Submission No 41

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

Organisation: Mansfield Matters Group Inc, Keep Mansfield Healthy Inc, MCHAC Inc.

Date Received: 26 January 2022

SUBMISSION TO:

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

From:
Mansfield Matters Group Inc.
Keep Mansfield Healthy Inc.
MCHAC Inc. (Mansfield) (Mansfield Cultural Heritage and Arts Centre)
(LGA: Mansfield)

Background:

Background into these Incorporated Groups will be provided at oral submission, but within their constitutions they include membership of: Rotary Mansfield, The Taungurung Lands and Waters Council, Arts Mansfield, Yooralla Mansfield, the Mansfield Historical Society and the Mansfield community. Among their remits is the advancement of Public Health in Mansfield, involvement in Strategic Planning, and in projects in the shire more generally, including at Heritage sites such as HO31 (LPPF) .. "The Railway Station". They have submitted to a number of local government planning Amendments, planning panels and VCAT Tribunals and more specifically have all supported the Shire of Mansfield by being joined at two of major VCAT cases involving Applications for developments within the Mansfield Gateway / Alpine Approach.

This submission particularly directs itself to the following Terms of Reference of "The Inquiry":

(3) delivering certainty and fairness in planning decisions for communities, including but not limited to —
(c) community concerns about VCAT appeal processes;
(d) protecting third party appeal rights;

and ..

(4) protecting heritage in Victoria, including but not limited to —
(a) the adequacy of current criteria and processes for heritage protection;
(c) separating heritage protection from the planning administration

Within the meaning of "not limited to" we also wish to explore briefly the failure of the Victorian Parliament to take action on past recommendations with respect to the nexus between Public Health and Planning, specifically, the failure to enact (most of) the recommendations of the: " Inquiry into Environmental Design and Public Health (in Victoria" (May2012). https://www.parliament.vic.gov.au/289-epc-lc/inquiry-environmental-design-and-public-health

It is of further concern that Shire Councils and communities are mandated by the state to conduct (and regularly renew) Municipal Public Health and Wellbeing Plans that are required to be consistent with the Shire's Municipal Strategic Statements, when those plans continue to have no weight all / are effectively ignored by .. the Planning and Environment Act more generally, and consequently, by VCAT Tribunals. Consequently, while in name being "linked" to planning schemes through the MSS, in fact they carry not weight at all before Tribunals, and their annual or biannual renewal is largely a waste of community and shire time and resources.

Specific examples will be used to show how the Planning and Environment Act fails to protect small rural communities more generally and third party Objectors specifically against inappropriate uses and developments in land with design and developments overlays near heritage sites, and in rural town gateways.

Case Studies:

In January 2020, The Mansfield Shire Council received a planning Application (subsequently to become VCAT P505/2020) for a Convenience Restaurant and Drive-Through on DDO1 protected land [i] opposite the Mansfield Railway Station (HO31) [ii] in the Mansfield Gateway / Alpine Approach (entry to the township from Melbourne).

The Application received 260 objections, mostly on the grounds of the DDO1 with respect to the gateway / nearby HO31, public health, parking and traffic (as it showed access from a small side street, rather than the Maroondah Highway). The Application claimed to have “no operator”, but the design was by an architect that works only for McDonalds among the fast food franchises, and was a McDonalds design. (this will be shown in oral evidence, and was published in “The Mansfield Courier”). The Application had no signage plan, despite it being clear that significant commercial and directional signage (well beyond that allowed by the DDO) would be needed to advertise the development and guide traffic safely off the highway. It also showed a crossover/access to a neighbouring property where a simultaneous application amendment was sought to expand an existing permit for a domestic service station into a service station for B-double trucks. The plan showed a high flow diesel bowser five metres from a domestic fence line. Rural Roads Victoria were also revealed within Shire meetings to have corresponded with the developer’s representatives on several occasions, and to have withdrawn several Objections without including the Shire or Third party Objectors in their correspondence, information which was revealed to the public and Councillors only within the meeting at which Councillors had to make a decision.

