Submission No 104

INQUIRY INTO THE PROTECTIONS WITHIN THE VICTORIAN PLANNING FRAMEWORK

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Parliament of Victoria

Inquiry into the protections within the Victorian Planning Framework

submission by Miles Lewis

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1 This submission draws upon my own experience in practice and as a member of the former Administrative Appeals Tribunal, as well as upon previous assistance from Professor Michael Buxton. It also refers to the attached paper by Justice Stuart Morris, at that time President of the Victorian Civil and Administrative Tribunal, 'VCAT and Bayside: A study of 2005/2006 Cases'. I am not seeking to appear at the Inquiry in person, but am happy to do so if required.

2 Victoria has a planning system which is fundamentally sound, and the basic concept of the incorporation of all planning controls within a coherent system, the Victoria Planning Provisions, is valid. However, the system has been degraded by *ad hoc* changes over time.

3 This submission identifies three major problems in the planning system:

- A lack of clarity as to where and by whom planning policy is generated.
- A lack of clarity in the application of planning controls, most of which are to some degree discretionary.
- Over-use and misuse of the planning appeals system, giving rise to undue cost, delay, and uncertainty.

Planning policy

4. The state (upon whatever advice may be considered appropriate) should determine policy at two levels. The first relates to strategic issues such as metropolitan transport routes, overall densities, and the preservation of green areas. The second relates to detailed local policies, where the state should delegate the finer mesh planning, but ensure that this is consistent with state policies

5. Responsible authorities (local councils) should develop detailed local plans which conform to the state's parameters, having regard to local conditions and the wishes of their constituents. These plans should be incorporated in the Victoria Planning Provisions once approved by the State

6 Councils have met with delays and difficulties from the Department of Planning and Community Development in seeking to get their local plans adopted and implemented. This had left dangerous gaps in the planning provisions and has generated unnecessary disputes.

7. Within the planning policies local councils should exercise their discretionary powers in a logical, consistent and equitable way.

8. The three levels of planning should be upheld by the appeals system.

The application of controls

9. Planning controls should be clear and unambiguous, and where some discretion is required in their application, then the basis or rationale for the application of this discretion should be indicated.

10. A major reason for the over-use of the appeals system is the ambiguity of planning controls. Words like 'must' are replaced by words like 'encourage'. Each such ambiguity provides the basis for appeals, and those developers who have done what is 'encouraged' are then penalised in relation to those who work the appeals system to avoid their obligations.

11 The present Minister, Mr Wynn is opposed to mandatory controls on the grounds that they discourage innovative solutions. But this is not the case. There need be nothing to prevent a developer from proposing an innovative scheme, nor to prevent the Minster from exercising djscretion in its favour.

12 But if this discretion is not to give rise to favouritism, corruption, or the perception of corruption, then the nature of the deal should be public. It should be known that because the developer has provided in their scheme a major work of public art, a crèche, or direct access to an urban park, the Minister has allowed three metres of additional height, or eight extra units. Such decisions are still political, and will be open to criticism like any other political decisions, but they represent a proper application of ministerial discretion.

The appeals system

13 The present operation of VCAT is illogical and wasteful, and it needs a more limited and precise remit. It should be the monitor of the planning system, as originally intended, not a responsible authority or a generator of planning policy. This is a very important reform, but it is also a relatively simple one. It will streamline the planning process, and it will save money.

14 Morris's paper was a response to concerns about VCAT expressed at that time by the City of Bayside, and purported to be 'designed to promote informed discussion'. This was not so. It deliberately fudged the distinction between the review of decision *de novo*, on its merits, and a review of its formal correctness in terms of legality, clarity, consistency with existing policy, and equity. This paper will show that the former is illogical and. undesirable but that the latter is essential and is a proper role for VCAT

15 Morris states in the attached paper:

VCAT is a multi-purpose tribunal, with general responsibilities for administrative review on the merits and the exercise of judicial functions in relation to a wide range of civil disputes. In the context of planning matters, the major role played by VCAT is to provide permit applicants and objectors with an opportunity to review decisions of responsible authorities about planning permits.

16 At present any decision made on applications for section 2 planning scheme uses can be appealed, and the outcome is very uncertain. This means that there are far more appeals than there should be, undue delay in development projects, and considerable additional costs.

17. Decisions on applications are made *de novo,* with little regard for the history of the issue or the context. This tends to produce results inconsistent with the planning history of the locality, and it is therefore unjust either to previous applicants or to the current ones. It amounts to the creation of new planning policy on an *ad hoc* basis, depending upon the constitution of the VCAT panel at the time.

18. The distinction may be clarified by an example. If a council has a policy of prohibiting visually intrusive developments within a conservation area there will soon develop an understanding – say, that structures over three storeys in height will not normally be permitted, nor new construction within three metres of the street alignment, nor mirrored glass in the front façade. This understanding is beneficial to all parties. Developers will not waste time and money on unacceptable proposals. Neighbours will have a degree of security against nasty surprises. Council officers will need to spend little time on negotiations and explanations.

