible authority is not strictly confined to planning merits and is inevitably open to the vagaries of decision making for political reasons, the need for a

well funded, impartial and politically independent Tribunal is essential to ensure that natural justice and procedural fairness are afforded to all who participate in planning processes.

6. Conclusion

VPELA is of the view that there is no need for a full review or re-write of the Planning and Environment Act. The vast majority of the Act continues to serve Victorians with fair, transparent and efficient processes. However, the matters raised above are matters that have become increasingly complex, time consuming and expensive and the lack of an independent umpire is proving to be problematic. We note too that many of these matters raise issues of the complex relationship between the Planning and Environment Act and other relevant Acts such as the Subdivision Act, Heritage Act and the Environment Protection and Biodiversity Act (Cwlth). Therefore, it may be necessary to consider consequential adjustments to other legislation in responding to these matters.

Of course any increase in the scope of VCAT's responsibilities must come with an increase in funding for that body and VPELA supports that outcome.

We would be happy to expand upon any of these submissions or to provide examples of the circumstances which are described above.

Yours faithfully

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President
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About VPELA

The Victorian Planning and Environmental Law Association (**VPELA**) is a non political multi-disciplinary professional association, concerned with the planning legal and environment fields. The Association draws its membership from professions involved in the planning and environment fields including:

- Architects – Building, Landscape
- Barristers
- Developers
- Economists
- Engineers – Civil, Traffic, Acoustic
- Environmental Scientists
- Heritage specialists
- Lawyers
- Local Government Officers
- Planners
- Social Planners
- State Government Officers
- Surveyors
- Transport Planners
- Valuers
- Urban Designers