Both applications were unanimously refused by Council and were appealed in cases lasting 5 and 7 days respectively. It was very clear in the cases that the legal teams for the developer were both much more experienced and much more expensive than those that Council or the community could afford, and the developer called a total of six expert witnesses to Council’s none. The community fundraised $50,000 to hire a lawyer and two expert witnesses (traffic and health).

At the commencement of the first hearing (Convenience Restaurant), the Developer’s legal team challenged the right of the third party objectors (the Mansfield Community) to bring health evidence on then basis of the use of the land for a Convenience Restaurant was “as of right” and only the development was under question. The community argued (through their lawyer .. attached Mansfield Submission2) that the “net community benefit” (social ,economic and environmental) of the use was contestable under the Act, that the “number of objectors” (The Planning and Environment Amendment (Recognising Objectors) Act 2015) meant that their argument should be heard. The community also argued that the Tecoma case defined the circumstances under which “health” could be heard as argument (point

no 56 of the attached “Mansfield Submission2”). These included the bringing forward of an expert witness for cross examination, which is exactly what the community did. It appeared clear to the Mansfield community that VCAT had ignored its own precedent ruling in favour of the developer. It was not supposed in this action that all fast Food Franchises everywhere should be disallowed, but rather that one such Franchise in a very small country town proximate to a primary school would have a serious Public Health impact (as they have in other medium sized towns such as Ararat and Benalla)

The outcome of the Developer’s objection to the “Public Health” argument being heard by VCAT was that President Dwyer was brought in by the Panel to adjudicate. His ruling was that the witness was stood down, and no reference to “Public Health” was allowed by the tribunal, even as it may relate to “net community benefit”. The community had spent $5000 in good faith to respond to the Tecoma ruling, and was left with no witness, no case and threatened legal costs.
The community then fought on, backing the Council’s arguments with respect to the DDO1, parking and traffic against what was clearly a vastly superiorly resourced legal team (numerically and in fees “usually charged”) and a major Melbourne Planning Firm (Ratio consultants) complete with a well resourced traffic department.

The supposedly independent expert witness for “Traffic” for the developer was also the principal [redacted] of the Traffic Department of Ratio Consultants, who were employed by the Applicant.

An argument was waged by [redacted] during both cases that one Application could be seen as being independent from the other, despite the fact that they showed a connecting carriageway, which had implications and so uncertainties with respect to outcome of both Applications. The argument was clearly disingenuous at best.

It also became clear during evidence that the recommendation of the Landscape Expert [redacted] with respect to the width of the proposed separation between the carriageways in both properties was not what was in the plan.

Rural Roads Victoria (DoT), as well as failing to correspond withdrawal of various parts of their Objections with Council, and engaging in correspondence with the developer only to the exclusion of Council and Third party Objectors, gave evidence that Functional Layout Plans for the Category 1 Road could be submitted by the Applicant *after* the Application had been decided upon by VCAT (with effectively no consideration of the FLP on the “surrounding Heritage sites”. This “order of decisions” leads to a potential for damage to heritage site (HO31) by road widening and the installation of Highway style traffic lights (as required by RRV) *after the decision to proceed with the development had already been taken.* Heritage protection with respect to significant Highway changes is non-existent with tis being allowed to happen in this order. While the Tribunal was highly experienced, they had not previously seen this happen, and had to ask RRV/DoT about what is allowed in this circumstance.

It will obviously not be in the scope of this inquiry to drill down into individual cases, so this submission has just presented the “bare bones” of where the lessons may lie for the Terms of Reference as listed above. It has also not supposed that the inquiry

would read the rulings, but both are easily available. A very few aspects are summarised below.

Rulings: VCAT Ref P505/2020, P751 2020.

The Tribunal upheld Council's refusal in both cases.

In P505 (Convenience Restaurant) the Tribunal adjudicated that the Application did not satisfy various aspects of the DDO, including setbacks, roofline and others. It did not consider the impacts of such a development on the nearby (opposite) Heritage site would be significant, nor that the number of Objectors (proportionately larger on a percentage population basis than all but one previous Victorian Case) was a factor that indicated a social impact. It also said it was "not lawful" to require a signage plan of the developer, and that as there was "no tenant" it was "not possible to determine what signage would be required".

In the case of P751 (Amendment to Service Station) traffic conflicts within the site were determinative, while the placement of a high flow diesel bowser for B Double trucks (with exhaust stacks) was seriously questioned.