19 The role of the appeals body should be to uphold this beneficial understanding. It should overturn a council decision only if it is unreasonable or inconsistent - if for no good reason it restricts development to two storeys or, on the other hand, it allows four storeys.

20 This is not the present role of VCAT. It is, as Morris puts it, to 'review on the merits'. This could be taken to mean precisely what I have advocated in the previous point – if the merits are taken to include and respect previous precedents and practices. But that is not Morris's interpretation or that of VCAT. It is taken to mean specifically that the past history of such decisions should be ignored, and the matter considered *de novo.*

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21 The bizarre effects of this are:

- Long developed council policies, based upon local knowledge and expert advice, and made under planning provisions which have been approved by the Minister, are arbitrarily set aside.

- They are replaced by new policies made up on the spot, not only inconsistent with those of the responsible authority, but potentially inconsistent with decisions made by other panels of VCAT itself.

- These decisions in effect generate new planning policy, but they are made by people less qualified than council staff and consultants who developed the original policies (because their expertise is largely legal and procedural).

- Not only are the VCAT members generally less qualified than the original policy makers, but they lack the staff and resources necessary to fulfill their adopted role. They are not equipped, for example, to assess the Munsell values of paint colours in a conservation area, or to construct a shadow diagram. They have a limited capacity to inspect sites, and no access to council records.

- Because there is always a good chance of getting something beyond what the responsible authority allows, it is worthwhile for a developer to appeal, regardless of the merits of the case. Success will give a large financial reward. Failure will simply be costed into the development.

- Bona fide resident objectors are forced out by these excessive costs.

- The direct costs of these gratuitous appeals, as well as the costs of the resultant delays, increase the cost of development and ultimately fall upon the consumer.

- There is no level playing field for developers. Those who can work the system, who know members of VCAT, and who have a good stable of consultants and venal expert witnesses, are those who reap the benefits.

- Planning policy across the state is arbitrary and inconsistent.

22. The planning system should not encourage gambling upon an arbitrary appeals system, but instead should deliver as much certainty as possible. It should be the planning authorities who decide the parameters for development, not VCAT.

23 The VCAT membership does not include a broad enough range of expertise, and in general is too development oriented. There should be a more balanced tribunal. If the government wishes to promote development, this should be done through explicit state planning policies, not through the composition of VCAT.

24. A panel consisting largely of lawyers makes decisions upon issues such as paint colours, which are outside their expertise, and are in any case a waste of their time. That sort of detail should be dealt with at council level, and council decisions, if properly made, should simply be sustained by VCAT.

25. VCAT will take into account state planning policies regardless of their applicability. If a local planning scheme has been approved and is in

operation, it should be assumed to have already met state planning policies. There should be no occasion to re-apply objectives, such as increased density, to individual cases.

26. VCAT attaches little weight to the number of objections or to community views, and thus reduces the problem of bulked-out objections with masses of objectors clogging up the appeal system. It is arguable that that is a proper approach, and that community views should be considered at local council level. But that principle only makes sense if the Tribunal then sustains the existing policies of councils, which it often does not.

27. Both levels of planning, state and local, should be equally upheld by VCAT. The role of VCAT should be limited to reviewing decisions for:
    - legal correctness, technical correctness and clarity
    - the correct application of planning scheme provisions, especially local policy
    - reasonableness, transparency and consistency in the exercise of discretion
    - the accordance of due weight to the available information, including the advice of council officers.

28. So far as practicable VCAT should operate not by overriding councils, but by referring issues back to them.

29 The cost of VCAT appeals is unreasonable for residents, whereas developers simply factor it into their budgets. Developers are able to wage a war of attrition. They can make continued applications until residents' resources are exhausted. Within a given appeal they can submit amended plans, which objectors are unable to assess in time, and/or cannot afford to do so.

Recommendations

1. **The planning provisions should so far as practicable be mandatory ('must' rather than 'should').**

2. **The Department of Planning and Community Development should facilitate rather than impede the adoption of local plans prepared by councils.**

3. **The Victoria Planning provisions should be upheld by all levels of government and by the appeal system.**

4. **The system should respect the practices and principles evolved by councils at a local level, and, rather than undermine them, should encourage consistencv in future decision making.**

5. **Where ministerial discretion is exercised, the costs and benefits should be explicit and publicly accessible.**

6. **The role of VCAT should be redefined as the review of issues of legality, consistency and equity. It should uphold the existing planning system and should not generate new policy. All matters should be considered in context, and not *de novo.***

7. **The membership of VCAT should be reviewed so those members of VCAT who handle planning matters better reflect the community, have greater expertise in such matters as conservation, and are less biased towards development.**

8. **Appeal fees should be drastically reduced for bona fide neighbours of a proposed development.**

9. **VCAT should adopt case management practices which reduce the increasing use of legal practitioners and expert witnesses, with preference for a single court-appointed witness only on any issue, to be paid by VCAT but with those costs reimbursed by the applicant.**

10. **The submission of amended plans should be prohibited except where necessitated by circumstances outside the control of the applicant (otherwise a new review application fee should be paid, and the resultant costs to other parties should be reimbursed).**

Miles Lewis.
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