Soon after both hearings, another Application for a Convenience Restaurant was submitted by the Applicant. No resubmission for the Service Station has been submitted at the time of writing.

Since then, the same developer has taken the Council to VCAT over their approval for a domestic service station on land where there had been a service station for many years. This is clearly a ploy to "delay" another Applicant and further drain the Council's resources with respect to defending their VCAT decisions. The thre cases are estimated to have cost Council, the community and the Applicant well over half a million dollars and are also a significant impost on the state.

Issues for the Community with respect to the Inquiry'sTerms of Reference:

1. **Why has the Parliament of Victoria done nothing to adopt the recommendations of a similar Inquiry (now ten years old)**

   "the development and severity of chronic disease can be attributed partially to lifestyle choices, however international and Australian evidence shows ***that the built environment plays an influential role in encouraging or discouraging healthy behaviours****."*

   Recommended:

   a. That the ***Vic Gov amend the Act so its objects include 'the promotion of environments that protect and encourage public health and wellbeing' as an objective of planning in Victoria***

   b. That the Vic Gov work with VicHealth to commission further Victorian Research into the cumulative health and wellbeing impacts of the density of Fast Food Outlets on a community

c. That a planning mechanism be developed that can be used by local Councils to limit the oversupply of fast food outlets in communities and facilitate supply of healthy food choices for Victorians.

(the "evidence" mentioned in part "b". Is now already "in" (see paper attached))

Municipal Public Health Plans:

It is effectively pointless for the State to require Local Government to continually modify their Municipal Public Health Plans, when they are afforded no status within the framework of the Planning and Environment Act.

"Net Community Benefit"

"Net Community Benefit" as defined within the act as encompassing social, economic and environmental considerations is a pointless phrase when a Tribunal pays (or cannot pay) any heed to the voices of proportionately the second greatest number of Objectors in the state's planning history with respect to how it reaches its decision.

2. ***Should signage plans not be made an integral part of a development application, so that the overall impact of the development can be properly assessed, especially with respect to its impact within sites of significance to local communities.***
3. ***Income and resource disparity and "the cost" of VCAT cases This case involved the huge resources of a large property development firm that makes its money from real estate transactions, gaming and alcohol outlets in Melbourne pitted against a small rural shire. Such a battle is vast and manifestly unfair. It would be more equitable if the VCAT system ensured resource equity in the way these cases are pursued.***
4. ***The two primary Objectives of the Local Government Act 2020 are:***
    1. ***Community Participation***
    2. ***Strategic Planning***

Despite this, the current Planning and Environment Act allows developers who lose both a planning Application and a VCAT Appeal to return "time and again" to VCAT with slightly nuanced Applications. All over the state there are cases being run time and again until developers with deeper pockets than small Councils and their communities "get their way". This system, while benefitting Planning Firms and lawyers, can lead ultimately to outcomes that communities

don't want for their country towns, and is a reason why faith in being involved at a community level in strategic planning (participation rates) is very low.

5. **Heritage Protection:** VCAT did not consider a major Fast Food Franchise (with its attendant signage) was in would have an "impact" as defined in :

   43.02-6 31/07/2018 VC148 Decision guidelines Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate: *… Whether the design, form, layout, proportion and scale of any proposed buildings and works is compatible with the period, style, form, proportion, and scale of any identified heritage places surrounding the site.*

   In fact, because signage could not be considered legally, the Tribunal's hands were tied in that regard.

6. **Disingenuity within Applications:**

   Despite the Application clearly being for a McDonalds development, this could not be considered with respect, for instance, of consideration of this particular company's signage requirements, or with respect to the proven evidence of health impacts on children due to this particular Franchise, its vast television advertising power, its use of gaming (Monopoly Game) on its premises, its use of free toy inducements for children etc. The Act should have a mechanism which clarifies Applicants' responsibilities to declare who is "behind" the development in this regard.

   The ability of a developer to put in separate Applications for what is clearly "one business model" should also be questioned by the Inquiry, as it leads to huge imposts on Councils and community third party Objectors. In this case, the claim that one development did not depend on the other, and the insistence of the Applicant on putting in two separate applications despite the Shire's request to consolidate them should also be questioned. Clearly the developments were interdependent, as this is the "business model" used all over the state, especially on major Highways.

7. **Costs:**

   We request the Inquiry to review the ability of a developer's barrister to bring "costs" against bona fide community organisations.

8. **Expert Witnesses:**

   The planning firm involved in this case was Ratio Consultants. Their "Independent Traffic Expert" was also the "Principal" of their Traffic Department. We request the Inquiry to ask themselves, how can such a "witness" also be "independent"? The fact that this is "common practice" is surely a failure within the Act, and how "expert witnesses" are defined.

The witness in fact brought this into sharp relief, by often referring to the failure to get a carriageway between the properties in the two applications as “worst case scenario”.

He also failed to bring traffic figures other than those collected during the bushfire State if Emergency (2019/20) to the hearing.

9. **State Government Referral Authorities** (such as RRV/DoT) should be required to include third party Objectors and Councils in all correspondence with the Applicant .. this did not happen in the cases mentioned.
10. **Functional Layout Plans**

    We request, on heritage protection grounds, that the Inquiry considers the issues that arise from developers not having to submit Funtional Layout Plans completed to the requirements of the Department of Transport prior to any VCAT hearing, so that the impact of Highway widening and lighting on “surrounding heritage sites” can be considered.

Conclusion:

The Mansfield Third Party Objectors received an excellent hearing in the cases as described. We believe that the Tribunal members acted impeccably within the law as it exists. While their interpretation was questioned by us in some aspects, we respect the rulings as laid out. The particulars of these cases are not the point.

The point is, that from the particular, however, there are lessons for the general, and we believe that these cases ask many questions of the Inquiry with respect to the fairness afforded third part Objectors by the current Act. We are also seeing similar scenarios playing out all over the state, as we get regular phone calls from community groups trying to understand how to defend their positions at VCAT.

Public Health has found a new found respect in the body politic in the last two years. Specifically, it is clear that those most at risk, and those who have died, are the elderly and those with intercurrent illnesses with strong evidentiary links to unhealthy food and lifestyle environments (diabetes, hypertension, obesity). While these are not exclusively due to “Fast Food Franchises” with drive-throughs, the potential impact on public health of such a development, with its advertising and social media power, near a primary school in our small country town, makes us fearful for the future health of our community. The planning mechanisms to defend against such an outcome are inadequate.

That the Parliament has failed to take note of or action on what is now a ten year old recommendation to give Local Government " ***planning mechanisms .. that can be used by local Councils to limit the oversupply of fast food outlets in communities and facilitate supply of healthy food choices for Victorians"*** is highly regrettable. Further, Parliament's inaction is commonly referred to in public health circles as being due to the undue influence purchased by the ultra-processed food industry through political donations to the Labor and Liberal political parties at a state and federal level, and the influence of lobbyists.

In that regard, and for the reasons given, we request this Inquiry to succeed where the last Inquiry failed, and to ensure that the parliament enacts swiftly the significant changes to the Planning and Environment Act needed to empower Local Government with regard protecting its citizens' Public Health.

We also request the Inquiry to give due consideration to what we see as significant inequities and deficiencies with respect to Heritage Protection, the conduct of VCAT cases with respect to the Rights of Third Party Objectors, how Expert witnesses are used against the interests of rural communities, and how the system is loaded in favour of the party with the greatest financial resources.

Attachments:

1. Mansfield Submissions2: The legal case mounted to have "health" heard by the Tribunal (unsuccessful, as ruled by President Dwyer with costs sought by the Applicant)
2. Health Impacts: "The Relationship Between unhealthy food environments and health (in children) " The evidence and the witness which was disallowed by the Tribunal (Assoc Prof Gary Sacks). The evidence was not allowed to be heard

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[i] https://planning-schemes.api.delwp.vic.gov.au/schemes/vpp/43_02.pdf?_ga=2.71937235.1187160208.1643028338-283543131.1613139540

[ii] https://planning-schemes.api.delwp.vic.gov.au/schemes/mansfield/ordinance/43_01s_mans.pdf?_ga=2.17423481.1187160208.1643028338-283543131.1613139540